WORKING THE COMMON LAW PURE: DEVELOPING THE LAW OF DELICT (TORTS) IN LIGHT OF THE SPIRIT, PURPORT AND OBJECTS OF SOUTH AFRICA'S BILL OF RIGHTS

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> [T]he common law . . . works itself pure by rules drawn from the fountain of justice.+

> The darkest thing about Africa has always been our ignorance of it.++

INTRODUCTION

South Africa lies at the Southern tip of the African continent nearly 8,000 miles away from the U.S. It has eleven different official languages[1] and combines significant populations from Africa, India, the Netherlands, and the United Kingdom. It is home to the cradle of humankind, where archeologists have found about 40% of the world's human ancestor fossils.[2] It also has large numbers of elephants, giraffes, lions, rhinoceroses, and zebras. As exotic as this may sound, there are no tigers, except in the zoo, no cannibals, unless you count the spiders,[3] and no headhunters, unless you are looking for the right person to fill an executive

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+ Omychund v. Barker, (1744) 26 Eng. Rep. 15, 22-23 (P.C.) (U.K.) (Lord Mansfield).

++ George Kimble, *Africa Today: The Lifting Darkness*, REPORTER, May 15, 1951.

1. S. AFR. CONST. 1996, ch. 1, § 6(1).

2. Lucille Davie, *Showcasing Humankind's Cradle*, SOUTHAFRICA.INFO, Mar. 22, 2005, http://www.southafrica.info/travel/cultural/cradle-centre.htm.

3. Unless one counts the baboon spider, a large tarantula species that often engages in cannibalism. Ansie Dippenaar-Schoeman, *The Baboon Spiders of South Africa*, SCI. IN AFR., Nov. 2002, http://www.scienceinafrica.co.za/2002/november/baboon.htm.

position, a professorial chair, or law school deanship. South Africa can be exotic, opaque, and strange, or it can be as familiar, transparent, and mundane as one's local shopping mall.[4]

Contrary to the literature that pigeonholes South Africa's legal tradition as something akin to a cave and its jurists as introspective hermits or monks, South Africa boasts one of the most open and cosmopolitan legal traditions known to humankind. I will not reveal all the mysteries of South Africa, or even all the mysteries surrounding the development of the law of delict in that country. However, I will shed light on some key features of South Africa's open legal tradition as well as the mechanisms at its disposal for developing its common law, and in particular, its law of delict. Throughout, I will be comparing and contrasting how the law in the United States (U.S.) and in South Africa has been developing, or "working itself pure." The contrast here is sharp. While in the U.S., the common law of torts has atrophied, in South Africa, it is thriving; while South Africa's law of delict is developing and working itself pure by drawing from South Africa's fountain of justice, namely the spirit, purport, and objects of its bill of rights, the U.S. common law of torts has been in decline over the last 20 years or so, largely due to a wave of regressive legislative tort reforms.

Part I of this article both situates the South African legal system within a group of systems referred to as mixed jurisdictions and distinguishes it from that group by highlighting South Africa's open, cosmopolitan tradition. Part II addresses the question of South Africa's "relevance for us." This section draws on the lessons of a number of approaches to comparative law and makes the case that South Africa's law of delict is neither too unique nor too familiar for fruitful and interesting comparisons to the U.S. law of torts. It accomplishes this by explaining a number of core similarities and pointing out some key differences between the U.S. and South African approaches to torts and delict. Part III addresses the desirability of harmonizing the Constitutions of the U.S. and South Africa with the private law in these countries. This section also addresses the need in the U.S. and South Africa for what is called horizontal application (the application of constitutional rights to persons in their relations with other persons). Part IV returns to the theme of South Africa's open tradition by detailing the mechanisms in South Africa for developing the common law in general and the law of delict in particular.

According to Jonathan Burchell, South African delict, not unlike torts, is

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4. South Africa is in fact a place with many pockets of extremes, from the multitudes of fancy shopping malls that could be found in half the suburbs of America to the shanty-towns at the edges of townships, from its world-class modern infrastructure linking the country, to the expansive nature preserves. It boasts some of the finest academics, scientists and jurists in the world, yet it has a very high infant mortality rate, HIV rate and is one of the most unequal countries in the world. It combines, in part, the best and worst of human achievements and continues to separate, in part, the best and worst of human achievements.

"dynamic—it can, and does, develop to meet the needs of a changing society."[5] Unfortunately, under Apartheid, the law of delict primarily served a subset of South African society. It did not draw from the fount of justice in order to work its common law pure during this period. Apartheid delict did not generally consist of blatant racist or sexist decisions; it had a veneer of neutrality. However, that veneer not only masked the inequality beneath, but protected it. It further entrenched inequality through a conservative libertarian bias that assumed the freedom and equality of persons while the Apartheid apparatus ensured that the opposite was true. At best, the development of South African delict was arrested during the Apartheid era.[6] The end of Apartheid not only provided for the transformation of South Africa's public law, it also provided mechanisms for the transformation of South African private law, including the law of delict. South Africa's final Constitution reinvigorated the claims of Lord Mansfield and Professor Burchell, by providing a framework for South Africa to continue the process of working the common law pure via the fountain of justice. The fountain of justice referred to here is not a reference to divine natural law or even to abstract reasoning, but is a reference to the conception(s) of justice embodied in the South African Constitution's Bill of Rights. South Africa's Constitution directs its jurists to that fountain in § 39(2), which provides that "when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." Part IV explores the meaning of this provision along with § 8(2), which provides for the application of the Bill of Rights to natural and juristic persons. These provisions present a tall order for the courts to fill. Although there is room for criticizing the South African judiciary's attempts to fill the order, one should not expect perfection. If it was easy to determine what justice required, there would be little need for working the common law pure on a case-by-case basis.

As will be demonstrated below, the constitutional text does not provide, and the courts have not settled on, a single comprehensive and coherent fount of justice for working South Africa's common law pure. Nonetheless, there is considerable evidence that the courts are striving to fill that order. The spirit and purpose of South Africa's new constitutional dispensation was to bring about a legal revolution rather than a bloody revolution. The Constitution drew from, and was designed to carry through, the struggle to end the oppression, gross inequality, and discrimination suffered by the vast majority of South Africans made possible by Apartheid public and private law. In doing so, the Constitution, like the struggle, drew from international human rights law, both as a means and as justification for overcoming Apartheid and its lingering effects. Although the

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5. JONATHAN BURCHELL, PRINCIPLES OF DELICT, at V (Juta & Co., Ltd. 1993).

6. For a fully developed argument on this point, see Christopher J. Roederer, *The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy*, 37 COLUM. HUM. RTS. L. REV. 447, 447-521 (2006) [hereinafter Roederer, *Democracy*].

text does not point inexorably to a single conception of justice for harmonizing the multitude of values that make up the spirit, purport, and objects of South Africa's Constitution and Bill of Rights, the text, along with South Africa's political history overwhelmingly support a transformative egalitarian conception of justice.

I. THE SOUTH AFRICAN LEGAL TRADITION: MIXED BUT NOT MIXED UP

The title of this symposium suggests that there may be something secondary about comparative law outside of Europe. Europe, with its two grand traditions of civil law and common law, is the touchstone for departure. These European traditions dominate, not only within Europe, but throughout the world. Moreover, as a result of colonization, a majority of jurisdictions fall within one or the other tradition.[7] South Africa is not even secondary in this way, as it does not fit into one or the other. Rather, it falls into what Vernon Palmer has termed the

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7. According to the University of Ottawa, Faculty of Law Study of World Legal Systems, the number of common law jurisdictions is 43; the number of civil law jurisdictions is 87; and the number of mixed jurisdictions is 14. There are only 3 pure customary law jurisdictions and numerous jurisdictions where the mix is between customary law and either the civil law or the common, or both (26, 15, and 5 respectively). The numbers for Muslim jurisdictions is similar with 2 pure, 11 mixed with civil law, 6 mixed with common law and 5 mixed with both. There are 4 countries in which the mix is Muslim, customary, and civil and 6 where the mix is Muslim, customary, and common law. University of Ottawa, Faculty of Law Civil Law Section, Alphabetic Index of Legal Jurisdictions, http://www.droitcivil.uottawa.ca/world-legal-systems/eng-tableau.php (last visited Apr. 3, 2009). It is common for treatises and scholarly comparative work to at least begin with different legal families or legal traditions on the macro scale. Rene David broke down the main families into Civil, Common Law, and Socialist, adding as "other," Jewish, Hindu, Asian, and African. RENE DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY, AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 18, 27, 28 (3d ed., Stevens Publishing 1985) (1968). Zweigert and Kötz break the systems down further into Romanist, Germanic, Anglo-American, and Nordic families, with the residual categories of law in the Far East and Religious based legal systems. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 63-73 (Tony Weir trans., Oxford Univ. Press 3d ed. 1998) (1977). H. Patrick Glenn divides up the legal traditions of the world into Chthonic, Talmudic, Civil, Islamic, Common, and Hindu. *See generally* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (2000) [hereinafter GLENN, LEGAL TRADITIONS]. Glenn uses the idea of a tradition rather than a system or family because he views systems and families as being exclusive and traditions as inclusive or at least as permeable. H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 421, 425 (Mathias Reimann & Reinhard Zimmermann eds., Oxford Univ. Press 2006). There is nothing magical about these different categories. One can proliferate the number of traditions, families, and subfamilies if one wishes. One could have a family for former colonies, or the former colonies of Great Britain, France, etc.

"third legal family," a tertiary group of countries.[8] South Africa is a mixed jurisdiction with both separate and overlapping influences from Roman-Dutch law, English common law, indigenous law, and religious law.[9]

The theme of much of the writing about mixed jurisdictions is one of remoteness and isolation. It is common for authorities on the subject to claim that these mixed jurisdictions lived largely in both physical and intellectual isolation from each other.[10] As Vernon Palmer put it in a recent article on the subject:

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8. VERNON VALANTINE PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 4 (Vernon Valantine Palmer ed., Cambridge Univ. Press 2007) [hereinafter PALMER, MIXED JURISDICTIONS]. Palmer included South Africa, Scotland, Quebec, Puerto Rico, the Philippines, Louisiana, and Israel in his study, but mentions other smaller mixed jurisdictions, including: Saint Lucia, Mauritius, the Seychelles, Zimbabwe, Botswana, Lesotho, Swaziland, and Namibia. *Id.* Palmer recognizes the marginal nature of mixed systems in a recent article, where he notes, "[a]ll efforts at classification in standard works have resulted in their marginalization and have not succeeded in giving closer analysis to their common traits and shared experiences." Vernon Valantine Palmer, Wilson Memorial Address at the Edinburgh University Second Worldwide Congress on Mixed Jurisdiction: Two Rival Theories of Mixed Legal Systems 2, *in* 12.1 ELEC. J. COMP. L. (2008), *available at* http://www.ejcl.org/121/art121-16.pdf [hereinafter Palmer, Rival Theories].

