

# *From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann*

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## I INTRODUCTION

There is one phrase that I think best captures Laurie Ackermann's temperament as a judge. It comes from that great judge Learned Hand's speech in Central Park in May 1944. There, Learned Hand spoke movingly of the Spirit of Liberty. 'Liberty', he said,

is not the ruthless, the unbridled will; it is not freedom to do as one likes . . . What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the mind of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias . . .<sup>1</sup>

There are some judges who have a deep-seated and unshakeable faith in their own sense of justice. Disagreement with their colleagues does not deter or bother them. Their sense of justice is like a shining light which guides them in their response to disputes and their judgment-writing. Other judges labour under the burden of dissent; that anxious sense that when they differ from their colleagues, they may well be wrong; that worrying remembrance of occasions in the past when even the greatest judges have erred materially, which reminds them that they too may err and so fail in their obligation to administer justice to all. Laurie Ackermann was such a judge. His judicial conscience was always one that 'was not too sure that it is right'. In order to be sure, he would, perhaps more than any other judge at the Constitutional Court, read widely on the jurisprudence of other countries. He would prepare for oral argument meticulously, and listen carefully to what was argued. He would also listen closely to his colleagues and gnaw at legal problems incessantly till he felt he had found the right way forward.

Such a temperament is, although fitting, a painful one for a judge. It is a temperament ordinarily accompanied by modesty, diligence and an

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<sup>1</sup> Learned Hand 'The Spirit of Liberty' (1944) available at <http://www.criminaljustice.org/public.nsf/ENews/2002e67?opendocument>.

ability to listen – all of which Laurie possesses in abundance. Yet make no mistake that when Laurie had set a course, after careful and thorough deliberation, he was implacable in pursuing it.

The work of a collegial court is a very special form of human endeavour which has perplexed sociologists, philosophers and lawyers – and not least – those of us who have the privilege to serve on them.<sup>2</sup> Judgment-writing on a collegial court, or at the very least on the South African Constitutional Court (perhaps like Tolstoy's unhappy families, each collegial court is different), is a joint deliberative process in which each judge determines what he or she considers to be the appropriate approach to a case and the reasoning that he or she considers should be followed in determining its outcome. The vast majority of cases involve more than one issue: so a case might involve a jurisdictional question (such as whether the case involves a constitutional issue), a standing question (such as whether the party has standing to raise that issue), as well as the key substantive question itself. Once that is answered, there will often be the tricky issue of deciding on an appropriate remedy. Each of these issues thus has to be considered and determined by each judge. Taking the plurality of issues into account, it is something of a miracle that an eleven-member court can ever produce a unanimous judgment. But it does. Indeed, in the 2005 year some 75 per cent of the Court's judgments were unanimous.<sup>3</sup>

At the Constitutional Court, collegial deliberation is lengthy, substantive and conducted both verbally in meetings and electronically by the exchange of notes and drafts. During the course of deliberation on a particular case, the court will meet at least twice to discuss it and often as many as half a dozen times and sometimes even more. In addition, there will ordinarily be many lengthy written exchanges on the case. The process of deliberation at its best refines issues, improves legal reasoning and renders just outcomes more likely. As a result of the process of deliberation, a draft judgment may change dramatically from when first written to its final form.

<sup>2</sup> There is a fairly voluminous literature. See, for example, D Leonard 'The correctness function of appellate decision-making: judicial obligation in an era of fragmentation' (1984) 17 *Loyola of Los Angeles LR* 299; L Kornhauser 'Modelling collegial courts I: Path dependence' (1992) 12 *International Review of Law and Economics* 169; L Kornhauser 'Modelling collegial courts II: Legal doctrine' (1992) 8 *Journal of Law, Economics and Organisation* 441; R G Seddig 'John Marshall and the origins of Supreme Court leadership' (1975) *University of Pittsburgh LR* 785; Rogers '“I vote this way because I'm wrong”: the Supreme Court justice as Epimenides' (1990–1) 79 *Kentucky LJ* 439; L Vargas 'Does a diverse judiciary attain a rule of law that is inclusive? What *Grutter v Bollinger* has to say about diversity on the bench' (2004) 10 *Michigan Journal of Race and Law* 101; L Kornhauser and L G Sager 'Unpacking the Court' (1986) 96 *Yale LJ* 82.

