Revolutionary Constitutionalism: Some Thoughts on Laurie Ackermann's Jurisprudence

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cite: Acta Juridica (2009).

'The end of rebellion is liberation, while the end of revolution is the foundation of freedom.'[1]

'In the African *Weltanschauung*, a person is not basically an independent, solitary entity. A person is human precisely in being enveloped in the community of other human beings, in being caught up in the bundle of life. To be . . . is to participate.'[2]

I INTRODUCTION

Justice Laurie Ackermann's decision in *Ferreira*[3] is a study in tonal dissonance. Ackermann's 232 paragraph legal opinion begins slowly. It plots out the judicial history of the case; it wades through questions of jurisdiction and standing; and it frames the question of the case all without offering a narrative version of the facts.

One must read carefully and between the lines to discern that the case concerns a plaintiff, Clive Ferreira, who was employed by Prima Bank Holdings Ltd., a corporation that had gone

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[1] H Arendt *On Revolution* (1990) at 142.

[2] A Krog *Country of My Skull* (1999) at 143.

[3] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC).

bankrupt and ceased operations.[4] Mr. Ferreira was summoned to give sworn testimony about the affairs and property of Prima Bank.[5] He declined, asserting a right not to offer self-incriminating testimony.[6] In doing so, Ferreira violated section 417 of the Companies Act that requires such testimony in administrative proceedings and also expressly allows that such testimony 'may thereafter be used in evidence' in a criminal proceeding.[7]

The *Ferreira* case raises a simple question: does the law requiring Ferreira to give evidence violate the Constitution? Since the South African Constitution protects the right of a criminal defendant 'not to be compelled to make any confession or admission that could be used in evidence against' him,[8] Ferreira's refusal to testify raises the possibility that the law compelling his testimony ought to be invalidated.

Justice Ackermann refuses to apply the constitutional prohibition on compelled testimony because the applicants in the case were not accused of a crime and were not on trial.[9] The mere possibility that their testimony would be used against them in a hypothetical future trial does not give them the right to claim that their constitutional right not to incriminate themselves has been violated.[10] Ackermann J argues that Ferreira and his co-applicants do not have standing to challenge the law on the basis of the Constitutional prohibition against self-incrimination.

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[4] The *Ferreira* decision actually combines two distinct cases, the first of Clive Ferreira and the second of Ann, Luke John, and Andrew Vryenhoek. For matters of narrative simplicity, I focus on the Ferreira case.

[5] Ibid at para 1 & 2.

[6] Ibid at para 2.

[7] Ibid at para 1.

[8] Constitution of the Republic of South Africa Act 200 0f 1993 ('Interim Constitution'); s 25(2)(c); Constitution of the Republic of South Africa, 1996 ('Constitution') s 35(1)(c).

[9] *Ferreira* (n 3) at para 41

[10] Ibid.

And yet, Justice Ackermann does not end his inquiry there. Instead, he turns to two general clauses of the Interim Constitution that provide, first, that 'every person shall have the right to respect for and protection of his or her dignity',[11] and that 'every person shall have the right to freedom and security of the person….'[12] Since these guarantees apply to all persons in South Africa and are not limited to persons accused at trial, Ackermann J reasons that the Constitution permits the determination of whether the statute's compulsion that Ferreira testify in an administrative proceeding violates his dignity and his freedom.[13]

Here, in his discussion of what he calls the 'residual right of freedom'[14] that inheres in the idea of dignity, Justice Ackermann's tone shifts—radically. If the first 44 paragraphs of his opinion are characterized by measured, careful, and rule-bound legal analysis, the discussion of dignity and freedom pulses with purpose. Thus constitutional interpretation must be '"generous' and 'purposive"'; it must 'give expression to the underlying values of the Constitution.'[15] The single Constitutional provision that protects "freedom and the security of the person" should be split in two parts in order to emphasize the 'right "to freedom"' as a 'separate and independent right.'[16] Since 'individual freedom is a core right in the panoply of human rights,' and also because the Court has 'specifically entrenched' the right to human dignity as 'the most important of all human rights,'[17] the centrality of dignity demands the elevation of freedom to a constitutionally protected right. In just a few short paragraphs, Justice Ackermann boldly affirms a constitutional right of freedom that inheres in the guarantee of

[11] Interim Constitution s 10; Constitution s 10.

