

# *Bridging the Span toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence\**

DRUCILLA CORNELL†  
*University of Cape Town*

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## I INTRODUCTION

Justice Laurie Ackermann has played a pivotal role in the development of the dignity jurisprudence of South Africa. At the heart of Ackermann's journey is nothing less than bravery exhibited by a constant struggle with the development of a dignity jurisprudence worthy of a constitution that does not simply forsake its moral grounding in ideals and values but insists that enumerated rights must always be defended alongside the aspiration to live up to those ideals and values. In a certain sense, then, the Constitution<sup>1</sup> is both law and an ethical call for its citizens to live up to the aspirational ideals listed in s 1 of the founding provisions of the Constitution. As Ackermann writes, there can be no final Constitution because it will be up to the people of South Africa continually to transform this country as guided by the great ideas of dignity, equality and justice:

[T]he ultimate fate of the Constitution, a bridge with a very long span, will not be decided by the jurisprudence of its courts alone, however devoted and inspired that may prove to be. A transforming Constitution such as ours will only succeed if everyone, in government as well as in civil society at all levels, embraces and lives out its vales and its demands. It will only succeed if restititional equality becomes a reality and basic material needs are met, because it borders on the obscene to preach human dignity to the homeless and the starving. This must, however, be achieved in a manner consonant with the human dignity of all. We are, after 10 years, only at the end of the beginning.<sup>2</sup>

Ackermann takes us on a journey in which his elaboration of the dignity jurisprudence becomes steadily more connected to the philosophy of

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† South African Research Chair in Customary Law, Indigenous Values and Dignity Jurisprudence, Department of Private Law, University of Cape Town.

<sup>1</sup> Constitution of the Republic of South Africa, 1996. Unless otherwise indicated all references to 'the Constitution' are to the 1996 Constitution.

<sup>2</sup> L W H Ackermann, 'The legal nature of the South African constitutional revolution' (2004) 4 *New Zealand Law Review* 633 at 678–79.

Immanuel Kant, which eventually leads him to revise and clarify some of his earlier formulations on the meaning and significance of dignity.

## II FREEDOM, DIGNITY AND THE RECHTSSTAAT OF REVOLUTION

Two points need to be made before continuing. First, no constitution for the robust, vibrant, dynamic cultural communities in South Africa with their own laws and ethical definitions of being human, such as, for instance, *ubuntu*, could or should be rooted strictly in the writings of a western philosopher. But, since the notion of a *Rechtsstaat* is so profoundly misunderstood in Anglo-American jurisprudence, we can at least echo Ackermann's own references to Kant in his constitutional decisions to help us understand a non-positivist conception of Right – by which I mean a conception of right as the realm of external freedom, which, at least for Kant, is understood as a subdivision of the 'moral'.<sup>3</sup> But we need to regard the term 'moral' with some intellectual suspicion, because the German word *Sitten* actually appeals to a larger ethical activity of justice, toward the aspirational ideal of a free humanity that can harmonise competing interests not simply through balancing but through an appeal to ideals and values that attribute ethical meaning to human life. All of the most controversial issues that arise in debates about South African jurisprudence, from the question of the justification for the plenary jurisdiction of the Constitutional Court to the significance of the horizontality of the South African Constitution, ultimately take us back not only to the question of what kind of revolution took place in the 1990s but also to why dignity – as it is integrally connected to freedom (both as individual and communal self-legislation) – lies at the heart of that reconstituted legal system.

Second, we must underscore that Justice Ackermann, although certainly not alone, has proceeded through an understanding of the new South Africa as a *Rechtsstaat* that embodies an objective realm of external freedom irreducible to the coordination of subjective interests or even of the legally inscribed protection of individuals against the state. Once we understand this aspect of the new South Africa, we will be able to understand the significance of the contention that there was indeed a revolution in South Africa – not a peaceful transition. It was a revolution that grew out of a relentless and courageous struggle for the freedom of the black population, which included as a last resort the organisation of the armed struggle under Nelson Mandela.

<sup>3</sup> See I Kant 'The metaphysics of morals' in I Kant *Cambridge Edition of the Writings of Immanuel Kant: Practical Philosophy* translated and edited by M J Gregor & general introduction by A W Wood (1996) 353 at 365.

Why is this legally important and not just historically important? As Ackermann tells us, the revolution in South Africa was not a full Kelsenian revolution in that it did not simply end all of the reigning institutions of the previous judicial order.<sup>4</sup> Ackermann, in his own words, writes that, ‘there is no discontinuous legal fracture with the old legal order. The revolution was commenced by a parliamentary statute of that old order (namely, the [interim Constitution]) and controlled by it, and the Constitutional Court was created by it’.<sup>5</sup> It was a revolution, however, in that law and indeed the principle of legality itself comes to be grounded in the Constitution. The Constitution is the grounding source of legality as the ideals of s 1 become the force of law that actually gives substance and value to the right-granting sections of the Bill of Rights. Already, we are indeed far from H L A Hart who argued that the social fact of sovereign authority, and with it the accepted social fact of norms that exist as law, is made possible by a presupposed agreement concerning another socially existing fact of a rule of recognition appropriate to identifying what is valid law.<sup>6</sup> Those who attempt to argue that there is and could be such a social fact as a rule of recognition, some form of pre-legal secondary order norms of understanding, are missing the impact of this revolution. Why should this be the case? Because the South African Constitution is not grounded solely on shared norms but appeals to an ideal community – Ackermann in *Dodo*<sup>7</sup> actually figures that community as the Kantian kingdom of ends – that not only legally constitutes a new South Africa but also, like the kingdom of ends, points to an ethical realm that has never existed and will certainly never exist in some kind of final institutional form. At the same time, however, the legalised ideals of the Constitution call South Africans to forsake the shared norms that allowed apartheid to be institutionalised. The Constitution, then, is emblematic of the very revolution that took place. It is a revolution that gives life to the spirit of transformation – a spirit of transformation of the realm of external freedom as it is legalised, but never in a final sense, so that it remains grounded in the ideal of a self-legislating community that is always aspirational and not merely a social fact.

Ackermann often writes of how the fundamental wrongs committed under apartheid constituted a complete denial of the dignity and freedom of the majority of the population.<sup>8</sup> These oppressed people were cruelly reduced to a means in a system of racist and economic exploitation. But,

<sup>4</sup> Ackermann (n 2) at 646.

<sup>5</sup> *Ibid.*

<sup>6</sup> See generally H L A Hart *The Concept of Law* 2 ed (1997).

<sup>7</sup> *S v Dodo* 2001 (3) SA 382 (CC) para 38.

<sup>8</sup> See, for instance, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) para 51.

staying with the notion of *Rechtsstaat* as the moral realm of external freedom, dignity of the person is what can potentially tie together the two legislations in Kant (the external realm of freedom and the ideal realm of self-legislation in the kingdom of ends) because it points us toward the ideal of freedom in which human beings can actually seek to harmonise their interest in an ethical community or nation state committed to justice. The question of whether or not the two legislations of external freedom and the uncoerced harmonisation of interest in the kingdom of ends might be rooted in a shared principle of humanity in Kant, is a much contested debate among Kantian scholars. But I want to argue here for the significance of understanding the South African Constitution as a *Rechtsstaat* that does indeed find a unified basis for these two legislations in the constitutionalisation of the ideals of s 1 as the right-granting force of the Bill of Rights.

This can help us understand why, even if the kingdom of ends must remain an aspirational ideal, the principle of a free humanity is what lies as the basis of the ‘we the people’ that inaugurates the preamble of the Constitution. Thus, freedom understood as the possible self-legislation of an ethical humanity committed to these aspirational ideals is at the heart of this new Constitution because it is only such an ethical notion of humanity that can feed the hope to move beyond the bloody and horrific past – the heteronomous realm of deeply entrenched racist practices that haunts us, and indeed ensnare us, in an unjust social reality.