<sup>3</sup> M Bishop et al 'Constitutional Court statistics for the 2005 term' (2006) 22 *SAJHR* 518 at 524.

Collegial deliberation of this sort is one of the key reasons for having a multi-member Court and for requiring courts to be diverse in their composition, as is required by our Constitution.<sup>4</sup> There is an extensive literature on why it is appropriate for a judiciary to be diverse<sup>5</sup> but time does not allow us to do justice to that debate. Suffice it to say that apart from issues of legitimacy in the eyes of the broader population the most important justification for requiring diversity on a collegial court is that it enables members of the Court to interrogate their own prejudices or blind-spots. If we are, as the oath or solemn affirmation requires, to ‘administer justice to all alike without fear, favour or prejudice’,<sup>6</sup> we need to know where our own prejudices lie. The more alike we are, the more likely that we will mistake prejudices for simple truths; the more different we are, the more likely that we will interrogate the correctness of our assumptions.

As Justice Ackermann himself said in his painfully honest and direct statement to the Truth and Reconciliation Commission:

Judges who believe that they are wholly free of prejudice delude themselves. It behoves us all to seek out rigorously, painful as that might be, our own particular prejudices and of whatever nature. We need to keep these constantly in mind and to endeavour actively and persistently to counteract them. Furthermore, we all need to understand the insidious influence of institutional culture and to appreciate the powerful effects of the class, social

<sup>4</sup> The Constitution of South Africa, 1996 s 174(2) provides as follows: ‘The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.’

<sup>5</sup> R Davis and G Williams ‘Reform of the judicial appointments process: Gender and the bench of the high court of Australia’ (2003) 27 *Melbourne University LR* 819; M Gleeson ‘Judicial selection and training: Two sides of the one coin’ (2003) 77 *Australian LJ* 591; B Hale ‘Equality and the judiciary: Why should we want more women judges’ 2001 *Public Law* 489; C L’Heureux-Dubé ‘Making a difference: the pursuit of a compassionate justice’ (2000) International Bar Association Joint Session on ‘Women on the bench’ 20 September 2000; R Graycar ‘The gender of judgments: Some reflections on “bias”’ (1998) 32 *University of British Columbia LR* 1; J Nedelsky ‘Embodied diversity and the challenges to law’ (1997) 42 *McGill LJ* 91; M Omatsu ‘The fiction of judicial impartiality’ (1997) 9 *Canadian Journal of Women and the Law/Revue Femmes et Droit* 1; R Devlin ‘We can’t go on together with suspicious minds: Judicial bias and racialized perspective in *R v RDS*’ (1995) 18 *Dalhousie LJ* 408; R Graycar ‘Law reform: Taking gender into account’ Paper presented at Australian Law Reform Agencies Conference Brisbane 23 September 1995; S Cooney ‘Gender and judicial selection: Should there be more women on the courts?’ (1993) 19 *Melbourne University LR* 20; M Minow ‘Stripped down like a runner or enriched by experience: Bias and impartiality of judges and jurors’ (1992) 33 *William and Mary LR* 1201; P Wald ‘Some real-life observations about judging’ (1992) 26 *Indiana LR* 173; E P Mendes ‘“Promoting heterogeneity of the judicial mind”: Minority and gender representation in the Canadian judiciary” in Ontario Law Reform Commission *Appointing Judges: Philosophy, Politics and Practice* (1991) 91; M Minow ‘Equalities’ (1991) 88 *Journal of Philosophy* 663; B Wilson ‘Will women judges really make a difference?’ (1990) 28 *Osgoode Hall LJ* 507; S Sherry ‘Civic virtue and the feminine voice in constitutional adjudication’ (1986) 72 *Virginia LR* 543.

<sup>6</sup> Constitution Schedule 2 Item 6.

and political environments in which we live and work, and the potential that this has for making us insensitive to the context and views of others.<sup>7</sup>

On a collegial court, a judge is as responsible for a judgment he or she signs, as for one which he or she has written. This statement is one that is often made at the Constitutional Court during the process of collegial deliberation and it is the basis on which one can propose to a writing colleague an alteration to the judgment which will make one more at ease with signing the judgment. Equally often asserted is that, even where one is not signing a judgment, one has a collegial responsibility to ensure that the judgment remains as good as it can be as a product of the Court of which we are all a part.