[12] Interim Constitution s 11(1); Constitution s 12.

[13] *Ferreira* (n 3) at para 45 & para 47.

[14] Ibid at para 69.

[15] *Ferreira v Levin* (n 3) at para 46 citing *S v Makwanyane and Another*, 1995(6) BCLR 665(CC) at para 9.

[16] Ibid at para 46

[17] Ibid at para 47.

dignity but also stands independently.[18] Freedom, Justice Ackermann argues, must be recognized as a *Grundnorm* of the South African Constitution.

Clearly, these pages look far beyond the case of *Ferreira v Levin*. Indeed, reading paragraphs 45 to 60 of Justice Ackermann's opinion—with extensive discussions of Isaiah Berlin, Karl Popper, and Immanuel Kant—one might even forget that one is reading a legal opinion. And yet neither does the *Ferreira* opinion read like an academic treatise. Far from either the courtroom or the ivory tower, these pages read as if Justice Ackermann imagined himself participating in an ongoing and public debate about the sense, structure, and composition of the Constitution as a foundation of freedom. Through his 'broad and generous construction' of the right of dignity and the residual right of freedom, Justice Ackermann is, in an important way, continuing the revolutionary debate over the essence of the Constitution—a debate that through his engagement has not come to an end with the enactment of the 1996 Constitution.

Allow me to propose the term 'revolutionary jurisprudence' to describe what I believe is going on in *Ferreira*. Justice Ackermann himself has emphasized the importance of revolution in his jurisprudence. In his article 'The legal nature of the South African Constitutional Revolution' published in *New Zealand Law Review*,[19] he insists that we take the revolutionary nature of the South African Constitution seriously. The constitutional recognition of dignity and freedom in South Africa is, as he rightly insists, a 'monumental break with the past' and a 'radical constitutional change'; most

[18] Ibid at para 49. As he concludes his position: 'Human dignity has little value without freedom; for without freedom personal development and fulfillment 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. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own.'

[19] LWH Ackermann, 'The legal nature of the South African constitutional revolution' (2004) 4 *New Zealand Law Review* 633.

importantly, the new South African Constitution is 'in substance, a constitutional revolution.'[20] The experience of the South African revolution is, I believe, central to Justice Ackermann's approach to constitutional jurisprudence. I want, therefore, to linger here not over the substantive elements of that revolution, but over the idea of revolution itself.

II REVOLUTION AND FREEDOM

In her classic exploration of revolution, Hannah Arendt writes: 'The end of rebellion is liberation, while the end of revolution is the foundation of freedom.'[21] Physical liberty is a prerequisite for freedom, but freedom 'is experienced in the process of acting and nothing else.'[22] The intimate connection between acting and freedom lies behind '[t]he modern concept of revolution,' as the idea 'that the course of history suddenly begins anew, that an entirely new story, a story never known or told before, is about to unfold.'[23] Revolution, as the coincidence of the idea of freedom and the experience of a new beginning, actualizes the 'experience of being free.'[24]

Arendt writes that the 'revolutionary spirit' of freedom unites two seemingly contradictory elements. The first is the 'act of founding the new body politic,' an act that 'involves the grave concern with the stability and durability of the new structure.'[25] As an act of foundation, revolutionary action strives to found new yet lasting governmental institutions. Often ignored amidst the focus on revolutionary violence, the desire to found stable structures is central to the revolutionary spirit.

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[20] Ibid at 646.

[21] Arendt (n 1) at 142.

[22] H Arendt *Between Past and Future* (1968) at 166.

[23] Arendt (n 1) at 28.

[24] Ibid at 34.

[25] Ibid at 223.

The second element of the revolutionary spirit, however, is the revolutionary's experience of the revolution. It is 'the experience… which those who are engaged in this grave business are bound to have,' namely the experience of an 'exhilarating awareness of the human capacity of beginning.'[26] Caught up in the thrall of creation, revolution gives birth to the 'high spirits which have always attended the birth of something new on earth.'[27] The revolutionary spirit, therefore, includes the joy and excitement that attends all endeavoring to tear down and build up. The joy in the destruction of the old that Nietzsche reminds us is inseparable from the joy in the creation of the new.