9. When the British took over the Cape in 1812, their policy was to allow local laws to remain in force if they were sufficiently civilized. As a result, the British recognized the law of the Dutch settlers, but did not recognize the laws of the indigenous peoples at the Cape, particularly the Khoe and San. T.W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 35 (Juta 2004). As the Colonies expanded across the region and more organized tribes were confronted and "subdued," the policy of non-recognition gave out to one of partial recognition. *Id.* at 37. In some parts only the law of intestate succession was recognized, while in others, civil suits between Africans was to be decided by the application of custom. *Id.* at 37-40. Soon after South Africa was consolidated as the Union of South Africa, its policy turned to one of segregation, with customary law applying to Africans in their areas and before their tribunals and European law applying in European areas in front of British style courts. *Id*. at 41-42. This changed with the end of Apartheid. The Constitution now recognizes customary law and requires that it be applied when it is applicable, subject to the Constitution and any legislation addressing the issue. *Id.* at 42-43 (citing S. AFR. CONST. 1996, § 211(3)). Although the question of when customary law is applicable can be a complex choice of law question, there are several factors that help a court make the determination, ranging from agreement by the parties, the nature of prior transactions (did they follow customary practices), the subject matter and environment of the transaction (e.g. was it local), the form of the transaction (e.g. did they follow customary rules regarding marriage in the formation of the marriage), and the way the parties live. *Id.* at 54-57. Where customary law has been allowed to govern, it has been subject to the test of conformity with public policy. If the customary rule or practice was deemed "uncivilized," immoral, contrary to natural justice or public policy, it would be trumped with the common law. T.W. Bennett, *Comparative Law and African Customary Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 7, at 642, 645 n.11, 666-71 [hereinafter Bennett, *Comparative Law*] (citing Campbell v. Hall, (1774) 98 Eng. Rep. 1045, 1048 (K.B.) as the source of the rule).

10. PALMER, MIXED JURISDICTIONS, *supra* note 8, at 3. Part of Palmer's project in

> [T]he mixed jurisdictions, up until relatively recently, have lived their entire existence in a kind of physical and intellectual isolation, cut off from family members around the world. They have been great solitaries, separated by the oceans, the currents and the continents. Each seemed to be one of a kind, something unique and peculiar, a wayward child who was destined to develop introspectively, conscious of its "otherness", unclear as to the nature of its laws, uncertain what to call itself, ambiguous as to its place among the world's legal systems.[11]

With globalization, every "legal system" is mixed to some degree. As Vernon Palmer notes in his more recent work, if one looks at the concept factually, as "the presence or interaction of two or more kinds of laws or legal traditions" within a given jurisdiction, then most of Africa, Asia, and India fall into this category.[12] In fact, given this definition, countries that are classically categorized as either purely common law like England, Canada, and the United States, or purely civil law, like France, Germany, and Switzerland, are mixed.[13] If one views the concept in this way, Palmer's claims about the nature of mixed

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collecting the various country reports and combining them in one work was to end the intellectual isolation of the various jurisdictions within the mixed family. *See also* Jacques DuPlessis, *Comparative Law and the Study of Mixed Legal Systems*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 7, at 477, 479-80 (note that DuPlessis is a South African Academic).

11. Palmer, Rival Theories, *supra* note 8, at 2. As will be argued below, South Africa is not easily captured by this depiction of a mixed legal system. Alan Watson indicates that South Africa is unique in having such an intense cosmopolitan approach to the law, at least in the modern period. ALAN WATSON, THE MAKING OF THE CIVIL LAW 41 (Harvard Univ. Press 1981). While South Africa may be unique among countries in terms of its cosmopolitan nature, I am not convinced that either Scotland or Sri Lanka (the two other countries often grouped with South Africa as having a common Roman law and common law heritage) have developed in this isolated way either.

12. Vernon Valentine Palmer, *Mixed Legal Systems . . . and the Myth of Pure Law*, 67 LA. L. REV. 1205, 1205 (2007) [hereinafter Palmer, *Myth of Pure Law*].

13. Palmer notes that if having a mixed legal system is defined in this way, then the concept is as broad as that of legal pluralism. *Id*. at 1205-06 (citing DuPlessis, *supra* note 10, at 483 n.17). The problem with substituting "mixed" with "pluralist" is that pluralist systems are generally considered systems in which two or more traditions coexist within a jurisdiction but do not mix. Rather, one set of laws from one tradition applies to one group of people (e.g., the indigenous population), while another set applies to another group (e.g., the colonizer). South Africa is pluralist in this sense. Mixed jurisdictions of the kind referred to here involve the application of one tradition across a given domain (e.g., the civil law being applied across the private law domain) while the other tradition applies across another domain (e.g., British law applied across the public law and procedural law domains). Thus, South Africa is also mixed in this sense.

systems lose all of their force (unless it can be said that every country has lived in physical and intellectual isolation as introspective, wayward children that are unclear as to the nature of their laws). Viewed in this way, what separates "mixed legal systems" from other systems may be more a matter of degree than a matter of kind.

The concept as traditionally used, and as used in Palmer's study, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY, is narrower than that of a mixed or plural system. As Palmer notes, there are at least three features that distinguish the "mixed legal system" from other systems, namely that:

- The common law and civil law form the core foundations of the system;
- The mixture is obvious to the ordinary observer; and
- The civil law component is confined to the private law, while the common law component dominates the public law.[14]

As a historical matter, it is understandable that western comparative law scholars, steeped in either the common law or civil law tradition, would view jurisdictions that combined the two as a third family. However, this way of using the concept is problematic for two related reasons. First, it privileges the colonizers' legal systems over that of the colonized, excluding jurisdictions where the mixture is between indigenous law (or what Glenn refers to as chthonic law[15]) and colonial law.[16] Thus, India (which combines indigenous law, religious law, and the English common law) is excluded from the family, while South Africa is included only because of its mix of civil and common law and not because of its indigenous law or its religious legal elements.[17] Second, this narrow interpretation

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14. Palmer, Rival Theories, *supra* note 8, at 7-9. The reference to common law here is not to judge-made law but to the substantive law of England. Note, however, that English law has had, and continues to have considerable influence over the law of Delict. *See infra* part II.B; *infra* text accompanying notes 60-63, 65-66, 69-70. Note also that the private law is no longer insulated from the public law and its values. *See infra* parts III & IV.

15. GLENN, LEGAL TRADITIONS, *supra* note 7, at 56-85.

16. Palmer, Rival Theories, *supra* note 8, at 24-27. Palmer reserves the notion of legal pluralism for the range of other mixtures (e.g. religious, indigenous, etc.).

17. *Id.* at 24, 27. Palmer appears to recognize the colonial elitist overtones of his previous work in his latter article in the Louisiana Law Review. This later article deconstructs the concept of a mixed legal system for the purpose of arguing that "mixed" legal systems are the norm. As he states, "[a] factual approach forces us to consider them as the norm rather than the exception, as the general pattern of legal development rather than historical accidents." Palmer, *Myth of Pure Law*, *supra* note 12, at 1218. This is a plausible revision if one reduces the classical concept of a mixed legal system to that of system with mixed legal influences. The study by the University of Ottawa Law Faculty places 86 jurisdictions within the category of mixed legal systems which it defines as including ". . . political entities where two or more systems apply cumulatively or

of the family of "mixed jurisdictions" implies that there are only two great families and that others are either a mixture of these two (the third family) or are even more peripheral. Given the richness and diversity of legal traditions and the multitude of approaches to categorizing legal traditions and systems, this is too narrow a view.[18]

Nonetheless, as a result of serial colonization, there are many jurisdictions that have a private law that "is essentially a structured blend of civil law and common law."[19] For the most part, the jurisdictions in question are mixed because they were first colonized by one of three civil law colonial powers (French, Spanish or Dutch) and then they were either colonized by Britain or the United Sates.[20] The reason for this ordering is partially based on the timing of colonial ascendance, with the British and Americans taking over through conquest or cession from former civilian colonizers, and partially based on the British practice of keeping the "substantive" private law of its colonies intact while imposing English procedural law and public law.[21] Thus, this conception of the mixed legal system privileges the colonizer because its roots are largely in the colonial experience.

As noted above, South Africa shares in the mixed tradition with a structured mixture of Roman-Dutch law and Common Law (among others).[22] Roman-Dutch law is the term used for the law of the Netherlands, which developed along Roman law lines from the twelfth century up to the arrival of the Napoleonic code in the Netherlands in 1809.[23] This uncodified Roman-Dutch law was transplanted to the Cape in the seventeenth century with the arrival of the Dutch East India Company.[24] When the English came to the Cape in the late

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interactively, but also entities where there is a juxtaposition of systems as a result of more or less clearly defined fields of application." JuriGlobe–World Legal Systems, University of Ottawa, *Mixed Legal Systems* (Feb. 9, 2009), http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php (last visited Apr. 1, 2009) [hereinafter Mixed Legal Systems]. However, it is unclear why one would want to abandon the category of mixed common law and civil law legal systems. It should be renamed, or at least one should be clear that when speaking of a "mixed legal system" we mean mixed common law and civil law systems, but it makes little sense to eviscerate the category because it has an unfortunate label. *See* Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 20 (2003).

18. *See supra* text accompanying note 1; Mixed Legal Systems, *supra* note 17 (breaking down mixed (or plural) systems into eleven different subcategories).

19. Palmer, *Myth of Pure Law*, *supra* note 12, at 1217.

20. *See* DuPlessis, *supra* note 10, at 479.

21. *See supra* text accompanying note 9.

22. The Netherlands Colony of the Cape was founded in 1652. It was occupied by the British in 1806 and formally ceded to them by the Treaty of Paris in 1814. It was organized as a Crown Colony and was granted self-governance in 1872. The cape became a province of the Union of South Africa in 1910. ZWEIGERT & KÖTZ, *supra* note 7, at 231-33.

23. *Id.* at 232.

24. *Id*. at 231-32.

1700s they did not impose English common law on the territory.[25] Rather, they simply imposed English public law and procedure (including a judicial system based on the English model) on top of the civil law base.

A. South Africa has Not Spent its Existence in Physical and Intellectual Isolation

The theme of isolation, often associated with mixed jurisdictions, is not completely alien to South Africa. It is consistent with accounts of South Africa being isolated from the international community and international law,[26] particularly during the Apartheid period.[27] But even here, the isolation was as

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25. This practice can be traced back to William the Conqueror's respect for the English common law or customary law when he conquered England and was a well-settled feature of English colonial practice. *Id*. at 182, 220; Campbell v. Hall, (1774) 98 Eng. Rep. 1045, 1047 (1774) (setting forth the English constitutional rule that "the laws of a conquered country continue in force, until they are altered by the conqueror").

26. South Africa was a member of the League of Nations, and was elected a member of the Council in 1939. JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 19 (Juta 2005) (1994). A South African was elected President of the League's General Assembly in 1933, and General Smuts, South Africa's Prime Minister took part in drafting the U.N. Charter, in particular its preamble. *Id.* at 19-20.

27. As John Dugard states in his Preface:

> [i]nternational law has been applied by South African courts for more than a century in cases arising from the country's vibrant commercial life and conflict-ridden political history. Apartheid was a setback to the development of international law in South Africa as both executive and courts viewed international law as a hostile legal order whose prescriptions on human rights and self-determination were incompatible with domestic law.

Id. at vii. *But see* Michael P. Lowry, *Legitimizing Elections Through the Regulation of Campaign Financing: A Comparative Constitutional Analysis and Hope for South Africa*, 31 B.C. INT'L & COMP. L. REV. 185 (2008). Lowry concluded his article by noting that South Africa "has [done] as well as may be realistically expected" in making progress in its transition to democracy and equality given "the problems inherent in overcoming decades of repressive government and international isolation[.]" *Id.* at 212. As Justice O'Regan wrote in her concurring opinion in *Kaunda v. President of the Republic of South Africa*, "[O]ur Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law." 2005 (4) SA 235 (CC) at 299 (S. Afr.).