The robust cultural panoply of the people of South Africa cannot be adequately explained by terms like diversity or weak-kneed ideas of multiculturalism. The centrality of freedom understood as the possibility of harmonisation follows because only such a freed humanity can aspire to a shared ethical practice of justice; and, it is fidelity to such practice that can fuel the teleological, interpretative approach of the South African Constitutional Court to a future that is always already further and further away from the violence of the past. Dignity, with its integral connection to freedom, may represent the richest western conception of an ethical humanity that still heeds the call and the commitment to justice – both as an ideal and a practice – in that law as the moral realm of external freedom does not seek legitimacy in some outside principle whether it be the rule of democratic legislatures, the social fact of presupposed agreements on secondary norms, or even some ideal community of dialogue. Freedom and dignity so understood is the *Grundnorm* of the new South Africa, because such an ethical conception of humanity is the only true hope to stave off the moral draining of law so that it is left with nothing other than cynical realist interpretations of law as either arbitrary balancing of interests, depending on who has more power, or some kind of rationalised scheme of utility-maximizing actors who only agree to put

down their guns because that is a necessary step toward greater self-interest.

Of course, the notion of law rooted in an ethical conception of humanity is not simply western. It also gives life to what Chuma Himonga speaks of as a 'living customary law'<sup>9</sup> of South Africa with ideals such as *ubuntu* that configure an extremely rich view of what it means to be a human being in community with other human beings. It is precisely this possibility that a law rooted in an ethical conception of humanity is shared by the very different traditions of law and ethics in South Africa that can give us hope that the fragility of any appeal to an ethical community will not shatter, because it is fed by many sources. We can now read Ackermann's judgment in *Ferreira v Levin*<sup>10</sup> and investigate why the principle of humanity rooted in ethical freedom, even as constitutionalised as the basis of the realm of external freedom, still always points beyond any list of enumerated liberties.

### III RESIDUAL RIGHT OF FREEDOM AND TELEOLOGICAL ASPIRATION

In *Ferreira*, Justice Ackermann defended a residual right of freedom through an interpretation of what was in the then interim Constitution s 11(1)<sup>11</sup> and in the 1996 Constitution became s 12(1), which states: 'Everyone has the right to freedom and security of the person'. Ackermann famously interprets this section by disjoining freedom from the wording that follows it regarding the security of the person. The case involved a challenge to the constitutional validity of a Companies Act provision,<sup>12</sup> which compelled a person during winding-up proceedings to testify and produce documents even if these documents and testimony could be used against them (both directly and indirectly) in further proceedings. Ackermann's order, which is accepted by all of the members of the Court (although for different reasons), is simple. The provision in this matter can only be constitutionally valid if direct-use immunity is read into it as a fundamental protection and judicial discretion is allowed on the part of the judge as to whether indirect use would be allowed in a specific case.<sup>13</sup> Although I do not want to focus on Ackermann's reasoning in this regard, we can mention in passing his argument that

<sup>9</sup> See for instance C Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: Problems solved or just beginning?' (2000) 117 *SALJ* 306 at 319.

<sup>10</sup> *Supra* (n 8).

<sup>11</sup> Constitution of the Republic of South Africa, Act 200 of 1993 ('interim Constitution'), s 11(1): 'Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.'

<sup>12</sup> Companies Act 61 of 1973, s 417.

<sup>13</sup> *Ferreira v Levin* (n 8) para 153.

s 25(3) of the interim Constitution, which in the 1996 Constitution became s 35(3), both protects the right of an accused to a fair trial and in subsec 1 protects against self-incrimination in such a way that it could not apply in this case because no one in these proceedings had been arrested and detained.<sup>14</sup>

Ackermann's judgment in this case has implications for standing, and I agree with O'Regan J and Chaskalson P that he wrongly curtailed the reach of standing;<sup>15</sup> however, in the final analysis Ackermann's real concern is to defend dignity as the grounding ideal, or *Grundnorm*, of the Constitution. Certainly, Ackermann makes it very clear in his judgment how important the right against self-incrimination is, both in South Africa and in legal systems around the world. So, the judgment is in no way meant to trivialise the right against self-incrimination or reduce it to a rule of evidence. Chaskalson P explains that he would have resolved this case on the basis of what was then s 25(3) in the Interim Constitution, yet notes that Ackermann finds it necessary to construct an argument out of s 11(1) 'in order to give substance to the right to human dignity'.<sup>16</sup> Chaskalson P rightly interprets the jurisprudential spirit behind Ackermann's decision to disjoin freedom from security of the person; indeed, the way in which Ackermann develops the argument in his judgment substantiates the President's insight into his ultimate reasoning about the legal significance of the integral connection between dignity and freedom in a *Rechtsstaat* rooted in an ethical conception of humanity.

As Chaskalson P, rightly, reads Ackermann, the judgment in its largest spirit wishes to philosophically deepen the meaning of dignity as a *Grundnorm* of the Constitution and seeks to struggle with what this means for constitutional interpretation; however, Ackermann is also moving further away from a positivist sense of law, even if at times inconsistently, because if freedom is irreducible to any enumerated set of liberties (as Ackermann argues in this judgment<sup>17</sup>) then it is something that always pulls the law beyond any of its current enumerations. In this sense, freedom becomes a kind of transcendental aspiration that always underscores the ethical and moral incompleteness of any legal system ever fully to actualise justice, equality, and dignity. Ackermann, then, is seeking to give depth both philosophically and constitutionally to dignity as a foundational norm. But, in the course of so doing, Ackermann uses semantic and philosophical resources that cannot fully express the residual right of freedom as what is always beyond any enumerated set of

<sup>14</sup> Ibid para 41.

<sup>15</sup> Ibid paras 158, 163 and 226–30.

<sup>16</sup> Ibid para 173.

<sup>17</sup> Ibid paras 49–69.

liberties. Ackermann's judgment in *Ferreira* argues that this right to freedom can only be limited with proper s 33(1), or what is now s 36, justification; I want to suggest that this constitutional conclusion might restrict legal regulation in the name of freedom and is the result of Ackermann's reliance in this case on Isaiah Berlin in stead of a more Kantian inspired notion of freedom. Indeed, he seems to contradict himself by relying on Berlin, suggesting 'in the context of the Constitution as a whole, there is [not] any difference between freedom and liberty'.<sup>18</sup>

Berlin famously argued that freedom in the negative sense defines the area in which a person is free to act without interference by other persons. Positive freedom involves the examination of the source of interference in addition to the values behind that interference.<sup>19</sup> Ackermann is determined in *Ferreira* to distinguish between freedom and the conditions of its exercise<sup>20</sup> because he is worried, as so many others have been, of 'forcing people to be free' and therefore undermining the South African commitment to an open society. The key problem in Ackermann's definition is that he understands there to be a paradox of unlimited freedom in the concept of negative liberty, which he seeks to resolve constitutionally through s 33(1) of the provisional Constitution. Thus, Ackermann believes he is following Berlin in that negative freedom can be limited, both by the freedom of others and by other ideals and values that are external to freedom. But Ackermann is in fact recognizing that there can be an internal limitation to freedom even as he recognises the external limit of other people's freedom. It is not just that freedom should be read generously, but that if it is to be read in a teleological sense then we must realise that there is more to it than any positive list of enumerated rights. By such a view freedom is not identical to any enumerated list or even the concept of liberty.