I mention Arendt's double characterization of the revolutionary spirit because I think it is undeniable that Ackermann J's opinion in *Ferreira* partakes of both the foundational and the experiential elements of revolution that Arendt identifies. The careful legal analysis that dominates the first and final parts of his opinion bespeak the deep desire to build a strong and stable constitutional system, just as the energy and activity, even the joy, of Ackermann J's spirited defense of a residual right of freedom recall the high spirit and love of activity, of discussion, and of creation that characterize Arendt's revolutionary experience of freedom. As one who participated in the rebellion and the constitutional revolution that followed, Justice Ackermann's jurisprudence reflects both the desire for foundation and the love of founding that are the paradoxical characteristics of the revolutionary spirit.

Given the not-coincidental affinity between Ackermann J's revolutionary jurisprudence and Arendt's revolutionary spirit, it is worthwhile to explore more fully Arendt's thinking about the power and eventual failure of the revolutionary tradition in the United States. For, despite its grand promise, the American Revolution has, pace Arendt, failed in its aim, to secure a lasting and stable world of

[26] Ibid.

[27] Ibid.

public freedom. How it nearly succeeded and how it failed offer both insight and caution for Ackermann's revolutionary jurisprudence.

III THE SPACE OF FREEDOM

Arendt attributes the loss of the spirit of the revolution—what she calls the revolutionary treasure—to one overriding cause. The problem is that the republics that the revolutions created—one after another, whether in France, Russia, or America—left no space for the very freedom that constituted part of the revolutionary treasure. Dedicated to founding stable republics, the revolutionaries found 'there was no space reserved, no room left for the exercise of precisely those qualities which had been instrumental in building [them].'[28] Paradoxically, the revolutionary spirit, once successful, could no longer hold together its antagonistic forces of foundation and creation.

The question Arendt asks is: what kind of institutional spaces could, potentially, preserve a place for the revolutionary spirit within a republic? First and foremost she bemoans that the U.S. founders 'failed to incorporate the township and the town-hall meeting into the Constitution….'[29] As with the revolutionary clubs in France, the *soviets* in Russia, and the municipal councils in Hungary, these public forums—so loved by Tocqueville—provided spaces for the experience of public and political freedom. The councils, town-hall meetings, and soviets were 'spaces of freedom';[30] as such, they were crucial institutions of the new republic. The life of the free man, Arendt writes, needs 'a place where people could come together—the agora, the market-place, or the *polis*, the political space

[28] Ibid at 232.

[29] Ibid at 236.

[30] Ibid at 264.

proper.'[31] The possibility of public freedom necessitates institutionally recognized forums for free action in which the free citizen manifests himself or herself to others.[32]

Arendt's interest in these councils and town-hall meetings—and also Thomas Jefferson's stillborn proposal for 'ward system' that would divide the nation into 'elementary republics'—is not a nostalgic call for direct decision making. Nor is it a desire for radical unruliness. Most certainly it is not a desire for private liberty. Freedom means for Arendt something very different from either individual liberty or anarchic self-determination. And yet, freedom, for Arendt, is necessarily revolutionary insofar as the 'idea of freedom and the experience of a new beginning' are bound together.[33] Her fascination with the revolutionary councils is, as Patchen Markell has argued, as one potential space for the preservation of revolutionary freedom. The Councils offer a space for freedom by nurturing political freedom and action; freedom, she argues, resides not in the ends achieved or the decisions made, but in the "'charms" they [the revolutionaries] discovered in action itself.'[34]

The point of these societies and councils was not necessarily to make decisions or to govern or administer a municipality. Indeed, Arendt praises one French club in particular that prohibited itself from any attempt to influence the General Assembly. The club existed only 'to talk about [public affairs] and to exchange opinions without necessarily arriving at propositions, petitions, addresses, and the like.'[35] The councils were a space for freedom, a space for people to gather and discuss the affairs of the day with others. Their importance was not in what they accomplished, but rather in what they

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[31] Ibid at 24.