See Neville Botha, *The Coming of Age of Public International Law in South Africa*, 1992-1993 S. AFR. Y.B. INT'L L. 37, 38 (arguing that South African judges had a poor grasp of international law during Apartheid). *See also* John Dugard, *The South African Judiciary and International Law in the Apartheid Era*, 14 S. AFR. J. HUM. RTS. 110 (1998) [hereinafter *South African Judiciary*].

much imposed as it was by choice.[28] It is easy to conclude from South Africa's isolation from international law developments (particularly in the area of human rights) that this was typical of the South African legal experience. Such a view is fortified by the fact that during the Apartheid period, a number of South African academics, judges, and practitioners consciously turned away from English common law sources, and in fact sought to purge the English influence from private law.[29]

Although the case can be made that South Africa was isolated from the world during the height of the Apartheid era,[30] for most of its history as an independent state, South Africa's status as a "mixed" jurisdiction has led the country to borrow from legal traditions around the world. Even when they turned away from common law sources during Apartheid, South African academics, practitioners, and judges did not merely turn inward, but reached out to those in the civil law tradition.[31] Rather than acting as an isolating factor, South Africa's status as a mixed jurisdiction has added to its cosmopolitan nature. As will be demonstrated below, this spirit was renewed with a vengeance following the end of Apartheid.

1. South Africa Was Not Isolated From its Siblings

While some "mixed" offspring may have remained isolated, there is considerable evidence of cross-pollination between South Africa and its siblings.

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28. John Dugard argues that the United Nations shares the blame for South Africa's negative contribution to international law because of its efforts to exclude it from international organizations and from law making conferences. DUGARD, *supra* note 26, at 21. South Africa was the one of the most prominent states on the U.N. agenda from the 1950s to the 1990s, as it was the subject of numerous resolutions, sanctions, and the denial of a U.N. General Assembly seat to the government representatives from South Africa from 1974 to 1994. *Id.* at 7, 20-21, 481. *See* G.A. Res. 3207, U.N. GAOR, 29th Sess. (Sept. 30, 1974).

29. See *infra* text accompanying notes 63-69.

30. DUGARD, *supra* note 26, at 21.

31. See *infra* Part II.B. Justice L.C. Steyn, who was Chief Justice of the Appellate Division from 1959 to 1971, is credited for calling on South African jurists to move beyond English sources and to embrace continental sources. Edwin Cameron, *Legal Chauvinism, Executive-Mindedness and Justice – L C Steyn's Impact on South African Law* 99 S. AFR. L.J. 38, 50 (1982). This was part of Chief Justice Steyn's efforts to purify South African law of its English influence. Cameron notes the irony that the courts really did not follow Steyn in referring to continental sources. *Id*. at 50-51. He also noted that reports in the late 1970s showed that while only five out of 684 reported cases cited continental sources, one out of every seven cases included references to English or Commonwealth sources. *Id.* at 51. References to Roman or Roman-Dutch sources occurred in only one out of every eighteen reported cases. *Id.* Thus, even at the height of Apartheid, English sources of law predominated.

South Africa's mixed siblings include Sri Lanka and Scotland. Like South Africa, Sri Lanka was colonized by the Dutch, and then by the British.[32] Scotland does not share the same colonial experience; rather, it received the Roman civil law, along with the rest of continental Europe, prior to unification with England in 1707.[33] While there are considerably more references to "Scots law" in the South African Law Reports and in the academic literature[34] than to Ceylon Law, or now Sri Lankan law, references to Ceylon law are substantial.[35] Although there is

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32. Sri Lanka, previously Ceylon, was first colonized by the Sinhalese from northern India in the 6th century B.C. Tamils established a kingdom in northern Sri Lanka in the 14th century and the Portuguese controlled the coastal areas of the island in the 16th century. The Dutch took over during the 17th century and the English took over at the end of the 18th Century and the beginning of the 19th Century. Ceylon gained its independence in 1948 and changed its name to Sri Lanka in 1972. *See, e.g.*, Central Intelligence Agency, *The World Fact Book, Sri Lanka*, https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html (last updated Mar. 19, 2009). *See also* S. ARASARATNAM, CEYLON 41-42, 98-116, and 124-73 (1964).

33. Elspeth Reid, *Scotland: Scotland (Report 1)*, *in* PALMER, MIXED JURISDICTIONS, *supra* note 8, at 201-02. Roman law gained considerable influence in Scotland during the 16th century when Scottish professional lawyers were trained in continental Europe (largely in either France or the Netherlands). Robert Eslie*, Scotland (Report 2*), *in* PALMER, MIXED JURISDICTIONS, *supra* note 8, at 241. Scotland's integration with England shielded its Roman-based common law from the spread of codification brought about by Napoleon at the beginning of the 19th Century. *Id.*

34. There is at least one reference to "Scots Law" in nearly every year of the South African Law Reports from 1947 to the present. There is a strong tradition of academic exchanges between South Africa and Scotland and a number of South African academics hold academic positions in Scotland, including Professor Cornelius G. Van Der Merwe, Professor Reinhard Zimmermann, and Professor David L. Carey Miller.

35. David L. Carey Miller, *Three of a Kind? Positive Prescription in Sri Lanka, South Africa and Scotland*, 12.1 ELEC. J. COMP. L., at 4 & n.18 (2008), http://www.ejcl.org/121/art121-3.pdf (arguing that there is negligible reference to Sri Lankan sources in South African Law) (citing L.J.M. COORAY, AN INTRODUCTION TO THE LEGAL SYSTEM OF SRI LANKA 95-96 (2d ed. Lake House Invs. 1992)). Professor Miller, who has authored and co-authored works on South African property law, personally attests to the negligible reference to Sri Lankan sources. *Id.* at 4. Miller wrote THE ACQUISITION AND PROTECTION OF OWNERSHIP (1986) and co-authored with Anne Pope, TITLE TO LAND IN SOUTH AFRICA (2000). Nonetheless, there are periodic references in the law reports to case law and commentary on the law of Ceylon, now Sri Lanka (particularly cases heard on appeal by the Privy Council). JAMES CECIL WALTER PEREIRA, THE LAWS OF CEYLON (2d ed. H.C. Cottle 1913) is sometimes referenced in the case law and in the area of Delict, the work of Chittharanjan Felix Amerasinghe is often referenced. *E.g.*, CHITTHARANJAN FELIX AMERASINGHE, DEFAMATION AND OTHER ASPECTS OF THE 'ACTO INIURIARUM' IN ROMAN-DUTCH LAW (IN CEYLON & SOUTH AFRICA) (1968); Chittharanjan Felix Amerasinghe, *The Protection of* Corpus *in Roman-Dutch Law*, 84 S. AFR. L.J. 56 (1967). Professor Ellison Kahn, the editor-in-chief of the South African Law Journal acknowledged the contributions of "eminent judges, practitioners and academics from abroad" from 1949 to 1983, including, "from Sri Lanka, Professor C. F. Amerasinghe, Professor L. J. M. Cooray, L.

continued interest in Scots law among South African academics, evidence of current interest in Sri Lankan law amongst South African academics is difficult to find.[36] South African authorities have had a much greater influence on Sri Lankan Law. David L. Carey Miller, in *Three of a Kind? Positive Prescription in Sri Lanka, South Africa and Scotland*, notes that it is trite that South African Roman-Dutch private law has been influential in the development of Sri Lankan private law and that this influence was present from very early in the colonial experience.[37] It is, however, unclear what, if any, influence South Africa and Sri Lanka have had on Scots law.[38]

2. South Africa was Not Isolated From its "Parents"

Even if it could be argued that South African private law developed in isolation from its siblings, it cannot be seriously contended that South Africa developed in isolation from its parents.[39] From early on, South Africa's legal elite

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Kadirgamar, M. Sornarajah, Professor G. L. Peiris, R. S. de Soysa[.]" Ellison Kahn, *The Birth and Life of the South African Law Journal*, 100 S. AFR. L.J. 594, 634 (1983). He also acknowledged Professor Sir Thomas B. Smith and Sheriff John G. Wilson from Scotland along with three jurists from the U.S., nine from England, and one each from Canada, Israel, Botswana, and Australia. *Id.*

The only South African Constitutional Court case to address Sri Lankan law was *Fose v Minister of Safety and Security*, 1997 (3) SA 786 (CC) at 814-15 (S. Afr.). The Court performed a rather exhaustive comparative review of the approach to punitive damages for the violation of constitutional rights by the state. *See generally id.* The Court did not give any special pride of place to Sri Lanka, although the decision of the Sri Lankan Supreme Court in *Saman v. Leeladasa & Another* 1989 (1) Sri. L.R. 1 (Sri Lanka) was held to be instructive and was ultimately consistent with the Constitutional Court's decision in *Fose*. *Id.* at 815. The court also reviewed the approach to this issue in India, Germany, Ireland, New Zealand, Trinidad and Tobago, the U.S., Canada, the U.K., and the European Union. *Id.* Although the case was at the intersection of delict and constitutional law (i.e. private and public law), the Court made no mention of the fact that Sri Lanka shared the same Roman-Dutch heritage or was a similarly mixed legal system.

36. This is the case even though the Sri Lankan experience is more comparable than the Scottish experience to the South African experience.

37. Miller, *supra* note 35, at 3 n.10. Miller, in note 11, by example cited the case of *Silva v. Mohamedu*, 1916 (19) NLR 426 (CC) (Sri Lanka) in which "the Sri Lankan Supreme Court followed the South African Appellate Division in *Breytenbach* v *Frankel and Hochstadter*, [1913 (390) W.L.D. (AD) (S. Afr.)] regarding a minor's contract agreeing to the disposal of property." Miller, *supra* note 35 at 3 n.11. In fact he goes so far as to cite one authority for the view that some treatises on the law in Sri Lanka devote a majority of work to the treatment of South African cases. *Id.* at 3 & n.15 (citing Cooray, *supra* note 35, at 95-96).

38. I am unaware of any authority addressing the issue.

39. This was, in part, the point of Kutner's work on the top ten delict cases in South Africa during the 1980s. *See* Peter B. Kutner, *Tort Cases in the South African Appellate*

were freed up by their somewhat unique situation. Rather than isolating themselves and turning inward, their mixed status opened them up to the possibility of borrowing from the insight and wisdom of jurists from around the globe. Thus, as early as 1887, Victor Sampson wrote, "[t]o say that there is not a book of law in the whole civilised world which may not possibly be an authority in the . . . [South African] Courts, is not to go beyond the truth."[40] To this day, South African jurists make heavy use of the works of Roman-Dutch and English jurists.[41] Thus, references to Dutch and British authority overwhelm references to Scottish and Sri Lankan legal authority. The leading South African treatises on delict contain numerous references to English Common law authority and to Roman-Dutch law authority.[42]

Division: A Top Ten of the Eighties, 6 TEMP. INT'L & COMP. L.J. 311 (1992). Note that there is something odd about referring to Roman-Dutch law and English law as the parents of South African law given that they were forced on South Africa. To stretch the metaphor, it could be said that while South Africa's indigenous mother still has some influence, she does not really have joint custody of the legal system.

40. Victor Sampson, *Sources of Cape Law*, 4 CAPE L.J. 109, 109-10 (1887). Sampson was an advocate of the high court of the Cape and was later the attorney general of the colony from 1904 to 1908. *See* The Cape, http://www.geocities.com/CapitolHill/Rotunda/2209/Cap.html (last accessed Apr. 1, 2009).