Truly, Kant's notion of negative and positive freedom is completely different to that of Berlin. Negative freedom, for Kant, is the ability to resist the imprisonment of immediate desires and impulses. Kant is often accused of being prudish for suggesting we know ourselves to be free when we know we are not doing what we want; however, this is not at all the point Kant is trying to make. Instead, he is suggesting that human life is purposive and that when we take our humanity seriously as a being who can set ends for itself and can coordinate those ends as a direction for a life, then we are able to exercise a kind of freedom precisely in coordination with those ends so that we rationally guide who we seek to

<sup>18</sup> Ibid para 52.

<sup>19</sup> I Berlin 'Two concepts of liberty' in I Berlin *Four Essays on Liberty* (1969) at 121–22, as quoted in *Ferreira* (n 8) para 52.

<sup>20</sup> *Ferreira* (n 8) para 52.

become. For Kant, humanity represents this ability of each and every one of us to set and coordinate ends in the promotion of our end-making in community with one another. Yet there is no implication that those ends necessarily be moral ends. However, to be sure, humanity involves the capacity to form ideas of what would constitute our well-being over time. Let me offer a concrete example. An older male professor is drawn to a younger female student because she has nice breasts. But, he loves his wife and connects his overall wellbeing with fidelity and honesty to his wife and, therefore, he forsakes the impulse to try and seduce his young student. This is simply negative freedom in Kant. It is not acting without interference; it is acting in accordance with a pragmatic notion of reason that allows us to coordinate our ends for our own well-being. This pragmatic aspect of our freedom in the negative sense is what Kant calls prudence.<sup>21</sup>

But positive freedom in Kant is causality through norms. It is this freedom that Kant associates with personality and upon which dignity is ultimately based. For Kant, when we act as moral agents we lay down a law for ourselves: a law that allows us to act at least as if we were free from the constraints of the real world around us and had the power to determine ourselves in accordance with what 'ought to be' and what we 'ought to do' in such a world. It is a normative law, not a natural law. By acting under the law of the categorical imperative, which, depending on how one counts, has three or four formulations, we can represent ourselves as acting as if we were able to actualise the power to determine ourselves in accordance with a law that we lay down to ourselves and which, in a certain sense, brings with it the possibility of acting as legislators with others in a kingdom of ends as we regulate ourselves in accordance with this power of positive freedom.<sup>22</sup>

Again, it is important to note that every time we set ends for ourselves and struggle to develop a life for ourselves – including a life in which we project into the future who we seek to become – we are exercising a kind of practical freedom, but it is primarily what Kant calls negative freedom. Human beings, for Kant, have dignity precisely because we are the ones who are able to exercise freedom both in a positive and a negative sense. But it is through the positive sense of freedom in which we as rational beings subject ourselves to a law of our own making and represent ourselves as so doing that freedom confers dignity on all of us as persons.

<sup>21</sup> Kant more clearly distinguishes between animality, personality, and humanity in I Kant 'Religion within the bounds of mere reason' in I Kant *Cambridge Edition of the Writings of Immanuel Kant: Religion and Rational Theology* translated and edited by A W Wood & G di Giovanni (2001) 39.

<sup>22</sup> See the second part of I Kant 'Groundwork of the metaphysics of morals' in Kant (n 3) 37 for all of the formulations of the categorical imperative, which are ellipsed here in general fashion.

But, again, negative and positive freedom together means that we are the ones who set value on the ends we make and that there is an ‘I’ who is there as a necessary postulate of reason setting those ends. And this ultimately leads us to respect the humanity and personality of others who are like us as rational beings and who give value not only to their lives but also bring value into the world we all share. Human beings are the ones who give value to the world around them through the rational exercise of freedom. This is why we have dignity and why we must regard others as equal sources of value both in their own lives and as legislators in a shared kingdom of ends. Through such an image we are ethically called to treat ourselves and all others as an end toward the greatest end represented in the figurative kingdom of ends where we all harmonise the ends worthy of being able to represent the power of the ‘ought to be’ as the basis of action and a possible, just constitution.

Having explored Kant in greater detail against Berlin, we can return to the tension between the two philosophical sources Ackermann uses to defend a residual right of freedom integrally bound to teleological aspirations toward ideality. As implied by the quotation from Kant used by Ackermann,<sup>23</sup> when we seek to coordinate, or harmonise, our ends as legislators in the kingdom of ends, freedom is even more explicitly limited by the very moral power that allows us to aspire to legislate together on the level of the ideal toward a world worthy of humanity and justice. When we degrade another human being, we fail to respect ourselves and other people as rational beings, and in so doing we tie ourselves up in knots of hierarchy that do indeed block us from exercising our freedom for the endless struggle to bring a just world into existence.

Under this understanding of freedom, white people were not free under apartheid in South Africa – not just those white people who were banned or curtailed because they sought to fight for the dignity and humanity of the black majority, but also the white people who were imprisoned by their own racist impulses and unable to evaluate such impulses as they lay eaten up by anxiety to confront the very legislative power that would set them free from the bonds of racism by coordinating their own ends with respect for all other persons as ends in themselves. If freedom itself is not just choice outside of interference, if it has in Kant a critical edge and internal self-limit in both negative and positive forms, then we can achieve what Ackermann aspires to: the protection of an

<sup>23</sup> *Ferreira* (n 8) para 52: ‘Kant luminously conceptualizes freedom as the “only one innate right” in the following terms: “Freedom (independence from the constraint of another’s will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.”[footnote omitted]’.

un-enumerated residual right of freedom beyond any stated list of liberties and, at the same time, be able to insist that such freedom is internally limited by the freedom of all others. This coordination is not an external limit suggesting that individuals need to make their freedom work against limitation respective to other people, but it is internal to the rational exercise of freedom which is what allows us to give value to the world in which we live, both in our humanity and in the exercise of our personality when we act and represent ourselves as so acting from the standpoint of the 'ought to be.'

Some of the dilemmas that, in *Ferreira*, worry Chaskalson P, O'Regan, Sachs and Mokgoro JJ about Ackermann's construction of s 12 (1) where he disjoins freedom from security of the person, do not lie in his attempt philosophically to justify a residual right of freedom that seeks fidelity to the significance of dignity and freedom as the *Grundnorm* of the Constitution; rather, the worry is that his philosophical defence would lead to limitations affecting the ability of the government to regulate in certain matters of the economy because the severity of the test that would be placed on such regulations would demand them to be necessary and not just reasonable. Chaskalson, P explicitly raises the spectre of *Lochner v New York*,<sup>24</sup> suggesting:

Implicit in the social welfare state is the acceptance of regulation and redistribution in the public interest. If in the context of our Constitution freedom is given the wide meaning that Ackermann, J suggests it should have, the result might be to impede such policies. Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms to the Constitution. It should not, however, require the legislature to show that they are necessary if the Constitution does not specifically require that this be done.<sup>25</sup>

To be fair, Ackermann J explicitly argues that the *Lochner* dilemma could not even arise in South Africa because the Constitution contains extensive protection of labour activities, and therefore labour legislation could not be struck down, as in *Lochner*, as a violation of an employer's liberty to contract.<sup>26</sup>

What I have said so far raises a different concern than that suggested by Chaskalson P, in that Ackermann is seeking jurisprudentially to do something very difficult. Ackermann defends a residual right of freedom

<sup>24</sup> 198 US 45 (1905).

<sup>25</sup> *Ferreira* (n 8) para 180.