[32] Ibid at 19.

[33] Ibid at 29.

[34] P Markell 'The rule of the people: Arendt, Arché, and Democracy' (2006) 100 (1) *American Political Science Review* 1 at 13.

[35] Arendt (n 1) at 243.

nourished. As institutional spaces of 'organized political experience,' the clubs promoted 'the same kind of attunement to events that had drawn the revolutionaries into action, and along its path.'[36] In other words, the councils offered the experience of freedom that 'is experienced in the process of acting and nothing else.'[37]

It is no accident, Arendt insists, that revolutionary councils rose like phoenixes out of the experiences of revolution. They were institutional refuges in which people could congregate to speak and act with others, and thus relive the joy of revolutionary activity. As harbors for free action, these institutional places of speech and action were, of necessity, anarchic and unpredictable. And this very unruliness of the councils in America, France, Russia, and Budapest was why they were either suppressed or allowed to wither away. The decision to abandon the participatory action of councils for the administrative efficiency of representative government is, Arendt writes, a fateful consequence of the widespread agreement amongst the political and the voting classes that 'the end of government was the welfare of the people, and that the substance of politics was not action but administration.'[38] For the sake of an illusory happiness and the paternalist promise of the welfare state, the masses and the elites will sacrifice the charms of revolutionary freedom for the comfort of administrative rule by professional politicians.

IV FREEDOM AND REPRESENTATIVE DEMOCRACY

A second potential space for freedom might be thought to exist in the legislatures of contemporary representative democracies. Most recently, Jeremy Waldron has written eloquently about the possibility and, at times, the actuality of respectful, meaningful, and thoughtful discussion amongst

[36] Markell (n 34) at 13.

[37] Arendt (n 22) at 166.

[38] Arendt (n 1) at 273.

people with different and even opposed views that can mark legislative debate. He has also pointed to the history of lawyerly and aristocratic dismissals of the dignity of democratic debate. Both of these observations are valuable and ought to be taken seriously.[39]

For Arendt, however, modern democratic legislatures have necessary limitations that make them incapable of acting as spaces for public freedom. First and foremost, modern democracies are representative bodies. The assumption of all representative government is that 'the electorate's business is more urgent and more important than [the representatives]; [the representatives] are the paid agents of people who, for whatever reasons, are not able, or do not wish, to attend to public business.'[40] In choosing representation over participation, modern republics have issued their negative judgment on the 'very dignity of the political realm itself.'[41] Representative institutions, because they are predicated on the presupposition of the elevation of private over public interests, and administration over action, are constitutionally incapable of service as a space of public freedom.[42]

The great thinker of representative government is Thomas Hobbes who has given it its pictorial representation in the famous frontispiece that adorns his *Leviathan* just as much as its theoretical expression in the book itself. What Arendt adds to our understanding of Hobbes's relation to representative government is the insight that representative government is coeval with the rise of bourgeois man. As the thinker who first imagined the political role of bourgeois man, Hobbes understands that man, that is, bourgeois man, is nothing more than his power to get what he wants, to

[39] J Waldron *Law and Disagreement* (1998).

[40] Arendt (n 1) at 237.

[41] Ibid.

[42] Ibid at 273.

pursue his private interests.[43] This man's final interest is to institute a power over himself that protects his right to expand his own private power.[44] The reduction of politics to simply a means for the securing of private power endangers more than the public realm itself. For the acquisition of wealth is 'a never-ending process' that 'must sooner or later force open all existing territorial limits.'[45] When the accumulation of power is the final end and goal of man, then no space—whether it lies outside the nation or inside it—is safe from the acquisitive drive of man.

The victory of the private over the public interests in representative government means that the great danger to freedom today comes not simply from the perversion of politics and public life, but from the perversion of private interests by the realm of social concerns. Under conditions of prosperity, where the public realm is reduced simply to a protection for the private interests, the threat to freedom is that socially and economically driven private interests will overwhelm both the public interest and, through them, other weaker private interests. In such a world, representative government is no protection for freedom, because it is a government that in its very form raises the interests of the

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[43] For Hobbes, the 'desire for power must be the fundamental passion of [bourgeois] man.' H Arendt *The Origins of Totalitarianism* (1973) at 139.