41. This is only partially true because Roman-Dutch law ceased to exist in the Netherlands after the adoption of the Napoleonic Code in 1806. Thus, while the Dutch Colonies in South Africa and Sri Lanka continued to use Roman-Dutch law, they could no longer draw from the Netherlands after that point. ZWEIGERT & KÖTZ, *supra* note 7, at 232.

42. *See* P.Q.R. BOBERG, THE LAW OF DELICT: VOLUME ONE: AQUALIAN LIABILITY (rev. reprint Juta & Co. 1989) (1984) [hereinafter BOBERG, DELICT]. Boberg's work is probably the most highly regarded work in South Africa on the subject. In it, the author refers to some 130 other common law cases [excluding Zimbabwean cases]. Twelve of the leading cases are referred to over 140 times throughout the book and the 130 remaining cases are cited over 250 times altogether. In total, there are nearly 400 references to common law cases in his book. Note that Boberg's book does not address the *Actio Injuriarum* which includes defamation and other intentional injuries to one's rights (e.g., privacy, dignity, etc.). Note also that there are over 4,000 references to cases in this book. In all, almost one tenth of the references to cases are to common law cases outside of Southern Africa. McKerron references some 378 common law cases out of approximately 1,500 cases cited (approximately one quarter). R.G. MCKERRON, THE LAW OF DELICT: A TREATISE ON THE PRINCIPLES OF LIABILITY FOR CIVIL WRONGS IN THE LAW OF SOUTH AFRICA, at xvii-xlii (7th ed. Juta & Co., Ltd. 1971) (1933). In his index, he notes the cases where the facts are given some treatment. *Id.* Here the ratio of common law cases to South African cases rises to approximately 72 out of 190 cases (over one-third). Johnathan Burchell refers to approximately 50 common law cases out of the approximately 450 cases he cites. BURCHELL, *supra* note 5. Johan Neethling only refers to 13 common law cases out of almost 1,500 cases. J. NEETHLING ET AL., LAW OF DELICT 399-430 (J.C. Knobel trans., 4th ed. Butterworths 2001) (1991). Only one of the 13 cases is referred to more than once in the work. *Id.* The first three casebooks on delict were written in English by academics at English institutions in South Africa, while the fourth was written in Afrikaans by

II. THE RELEVANCE FOR US

The fact that South Africa has a long tradition of cosmopolitan legal development makes it an interesting legal system to study; but it is fair to ask whether its unique nature reduces its value "for us" to little more than a curiosity.[43] Why spend time on South Africa rather than the U.K., other common law jurisdictions, or other pure civil law systems? The answer to this question depends in large measure on what approach one takes to the study of comparative law.

There is a range of approaches to the study of other legal systems, from an emphasis on the strange to the familiar; from what is unique to what we have in common. Imagine that studying foreign legal systems is like a trip to the museum—a chance to look and marvel at the artifacts of other people. The law is a complex artifact and thus when looking to the law of other countries, we should not expect to find a perfect fit or coherence with our own view of law, even if the law comes out of the same tradition or "family." Not only do we expect that many of the laws will be different, but we also expect that the underlying values, principles, or theories that justify those laws will be different. On the one hand, there would be little point to comparative law if everyone else's laws and legal principles were the same as ours. How interesting would a trip to the museum be if everyone's art, dress, or technical accomplishments were the same? Why would one bother looking at the law of South Africa, or anywhere else, if it merely reflected our own?

On the other hand, we also do not expect other legal systems to be completely different, with no similarity in the sets of laws and no similarity in the values, principles, and theories that justify those laws. We are able to learn from a trip to the museum, in part because of the many connections, in both form and substance, between the artifacts there and our own artifacts, both past and present. It is not unreasonable to expect that the human condition presents many similar challenges and problems throughout the world and that something that goes by law is used to meet those challenges and to solve those problems. As far away

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academics at Afrikaans universities. Professors McKerron and Boberg were at the University of the Witwatersrand. Professor Burchell started his career at the University of the Witwatersrand and then moved on to the University of Natal. He is now at the University of Cape Town. Two of the authors of NEETHLING, Professors Neethling and Potgeiter, are from the University of South Africa while the other, Professor Visser, is from the University of Pretoria. Their English translator, Professor Knobel, is also from the University of South Africa.

43. Those familiar with Zweigert and Kötz's treatise will have read the quote from Samuel Johnson in their preface; namely, that "[a] generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed, than in examining the laws and customs of foreign nations." ZWEIGERT & KOTZ, *supra* note 7, at v (quoting SAMUEL JOHNSON, BOSWELL'S LIFE OF JOHNSON I, at 89 (Hill & Powell eds., Oxford 1934)).

and as different as South Africa is, there are many more points of commonality than there are of difference. Without these points of commonality, again there would be little to marvel at. Rather the laws would appear as mere oddities – like a trip to a Ripley's "Believe it or Not."

A. A Range of Approaches to Comparative Law

If we are looking for an exact fit, not only are we not likely to find it, but we are also most likely missing the point of comparative law. Likewise, if we are only looking for what is strange or different we may also be missing out on those aspects of other people's practices that can be fruitfully linked to aspects of our own practices. The remainder of this section explores four different approaches to comparative law that negotiate these issues: (1) the social evolution approach; (2) the functionalist approach; (3) the expressivist approach; and (4) bricolage. These approaches are explored in order to draw out lessons for those of us wishing to engage in the study of foreign law. The next section draws from these lessons to look more closely at South Africa's law of delict. As will be shown, the South African law of delict is neither too strange nor too familiar for fruitful and interesting comparisons.

1. Social Evolution

The first approach, now long discredited, was to look at the law as a part of social evolution, as developing in stages from the primitive to the civilized.[44] With this approach, Europe and its traditions were treated as civilized and most other traditions were treated as primitive.[45] Traditions outside of Europe were often viewed as something "other" than legal traditions. They were moral codes or mere customs and they were often treated more as oddities than as something worthy of serious study. At best, they were viewed as nascent, as systems that could develop into civilized legal systems. The view was that they had little to offer, but much to gain from the interaction with western legal systems. This 19th Century approach to anthropology and to comparative law helped justify the imposition of western law on the colonized people of the world. This resulted in over half of the world falling under one or the other families of civil law and

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44. *See* Bennett, *Comparative Law*, *supra* note 9, at 652 (referring to SIR HENRY MAINE, ANCIENT LAW (1861) as the founding father of this approach to comparative law).

45. This included traditions as ancient and developed as the Chinese tradition. In fact, at the extreme, this approach reserved the title of "law" to those traditions it counted as "civilized." Thus, the 19th and 20th century approach to China was that its system of social order was antithetical to law. *See, e.g.*, Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 182-83 (2002).

common law.

2. Functionalism

During the 20th century, a second approach, the functionalist approach to anthropology and comparative law, overtook the evolutionary approach.[46] The functionalist approach is tied to modernist rationalism and views the law as rationally serving social functions. Functionalism is based on the idea that different societies often face similar problems and that the law is a rational response to those problems; the law is a tool for fixing problems or meeting societies' needs. Different societies might construct different types of legal rules or even different sets of legal rules to serve these purposes or to fulfill these functions. For authors such as Konrad Zweigert and Hein Kötz, the key to gaining understanding through comparative work is to resist looking too narrowly for equivalents in terms of specific causes of action or legal regulations, but to ask the question more broadly, i.e. in terms of what laws or sets of laws fulfill similar functions or purposes within the relevant societies.[47] Then one can evaluate how the different systems serve the given functions or purposes.[48] Thus, while the legal rules themselves might not fit our own, we might be able to identify the same set of underlying problems that the legal rules are meant to address. The rules might not fit, but since the problems do, we might see some value in adopting these different sets of rules for the purposes of solving our own problems. These other rules may be more efficient, avoid unwanted costs or harms, or may be animated by a better or more appealing set of values.

Mixed systems, as defined above, are a product of legal transplants from civil and common law countries. If one takes a functionalist view, then there is little reason to be skeptical of the appropriateness of these transplants. If the transplanted law works equally well or better to serve the functions of society, then there is no reason to disparage it and there are perhaps good reasons to embrace it. There is also no bar to borrowing from beyond these transplants.

Mark Tushnet, in *The Possibilities of Comparative Constitutional Law*,[49] outlines two further approaches to comparative law;[50] namely, expressionist[51] and

46. Bennett, *Comparative Law, supra* note 9, at 652-56.

47. ZWEIGERT & KÖTZ, *supra* note 7, at 34-35.

48. *Id.* at 32-47.

49. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

50. *Id.* Note that while Tushnet is talking of comparative constitutional law this article appropriates his ideas for comparative law more generally.

51. *Id.* at 1270 & n.214 (citing as an example of expressivist comparative constitutional law, Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 524 (1992)). According to Tushnet, "Mary Ann Glendon has vigorously promoted the idea that law 'tells stories about the culture that helped to shape it and which

bricolage.[52] The expressionist approach is tied to cultural relativism or a social constructionist position, while bricolage in the hands of Tushnet is a postmodern approach.[53]

3. Expressivist

The expressivist is skeptical of transplants and borrowing. According to Pierre Legrand, it is not merely that transplants are unwise, but rather are impossible.[54] They are impossible because statements about the law are invested with social meaning; the law's meaning is rooted in the culture that created it. Thus, if one transplants the words, without transplanting the culture, the meaning is left behind. For the expressionist, each legal system is the product of each society's unique culture, history and values. Not only does this view not expect much fit in terms of the actual rules, but, perhaps more importantly, it does not see our problems as being the same, nor our values, principles and/or sets of theories as being the same. Thus, unless we have similar histories, values, etc., it will not help us greatly to bring in alien legal ideas that have grown out of a particular soil and climate and in many cases require that soil and climate to survive and/or to thrive.[55]

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it in turn helps to shape.'" *Id.* at 1269-70 (quoting MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8 (Harvard Univ. Press 1987)).

52. *Id.* at 1295, 1296 n.326 (citing as an example of the bricolage approach, Kim Lane Scheppele, Presentation at the University of Pennsylvania Law School Symposium: Contextuality and Universality: Constitutional Borrowings on the Global Stage (Mar. 21, 1998) (analysis of Hungary's "accidental constitution.")).

53. *Id.* at 1228 n.14.

54. Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EUR. & COMP. L. 111, 120-21 (1997).

55. This may have been the view of both former Chief Justice Rehnquist and Justice Scalia as illustrated by their dissenting opinions in *Atkins v. Virginia*. 536 U.S. 304, 321-36 (2002) (Rehnquist, C.J., dissenting); *id.* at 337-53 (Scalia, J., dissenting). Justices Rehnquist and Scalia criticized the majority's reliance on foreign law to determine whether sentencing the mentally retarded to death offends evolving standards of decency and amounts to cruel and unusual punishment under the Eight Amendment. As Justice Rehnquist stated:

> I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination. While it is true that some of our prior opinions have looked to "the climate of international opinion," . . . to reinforce a conclusion regarding evolving standards of decency . . . ; we have since explicitly rejected the idea that the sentencing practices of other countries could "serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people."

Nonetheless, if the history, values or culture are similar, or if one wishes to engage in an exercise of contrasting rather than comparing, then comparative law through an expressivist lens could be very fruitful and rewarding. On the expressivist view, the benefits of comparative law arise from coming to understand different cultures and value systems, and of seeing completely different ways of doing things. While there may be no direct fit expected, there may be considerable aspirational value in seeing not only how things are done differently in other places but also in coming to see that there may be other value systems that rival one's own.