What is the reason for this rather lengthy excursion on the process of decision-making on collegial courts? It partly arises from the sense of discomfort I have attending a conference to discuss closely the work of a judicial colleague in circumstances where I have been party to most of the judgments concerned. The discussion of collegial decision-making thus paves the way for two assertions: the first is to state that it is impossible as a signatory of a judgment not to acknowledge responsibility for the judgment. This is one of the causes of my discomfort. Many of the judgments that I will be discussing and that will be discussed by others over the next few days are judgments which I myself signed. I am judicially responsible for those judgments and not impartial to them.

The second cause for discomfort also arises from the process of collegial deliberation which I have described. I am unabashedly a supporter of judicial deliberation for reasons which I have suggested already. In my view, for it to function at its best, that process of deliberation must remain confidential. Knowing that deliberation is confidential enables judges to exchange views frankly and, where persuaded, to change their views and their reasoning. I am constrained therefore to discuss the judgments of the Constitutional Court as end-products as they appear in the public domain and not on any other basis.

There is one final comment on judicial deliberation that I should make. It would be, at a conference in honour of the jurisprudence of Justice Ackermann, remiss when speaking of judicial deliberation not to mention the extreme care and thoroughness with which Justice Ackermann undertook his collegial responsibilities in respect of colleagues' judgments. The scholarly notes he prepared for his colleagues on each draft judgment were, I think it is fair to say, the most careful and thorough analysis of draft judgments undertaken by any judge at the Court. His notes were famous. They started with the heading of the case

<sup>7</sup> L Ackermann 'Submission on the role of the judiciary' (1998) 115 *SALJ* 54.

and finished with counsel's details. They would certainly cover all footnotes, no matter how numerous. They dealt with matters of syntax, grammar, spelling and, of course, substance. Often he would tender proposed replacement paragraphs (complete with footnotes) and reasoning to support his proposal. They were also (generally) in exceedingly small print, and lacking any style or lay-out. The wayward habits of Microsoft software remained, by and large, and I think Laurie will agree on this, a closed book to him for most of his tenure on the court!

Justice Ackermann's extraordinary diligence in regard to the judgments of his colleagues greatly enriched and enhanced the jurisprudence of the Court. Focussing only on the judgments Justice Ackermann authored will not capture fully the great jurisprudential contribution he made at the Court. Unfortunately, the demands of confidentiality permit me to give no detailed examples of the contributions he made to the judgments authored by others. Suffice it to say that his diligence and generosity in this regard played a crucial role in establishing a cherished culture of genuine collegiality at the Constitutional Court in relation to the preparation of judgments. It is my fervent hope that that culture will continue to survive long into the future.

## II AN OVERVIEW OF JUSTICE ACKERMANN'S JURISPRUDENCE

According to my research, Justice Ackermann wrote 23 judgments while a member of the Court. Nineteen of these were majority judgments (of which 12 were unanimous); 16 of the 19 were authored in his name, and three were written jointly with other colleagues (*Prinsloo v Van der Linde*,<sup>8</sup> which was co-written with Sachs J and myself, *Carmichele*,<sup>9</sup> with Goldstone J, and *Basson*<sup>10</sup> with five colleagues. Three were separate concurrences: one in the death penalty case (*Makwanyane*<sup>11</sup>), one in the *Executive Council, Western Cape*<sup>12</sup> case (jointly with myself); and one in *Du Plessis*.<sup>13</sup>

Five of his judgments have been selected for the purposes of discussion during the course of this symposium: *Makwanyane*; *Ferreira v Levin NO and Others*;<sup>14</sup> two cases brought by the National Coalition for Gay and

<sup>8</sup> 1997 (3) SA 1012 (CC).

<sup>9</sup> *Carmichele v Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 (4) SA 938 (CC).

<sup>10</sup> *S v Basson* 2005 (1) SA 171 (CC).

<sup>11</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

<sup>12</sup> *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC).