[44] T Hobbes, JCA Gaskin (ed) *Leviathan* (1998) at 111: 'The final cause, end, or design of men (who naturally love liberty and dominion over others) in the introduction of that *restraint upon themselves* in which we see them live in commonwealths is the *foresight of their own preservation*, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war, … when there is no visible *power to keep them in awe*….'

[45] Arendt (n 43) at 146. This is the link between liberalism and imperialism that Arendt draws so forcefully in *The Origins of Totalitarianism* and that Uday Mehta has developed so explicitly in his reading of the imperial tendencies of John Stuart Mill, John Locke, and the entire tradition of English liberalism. See U Singh Mehta *Liberalism and empire: A study in nineteenth-century British liberal thought* (1999).

private sphere above that of the public sphere. Even the political representatives themselves are, ultimately, acting in their own private vocational interests, as Max Weber so clearly perceived.[46]

V THE SUPREME COURT AND THE SPACE OF FREEDOM

If the American Constitution failed to preserve the town-hall meetings, and if the representative legislature trades public for a debased private freedom, there is, Arendt argues, one institution that the American founders did discover that might preserve a space of freedom in modern society: namely in the Constitution itself and its institutional Praetorian guard, the Supreme Court.

The idea that a constitution could become a space for freedom is counter-intuitive. Arendt well understands Jefferson's 'occasional, and sometimes violent, antagonism against the Constitution,' which is traceable to his 'feeling of outrage about the injustice that only his generation should have it in their power 'to begin the world over again.'[47] Jefferson saw the Constitution as the great opponent of the revolutionary treasure, the experience 'of action exclusively in the image of tearing down and building up.'[48] As a sanctuary of the foundational aspirations of the revolution, the Constitution could easily become a dark hole in which the spirit of creating, beginning, and freedom, would be sacrificed to the needs of stability.

Nevertheless, Arendt rightly suggests that the American Constitution did, at least in part, become a space for freedom within the American republic. It could do so because of the double sense inherent in the word itself, by which constitution means both the text—an act of a government—and the active beginning in and through which a people founds itself as a people. It is the enduring power of this second sense of the constitution as a constitutive act of foundation that, for Arendt, is the

[46] M Weber 'Politik als Beruf' in *Gesammelte Politische Schriften* (l921) 396-450. See Arendt (n 1) at 277.

[47] Arendt (n 1) at 233.

[48] Ibid.

secret behind the successful foundation of freedom in the American Revolution. Indeed, what 'saved the American Revolution from' the fates of all other modern revolutions—the replacement of the loss of absolute religious or traditional authority with the absolute authority of the democratic will of the nation—was, Arendt writes, 'the act of foundation itself.'[49]

When Arendt speaks of the Constitution as a manifestation of the founding moment, she alludes to the founder's emulation of ancient Rome. In Rome, the Senate's authority was not founded upon its claim to democratic representation. Instead, the Roman Senate ruled through its claim to be spiritually connected with the city's original founders. The Senators, she insists, 'reincarnated' the ancestors and the 'founding fathers'.[50] As Arendt writes in words that need to be taken in their full force: 'Through the Roman Senators, the founders of the city of Rome were present, and with them the spirit of foundation was present, the beginning, the *principium* and principle, of those *res gestae* [Latin for 'things that are done'] which from then on formed the history of the people of Rome.'[51] The strength of the Roman idea of political authority was that it rested upon a vital 'spirit of foundation' that allowed the Roman Senate to unite 'permanence and change' in the self-same act.[52] Whatever the Senate did, it did as a continuation of the founding spirit of Rome, which it possessed as representatives not of a collective will but as the present incarnation of a past-yet-still-vibrant foundational moment.

The distinction of the American Constitution is that it transfers the Roman foundation of freedom from the Senate to the Supreme Court. Because the Supreme Court is, in Woodrow Wilson's

[49] Ibid at 196.

[50] Ibid at 200.

[51] Ibid.