One can heed the insights of the expressivist and be cautious about assuming that our histories, values, and problems are the same without falling into the equally untenable position of assuming that our histories, values, and problems are completely different and incompatible. Oddly enough, both the functionalist and the expressivist approaches assume that man and womankind's artifacts are rational responses to their environment. In the first case, the law is a rational response to common problems, while in the second, to a unique set of values and problems.

4. Bricolage

A fourth approach, Bricolage, challenges the assumption of rationality found in both functionalism and expressivism. Bricolage is named after a concept that was originally pejorative. It was coined by the somewhat infamous Margaret Mead to describe how the people of New Guinea would simply appropriate elements of culture from anything at hand with no real discrimination or rational integration into a coherent framework.[56] Bricolage is not concerned with finding functional equivalents or a rationally coherent system from which laws come and into which they go. This is because the *bricoleur* is skeptical about the rationality of legal systems to begin with. Laws and legal systems are often products of compromise, conflict, and historical accident. One need not be so caught up in the exact place or function that a given law or set of laws served in a given context,

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536 U.S. at 324-325 (internal citations omitted). Justice Scalia restated the point in his dissent:

> We must never forget that it is a Constitution for the United States of America that we are expounding. . . . Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.

536 U.S. at 348 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting)).

56. Margaret Mead, *Note from New Guinea*, 34 AM. ANTHROPOLOGIST (New Ser.) 740 (1932) (cited in Tushnet *supra* note 49, at 1229 n.16).

nor in the elaborate web of values and traditions from which that law emerges. On this view, comparative law does not involve the work of a surgeon in a heart or kidney transplant, but something more akin to the work of an artist who creates art out of the various objects that others discard, or which were originally intended for radically different purposes.

Just as one can heed the insight of the expressivist without giving into complete cultural relativism, one can heed the insights of the *bricoleur* without becoming a complete skeptic. One can acknowledge these insights without concluding that all or even that most of the law is a matter of compromise, or accident. If we accept that our own legal system or tradition is not a closed rational system, but one created in part by compromise, accident, and even borrowing here and there, then there is considerable potential for the laws of other countries to enrich our own tradition.

B. South African Delict is not too Strange or Unique to Fruitfully Compare with the U.S. Law of Torts

Leaving the evolutionary approach aside, and heeding the lessons from expressivism, South African law in general and the law of delict, in particular, is not radically different from our own. Nonetheless, during the Apartheid years one could find little to no positive references to the South African law of delict in the U.S. or in other common law countries. This motivated Peter Kutner to publish an article on the top ten "tort" cases from the Appellate Division of the Supreme Court of South Africa during the 1980s.[57] That piece focused on the contribution made by South African courts to the development of the "common law"—that is—to the body of law founded upon the common law of England. Kutner convincingly argued that since 1910, the Appellate Division of the Supreme Court of South Africa had made significant contributions to the common law, yet to that day (the early 1990s) those contributions had gone unnoticed by common law jurisdictions.

Although language barriers were partially to blame,[58] the main reasons for neglecting South African law involved the perception that it was tainted by Roman-Dutch law and by Apartheid, which made it both difficult and unseemly to turn to South Africa for comparisons.[59] As noted above, when the English came

57. Kutner, *supra* note 39.

58. There was, and remains, a small but significant number of cases reported in Afrikaans, about five percent or so over the last 10 years in the area of delict. Nonetheless, most cases are now translated into English and many Afrikaans speaking academics are publishing in English. For instance, NEETHLING ET AL., *supra* note 42, was originally written in Afrikaans as DELIKTEREG. *See* NEETHLING ET AL., DELIKTEREG (Butterworths 1989).

59. As I wrote elsewhere, no one wants to look to the rotten apple for lessons on how to develop or perfect the common law. Roederer, *Democracy*, *supra* note 6, at 458.

in the late 1700s they did not seek to impose English common law on the territory of South Africa. Nonetheless, over time, as more and more lawyers, judges, and even academics arrived with English legal training, it was inevitable that the common law would make its mark on the Roman-Dutch law of delict.[60] This was particularly true up to the time of Apartheid. As Kutner states:

> [O]ne will find that the common law has had much influence upon the development of South African law and that the legal principles, or *media concludendi*, of the cases are similar to the principles or methods of decision found in common law jurisdictions. For this reason, many of the reported cases in South African courts form part of the body of common law, even when they purport to apply and elaborate Roman-Dutch law.[61]

With the advent of Apartheid in the late 1940s also came a backlash against the English influence.[62] As D. Visser notes, "The bellum juridicum [the battle over the nature or the soul of the South African legal system] was probably most hard-fought in the area of tort."[63] The backlash against the English influence

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60. A distorted version of the Westminster constitutional system was eventually established, with an English based court system. "For the most part, its system of courts and procedural law dates from the Charters of Justice of 1827 and 1832, which grafted institutions and methods of adjudication characteristic of the English common law onto a substantive law with deep roots in continental European civil law." Francois Du Bois & Daniel Visser, *The Influence of Foreign Law in South Africa*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 593, 594 (2003) (citing H.J. Erasmus, *The Interaction of Substantive and Procedural Law: The Southern African Experience in Historical and Comparative Perspective*, 1 STELLENBOSCH L. REV. 348 (1990)). Thus, English law heavily influenced constitutional law and administrative law. English law also had a considerable influence over certain statutory areas of the law, particularly those related to commercial law, negotiable instruments, bankruptcy, maritime law, insurance, and partnership law. ZWEIGERT & KÖTZ, *supra* note 7, at 233. In fact, the English statutes were borrowed nearly verbatim. *Id*. Property law, succession, and family law were not heavily influenced by the English common law. *Id*. at 234. Private law areas, such as contract and delict, were not supposed to be affected, but they were. R.G. McKerron, in particular, was responsible for viewing delict through the lens of the common law of tort. MCKERRON, *supra* note 42.

61. Kutner, *supra* note 58, at 311.

62. The "purist" backlash to rid Roman-Dutch law of the English influence is associated with the ascendancy of L.C. Steyn to the position of Chief Justice of the Appellate Division from 1959 to 1971. Eduard Fagan, *Roman-Dutch Law in its South African Historical Context*, *in* SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 33, 60-64 (Reinhard Zimmermann & Daniel Visser eds., 1996); *see also* William Tetley, *Mixed jurisdictions: Common law vs civil law (codified and uncodified) (Part I),* 4 UNIF. L. REV. 592 (1999), *available at* http://www.unidroit.org/english/publications/review/articles/1999-3.htm (last visited Apr. 4, 2009).

63. Daniel Visser, *Cultural Forces in the Making of Mixed Legal Systems*, 78 TUL. L.

was part of a broader Afrikaner nationalist and expressivist movement. The Afrikaner national government, along with judges and academics sought a return to its Roman-Dutch roots. The policy during that era was one of segregation and "purification." The Apartheid regime sought, not only to place black South Africans on separate lands, but also under separate governance and legal authority.[64] At the same time, a number of judges and academics sought to purify or cleanse South Africa's common law of its English influence. Edwin Cameron went so far as to declare, "On a broad view it is fair to say . . . that what the National Party Government sought to attain in terms of racial exclusivity and purity . . . the Roman-Dutch 'purists' sought to achieve in respect of South Africa's legal system."[65]

To this day, some judges and academics still attempt to purge delict of English influences.[66] One example is the attempt to purge the English notion of a "duty of care," which straddles and sometimes confuses the two distinct elements in delict of wrongfulness and fault.[67]

REV. 41, 56 (2003) (citing P. Q. R. Boberg, *Oak Tree or Acorn? - Conflicting Approaches to Our Law of Delict*, 83 S. AFR. L.J. 150, 150-75 (1966) [hereinafter Boberg, *Oak Tree*]); C.F. FORSYTH, IN DANGER FOR THEIR TALENTS: A STUDY OF THE APPELLATE DIVISION OF THE SUPREME COURT OF SOUTH AFRICA FROM 1950-1980, at 182-224 (Juta 1985); A.S. Mathews & J.R.L. Milton, *An English Backlash?,* 82 S. AFR. L.J. 31 (1965); G.A. Mulligan, *Bellum Juridicum (3): Purists, Pollutionists and Pragmatists*, 69 S. AFR. L.J. 25, 28-29 (1952); Proculus, *Bellum Juridicum: Two Approaches to South African Law*, 68 S. AFR. L.J. 306, 311 (1951); Proculus, *Redivivus, South African Law at the Crossroads or What Is Our Common Law?*, 82 S. AFR. L.J. 17 (1965); Adrienne van Blerk, *The genesis of the "modernist"--"purist" debate: A historical bird's-eye view*, 47 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 255, 258-64 (1984)). Boberg has a more extensive list in his Law of Delict. BOBERG, DELICT, *supra* note 42, at 27-28.

64. *See infra* text accompanying notes 161-64.

65. Cameron, *supra* note 31, at 50.

66. NEETHLING ET AL., *supra* note 42, at 4 n.12 (arguing that the courts should "follow the English 'law of torts' with circumspection, and only in so far as those legal rules are reconcilable with our own law. The recent tendency of the courts to give preference to our own delictual principles and thus to avoid the injudicious adoption of English law, is thus to be welcomed."). *But see* BOBERG, DELICT, *supra* note 42, at 26-27.

67. A recent South African Law Commission Report corrects R.G. McKerron's use of the notion of a "duty of care" in MCKERRON, *supra* note 43, at 276 and applied by *Da Silva v Coutinho* 1971 (3) SA 123 (A) (S. Afr.) (Jansen, JA), by noting that the use of the term "legal duty" "is more consistent with the contemporary approach to the distinction between unlawfulness and fault." SOUTH AFRICAN LAW REFORM COMMISSION PROJECT NO. 96, REPORT: THE APPORTIONMENT OF DAMAGES ACT 34 OF 1956, at 28 (2003). *See also* NEETHLING ET AL., *supra* note 42, at 149 where the authors state:

> The duty of care approach is foreign to the principles of Roman-Dutch law which form the basis of our law of delict. From a historical point of view the application of these principles must be rejected. An even more important reason to reject the application of a duty of care in our law is

Although the result of this ongoing battle sometimes leads to doctrinal confusion,[68] for the most part, the law of delict in South Africa is coherent; it is mixed without being mixed up.[69] Even if the English and Roman-Dutch approaches to this area of the law were at one time distinct and perhaps even divergent in the results they would produce, those differences have been largely ironed out over numerous years of blended application of the law to the facts of individual cases.[70] Some have gone as far as to say that "the development of the

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> that it is an unnecessary and roundabout way of establishing that which may be established directly by means of the reasonable person test . . . . Moreover, the use of the duty of care doctrine may confuse the test for wrongfulness (breach of a legal duty) with the test for negligence.

68. *See* Christopher T. Roederer & James Grant, *Law of Delict,* 2003 ANN. SURV. S. AFR. L. 297, 313-18, 344-46 (criticizing the decision of Lewis, JA in *Premier, Western Cape v Faircape Property Developers (Pty) Ltd*. 2003 (6) SA 13 (SCA) (S. Afr.), for her confusing use of tort concepts when conducting the analysis of the case under wrongfulness and fault (legal duty and breach of the legal duty)).