<sup>13</sup> *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

<sup>14</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).

Lesbian Equality<sup>15</sup> (one declaring the crime of consensual sodomy to be inconsistent with the Constitution; and the other declaring that to the extent that immigration regulations made special arrangements for spouses but not for gay and lesbian life partners, they were unconstitutional); and *Dodo*<sup>16</sup> (which dealt with minimum sentence legislation). It might be of interest to know as well that in his years as a judge prior to 1994, I have traced 32 reported judgments in the law reports – many dealing with important issues of criminal law and procedure. From the 23 Constitutional Court decisions, I have picked for discussion three broad themes which relate to the themes of this conference: dignity, law and transformative constitutionalism. They are:

- the relationship between law and values in our constitutional order and the impact of that relationship upon the manner of legal reasoning;
- the proper role of the courts in our constitutional order and hence the relationship between courts and the elected arms of government, the legislature and the executive; and
- the Constitution's conception of human beings.

In order to understand the topic of law and transformative constitutionalism in particular it is important to understand how we conceive of law in our constitutional system and how we understand the role of the courts. It is on these questions that I shall focus, given that much of the rest of the conference will address the issue of dignity in our legal order.

### III LAW AND VALUES AND THEIR RELATIONSHIP TO LEGAL REASONING

If asked to pick one paragraph of Justice Ackermann's jurisprudence which I think is of extraordinary importance, it would be paragraph 54 from the joint judgment of Goldstone J and Ackermann J in *Carmichele*, which reads as follows:

Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: "The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary-

<sup>15</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

<sup>16</sup> *S v Dodo* 2001 (3) SA 382 (CC).

ry.”[Reference omitted.] The same is true of our Constitution. The influence of the fundamental values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.<sup>17</sup>

This understanding is based firmly on the text of the Constitution. There can be no mistake of the normative purpose of our Constitution because the very first section of the Constitution asserts as follows:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the Constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters’ roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.<sup>18</sup>

Express guidance on how and when to apply values is provided by a range of provisions in the Constitution<sup>19</sup> perhaps most importantly by section 39 of the Constitution which provides:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The recognition that our Constitution establishes through chapters 1 and 2 of the Constitution an objective normative value system which will

<sup>17</sup> *Carmichele* (n 9) para 54.

<sup>18</sup> Constitution, s 1.

<sup>19</sup> See the reassertion of values in s 7(1), which states: ‘This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.’ Section 8 governs the applicability of the Bill of Rights (chapter 2) not only to the legislature, executive, judiciary and all organs of state, but also to natural or juristic persons. Section 36, the general limitations clause, provides as follows: ‘(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.’

(to use a Germanic word) control the development of the common law is one of great importance. It has two consequences. First, it constitutes a firm rejection of the sharp split between law and justice or morality which underpinned the use of law for evil ends during the apartheid era. John Dugard in his inaugural address in the early 1970s, subsequently published as the final chapter of his landmark text, *Human Rights and the South African Legal Order*, described the arid legal positivism evident in South African jurisprudence in the following manner:

South African lawyers [were] peculiarly prepared to accept as law anything that calls itself by that name or is printed at government expense in the Government Gazette.<sup>20</sup>

In reaching this conclusion, Dugard relied heavily on the works of the German lawyer, Gustav Radbruch, and also those of Lon Fuller.<sup>21</sup> Radbruch, an opponent of Nazi Germany, described the application of a similar doctrine of legal positivism in Nazi Germany as follows:

Legal positivism, which has constituted nothing but an elevation of state caprice into law and which has equated legal conscience with obedience, this idolatry of power has been merely the juristic representation of the period of the real-political and authoritarian State.<sup>22</sup>

Instead, Radbruch urged lawyers:

We must first again become conscious of the proverbial opposition between law and caprice and between law and might, and we must see law again not in the first place as a decree of the State but rather as an attempt to achieve justice, and we should consider ourselves as its inspired collaborators; indeed, we should see ourselves as servants, not only of law, but, within the framework of law, of justice.<sup>23</sup>

Before going further, I should note that it is perhaps misleading to refer to this approach to law and values as legal positivism as there is a far richer tradition of legal positivism, which asserts that law may draw on values,<sup>24</sup> than that described by John Dugard and Gustav Radbruch. Nevertheless, whatever the methodology is called, the point that Dugard makes is undeniable. The dominant approach to law in South Africa during the

<sup>20</sup> J Dugard *Human Rights and the South African Legal Order* (1978) at 393.