[52] Arendt (n 1) at 201.

phrase, "'a kind of Constitutional Assembly in continuous session,'"[53] the Court bases its authority on a reverence for—and a claim to be reenacting—the founding experience of the nation. It is this intimate weaving of 'foundation, augmentation, and conservation,' into a single cloak of constitutional authority that Arendt understands to be 'the most important single notion which the men of the Revolution adopted.'[54] Like Roman Senators, the Court justices must remain at all times as founders[55] who would regularly experience the revolutionary thrill of foundation and beginning. The Court was, Arendt saw, a constitutionally authorized space of revolutionary freedom.

How the Supreme Court and its justices tie themselves back to the founding moment as reincarnations of the founding fathers partakes, of course, of the mysterious. The initial success of the American Constitution resulted from the founders causing the US Constitution to be worshipped.[56] This worship depended upon and allowed an ambiguity to persist in the sense and understanding of the Constitution, on its becoming both 'an endurable objective thing,' on the one hand, and yet one that could be approached from many angles and many interpretations. It must be amendable and changeable, and yet impervious to any subjective states of mind or influences of will.[57]

The miracle of the Constitution's foundational authority—it being worshipped as both a text and a continual reincarnation of the founding revolutionary act—is made possible only by a prior miracle—the miracle of beginning. As Arendt argues throughout her work, all men 'are equipped for

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[53] Ibid at 200.

[54] Ibid at 201.

[55] Ibid at 203.

[56] Ibid 198-99. 'The great measure of success the American Founders could book for themselves… was decided the very moment when the Constitution began to be "worshipped", even though it had hardly begun to operate.' The mysterious worship of the American Constitution is both what makes the American Revolution 'most conspicuously different from all other revolutions' and is also the secret of its success.' Ibid 200-201.

[57] Ibid 157.

the logically paradoxical task of making a new beginning.'[58] As beginners, we men are uniquely capable of understanding the mysterious way in which a beginning can also rest on ancient and unyielding foundations. Since men are themselves, as part of the human condition, beginners who can and do appear in the world to start things anew—since men are thrown into the world that we must respond to—thus are we uniquely open to the idea of finding in the first and foundational act not only an arbitrary deviation but also an authoritative principle.

In the words of Augustine that meant so much to Arendt, '*Initium ergo ut esset, creatus est homo*—That there be a beginning, man was created.'[59] As a beginner, one's birth does not predestine an entire life—our lives are marked by contingency and unpredictability. And yet, we are born into a given world, a world with a spirit or an ethos that defines who we are. Because we are born into language, man is, as Aristotle long ago understood, a linguistic being. To act, to initiate a new beginning, therefore, requires always also an acceptance of who one has been given to be. For men, therefore, the act of beginning anew is not an arbitrary deviation from the foundation. The foundation is in the past, and yet it remains a forceful part of everyday practice.[60] The beginning, Arendt argues, 'carries its own principle within itself, or, to be more precise, that beginning and principle, *principium* and principle, are not only related to each other, but are coeval.'[61] As beginners, men are open to the claim of the beginning and foundation as an origin that carries with itself a principle and thus simultaneously allows for augmentation and conservation.

VI THE SUPREME COURT'S LOST FREEDOM

[58] Ibid at 211.

[59] Ibid.

[60] J Frank *A Democracy of Distinction* (2005) at 136.

[61] Arendt (n 1) at 212.

In spite of the American founding fathers' best efforts to found a republic that kept a constitutional space for freedom, they failed. Paradoxical as it may sound,' Arendt writes in her chapter on *The Revolutionary Tradition and Its Lost Treasure*, 'it was in fact under the impact of the Revolution that the revolutionary spirit in America began to wither away, and it was the Constitution itself, this greatest achievement of the American people, which eventually cheated them of their proudest possession.'[62] The sad fate of the American Constitution and its institutional home in the Supreme Court, is that the need for conservation and stability will overwhelm the equally important drive for newness and the experience of beginning something new.