69. Paul Farlam & Reinhard Zimmermann, *The Republic of South Africa: South Africa (Report 1)*, *in* PALMER, MIXED JURISDICTIONS, *supra* note 8, at 83, note that although historically jurists have been divided between purists, pollutionists, and pragmatists, the current approach by jurists to the nature and sources of South African law is pragmatic. *Id.* at 133. They note that the primary sources are legislation and precedent, and "beyond these formal sources, English and Roman-Dutch law carry about equal weight." *Id*. C. G. Van der Merwe et al., *The Republic of South Africa: South Africa (Report 2)*, *in* PALMER, MIXED JURISDICTIONS, *supra* note 8, at 145, note that the term pollutionist is pejorative as is the term antiquarian, which is sometimes used instead of purist. *Id.* at 196.

70. *See, e.g.*, NEETHLING ET AL., *supra* note 43, at 4 n.12 (noting that until recently, the English law of torts exercised a very strong influence on the law of delict in South Africa (citing N.J. VAN DER MERWE & P.J.J. OLIVIER, DIE ONREGMATIGE DAAD IN DIE SUID-AFRIKAANSE REG 20-21 (6th ed. 1989)) and that at times the casuistic (or case by case) nature of the English law of torts has blended in nicely with the more general principles of Roman-Dutch delict creating a harmonious unity). Also note that in the area of unlawful competition the courts almost wholeheartedly adopted English Tort law. *Id*. Most every important case in the law of delict includes a comparative survey of common law decisions. The opinion written by Justice Nugent in *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) (S. Afr.), is an excellent example of the use of comparative common law. This case involved the issue of state liability for the failure to take appropriate action to protect its citizenry. *Id.* at 437. Justice Nugent provided a highly informative tour of English, Australian, and New Zealand law on the topic. *Id*. at 442-44; *see also Messina Associated Carriers v Kleinhaus* 2001 (3) SA 868 (SCA) 874-75 (S. Afr.) (Scott JA turning to the law of England and the U.S.A. to support his argument that actual control was not a requirement in vicarious liability cases); *Costa da Oura Rest. (Pty) Ltd. t/a Umdloti Bush Tavern v Reddy* 2003 (4) SA 34 (SCA) at 41 (S. Afr.) (Olivier, JA) (finding the case most on point was a 1949 Australian case, Deatons (Pty) Ltd. v. Flew (1949) 79 C.L.R. 370 ¶ 6 (Austl.)). The court in *Bezuidenhout NO v. ESCOM* 2003 (3) SA 83 (SCA) (S. Afr.), revisited a case directly on point from the 1950s. *Id.* at 88. In approaching that case and in rendering its decision the court noted and addressed the considerable criticism of the judgment and its principles, both in South Africa and abroad.

South African law of delict/tort often, although by no means always, followed the developments in England."[71]

Even though the common law of South Africa is primarily rooted in Roman-Dutch law, the Roman-Dutch counterpart to torts, delict, deals with much of the same terrain as the English common law of tort. In oversimplified form, the law of delict consists of private or civil actions (not founded in equity, contract, family law, or the law of property) for damage to one's body, property, and reputation (as well as dignity, privacy, and other rights) that are wrongfully caused by a defendant with capacity and usually with the requirement of some degree of fault. The elements of a delict include: wrongfulness (or unlawfulness which is roughly equivalent to the notion of a legal duty);[72] generally some form of fault (e.g. negligence or the unreasonable breach of a duty); causation and legal

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Id. at 88-94. The court took on the criticism and contrary decision in the U.S. and U.K. (arguing that they were confused), and finished by drawing attention to the number of cases following the principle of the court's earlier decision in the U.S., England, and even in Germany. *Id*. at 95-96. The concurring opinion of Howie, JA in that case was based in the reasoning of P. S. ATIYAH, VICARIOUS LIABILITY IN THE LAW OF TORTS (1967). *Id*. at 96-97. *See also Premier, W. Cape v Faircape Prop. Developers (Pty) Ltd.* 2003 (6) SA 13 (SCA) at 30 (S. Afr.) (Lewis, JA turning to JOHN G. FLEMING, THE LAW OF TORTS 18 (4th ed.) for the inquiry into wrongfulness); *Fose v Minister of Safety & Sec.* 1997 (3) SA 786 (CC) (S. Afr.) (reviewing the practice of ten different jurisdictions with regard to the awarding of "constitutional punitive" damages).

71. Visser, *supra* note 63, at 60 (citing REINHARD ZIMMERMANN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY 126-28 (2001)). Even if this is slightly exaggerated one study of the number of references to foreign authority in the 1979 law reports by Edwin Cameron and Van Zyl Smit:

> found 193 references to English and Privy Council decisions, 21 to Commonwealth judgments and 11 to American judgments. These references came in 99 of the 684 reported cases (almost 1 in 7). On the other hand, they found references to Roman or Roman Dutch materials in only 39 of the reported cases.

Kate O'Regan, *The Best of Both Worlds? Some Reflections on the Interaction Between the Common Law and the Bill of Rights in Our New Constitution*, 1999 POTCHEFSTROOM ELEC. L.J. 1, 5 n.8 (citing Edwin Cameron & Dirk van Zyl Smit, *Adminstration of Justice, Law Reform and Jurisprudence*, 1979 ANN. SURV. S. AFR. L. 511, 538). O'Regan also notes that Daniel Visser found similar results in 1985. *Id.* at 4 n.6 (citing Daniel Visser, *Daedalus in the Supreme Court - the Common Law Today*, 49 J. CONTEMP. ROMAN-DUTCH L. 127 (1985).

72. There is a good deal of debate in South Africa over whether these concepts are different or the same. Much of the debate in Visser, *supra* note 63, addressed this issue. While there may have been historical differences, recent scholarship tends to show that there really are no major differences. Visser, *supra* note 63, at 56-57. Professor Visser notes that when South African courts gave content to the element of wrongfulness in delict they drew on policy arguments developed in English cases dealing with the element of duty. *Id* at 60.

causation; as well as cognizable harm or damage.[73] This is quite similar to the standard formulation in the U.S. for a negligence claim.[74] Those elements are: the defendant owes the plaintiff a duty of care;[75] the defendant unreasonably breaches the duty of care (fault) causing an unreasonable risk; the defendant's breach is the cause in fact and the proximate cause (often referred to as legal cause in South Africa) of the harm to the plaintiff; and the harm is legally recognized.[76]

Although there are many differences between the law of torts and delict,[77] the similarity between the two can be illustrated by a look at the law of negligence in the U.S. and South Africa. Drawing out these similarities should help provide a basis for understanding the differences that will be addressed in the next section, as well as for understanding the differences in how the law in these two countries is developing, or "working itself pure." The final section below demonstrates that the overall trajectories of the two countries are diverging significantly. While South Africa's law of delict is developing and working itself pure by drawing from South Africa's fountain of justice, namely the spirit, purport and objects of its bill of rights, U.S. tort law has been regressing over the last 20 years or so, largely due to a wave of regressive legislative tort reforms.[78]

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73. *See* NEETHLING ET AL., *supra* note 42, at Part II. *See also id*. at Part III (addressing a number of specific actions with slightly different elements).

74. Sometimes it is formulated as having four elements and sometimes as having five, but in either case, the elements are the same. Richard Epstein's formulation has only four elements because factual causation and legal causation are listed as one element. RICHARD EPSTEIN, TORTS 109-110 (1999). DAN B. DOBB, THE LAW OF TORTS § 114 (2000) has five elements because legal causation and factual causation are listed separately.

75. There has been some level of controversy over the absence of the duty element in the draft Restatement (Third) of Torts. John Goldberg and Benjamin Zipursky have taken the drafters to task for failing to replicate the standard four element test and, in particular, for failing to include the element of duty. John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001). This sparked what W. Jonathan Cardi and Michael D. Green have termed the "duty war." W. Jonathan Cardi & Michael D. Green, *Duty War,* 81 S. CAL. L. REV. 671 (2008). The scholarship through which the combatants are sparring includes the above cited work as well as Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265 (2006) and John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases,* 79 S. CAL. L. REV. 329 (2006).

76. DOBBS, *supra* note 74, § 114.

77. Some South African Scholars argue that delict is governed by general principles or requirements while common law torts consists of several different tort law actions. *See, e.g.*, Van der Merwe, *supra* note 69, at 181-82.

78. Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. VA. L. REV. 647, 684-702 (2008) [hereinafter Roederer, *Tort Law in America*].

1. The Standards for Negligence: Similar, but not Quite the Same

A brief analysis of the law of negligence reveals that although the terminology is somewhat different, the legal framework is virtually the same. While common law systems, including the U.S., use the reasonable man, now reasonable person standard, those following the civil law traditions, including South Africa, use the notion of a *diligens paterfamilias*. The "diligent patron of the family" standard is now completely interchangeable with that of the reasonable person standard in South Africa.[79] While in both countries these standards are objective, they are relativized, or made subjective in both countries with the addition of certain qualifiers. In South Africa, the test is generally articulated as the reasonable person in the position of the defendant.[80] In the U.S., doctors and other professionals are expected to act as a reasonable doctor or professional rather than as the reasonable layperson and those with physical challenges are expected to act with the care that a reasonable person with that challenge would act.[81]

In both systems, the test for negligence involves more than the reasonable foreseeability of harm. It requires that a reasonable person would take steps to avoid causing the harm. The test in South Africa was articulated by South Africa's Justice Holmes in *Kruger v. Coetzee.*[82] The Holmes test asks "whether the reasonable person in the position of the defendant would have foreseen the reasonable possibility of his conduct injuring another and causing him patrimonial loss; and, if so, whether the reasonable person would have taken *steps* to guard against the occurrence of harm."[83] In the U.S., the second part of the Holmes test is sometimes answered using the Learned Hand test from *United States v. Carroll Towing Co.*,[84] which only applies liability if the probability of harm multiplied by the degree of harm outweighs the burden on the defendant to avoid the harm.[85]

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79. *See, e.g.*, NEETHLING, ET AL., *supra* note 42, at 128-129.

80. *See, e.g.*, *id.* at 145. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1 2005), defines negligence as: "[a] Person acts negligently if the person does not exercise reasonable care under all the circumstances."

81. DOBBS, *supra* note 74, § 118.

82. 1966 (2) SA 428 (A) (S. Afr.).

83. *Minister of Safety & Sec. v Mohofe* 2007 (4) SA 215 (SCA) at 218 (S. Afr.) (Lewis, J.) (citing *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430 (S. Afr.)) (emphasis in original), *available at* http://www.supremecourtofappeal.gov.za/judgments/sca_2007/sca07-021.pdf.

84. United States v. Carroll Towing Co., 159 F. 2d 169 (1947).

85. *Id.* at 173. RESTATEMENT (THIRD) OF TORTS, *supra* note 80, adopts something very similar to the Hand formula when it specifies the primary factors for determining negligence, as it states: "[p]rimary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm." *Id.* § 3. The authors of the Restatement justify this approach in the Reporter's Note, Comment (d) by noting that

South African courts routinely balance these three factors, but they rarely articulate the standard as one of a mere cost-benefit analysis. Justice Oliver Schreiner's approach in *Herschel v Mrupe* is illustrative:

> No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened, the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it, even if the chances of its happening were fair or substantial.[86]

Thus, while South African courts balance the cost to the defendant with the risk of harm and severity of harm, these factors are all weighed to determine what a reasonable person would do in that situation. What a reasonable person would do is not equated with what a rational individual who wanted to maximize her or his utility, welfare, or economic well-being would do.[87] Jurisdictions

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"[l]eading torts treatises support the balancing approach to negligence. *Id.* § 3 rep. cmt. d; DOBBS, *supra* note 74, §§ 144-46; 3 FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, THE LAW OF TORTS § 16.9 466–482 (2d ed. 1986); W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 31 (5th ed. 1984). The approach is also highlighted in almost every torts casebook, most of which use Judge Hand's opinion in *Carroll Towing* as a central case. *E.g.*, MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 44 (8th ed. 2006); ROBERT E. KEETON ET AL., TORT AND ACCIDENT LAW 10, 155 (3d ed. 1998).