<sup>21</sup> Ibid. See also L Fuller 'Positivism and fidelity to law – a reply to Professor Hart' (1958) 71 *Harvard LR* 630 at 639; and also B van Niekerk's description of the work of Gustav Radbruch: 'The warning voice from Heidelberg: The life and thought of Gustav Radbruch' (1973) 90 *SALJ* 234 at 243.

<sup>22</sup> As quoted in Van Niekerk (n 21) at 243.

<sup>23</sup> Ibid.

<sup>24</sup> In this regard, the work of both H L A Hart and Ronald Dworkin is of particular importance.

apartheid years did not question the relationship between law and morals, but generally saw the task of judges as giving effect to the will of the so-called sovereign, an undemocratic legislature which until its dying decade, represented only white South Africans. What paragraph 54 of *Carmichele* made plain is that the effect of the constitutional project is a new understanding of the relationship between law and morals; an approach, by and large, alien to the mainstream legal tradition in South Africa.

Thus, in establishing an objective value system through which all law must be understood, the Constitution establishes a particular conception of law with far-reaching implications for the practice of law and legal reasoning. This is no small task, nor is it accomplished overnight, or indeed over 13 years. It is an ongoing constitutional project which requires a fresh legal imagination – and courage. The scope of the constitutional project thus understood continually baffles, and at times irritates and frustrates, lawyers and judges. The frustration and irritation is understandable but must be resisted if the transformative vision of our Constitution is to be pursued.

In *Carmichele*, the court demonstrated how the objective normative value system of the Constitution could impact upon the law of delict or tort through the normative concept of ‘wrongfulness’. This approach has been adopted and refined in subsequent judgments both by the Supreme Court of Appeal and the Constitutional Court.<sup>25</sup>

Most recently, in the case of *Barkhuizen*,<sup>26</sup> the Constitutional Court accepted, as the Supreme Court of Appeal already has,<sup>27</sup> that the objective value system of the Constitution will operate in the field of contract law as well. Perhaps we shall yet see that one of the most influential aspects of the Constitution will be the application of its objective normative system to the rules and remedies of the common law. In this, we will be following the technique of ‘mittelbare Drittwirkung’ established in Germany where the individual rights in the Bill of Rights do not apply directly to private individuals but operate as an objective value system that influences the private law.<sup>28</sup> The Germans also speak of the radiating effect of the rights on the private law.<sup>29</sup>

<sup>25</sup> See *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust as Amicus Curiae)* 2003 (1) 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA); *Minister of Safety and Security v Van Duivenboden* (2002) (6) SA 431 (SCA).

<sup>26</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

<sup>27</sup> *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA); *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) and *Bafana Finance Mabopane v Makwakwa and Another* 2006 (4) SA 581 (SCA).

<sup>28</sup> See the discussion by Ackermann J in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) para 94ff.

<sup>29</sup> *Ausstrahlungswirkung*.

The second effect of the constitutional conception of law explained in paragraph 54 of *Carmichele* is its effect on what constitutes a 'constitutional matter'.<sup>30</sup> Our Constitution clearly envisages a division between those matters which are constitutional and those which are not. The constitutional purpose of this division is to provide for the division of labour between the Constitutional Court and Supreme Court of Appeal. The latter then is the highest court of appeal on matters that are not constitutional.<sup>31</sup> Yet in asserting that all law must conform to the values of the Constitution, drawing lines between constitutional matters and non-constitutional matters is very difficult. Judges of both the Constitutional Court and the Supreme Court of Appeal have pointed to this difficulty.<sup>32</sup> Once again, this is not a matter upon which much more can be said on this occasion.

In conclusion on this first issue – given the conception of law in our Constitution, it is not surprising to me that it is Germany and South Africa that have so clearly opted for a constitutional order which requires that law must be interpreted and applied within an express objective normative value system (what is called in German 'eine objective wertordnung'). During the course of the twentieth century, both these societies experienced that evil can be achieved through law and legal process. In both countries, Constitutions were adopted in the spirit of 'never again' and in both a conception of law was adopted which makes impossible an understanding of law as being an enterprise that can be insulated from morals and values, and which instead urges a normative conception of law based on expressly articulated values.