Arendt's point is that the Court's mysterious and unaccountable power—its ability to do justice as a new act beyond the laws—threatened its legitimacy.[63] In an age when power must be justified, the mystical authority of the Supreme Court could not but appear as illegitimate. In the face of what Jürgen Habermas has called the modern crisis of legitimacy,[64] the Court and the Constitution have gradually shed the protective skin of ambiguity. The double meaning of constitution has been lost and with ever greater claims for certainty, the Constitution has come to be understood both by the Court and its public as a document, an act of government that lays down the highest law of the land.

Over the last century, the US Supreme Court has indeed lost much of its claim to be something more than a super-legislature. And the Constitution, while still respected, is rarely worshipped. In spite of former Chief Justice Rehnquist's effort to resurrect the Court's majesty with a

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[62] Ibid.

[63] Patchen Markell has recently argued that Arendt opens an alternative to the paradoxical reading of democratic action as either stabilizing and archic or destabilizing and anarchic. Arendt's theory of democratic action, he argues, offers a way of responding to the necessary newness of events with 'practical attunement.' Markell (n 34) at 7.

[64] J Habermas *Crisis of Legitimacy* (1973).

renewed sartorial splendor, the idea of the Court as mysterious reincarnation of the founding moment has been sacrificed to ideological and political disputes. Advocates, journalists, and people on the street count votes on the Court as they do in Congress. Justices are members of factions. As things stand, Jeremy Waldron is right, there is little legitimacy or justice in having nine undemocratically appointed judges make what have come to be political decisions that overrule the political judgments of more than 500 representatives.[65]

The claim that the revolutionary treasure of freedom has been lost is not local to America. For Arendt, the loss is global in scope and modern in form. In the place of the ambiguous constitutionalism of foundation, modern republics have sought the more secure legitimacy of the will of the people. In a world of positive law, there is an unstoppable drive to ground the law in a stable, secure, and unquestionable authority. When the authority of religion, tradition, and custom have lost their sway, law threatens to become a mere command, an act of will. As willful, law is changeable. Changeable law is positive law, which, as Niklas Luhmann has insightfully described it, is valid by the power of a contingent and alterable decision: 'We can reduce this concept of positive law to a formula, that law (*Recht*) is not only *posited* (that is, selected) through decision, but also is *valid* by the power of decision (thus contingent and changeable).'[66] Positive law, in other words, is law that is posited. It is based on the authority of a willful and alterable decision.

And yet, precisely because law, as law, must be more than simply command, law is compelled to offer up justifications for its authority. With the loss of law's traditional authority, there is only one alternative remaining in our secular and rational world. Law must be granted the objective authority of

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[65] Waldron (n 39) 49 ff..

[66] '*Wir können diesen Begriff der Positivität demnach auf die Formel bringen, daß das Recht nicht nur durch Entscheidung* gesetzt (*das heißt ausgewählt*) *wird, sondern auch kraft Entscheidung* (*also kontingent und änderbar*) gilt.' N Luhmann *Rechtssoziologie* 3ed (1987) at 210 (Emphasis in original).

science. Science, by providing positive law with an objective claim to justice, becomes a necessary element of all positive law.[67]

Arendt herself understands the law's need to become a product of science. She attributes to Grotius the effort to set law on the firm foundation of science. When Grotius insisted that 'even God cannot cause that two times two should not make four,' he expressed the conviction that 'only mathematical laws were … sufficiently irresistible to check the power of despots.'[68] Mathematical laws, which since Plato have been the paradigm of true and certain knowledge, are, in the Age of Enlightenment, the only kinds of truths that man will bow down to.[69]

And yet, Arendt is also rightly skeptical of the effort to turn law into a science.[70] The last 300 years of jurisprudence are witness to the rise of science as the authoritative ground of law. The rise of legal science, from its origins with Leibniz to its flowering with the legal-historical school of Savigny and Jhering in nineteenth-century Germany, culminates in the contemporary dominance of social-scientific approaches to law. In law schools and courtrooms, law is increasingly subordinated to the scientific discourses of economics, sociology, normative moral philosophy, and cognitive psychology. Law, today, is either consciously or unconsciously, understood as a product of the social sciences.

The social-scientific approach to law has distinct advantages. As a means for the achievement of social and political ends, law is enlisted in the progressive drive for an ever more rational society. Depending on which social science is employed to investigate the rational ends of society, law can be

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[67] For an account of how law's turn to science to justify itself leads to the rise of positive law, see R Berkowitz *The Gift of Science* (2005).