86. 1954 (3) SA 464 (A) at 477 (S. Afr.), *quoted in Mohofe* SCA 21, at ¶ 12 (Lewis, JA). Sometimes the court articulates four factors to balance: the nature and extent of the risk, the seriousness of the damage, the importance or utility of the wrongdoer's conduct or activity and the cost or difficulty of taking precautions. *See* NEETHLING ET AL., *supra* note 42, at 142-144. *See also* J.C. VAN DER WALT & J. R. MIDLEY, DELICT: PRINCIPLES AND CASES 144 (3rd ed., Durban; Butterworths 1997); *Pretoria City Council v De Jage*r 1997 (2) SA 46 (A) at 55-56 (S. Afr.).

87. Kenneth W. Simons argues that although the drafters of the Draft Restatement (Third) of Torts adopted the Hand formula, that formula can accommodate values of fairness in addition to the value of efficiency. *See* Kenneth W. Simons, *The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency*

within the U.S. have a mixed record of adopting the Hand formula and at least one commentator has questioned whether juries in the U.S. actually apply the standard at all.[88] In fact, punitive damages have been awarded in cases where defendants put lives at risk based on a crass Hand-type cost-benefit analysis.[89]

No treatment of negligence in the U.S. would be complete without addressing the abstract and relative approaches to negligence as formulated in the case of *Palsgraf*.[90] The courts in South Africa are divided on the test for negligence in much the same way that we are in the U.S.[91] One test, the relative

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Values, 54 VAND. L. REV. 901, 902 (2001). Nonetheless, he goes on to argue that the way the Draft is worded could lead people to reduce the Hand formulation to a purely economic efficiency balancing. As a remedy, he proposes that the Hand formula be revised to "employ the language of 'socially recognized advantages and disadvantages' as a signal that social judgments about policy and principle are critical." *Id*. at 925. He goes on to argue that the commentary should state that there is "need for the decisionmakers to make value judgments" and that these should be articulated on a case by case basis. *Id.* at 925-26.

88. Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 648-49 (2003). The Second Restatement formulated the balancing somewhat differently:

> [t]he judgment which is necessary to decide whether the risk so realized is unreasonable, is that which is necessary to determine whether the magnitude of the risk outweighs the value which the law attaches to the conduct which involves it. This requires not only that the actor give to the respective interests concerned the value which the law attaches to them, but also that he give an impartial consideration to the harm likely to be done the interests of the other as compared with the advantages likely to accrue to his own interests, free from the natural tendency of the actor, as a party concerned, to prefer his own interests to those of others.

RESTATEMENT (SECOND) OF TORTS § 283, cmt. e. The authors of the Third Restatement cite this Comment in support of their own formulation. However, the two formulations significantly differ. The Second Restatement formula places the heavy weight of what "value which the law attaches to the conduct" on the scale, while the Draft Third Restatement does not put this on the scale.

89. Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348 (Ct. App. 1981).

90. Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928).

91. *Compare Sea Harvest Corp. (Pty) & Another v Duncan Dock Cold Storage (Pty) Ltd. & Another* 2000 (1) SA 827 (SCA) at 839-40 (S. Afr.) (Scott, JA) (using the relative approach to negligence) *with id.* at 846 (Streicher, JA, concurring) (using the abstract approach). Note that Justice Scott did not argue that he was compelled to adopt the relative approach, as he stated:

> Whether one adopts a formula which is said to reflect the abstract theory of negligence or some other formula there must always be, I think, a measure of flexibility to accommodate the 'grey area' case. . . . Inevitably the answer [to the question of what test is to be used] will

test, follows Justice Cardozo's approach in *Palsgraf*[92] and limits liability to foreseeable plaintiffs.[93] On this test, the duty to act reasonably is relative or relational in that it only applies between defendants and reasonably foreseeable plaintiffs. In South Africa, this approach does not require a subsequent legal causation analysis. The other approach, the abstract approach, follows Justice Andrews' approach in his dissenting opinion in *Palsgraf*.[94] This is referred to as the abstract approach because the duty to act reasonably is not relative to foreseeable plaintiffs or foreseeable harms, but is an abstract duty to act reasonably. In cases where the courts adopt this approach, they also engage in a legal causation analysis.[95] The legal causation analysis in South Africa goes well beyond foreseeability of harm, remoteness, direct cause, adequate cause, and lack of a *novus actus interveniens*. It involves an "all things considered" policy analysis designed to ensure that the court does not impose liability for harms that are too remote, that are unforeseeable or where it would be unreasonable, unfair, or unjust to hold one liable for the result.[96]

In South Africa, one can find cases at the Supreme Court of Appeal level where a majority of the court adopts one or the other approach, or that contain a concurring opinion that arrives at the same result using the other test.[97] In at least one case, the Supreme Court of Appeal used the relative approach and conducted a legal causation analysis.[98] This gave the defendant two opportunities to limit its liability and was a mistake.

> only emerge from a close consideration of the facts of each case and ultimately will have to be determined by judicial judgment.

Id. ¶ 22. Both the majority and concurrence found that the defendant was not liable for a fire that took place at its cold storage facility as a result of fireworks landing on its roof. The majority's decision was based on finding that a fire of this type was not reasonably foreseeable, while the concurrence's decision was based on a finding that the harm was not legally caused by the defendant because the harm was too remote.

92. 162 N.E. 99 (joined by Pound, Lehman, & Kellogg, JJ.). While it is common to view this as the foreseeability test under legal causation in U.S. law, in South Africa it is viewed as a more strict negligence analysis which requires that the actual type and manner of the harm be foreseeable. In South Africa, it obviates the need for a proximate causation analysis. In the U.S., most jurisdictions follow the Andrews abstract approach when it comes to negligence, but they couple this with a legal causation analysis that effectively brings back in the Cordozo analysis.

93. This test is supported by both BOBERG, DELICT, *supra* note 43, at 276-77 and NEETHLING ET AL., *supra* note 42, at 139-40, and was followed in *Sea Harvest Corp.* (1) SA 827. *See Ablort-Morgan v Whyte Bank Farms (Pty) Ltd.* 1988 (3) SA 531 (E) (S. Afr.).

94. *Palsgraf*, 162 N.E. at 102-104 (Andrews, J., dissenting) (joined by Crane & O'Brien, JJ.).

95. *See, e.g.*, *Botes v Van Deventer* 1966 (3) SA 182 (A) (S. Afr.); *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) (S. Afr.).

96. *See, e.g.*, NEETHLING ET AL., *supra* note 42, at 187.

97. *See Sea Harvest Corp.* (1) SA 827.

98. *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) (S. Afr.).

III. DIFFERENCES DURING APARTHEID: THE NEED FOR HARMONIZATION AND HORIZONTAL APPLICATION

As noted in the introduction, during the time of Apartheid, South African law in general, and the law of delict in particular, was not developing to meet the needs of the majority of South Africans. The overall system was blind to justice and thus there was little guidance for working the common law pure. Rather, the dominant private law theme (at least with regards to contracts and delict) was to allow the invisible hand of the market to dominate. During roughly the same period, tort law in the U.S. was developing to meet the needs of the people. During the 1960s and 1970s, tort law in the U.S. was reformed through the development of a number of mechanisms, including class actions, strict liability/products liability, related doctrines like *res ipsa loquitur,* punitive damages, contingency fees (as opposed to loser-pay-costs awards), and consumer protection laws.[99] These mechanisms were made possible, in part, by democratic progress during that period and these developments helped secure the benefits of democratic progress by making it much easier for the average person to obtain justice through the tort system.[100] South Africa did not draw from any of these potential developments during the Apartheid era.[101] It was only after the end of Apartheid that there was any serious development in these areas.[102] Although tracing all of those developments is beyond the scope of this article,[103] the final section below will highlight some of those developments by way of illustrating how South Africa is developing its common law in light of the spirit, purport, and objects of its Bill of Rights.

One problem with Apartheid was that there was very little faith in the system of "justice" or in the impartiality of the judiciary.[104] At the end of

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99. *See* Roederer, *Tort Law in America*, *supra* note 78, at 683-84.

100. *Id.*

101. For a thorough treatment of the developments that took place in the U.S. during this period, but were not followed in South Africa, see Roederer, *Democracy*, *supra* note 6, at 484-96. Note, however, that South Africa did follow the English statutory development of apportioning damages according to the degree of fault in relation to the damage caused. *See* Van der Merwe, *supra* note 69, at 183. Van der Merwe notes that the South African Apportionment of Damages Act 34 of 1956 followed the English Law Reform (Contributory Negligence) Act of 1945 to get rid of the all or nothing rule and the "last opportunity rule." *Id*. Although it can be maintained that South African delict was generally in line with English tort law, even during Apartheid, the U.K. had a number of social safety nets in place during the post WWII era that lessened the need for tort reform. For example: the 1944 Butler Act, which reformed schooling; the Family Allowance Act of 1945; National Health Service Act 1946 (revised in 1948), and the 1946 National Insurance Act. *See, e.g.*, Frank Field, *The Welfare State - Never Ending Reform*, BBC, Aug. 9, 1999, *available at* http://www.bbc.co.uk/history/british/modern/field_01.shtml.

102. *See* Roederer, *Democracy*, *supra* note 6, at 484-96.

103. *See id.*

104. *See, e.g.*, DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH,

Apartheid, the new government did not institute a purging of officials and judges from the prior regime.[105] They did not dismantle the existing system of "justice," but chose to augment it. The transition from Apartheid rule to democratic rule was negotiated, and as part of that negotiation, the parties agreed on an Interim Constitution, Act 200 of 1993, which would last until a democratically elected parliament could draft a Final Constitution.[106] One of the most significant developments in the Interim Constitution was the creation of a new court, the Constitutional Court of South Africa. The new Court was a compromise between keeping things the same and completely revamping the system of justice. Under the Interim Constitution, the Constitutional Court had exclusive and final jurisdiction over constitutional matters, while the Appellate Division had final jurisdiction over all non-constitutional matters.[107] The Interim Constitution's division of labor meant that, for the most part, private law matters would fall under the purview of the Appellate Division, while public law matters would fall under the Constitutional Court.

RECONCILIATION AND THE APARTHEID ORDER 154-158 (1998).

105. The sunset clauses were agreed to by the African National Conference during the negotiations with the National Party in order to bring about a peaceful constitutional revolution in between 1992 and 1993. *See, e.g.*, ZIYAD MOTALA & CYRIL RAMAPHOSA, CONSTITUTIONAL LAW 5 (Oxford Univ. Press 2002); Heinz Klug, *Participating in the Design: Constitution-making in South Africa*, *in* P. ANDREWS & S. ELLMAN, 128, 140-141 (2001). The sunset clauses allowed for power sharing between the African National Congress and the National Party for a period of five years after the first democratic election.