#### IV THE ROLE OF THE COURTS AND THE SEPARATION OF POWERS

The second theme I wish to select from the jurisprudence of Justice Ackermann is his understanding of the role of the courts and the principle of separation of powers in our constitutional democracy. What is clear from both the text of the Constitution and the jurisprudence of the Constitutional Court is that the separation of powers in our constitutional democracy is not absolute: neither between the legislature and the

<sup>30</sup> Section 167(3) of the Constitution provides that the Constitutional Court is the highest court in constitutional matters. Section 168(3) provides that the Supreme Court of Appeal is the highest court of appeal except in constitutional matters.

<sup>31</sup> Section 168(3) of the Constitution.

<sup>32</sup> See, for example, C Lewis 'Reaching the pinnacle : Principles, policies and people for a single apex court in South Africa' (2005) 21 *SAJHR* 509; Ngcobo J in *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) para 32: 'Whether one can speak of a non-constitutional issue in a constitutional democracy where the Constitution is the supreme law and all law and conduct has to conform to the Constitution is not free from doubt.' See also Chaskalson P, Goldstone J and O'Regan J in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 111.

executive, nor between the judiciary and the other two arms of government. The primary purpose of the doctrine of the separation of powers is to provide a system of checks and balances to prevent the abuse of power while on the other hand not undermining the effective performance of the constitutional role of any of the three arms of government.

I have selected three key principles on the separation of powers from Justice Ackermann's jurisprudence for discussion: the first is the proper approach to understanding and analysing the separation of powers in our Constitution; the second is the deep respect to be paid to the proper constitutional role of the elected arms of government, the legislature and the executive; and the third is his understanding of the principle of the independence of the judiciary.

The first principle of importance to be found in the jurisprudence of Justice Ackermann is an epistemological one which asserts that the separation of powers needs to be understood on the basis of our constitutional text and not on the basis of abstract principles of political philosophy. In *S v Dodo*,<sup>33</sup> for example, Justice Ackermann quoted from Lawrence Tribe's magisterial work on the US Constitution, in which Professor Tribe writes on the separation of powers as follows:

We must therefore seek an understanding of the Constitution's separation of powers not primarily in what the Framers thought, nor in what Enlightenment political philosophers wrote, but in what the Constitution itself says and does. What counts is not any abstract theory of separation of powers, but the actual separation of powers, "*operationally defined* by the Constitution."<sup>34</sup>

This sense that the separation of powers must be based on our Constitution and our circumstances was also set out in an early judgment on the separation of powers, *De Lange v Smuts NO*,<sup>35</sup> in which Justice Ackermann noted that,

over time our courts will develop a distinctly South African model of separation of powers, one that fits the particular system of government provided for in our Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so

<sup>33</sup> *Supra* (n 16).

<sup>34</sup> *S v Dodo* (n 16) para 17, quoting Tribe in *Tribe's American Constitutional Law* 3 ed (2000) Vol 1 at 127.

<sup>35</sup> 1998 (3) SA 785 (CC).

completely that the government is unable to take timely measures in the public interest.<sup>36</sup>

The second principle to be found in his jurisprudence concerning the separation of powers is a fundamental respect for the constitutional role of the two other arms of government, the Legislature and the Executive, while not denying the important role of the judiciary. In a country whose past was sharply defined by the absence of democracy, respect for the democratically elected arms of government is particularly important. It is not surprising then that ‘a multi-party system of democratic government to ensure accountability, responsiveness and openness’<sup>37</sup> should be asserted as founding values of our constitutional order.

In the important decision in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,<sup>38</sup> after a careful and close analysis, Justice Ackermann concluded that the remedial powers of the Constitutional Court included the power to read words into a statute. To non-lawyers this might sound like something of a non-event. Let me hasten to advise that it is indeed a jurisprudential event of some magnitude. Courts around the world have accepted that severance of words from a statute or regulation is legitimate if the effect of the severance is to avoid an unconstitutional result and the statute as it remains fulfils the legislative purpose for which it was designed. Reading words into the statute to achieve the same effect has been regarded with far greater suspicion.