[68] Arendt (n 1) at 193.

[69] Ibid at 192. 'There is perhaps nothing surprising,' she writes, 'that the Age of Enlightenment should have become aware of the compelling nature of axiomatic or self-evident truth, whose paradigmatic example, since Plato, has been the kind of statements with which we are confronted in mathematics.'

[70] See R Berkowitz *The Gift of Science: Leibniz and the Modern Legal Tradition* (2005).

motivated for the ends of fairness, equality, efficiency, and security. Whatever the end, however, law, as a product of science, is uniquely free to bring it about.

But the price for law's scientific freedom is heavy. As law retreats behind reasons and grounds, it loses its natural connection to any ideas of truth and justice except those that are given as its justification. Law threatens to become merely a means to any rational ends that legislators posit. As a product of science, law is limited only by the limits of scientific justification. While the dominant science in private law is economics that subordinates law to the principle of efficiency, public law is still dominated by the political scientific elevation of legitimacy to the highest of legal values. The rise of democracy as the most legitimate form of governmental authority is a response to the need of positive law to legitimate itself through a claim to the objective fact of numerical majority.

Arendt sees that the fateful choice to found the legitimacy of modern law in democratic consent is 'built on quicksand.'[71] It is a solution to the problem of authority that replaces 'monarchy, or one-man-rule, with democracy, or rule by the majority.'[72] But democratic rule is, as rule, nothing but the principle of majority decision. Since that democratic decision 'is ever-changing by definition' and susceptible to the weakness of willful demagoguery, the elevation of democratic decision-making to democratic rule harbors a grave threat to the protection of political and human rights and thus to the protection of every limitation and space of freedom. 'Only where the majority, after the decision has been taken, proceeds to liquidate politically, and in extreme cases physically, the opposing minority does the technical device of majority decision degenerate into majority rule.'[73] While Arendt understands that consent, as it is expressed in deliberative councils and assemblies, is inherent in the very process of decision-making and thus is present in all forms of government, including despotism,

[71] Arendt (n 1) at 163.

[72] Ibid at 164. For a further elaboration of this idea, see Markell (n 34) at 7.

[73] Ibid.

with the possible exception only of 'tyranny,' she is acutely aware of the dangers inherent when the technical principle of democratic decision is confused with the politically legitimating concept of democratic rule.[74]

In lieu of the democratic rule of majority decision, Arendt insists that only a government that harbors the revolutionary spirit can secure a stable space for freedom in the modern world. Whether the revolutionary spirit—with its double characteristic of foundation and beginning—can survive the scientific compulsion to root itself in objective and rational facts—be they social norms, efficiency, or legitimacy—is and must remain a question for us today.

VI CONCLUSION

What I find distinctive and exciting about Justice Ackermann's jurisprudence—beyond his substantive defense of dignity and a residual right of freedom—is the joy in debating, the love of contest, and the exhilaration in the act of founding that erupts from his prose. His judgments reflect a free mind in action, one who is at home in the uncertainty and excitement of revolution. What I see in Justice Ackermann's opinions is an example of the double revolutionary activity of founding and creating.

Justice Ackermann's jurisprudence calls upon South Africa to imagine a Constitution not simply as a document, but as a revolutionary act. He asks that the Court and the nation hold on to the spirit of the revolution that has so possessed this young republic and gifted it with a truly revolutionary Constitution. South Africa's revolution is still young, as Justice Ackermann reminds us.[75] The question is, can the necessary demand for legitimacy—the need that modern and thus positive laws be given scientific and objective justifications—make room for the ambiguous idea of a constitution that holds open a space for freedom?

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[74] Ibid.

[75] Ackermann (n 19) at 633.

It is, I admit, a small space. One might rightly wonder if a space for 11 judges to be free is meaningful in a country of many millions. Recall, however, that freedom is a powerful idea. If it exists somewhere, it moves people everywhere. It is hopeless utopianism to expect everyone, at all times, to act freely. Nevertheless, an oasis of freedom is an ever-present respite in the desert of daily life.