<sup>26</sup> *Ibid* para 65.

that, as we saw in the opening quotation, always means that there is a legal limit placed upon this residual right even if at the same time it serves the Constitution as its *Grundnorm*. Simply put, the work of freedom is never complete. Sachs J, in his concurring judgment, writes:

To equate freedom simply with autonomy or the right to be left alone does not accord with the reality of life in a modern, industrialised society. Far from violating freedom, the normal rules regulating human interaction and securing the peace are preconditions for its enjoyment. Without traffic regulation, it would be impossible to exercise freedom of movement in a meaningful sense; absent government compulsion to pay taxes, the expenditure necessary for elections to be held, for Parliament to pass legislation, or for this court itself to uphold fundamental rights, would not be guaranteed. The *rechtsstaat*, as I understand it, is not simply a state in which government is regulated by law and forbidden to encroach on a constitutionally protected private realm. It is one where government is required to establish a lawfully regulated regime outside of itself in which people can go about their business, develop their personalities and pursue individual and collective destinies with a reasonable degree of confidence and security. I accordingly cannot accept that the laws that guarantee my freedom – for example, my right to vote, or to litigate, or to receive education – represent invasions of my freedom, simply because they are subject to governmentally enforced rules and contain penal clauses. We should ever be mindful of the fact that the review powers of this Court are not concerned with maintaining good government, or correcting governmental error, but with keeping government within constitutional limits.<sup>27</sup>

As we have seen, autonomy and being left alone are not coincidental in Kant. What Ackermann needs in his conception of a residual right of freedom to avoid the paradox of unlimited freedom, is to continue to move away from Anglo-empiricist notions of freedom. As Ackermann strives to use Kant, he will understand that freedom is integrally bounded by reason, which both provides a critical edge for us to judge an action as free and allows us to understand how the aspirational ideal of the kingdom of ends (and with it the harmonisation of our ends) may supply an answer to the worry of Chaskalson P and Sachs J that Ackermann's definition of freedom is going to prove onerous to the redistributive aspects that are also enshrined in the socio-economic rights that are contained in the Bill of Rights. Notably, although O'Regan J disagrees with Ackermann J's notions about standing, she does not express any view on the question of his interpretation of s 12(1). Understanding freedom as integrally limited by the conditions of its exercise, the seeming paradox of unlimited freedom can be resolved internally and we

<sup>27</sup> Ibid para 250.

will see this is much more consistent with the slow move to Kant by Ackermann over the remainder of his tenure on the Constitutional Court.

To summarise, some of the tensions throughout Ackermann's judgment in *Ferreira* have led to confusions about the possible jurisprudence that is indicated but certainly not fully worked out in that decision. For the sake of clarity, I want to review the central propositions that will be deepened and expanded upon in an explicitly Kantian manner in his later decisions. First, Ackermann offers a strong interpretation of s 39(1).<sup>28</sup> This strong interpretation is what Ackermann means as a teleological interpretation of the Constitution, which always points to the *Grundnorm* as the aspirational ideal that must inform all of the Court's interpretation of the enumerated rights in the Bill of Rights. There is, then, a central connection between Ackermann's teleological interpretation of the Constitution (as it is both grounded by ideals but also aspires to regulate South African society in accordance with the highest ideals) and his defence of a residual right of freedom. Such a residual right of freedom is one in which the positive law can never function as a self-contained system, but always points beyond itself to the promises of the ideals both grounding the Constitution and aspired to by the Constitution. Under this reading of s 39(1)(a) and the teleological interpretation of the Constitution that always points beyond itself by grounding itself explicitly in moral commitments, the dignity jurisprudence has already moved far beyond positivist conceptions of law and will therefore demand a jurisprudence worthy of this Constitution committed to moral and ethical transformation.

This interpretation also helps us to make jurisprudential sense of the commitment to horizontality in which relations between individuals are to be guided by these ideals which serve as an objective order of norms; values and ideals that enact an ethical call for the transformation of all South Africans in their day-to-day relationships long before any individual comes to the Court to challenge their subjective interests. Horizontality would be difficult to maintain under an Anglo-empiricist notion of freedom because it would seem to demand far too much interference in the lives of people; but, if we are to imagine ourselves in the New South Africa as legislators in the kingdom of ends then his two-fold interpretative contribution (the residual right of freedom and teleological approach to the ideality of the Constitution) is why we have a world where racism has no place in the social crevices of our day-to-day

<sup>28</sup> Constitution s 39 (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.'

lives and it is up to us to transform ourselves as guided by these great ideals which will never be fully realised, but always promise a better world as we struggle to be worthy of this extraordinary Constitution.

#### IV THE CRITICAL EDGE OF DIGNITY AS MORAL IDEAL

Although Kant is often mischaracterised as an individualist, what is often missed in his work is the profound influence of Jean-Jacques Rousseau. In the kingdom of ends, we not only legislate for ourselves what is the right thing to do by rationally reflecting on the demands of the categorical imperative, but also, as members and as legislators in the kingdom of ends, we seek to harmonise our ends with one another so that we can aspire to live up to the ideal of justice, even if as an ideal it always remains beyond any actual existing legal system. Indeed, it is through the appeal to the kingdom of ends and from the imagined ideal standpoint of that kingdom that human beings have infinite worth precisely because they are each viewed as a persona; being such a persona allows them to subject themselves to moral, practical reason and aspire to a world of justice which demands nothing less than that each one of us tries to live up to the harmonisation of our ends with one another.

As suggested earlier, that is the moral justification for the legalisation of horizontality in South Africa. In *Dodo*, Ackermann explicitly echoes the language of Kant, arguing that: 'Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.'<sup>29</sup> In one of his earlier attempts at formulating the relationship between the moral ideal of dignity, which as we have just seen in his later decision explicitly echoes the language of Kant, Ackermann defends dignity when it is used in the South African Constitution as something analogous to what has been called neutral principles in the constitutional law of the United States.<sup>30</sup> But I want to argue strongly here that the language of neutrality is not the one that Ackermann purports in his most recent writing. Nor is it adequate to the moral ideality that is ultimately the touchstone of the South African Constitution. A neutral principle in Herbert Wechsler's famous formulation is one that must be neutral to the context of the case in the specific sense that it provides a criterion of generality.<sup>31</sup> The goal here was to restrict open-ended assessments of morality and ethics by judges by requiring them to have reference to general legal rules that could be ascertained separately from the actual adjudication at hand.

<sup>29</sup> *Dodo* (n 7) para 38.

<sup>30</sup> L W H Ackermann 'Equality and the South African Constitution: The role of dignity' (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 537 at 554.

<sup>31</sup> See H Wechsler 'Toward neutral principles of constitutional law' (1959) 73 *Harvard LR* 1.

But, more fundamentally, as we have seen in the previous section, the grounding of the moral ideal is precisely moral as *Recht*; therefore, these moral ideals are converted into legal principles and this is what, on my reading, inspired Ackermann to suggest that dignity could be the basis for neutral principles. But ultimately these moral ideals that ground the Constitution are ideals that can never be perfectly enumerated in any actual legal system; thus, the South African Constitution holds a critical edge, which at the same time demands that the legal system itself endlessly aspires to realise those ideals. In summation, the desperate search for neutral principles in the United States Constitution to counter the many versions of legal realism that reduce law to politics was rooted in a philosophical orientation which could not effectively imagine law as an objective normative order of ideas and values that was above and beyond the subjective clash of individual interest. Without such a philosophical imagination it becomes nearly impossible for any jurisprudential work on the United States Constitution to even suggest that moral ideals could both ground a legal system and endlessly point beyond such grounding to the ideals that by their definition can regulate, but never constitute, a legal system.

The critical edge offered by the transformative character of the South African Constitution is not only away from the deep tragedies of the past and toward the great regulative ideals, but it also points us toward a telos of change; the spirit of such transformative change is what prompts Ackermann to insist that there can be no final Constitution. Thus, the teleological aspiration and generous interpretation of the ideals of freedom found throughout the jurisprudence developed by Ackermann is not only a matter of legal interpretation but is also a philosophical statement that is integrally connected to the complex relationship between moral ideals and enumerated rights. Exploring further the ways Ackermann gives life to the legality of the South African Constitution, particularly in terms of dignity, will help to demonstrate the evolution of thinking in his jurisprudence.