The matter arose squarely for decision in the *Home Affairs* case. In approaching the question, Justice Ackermann reasoned that the Court must balance two important considerations: the first is the obligation placed upon courts to provide ‘appropriate relief’ for an infringement of the Bill of Rights; and the second is the separation of powers. On this, he reasoned as follows:

The other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature. Whether, and to what extent, a court may interfere with the language of a statute will depend

<sup>36</sup> Ibid para 60. This passage was subsequently endorsed by the full Court in *SA Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) para 24; and *S v Dodo* (n 16) para 15.

<sup>37</sup> Constitution, s 1(d).

<sup>38</sup> Op cit n 15.

ultimately on the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case.<sup>39</sup>

Underlying his discussion is a fundamental respect for the democratic role of the legislature, moderated by his recognition that that role should not prevent courts from pursuing their own democratic role – protection of the Constitution and the provision of appropriate remedies for the infringement of rights.

A similar respect for the proper constitutional role of the legislature and the executive is to be found in *S v Dodo*, in which the Constitutional Court had to determine whether the minimum sentencing regime adopted by Parliament constituted an infringement of the separation of powers. In this regard, Ackermann J reasoned as follows:

There is under our Constitution, no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive function on the other. When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the legislature to determine what conduct should be criminalised and punished. Even here the separation of powers is not complete, because this function of the legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the Courts.<sup>40</sup>

He continued by emphasising that the legislature and executive have an obligation to protect citizens from criminals, and reasoned that,

in order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. They must have the power through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society. The legislature's objective of ensuring greater consistency in sentencing is also a legitimate aim and the legislature must have the power to legislate in this area.<sup>41</sup>

This recognition of the fundamental importance of the constitutional and democratic role of the legislature and the executive in our constitutional order is an important foundation of the Constitutional Court's jurisprudence on the separation of powers.

<sup>39</sup> *Minister of Home Affairs* (n 15) para 66.

<sup>40</sup> *S v Dodo* (n 18) para 22.

<sup>41</sup> *Ibid* para 25.

The third principle of the separation of powers that emerges from Justice Ackermann's jurisprudence is the need to protect and assert the constitutional role of the judiciary in our constitutional order as well as its independence. In *De Lange v Smuts NO*, the court was concerned with the power to commit an uncooperative witness to prison. Of this, Justice Ackermann reasoned, 'the power in question here . . . is within the very heartland of the judicial power and therefore cannot be exercised by non-judicial officers.'<sup>42</sup>

In that case, Justice Ackermann engaged in an important discussion of the criteria of independence and impartiality of the judiciary. He noted that there is a distinction between the two qualities of impartiality and independence. The first – impartiality – refers to the state of mind of the tribunal or decision-maker in a particular case and connotes absence of bias. The second – independence – refers not merely to a state of mind, but to a status or relationship to others, particularly the other arms of government.<sup>43</sup> Three 'essential conditions' of independence were identified: security of tenure; financial security; and institutional independence.<sup>44</sup> In *R v Valente*,<sup>45</sup> the leading Canadian Supreme Court case which Ackermann J quoted with approval in *De Lange*, Le Dain J describes the possibility that a tribunal might be impartial but not independent as follows:

It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a Judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationship to the executive and legislative branches of government. . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function he or she cannot be said to be an independent tribunal.<sup>46</sup>

The doctrine of separation of powers that underlies our Constitution is an important one. The deep respect for the legislature and executive that underlies Justice Ackermann's jurisprudence is rooted in democratic principles. The recognition that courts must be afforded appropriate protection to enable them to carry out their important constitutional

<sup>42</sup> *De Lange v Smuts NO and Others* (n 35) para 61.

<sup>43</sup> *Ibid* para 71 relying on the discussion of the distinction in *R v Valente* (1985) 24 DLR (4th) 161 (SCC).

<sup>44</sup> *Ibid* para 70.

<sup>45</sup> *Supra* (n 43).

<sup>46</sup> *R v Valente* (n 43) at 171.

mandate is a principle of equal importance rooted in the constitutional values of the rule of law and supremacy of the Constitution.