Ackermann uses a number of constitutional provisions to underscore his jurisprudence. First, he relies on s 1(a) which values '[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms'.<sup>32</sup> This provision is the touchstone, providing the foundation of the Constitution. Second, Ackermann carefully reads s 10, which states that: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'<sup>33</sup> Similarly, Ackermann J argues in *Dodo* in response to s 12(1)(e):

<sup>32</sup> Constitution, s 1(a).

<sup>33</sup> Constitution, s 10.

In the phrase “cruel, inhuman or degrading” the three adjectival concepts are employed disjunctively and it follows that a limitation of the right occurs if a punishment has any one of these three characteristics. This imports notions of human dignity as was correctly recognised, although in another context, by the High Court in this case. The human dignity of all persons is independently recognised as both an attribute and a right in s 10 of the Constitution, which proclaims that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.” It is also one of the foundational values of the Constitution and is woven, in a variety of other ways, into the fabric of our Bill of Rights. While it is not easy to distinguish between the three concepts “cruel”, “inhuman” and “degrading”, the impairment of human dignity, in some form and to some degree, must be involved in all three. One should not lose sight of the fact that the right relates, in part at least, to freedom.<sup>34</sup>

Thus, the right to respect the inherent dignity of a person is based on a moral and ideal attribution of both personality and humanity. As we will see later, Ackermann is closely following Kant in this argument in that dignity is an ideal attribution to persons both in their humanity and personality. What we need to underscore here, though, is that the right recognises a moral ideal, which is not conceptually reducible to positive right; indeed, the opposite is the case. We have the right because of the ideal aspect of our humanity and personality.

We have already reviewed how Ackermann disjoins s 11(1) so as to protect a residual right of freedom that both deepens the ideal associated with a Kantian notion of ideality and personality, and prevents any enumerated list of liberties to be reduced to the ideal of freedom. The South African Constitution is not a codified system of law nor does it have a general clause to be read through all of the provisions of the legal system (such as in Germany). To this end, Ackermann following O’Regan J in *S v Makwanyane*,<sup>35</sup> interprets s 39(1)(a) as meaning that the ideals listed in that section begin with human dignity, which is actually meant to mould the interpretation of the Bill of Rights as explained in our discussion of *Dodo*.

Ackermann is also well known for his careful review of international law, which is demanded by s 39(1)(b), and he also takes into account foreign law, which according to s 39(1)(c) may be considered. How does he interpret the distinction between international law and foreign law such that it relates back to the connection between the moral ideals of dignity, equality, and freedom and the attempt to translate them into a workable Bill of Rights? Again Ackermann finds allegiance with Kant, by articulating the demand to consider international law as something

<sup>34</sup> *Dodo* (n 7) para 35.

<sup>35</sup> See the judgment of O’Regan J in *S v Makwanyane* 1995 (3) SA 391 (CC) paras 326–32.

beyond the mere review of established treaties and rights; instead, Ackermann J is also considering what Kant would call *divinatory history* in which the establishment of these treaties and rights point toward a slow progress of greater fidelity to the ideality of humanity.<sup>36</sup> So, when Ackermann J strongly interprets s 39(1)'s demand to consider international law, he does so in such a way that it enacts the philosophical and moral pursuit inherent within the Constitution of South Africa, which demands aspiration to the slow achievement of a peaceful world by coordinating its ends with the larger international community.

Here Ackermann J comes close to the great legal philosopher Hans Kelsen who insisted that ultimately state sovereignty and the legal systems of any nation state would have to be subordinate to an international law system if their true meaning were to be given to the aspirational ideals embodied in human rights.<sup>37</sup> Correspondingly, for Kelsen, the ideal of perpetual peace is the foundational ideal of all international law.<sup>38</sup> Therefore, the appeal by Ackermann to international law is profoundly principled and follows Kelsen in that the constitution of any nation state must subordinate itself, in a sense, to the ideals embodied in international law. It is not, by any viewpoint, a quirk for Ackermann to always review international law; rather, it is integral to his jurisprudence and his understanding of legality for the nation state. Putting this philosophical and jurisprudential manoeuvre into a metaphoric context, we could say it is fine for a nation state to build itself a house, but only if all nation states start to pave roads to each others' homes can we slowly begin to coordinate the aspirational ideals of humanity in the form of an international law that might yet one day evolve into a global city founded on the ideality of perpetual peace.

Similarly, Ackermann uses the limitations clause of s 36(1) as another provision which underscores the way in which the ideals of dignity, equality, and freedom inform not only the interpretation of the actual Bill of Rights but also the jurisprudence of limitation in which those same rights can be expressed. Thus, what we have seen so far is that Ackermann gives a careful reading to crucial clauses in the Constitution to show how the ideals of dignity, freedom, and equality must inform the way in which the law is always teleologically interpreted towards these great regulative ideals. And, this 'towards', then, is integral to the development of principles, which are further used to resolve actual constitutional issues. The South African Constitution, then, as it has

<sup>36</sup> See, for instance, I Kant 'An old question raised again: Is the human race constantly progressing?' in I Kant *Kant on History* translated and edited by L W Beck (1963) 140.

<sup>37</sup> See generally H Kelsen *Pure Theory of Law* translated from the second (revised and enlarged) German edition by Max Knight (1967).

<sup>38</sup> See H Kelsen *Peace Through Law* (1944).

legally operationalised the moral significance of these great ideals is a jurisprudence of principle, not a jurisprudence of rules. For example, a principle of law is invoked when Ackermann disjoins the ideal attribution of dignity from the right of dignity and shows the legal significance of that disjoining.<sup>39</sup> As Ackermann tells us, one crucial aspect of constitutional interpretation is that it seeks to build a culture of justification and, therefore, the often lengthy decisions are done with such care so as to show exactly why the disjoining (and very specific reconnection) of the ideal attribution of dignity from the right of dignity matters so that we come to understand the legal significance of that right as a part of the slow development of a coherent set of principles as the basis of constitutional jurisprudence.<sup>40</sup>

## V DISTINCTIONS OF EQUALITY AND A JURISPRUDENCE OF HUMAN WORTH

Ackermann (and the Constitutional Court generally) has been criticised as either ignoring equality or rendering equality so subordinate to dignity and freedom that he is actually misreading the Constitution, which always lists dignity, equality, and freedom in fair proportion.<sup>41</sup> But, is this a correct criticism of the dignity-based approach? Section 8(1) under the interim Constitution and s 9(1) of the 1996 Constitution begin with the important right to equality before the law and equal protection of the law. It is important to note the distinction between the two forms, because equality before the law and equal protection of the law do not mean the same thing. Indeed, it is equality before the law that is further defined in s 8(2) under the interim Constitution and s 9(2) of the 1996 Constitution, which explicitly state that equality must include 'the full and equal enjoyment of all rights and freedoms'. Further, the Constitution requires the pursuit of equality through legislative or other means to promote and advance persons who have suffered disadvantage by unfair discrimination. Section 8(3) of the interim Constitution and s 9(3) in the 1996 Constitution provide a list of enumerated, specific grounds on the basis of which no person can be discriminated against; if a person can establish discrimination based on such a ground, then it will be presumed that there is unfair discrimination.

The Constitutional Court has also emphasised that the specifically listed grounds in s 9(3) are by no means inclusive of all forms of unfair

<sup>39</sup> Ackermann (n 2) at 647.