## V THE CONCEPTION OF HUMAN BEINGS IN OUR CONSTITUTIONAL ORDER

There can be no doubt that the aspect of Justice Ackermann's jurisprudence which has attracted most attention, including the attention of this conference, is his exploration of the constitutional principles of human dignity, freedom and equality. These three principles are fundamental to our constitutional order: they are of hermeneutic importance both in interpreting the content of rights in the Bill of Rights;<sup>47</sup> and in determining the justifiability of the limitation of rights.<sup>48</sup>

In my view, his judgment in *Ferreira v Levin NO* was one of the most courageous and important judgments written at the Constitutional Court. It was courageous because extremely early on in the jurisprudence of the Court (the case was heard in May 1995 only months after the court was established in February), Justice Ackermann grappled with the concept of freedom of the individual in our constitutional order and he adopted a mode of legal reasoning hitherto little employed in South African jurisprudence. The task was made all the more difficult because of the complex way in which the matter arose before the court – with issues of limitation and standing both muddying the waters. It was courageous too because it attracted no support from his judicial colleagues. The importance of the judgment lies in its methodology: it seeks to ground the right to freedom of the person in an overall jurisprudential understanding of individual rights. It links freedom to human dignity in a memorable passage:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their “humanness” to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.<sup>49</sup>

This passage could hardly be a better example of a new form of legal reasoning quite antithetical to the arid positivist legal reasoning that had

<sup>47</sup> Section 39(1)(a) of the Constitution.

<sup>48</sup> Section 36 of the Constitution.

<sup>49</sup> *Ferreira v Levin NO* (n 14) para 49.

been the hallmark of much of the jurisprudence of previous generations.<sup>50</sup> It identifies fundamental normative principles to inform the understanding of the provisions of our Constitution. As I have said before, this form of reasoning was by and large unfamiliar to judges and lawyers in South Africa and they would for the most part prefer to eschew such forms of reasoning, as Iain Currie memorably described in an essay on the Court's early jurisprudence.<sup>51</sup>

The form of reasoning displayed in this passage is reasoning from first principles rather than from precedent. Precedent is of course an important part of the rule of law and the basis of stability in a legal system.<sup>52</sup> But a constitutional democracy that is based on objective express values needs to find other forms of reasoning which might introduce ideas that are controversial and criticised (as those expressed in *Ferreira* were). Lawyers are often tempted to leave unexplored fundamental assumptions such as those raised in this passage. Leaving such assumptions unspoken may be tempting but it is dangerous. Our most deep assumptions remain unexpressed and unacknowledged: they may not be challenged or endorsed. A constitutional order requiring openness and accountability in relation to the exercise of public power cannot tolerate judicial avoidance of reasoning on fundamental constitutional values.

It is not necessary to say more of the manner in which Justice Ackermann continued to develop the constitutional values of human dignity, freedom and equality in later cases. This conference considers these matters extensively. At this stage, all I wish to emphasise is that the principled exploration of these values in his jurisprudence is an exercise in a form of judicial decision-making that marks a radical break from the traditional forms of legal reasoning in our legal system; and it is a form of reasoning entirely appropriate to our new constitutional order.

## VI CONCLUSION

In briefly expounding on these three themes, I hope I have laid a framework for our discussion going forward. In conclusion, I would like to suggest that there can be no doubting the immense contribution that Laurie Ackermann has made to the early years of constitutional jurisprudence in South Africa. We are all in his debt. The very fact that

<sup>50</sup> This was acknowledged by Alfred Cockrell in his illuminating article 'Rainbow jurisprudence' (1996) 12 *SAJHR* 1 at 12–13.

<sup>51</sup> I Currie 'Judicious avoidance' (1990) 15 *SAJHR* 138; see also C Sunstein 'Leaving things undecided' (1996) 110 *Harvard LR* 6.

<sup>52</sup> C O'Regan 'Change v certainty: Precedent under the Constitution' (2001) 14 *The Advocate* 31.

we are gathered here today, philosophers and lawyers alike, is evidence of that. I look forward immensely to the conversations that will follow. I have no doubt that they will be illuminating.