<sup>40</sup> *Ibid.*

<sup>41</sup> See generally, A Fagan 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' (1998) 14 *SAJHR* 220; C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; D Davis 'Equality: The majesty of legoland jurisprudence' (1999) 116 *SALJ* 398.

discrimination.<sup>42</sup> Ackermann explains such a list as a positive protection of equality, which differs significantly from other jurisprudential orders such as that of the United States. Justices Ackermann, O'Regan and Sachs, writing in *Prinsloo*,<sup>43</sup> suggest:

Proper weight must be given to the use of the word 'discrimination' in subsection (2). The drafters of section 8 did not, for example, follow the model of the Fourteenth Amendment to the Constitution of the United States which, in paragraph 1 thereof, refers only to the denial of 'the equal protection of the laws.' Section 8(1) certainly positively enacts the encompassing and important right to 'equality before the law and to equal protection of the law', but section 8 does not stop there. It goes further and in section 8(2) proscribes 'unfair discrimination' in the two forms we have mentioned.<sup>44</sup>

How is one to determine, then, the constitutional reach of s 8(4) of the interim Constitution or its equivalent in s 9(4) in the 1996 Constitution? For the Court in *Prinsloo*, and following what we already argued about the multi-layered constitutionalisation of dignity in the South African Constitution, the unfair discrimination provisions in s 8(2) and (4) of the interim Constitution read together (similarly in s 9(2) and (4) of the 1996 Constitution) emphasise that forms of discrimination which violate the dignity of persons will be central to the interpretation of the constitutional meaning behind the idea of positive protection of equality before the law and, therefore, to what constitutes unfair discrimination. Again, to quote Justices Ackermann, Sachs and O'Regan:

We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.<sup>45</sup>

Although an affront to dignity is seen as at the heart of what distinguishes unfair discrimination from the inevitable differentiation between people that must occur in any modern legal system, other forms of differentiation which may adversely affect people are not excluded. In *Prinsloo* the differentiation between owners and occupiers inside fire control areas and those who own or occupy land outside those areas was not seen as unfair discrimination, because, to quote the Court,

It is clearly a regulatory matter to be adjudged according to whether or not there is a rational relationship between the differentiation enacted by s 84 and

<sup>42</sup> See *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) paras 27 & 28, *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 47.

<sup>43</sup> *Prinsloo* *ibid*.

<sup>44</sup> *Ibid* para 30.

<sup>45</sup> *Ibid* para 31.

the purpose sought to be achieved by the Act. We have decided that such a relationship exists. Accordingly, no breach of s 8(1) or (2) has been established.<sup>46</sup>

What is demanded if dignity is constitutionalised as central to the legal meaning of s 8(2) and (4) of the interim Constitution (and s 9(2) and (4) in the 1996 Constitution), is not that persons be treated equally as if equality could be reduced to a mathematical formula suggesting what is 'like' should be treated 'like'. Nor should such equality be viewed as a rubber stamp of 'same treatment' if there is a real and significant difference that must be recognised and respected in order to honour dignity and equality. The key is that people must be treated *as* of equal worth rather than treated equally in some simplistic sense; for, every citizen of South Africa is to be treated alike under equal protection of the law.

In a series of cases relating to the rights of gay and lesbian citizens of South Africa, the Constitutional Court profoundly expanded the meaning of respect for the dignity of persons and its relationship to other enumerated rights in the Constitution such as equality and privacy. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*,<sup>47</sup> several statutory provisions that penalised the act of sodomy between men as well as the common law crime of sodomy were found invalid under ss 9, 10, and 14 of the 1996 Constitution. The common law crime of sodomy was not before the Court because the 1996 Constitution does not require orders of constitutional invalidity of common law by the Constitutional Court nor does it empower a referral for such purpose.<sup>48</sup> But, as Ackermann writes for the Court, it was impossible to separate the statutory provisions from the common law crime of sodomy and, therefore, even though it was not directly before the Constitutional Court a finding of constitutional invalidity was argued as indispensable to the statutory orders of constitutional validity ordered by the High Court.<sup>49</sup>

Ackermann begins his analysis of what is in a deep way morally and constitutionally wrong with both the statutory sodomy penalisation as well as the common law criminal offense of sodomy. It was only sodomy between men that was a crime in South Africa.<sup>50</sup> The High Court found in its own order of constitutional invalidity that both the statutory penalisations and the common law offense of sodomy was unfair discrimination on two grounds. First, it discriminated on the basis of sex

<sup>46</sup> Ibid para 41.

<sup>47</sup> 1999 (1) SA 6 (CC).

<sup>48</sup> Ibid para 2.

<sup>49</sup> Ibid para 9.

<sup>50</sup> Ibid para 11.

and gender in that no equivalent act performed by heterosexual couples or two women was criminalised. Second, the High Court concluded that unfairness would be presumed under s 9(3) since sexual orientation is one of the listed grounds protected against discrimination.<sup>51</sup> Ackermann here reiterates that neither the 1993 nor the 1996 Constitution is based on a purely negative or formal notion of equality.<sup>52</sup> Instead, what is called for is a nuanced, multi-layered approach to s 9. After a careful description of this nuanced constitutional interpretation of s 9, Ackermann continues graphically to describe the horrific wrong to gay men by the criminalisation of sodomy. Ackermann reiterates this wrong in both philosophical and moral terms by suggesting that '[t]he desire for equality is not a hope for the elimination of all differences. . . . To understand "the other" one must try, as far as is humanly possible, to place oneself in the position of "the other".'<sup>53</sup>

Gay men, then, are identified as a political minority who are particularly vulnerable because of the stigma that has long been associated with their sexuality in South Africa.<sup>54</sup> This means that they have to endure serious other consequences such as fears of entrapment and the intimidation that comes with having a so-called stigmatised identity. Since sexual orientation is a listed ground, the case is evaluated from the standpoint of presumed unfair discrimination and Ackermann writes frankly that there could be no legitimate purpose for this discrimination.<sup>55</sup> We will return to such a possible legitimate purpose in his analysis of the limitation clause because, at best, that purpose is a concession to gross stereotypes of gay men or to religious beliefs that must not be used to deny the dignity of other persons. Although Ackermann starts his judgments from the standpoint of inequality, he then explains the wrong that occurs to the dignity of gay men under s 10:

The common-law prohibition on sodomy criminalises all sexual intercourse per anum between men: regardless of the relationship of the couple who engage therein, of the age of such couple, of the place where it occurs, or indeed of any other circumstances whatsoever. In so doing, it punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they

<sup>51</sup> *Ibid* para 13.

<sup>52</sup> *Ibid* para 16.

<sup>53</sup> *Ibid* para 22.

<sup>54</sup> *Ibid* para 25.

<sup>55</sup> *Ibid* para 26.

seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.<sup>56</sup>

As we saw earlier, Ackermann reads the limitation clause through s 1 as the basis for a proportionality analysis in that the limitation must be reasonable and justifiable in an open and democratic society. Thus, the proportionality which seems to call for a balancing of different interests should be understood as more demanding than the mere balancing of interests. Put most dramatically, if we take Ackermann at his word in *Dodo*, and we should, proportionality demands nothing less than that we analyze the possibility of the limitation of rights in accordance with the great ideal of the kingdom of ends in which different interests are not simply balanced off against each other but, instead, *harmonised* with the ideal of dignity itself. It is precisely because of the central, foundational importance of the constitutional establishment of the new South Africa as based on human dignity, equality, and freedom that it is not only the purpose of the limitation that must be considered but the relation between the limitation and its purpose as well as a consideration of whether or not there were less restrictive means to achieve the purpose.<sup>57</sup>

Many of the critics of the dignity jurisprudence have worried that dignity in some way trumps equality and undermines the full-force of the equality provision, and, of course, as a matter of enumerated rights, dignity and equality can be separated. Sachs J nicely argues this point:

Contrary to the Centre's argument, the violation of dignity and self-worth under the equality provisions can be distinguished from a violation of dignity under s 10 of the Bill of Rights. The former is based on the impact that the measure has on a person because of membership of a historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics of its members; it is the inequality of treatment that leads to and is proved by the indignity. The violation of dignity under s 10, on the other hand, contemplates a much wider range of situations. It offers protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These

<sup>56</sup> Ibid para 28.

<sup>57</sup> Constitution s 36(1)(d) and (e).

would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.<sup>58</sup>

Indeed Sachs J continues in the same concurring judgment, suggesting:

The commonality that unites them all is the injury to dignity imposed upon people as a consequence of their belonging to certain groups. Dignity in the context of equality has to be understood in this light. The focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such focus is in fact the guarantor of substantive as opposed to formal equality.<sup>59</sup>

The central point emphasised by Justice Sachs and Ackermann is that the enumerated Bill of Rights must be read against the foundational provision of chapter 1; but, this in no way undermines the specificity of the right of equality and dignity even when both Ackermann J and Sachs J argue that the enumerated rights can and should be read in terms of the higher moral principles of the Constitution and in terms of the complex identities that human beings develop over time so that categories and classifications of identification are interactive, rather than abstracted from one another.

Still, I think the critics that worry about substantive equality might be answered more meaningfully if s 9(1) and (2), which includes the equal enjoyment of all rights and freedoms, was interpreted as protecting what Amartyah Sen calls 'capability freedom'.<sup>60</sup> This would give both philosophical and constitutional weight to the first sentence of s 9(2), which promises the full protection and equal enjoyment of all rights and freedoms. This, read with the insistence that one not only deserves equal protection but equal benefit, can constitutionally underscore capability freedom. In short measure, capability freedom is affirmative in that human beings must both have their fundamental human functioning protected – the right, for instance, to food, medical care and work – and be allowed the space to turn their dreams of capability into actual functionings. Simply put, it is not enough to protect the right of everyone to be a lawyer and enter law school if the education of the country is unequal and racially or sexually discriminatory.

The space of capability freedom in which all persons could enjoy rights and freedoms can then be understood as protection to the widest legal extent possible for human beings to realise their potential capabilities and turn them into actual functions. Again, someone who has the potential to be a lawyer may well need to be supported to turn that capability into an

<sup>58</sup> *National Coalition v Minister of Justice* (n 47) para 124.

<sup>59</sup> *Ibid* para 126.

<sup>60</sup> See generally A Sen *Development as Freedom* (2000).

actual function. But, on another level we cannot function without food. As Sen himself has argued, time and again, this emphasis on capability freedom is philosophically consistent with a broad deontology such as would be possible with an interpretation through the work of Kant or, as Sen himself preferred, through John Rawls. However, I am arguing more specifically that capability freedom fits the deeper meaning of s 9(1) and (2) and is yet constituent with the constitutional interpretation that the violation of dignity is at the heart of the equality jurisprudence. The lifeblood flowing through such a heart is of course the transformative jurisprudence of the Court that can one day constitutionalise capability freedom.

Gay and lesbian marriage has now come to be protected as a constitutional right in South Africa, making it one of the few states in the world to recognise the full right to marriage.<sup>61</sup> This recognition was achieved by way of an explicit operationalisation of the connection between the enumerated right to equality in s 9 and the right to dignity in s 10. In *Fourie*, Sachs J emphasised that this connection demands a reading of equality that affirms and celebrates difference:

Equality . . . does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.<sup>62</sup>

<sup>61</sup> See *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC), and the Civil Union Act 17 of 2006.

<sup>62</sup> *Fourie* (n 61) para 60.

Under s 172(1)(b) of the Constitution,<sup>63</sup> Sachs J made an order that, to his mind, was just and equitable, which suspended the declaration of invalidity to allow Parliament a year to correct the injustice in the marriage law. We will return to O'Regan J's concurrence<sup>64</sup> in *Fourie* as it relates to her own profound role in the development of the jurisprudence of South Africa. For, indeed, the legalisation of dignity as the founding ideal of the Constitution not only affects the interpretation of the substantive enumerated rights, it also affects and explains the horizontal application of the Constitution, as well as interpretations of the legal significance of a division of powers between the judiciary, legislative, and executive. In constitutionally ordering a remedy, as this remedy must be faithful to the foundational role of dignity and with it the harmonisation of interests and ends through the ideality of the kingdom of ends, non-discrimination is not only central for those who are discriminated against but for the protection and enhancement of the humanity of all who live within the new South Africa. As Ackermann movingly writes:

The bell tolls for everyone, because “[t]he social cost of discrimination is insupportably high and these insidious practices are damaging not only to the individuals who suffer the discrimination, but also to the very fabric of our society.” The most effective way of achieving this in the present case is by a suitable reading in order, if this is reasonably possible.<sup>65</sup>

The bell tolls for everyone in the New South Africa because apartheid did not just affect the humanity of the majority black population who suffered worst under its brutality. Apartheid and its concomitant brutality also significantly diminished the humanity of white South Africans. Therefore, the moral demand to live up to the aspirational ideals of dignity, freedom, and equality is the moral symphony we can all hear.

## VI THE LEGACY CONTINUES

Justice O'Regan has captured the philosophical view of the relationship between moral ideals, law and democracy that is echoed in every one of Ackermann's decisions. For instance, O'Regan J develops her own judgment on the wrong of the death penalty as both against the right to life and the right to dignity. What makes her discussion of the right to life so important, though, is that she reads this right against the moral ideal of

<sup>63</sup> This provides that: ‘When deciding a constitutional matter within its power, a court (b) may make any order that is just and equitable, including – (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.’

<sup>64</sup> *Fourie* (n 61) paras 163–73.

<sup>65</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para 82.

dignity; and it is this moral ideal which she uses to inform the constitutional significance of the right to life. To quote O'Regan J:

The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.<sup>66</sup>

We need to note here jurisprudentially that O'Regan is reading the right to life through dignity as a touchstone ideal of the Constitution, not yet, at this point in her decision, as also defending the legal proposition that the death penalty is against the enumerated right of dignity. After the right to life is read through the ideal of dignity, O'Regan does indeed take that next step in her argument, suggesting that the death penalty violates the right to the respect of dignity under s 10.<sup>67</sup> As she notes, any limitation under the limitation clause that infringes the right to dignity must be shown to be reasonable, justifiable, and necessary, whereas a law that limits the right to life need only to be shown to be reasonable and justifiable.<sup>68</sup> In conclusion, O'Regan holds against the death penalty as both a fundamental violation of the right to life and dignity, and – given its brutal abuse during apartheid – as running against the promise of a moral future upon which the moral foundation of the constitution is both grounded and the highest summit to which it aspires.<sup>69</sup>

Justice O'Regan further develops her jurisprudence in *Dawood*,<sup>70</sup> which addresses the differential status of spouses where one has a temporary immigration permit and the other is in a foreign country. The case, of course, addresses the actual effect of this differentiation on the lives of people without permits, as those spouses must remain outside the country while they seek legal entry. But, it also echoes the two *National Coalition* cases in the following sense. The right to form families and intimate relationships is seen as an extraordinary value which must be constitutionally respected. Although, as O'Regan J notes, there is no express clause in the Constitution to protect family life, this canon should be read into the right to dignity.<sup>71</sup> And this, of course, echoes Ackermann and Sachs JJ in the *National Coalition* cases. To quote O'Regan J:

Marriage and the family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the

<sup>66</sup> *Makwanyane* (n 35) para 327.

<sup>67</sup> *Ibid* para 335.

<sup>68</sup> *Ibid* para 338.

<sup>69</sup> *Ibid* para 344.

<sup>70</sup> *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

<sup>71</sup> *Ibid* paras 28 and 36.

parties to that marriage for they make a promise to one another to establish and maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another. Such relationships are of profound significance to the individuals concerned. But such relationships have more than personal significance at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well.<sup>72</sup>

O'Regan is sensitive to the recognition that not only are South African families very diverse, but there are different legal regimes that actually protect marriage – those under African customary, Islamic, and common law.<sup>73</sup> To recognise the importance of family and intimate ties in no way, then, privileges certain forms of family or one legal regime of marriage over another.<sup>74</sup> In this case, O'Regan again underscores how dignity is the moral ideal and legal touchstone of the entire Constitution. First, she reviews chapter one – establishing the sovereign democratic state based on dignity. Second, s 7(1), which introduces the Bill of Rights and which is seen as the cornerstone of democracy in South Africa, is enshrined and rooted in the ideal of dignity.<sup>75</sup> O'Regan J concludes as follows:

The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis.<sup>76</sup>

As in *Makwanyane*, O'Regan then continues her argument that the right to have dignity respected is itself an enumerated right and can be directly violated; and, indeed, in this case, when there is no established right to family and intimate ties, it is the right to dignity that is directly violated.<sup>77</sup> As O'Regan goes on to note, however, there will be times when the

<sup>72</sup> Ibid para 30.

<sup>73</sup> Ibid para 32.

<sup>74</sup> Ibid para 31.

<sup>75</sup> Ibid para 34.

<sup>76</sup> Ibid para 35.

<sup>77</sup> Ibid paras 36–37.

value or ideal of dignity – and as I have argued elsewhere, dignity is more precisely defended as an ideal and not a value<sup>78</sup> – is violated. It may be found to be constitutionally breached as a more specific right, say for example in the right to bodily integrity, the right to equality, or, to use another of O'Regan J's examples, the right to not be subjected to slavery, servitude, or forced labour.<sup>79</sup>

We need to summarise now what is exactly constituted by this jurisprudence, because it is so deeply misunderstood. First, dignity as a moral ideal is constitutionalised in chapter 1 and ss 7, 36, and 39. Second, dignity is itself an enumerated right and, indeed, the wording of that right as interpreted by Ackermann J – rightly to my mind – turns on the re-inscription of dignity as an ideal attribute of a person, and it is that ideal attribute that must be respected. Third, the ideal character or value of dignity when it is violated may also take the form of a more specific breach of another enumerated right, as the violation of dignity as an ideal then informs the breach of some of the most fundamental constitutional rights in the Bill of Rights of South Africa. The central point to be made is that the moral ideal informs the reading and interpretation of s 10 as well as the other specific rights that O'Regan lists as examples in *Dawood*. The symbolic, objective order of the Constitution, which makes certain activities both illegal and constitutionally unviable, does so long before there is any actual adjudication to invalidate particular legislation. The recognition that sometimes a significant wrong to persons is allowed to continue despite the Constitution means that the Court must exercise its responsibility to deliver justice speedily. As O'Regan J remarks in her dissent in *Fourie*, it is the duty of the Courts to ensure that the common law is in conformity with the Constitution; and it is this duty that was underscored in the *Carmichele* case.<sup>80</sup> Thus, O'Regan J, while in full agreement with Sachs J's recognition of the right for gays and lesbians to marry, disagrees with his suspension of the order of invalidity for a year under s 172(1)(b). As O'Regan J argues:

In my view, this Court should develop the common-law rule as suggested by the majority in the Supreme Court of Appeal, and at the same time read in words to section 30 of the Act that would with immediate effect permit gays and lesbians to be married by civil marriage officers (and such religious marriage officers as consider such marriages not to fall outside the tenets of their religion). Such an order would mean simply that there would be gay and lesbian married couples at common law which marriages would have to be regulated by any new marital regime the legislature chooses to adopt. I cannot

<sup>78</sup> See D Cornell 'A call for a nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation' (2004) 19 *SAPL* 661.

<sup>79</sup> *Dawood* (n 70) para 35.

<sup>80</sup> *Fourie* (n 61) para 167.

see that there would be any greater uncertainty or instability relating to the status of gay and lesbian couples than in relation to heterosexual couples. The fact that Parliament faces choices does not, in this case, seem to me to be sufficient for this Court to refuse to develop the common law and, in an ancillary order, to remedy a statutory provision, reliant on the common law definition, which is also unconstitutional.<sup>81</sup>

Thus, it has been unjust for gays and lesbians to be denied the right of marriage from the time of the passage of the 1996 Constitution. O'Regan's preferred remedy is consistent with her and Ackermann's dignity jurisprudence in which the delivery of justice that has been too long delayed must be done immediately as a matter of principle.

We are returned, then, to O'Regan J's telling paragraph in *Makwanyane* where she argues that dignity demands democracy,<sup>82</sup> and, as I have further elaborated, morally mandates Parliament to certain actions. In a deep sense, then, the Constitutional Court cannot wait for Parliament to catch up with what it should have done years before, because the dignity of gay and lesbian citizens is being violated and has been violated, and in the name of that dignity there must be a legal remedy now. Thus, ultimately the dignity jurisprudence that has been developed by Ackermann and O'Regan JJ has implications for the way in which all of the political powers of the constitutional government must be organised. This point is so often misunderstood. If democracy is a moral demand, and not simply an imperfect political structure, then there is nothing anti-democratic about the Constitutional Court recognizing and protecting, as an institutional matter, the moral ideals upon which democracy rests. We need to note here that O'Regan J did not take a position in *Ferreira* regarding whether or not Ackermann J correctly read s 12(1). But, I believe that her position, which is so clearly shared with Ackermann J regarding the constitutionalisation of the moral ideal of dignity, would lead her ultimately to see the importance of protecting a notion of freedom that is always beyond any constitutional definition of liberty, because it is this freedom which ultimately points beyond any legal system to the great ideal of humanity in which human beings, as a matter of dignity, actually can struggle to live up to justice and collectively seek to harmonise their own ends against the great ideal of the kingdom of ends.

Returning to the quotation from Ackermann beginning this essay, the Constitution is indeed transformative, spanning across a great chasm separating the horrific past from the aspirational possibilities of a moral future. But, by what traditions we orient ourselves as we try to navigate a

<sup>81</sup> *Ibid* para 169.

<sup>82</sup> *Makwanyane* (n 35) para 330.

way over that bridge, is certainly open for debate. We need not be Kantians; indeed, no law could demand that only one philosophy be institutionalised in a pluralistic, open democracy. Although Kant clearly inspired Ackermann, his legacy – as developed by O'Regan – has now created a constitutional jurisprudence in which this ideal has taken on an independent meaning as it is read through specific clauses of the actual Constitution. It would, of course, go against the moral mandate of this Constitution to rest it solely on even the best ideals of European philosophy. For this is an African Constitution in which indigenous values and ideals are explicitly valued and respected as a matter of right. Great South African ideals like *ubuntu*, then, could easily be – and have been – deployed to defend the moral ideal of dignity as it has become constitutionally developed as the touchstone of the New South Africa.

Yet the aspirational ideal of the kingdom of ends, even if it is but one configuration of humanity finding its way back to justice, still underscores the fragility of the new South Africa. For, ultimately, it will be up to all of us who have the privilege of serving this Constitution to live up to its moral ideals by pulling ourselves up and taking the necessary first, second, and perhaps endless steps in the stride to the other side of the bridge. But, for this author, the dignity jurisprudence as developed in the South African Constitutional Court is what Kant would have called a *divinatory sign*, a most meaningful sign, that justice is still possible.