106. The parties also agreed to 34 principles that would guide the drafting of the Final Constitution. These were placed in Schedule 4 to the Interim Constitution. The Interim Constitution specified that the draft final constitution would need to be certified by the Constitutional Court as being consistent with the 34 principles in order to become the Final Constitution. The first draft was rejected in part as being inconsistent with a number of the principles in the first Certification Judgment. *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) (S. Afr.). The second draft was accepted by the Court in *Certification of the Amended Text of the Constitution of The Republic of South Africa* (S. Afr.); 1997 (2) SA 97 (CC) (S. Afr.). *See* Carmel Rickard, *The Certification of the Constitution of South Africa*, *in* ANDREWS & ELLMANN, *supra* note 105, at 224, 286.

107. Patric Mzolisi Mtshaulana, *The History and Role of the Constitutional Court of South Africa*, *in* ANDREWS & ELLMANN, *supra* note 105, at 525, 535. Under the Final Constitution, Act 108 of 1996, South Africa moved to the U.S. model and gave all High Courts, including the Supreme Court of Appeal jurisdiction over constitutional matters, unless they were specifically limited to the Constitutional Court under section 167(4). S. AFR. CONST. 1996, ch. 8, §§ 167(4), 168(3). Under section 167(3), the Constitutional Court can only hear constitutional matters and issues connected with decisions on constitutional matters, but it is the final arbiter of what constitutes a constitutional matter and it is the highest court on all constitutional matters. S. AFR. CONST. 1996, ch. 8, § 167(3)(a)-(c).

Under the Final Constitution, the Appellate Division was renamed the Supreme Court of Appeal,[108] and the High Courts and the Supreme Court of Appeal were given jurisdiction over all but a few constitutional matters reserved for the Constitutional Court.[109] As the Constitutional Court held in *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa & Others*,

> There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[110]

Even after the Final Constitution came into effect and the Court announced that the public law/private law divide was dissolved, the practice of separating these areas of law continued.[111] During the first five years after the official end of Apartheid, there were sweeping changes in constitutional and administrative law, but it is fair to say that there were not wholesale sweeping changes to common law areas of the law, such as torts or contracts. No one sat down and proposed a civil law code for the law of obligations (contract, delict, and unjust enrichment).[112] This is not to say that the drafters of the Final Constitution did not envision changes in this area. However, rather than adopting wholesale change (civil law codification style), they adopted a set of mechanisms that would allow for the common law to develop incrementally and to be brought in line with the Constitution and its values over time.

Before celebrating these mechanisms for harmonizing the common law with the Constitution and its values, it is worth asking whether harmonization is really appropriate, necessary, or desirable. The answer to these questions depends in part on what one's constitution is meant to constitute and whether other areas of the law function well enough without harmonization. In this section I will survey a few constitutional models, namely the pre-liberal Westminster model, the liberal U.S. model, and the post-liberal South African model. Then I will demonstrate the need and desirability of some level of harmonization between the common law and constitution under the U.S. model. Finally, I will demonstrate the relatively

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108. S. AFR. CONST. 1996, ch. 8, §§ 166, 168.

109. S. AFR. CONST. 1996, ch. 8, §§ 168-169. Matters reserved for the Constitutional Court can be found in section 167(4).

110. 2000 (2) SA 674 (CC) at 696 (S. Afr.).

111. To this day, many law schools in South Africa still have separate departments for private law and public law.

112. In civil law countries, contract, delict and unjust enrichment are often grouped under the general heading of the law of obligations.

greater need and desirability of harmonization in the South African case under its constitutional model.

For the bulk of South Africa's history, its constitutions followed a distorted version of the British Westminster model;[113] the role of these constitutions was to constitute the organs of state.[114] Constitutional law, on this model, is primarily concerned with the power and authority of the various branches of government.[115] The model as applied in South Africa resulted in parliamentary supremacy, with no Bill of Rights and no judicial review. Although South Africa had constitutions, they generally could be amended by normal majority vote,[116] and the judiciary could only review laws that were inconsistent with the Constitution on procedural grounds, and not because they violated "rights."[117] This model is pre-liberal as it provides little to no protection for individual liberty.

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113. These models were truncated because, until the 1983 Constitution, non-whites could not vote. Although the 1983 Tri-Cameral Constitution allowed for representation of coloreds and Indians, these representatives were still outweighed by the white representatives. S. AFR. CONST. 1983. In other words, the representation here was largely a facade.

114. South Africa Act, 1909, 9 Edw. 7, c. 9 (Eng.), Constitution Act 32 of 1961, and S. AFR. CONST. 1983 (introducing the Tri-Cameral parliament) were all based on the British model of parliamentary supremacy.

115. Of course, even the British had the Magna Carta (1215) and the English Bill of Rights (1689). The rights recognized in these documents included habeas corpus, freedom from Monarchial interference with the law, freedom of speech in parliament, the right to non-interference in the election of parliament, the right to bear arms, freedom from cruel and unusual punishment and excessive bail, freedom from taxation through royal prerogative, freedom from the standing army in times of peace, and freedom from fine or forfeiture without trial. Note, that many of these "rights" concerned the rights of parliament and/or parliamentarians vis-à-vis the Crown.

116. Some sections of the 1909 Union Constitution were entrenched and required special procedures. Section 152 of the 1909 Union Constitution provided that "Parliament may, by law, repeal or alter any of the provisions of this Act." However, under section 152, the repeal or alteration of the provisions of sections 35 (protecting the non-white franchise in the Cape Province), 137 (protecting the equality of both Dutch and English as official languages), and 152 (the Entrenchment Clause) required passage by both Houses of Parliament sitting together and agreed to by not less than two-thirds of the total number of members of both Houses. The National Party attempted to repeal section 35 without going through the correct procedure; this was struck down in *Harris & Others v Minister of the Interior & Another* 1952 (2) SA 428 (A) (S. Afr.). The requisite vote was later met and the repeal was upheld in *Collins v Minister of the Interior & Another* 1957 (1) SA 552 (A) (S. Afr.).

117. In *Brown v Leyds NO* 1897 (4) Eng. Reports (17) (S.C.) (S. Afr.), Chief Justice Koetze of the Transvaal tried to follow in Justice Marshall's footsteps and introduce American style judicial review (case involving an American mining engineer who claimed damages arising out of the government's failure to issue licenses for gold claims he had staked). President Kruger responded with an emergency session of parliament and the

The American Revolution and the U.S. Constitution were, in part, reactions to the British constitutional model. The U.S. constitutional model was based on classical liberal thinking, and the need to protect individual liberty from the concentrated power of government. It was not enough to have checks and balances between the branches. Thus, the U.S. Constitution not only constitutes the framework for government, but it strives to "form a more perfect union."[118] In trying to "promote the general welfare, and secure the blessing of liberty,"[119] the Constitution sets out rights and limits on government.

This model takes us beyond the separation of powers and checks and balances of government to the vertical relations between the state and individuals. On this model, public law is concerned with the relationships between the levels and branches of government and the vertical relationships between government and the people. As a corollary, horizontal issues between persons are to be governed by private law, for instance contracts and torts, or delict. On this model, private common law predates public constitutional law and has its own separate domain.[120] It is worth querying if there is any good reason for a Constitution to break from this classical liberal mold and apply to relations between individuals. Is there any good reason to bring traditionally private law areas in line with the Constitution or does this simply mix apples and oranges?

If the Constitution is seen as simply one other area of law, or an addendum to existing private law, then one might be skeptical of its reach into this existing domain. On the one hand, this makes sense if the Constitution is a mere contract where individuals agree to give up some of their freedom and power to the state in exchange for the guarantee of certain liberties or rights. If, on the other hand, the Constitution is seen as providing a comprehensive normative system for the state and all of the law within the state, then one might want to have harmony with that value system throughout the legal system. This latter view makes sense if the Constitution is seen as the legal embodiment of the state and the state is "the people" rather than "the sovereign."

The second reason that the horizontal application of rights in a Constitution might be desirable is if there is a real or perceived need for the protection of individuals' rights from both the state and other private persons. If one is truly concerned with rights, and rights, such as the right to vote, to speak, to associate, etc., can be put in jeopardy by individuals and corporations in much the same way that they can be put in jeopardy by the state, then it may be desirable to have the constitutional right go that extra mile, so to speak, and apply to these

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eventual dismissal of Chief Justice Kotze. *See* H. R. HAHLO & ELLISON KAHN, THE UNION OF SOUTH AFRICA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 107-10 (George W. Keeton ed., Juta & Co. 1960).

118. U.S. CONST. pmbl.

119. *Id.*

120. The Ninth and Tenth Amendments make it clear that there are rights and powers that pre-exist the Constitution that are not diminished by the Constitution. U.S. CONST. amends. IX & X.

horizontal relations. Whether there is such a need will depend on both the threats from the private sphere and the existing actions and remedies that exist under private law to address those threats. If private power rivals governmental power and the existing private common law is not up to the task of protecting the freedom, equality, and dignity of individuals, then one may want her or his Constitution to step in and protect those rights or values.[121]

A. The U.S. Model

While South Africa's previous constitutions failed to live up to even the liberal model,[122] the U.S. Constitution largely followed the classical liberal model, at least up until the end of the Civil War. Although as a general rule, the U.S. model still follows the classical liberal model,[123] there are a number of exceptions to this general rule. By looking at the need for horizontal application in the U.S. case, the need, or desire for horizontal application in the South African case should become more apparent.

Prior to the Civil War, constitutional rights were primarily rights against the federal government. The preoccupation at the time of creating the Union was to protect individuals, and to some degree states, from the concentrated power of the federal government. At that time, it was thought that individuals would turn to their state constitutions for protection from individual states. However, the institution of slavery made it painfully clear that everyone could not count on their state to protect their rights. Further, while the institution of slavery was made

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121. South Africa's Final Constitution also provides for positive rights, or socio-economic rights. It is more controversial to hold a person responsible for delivering on these rights. For a thoughtful treatment of the subject see Stephan Ellman, *A Constitutional Confluence: American 'State Action' Law and the Application of South Africa's Socio-economic Rights Guarantees to Private Actors*, *in* ANDREWS & ELLMAN, *supra* note 105, at 444.

122. South Africa's previous constitutions were truncated forms of the British constitutional model, or the Westminster system of parliamentary supremacy. Thus, there was no supremacy clause in previous constitutions and no judicial review. *See, e.g.*, Roederer, *Democracy*, *supra* note 6, at 462 n.55.

123. Even during the heyday of classical liberalism on the bench there were strong dissents. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (the majority invalidated New York maximum hours law for bakers on the grounds that it interfered with freedom of contract and thereby the liberty interest protected by the 14th Amendment; Holmes argued that "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory . . . . It is made for people of fundamentally differing views"). As noted by Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003), just because the Bill of Rights does not bind individuals directly, does not mean that they do not indirectly govern relations between individuals in the U.S. *Id.* at 388-80 (citing by example, *New York Times v. Sullivan,* 376 U.S. 254 (1964)).

possible by state laws regarding property and contract, the state was not the primary actor. Rather, it was individuals who bought, sold, and exploited their fellow humans through the institution of slavery. Thus, it would make little sense to think that the states, particularly in the South at that time, would protect the rights of African-Americans, and it made even less sense to think that slavery and involuntary servitude were only problematic when the government was directly involved.

Thus with the end of the Civil War came the Civil War Amendments: the Thirteenth, Fourteenth, and Fifteenth Amendments. While the language of the Fourteenth Amendment[124] and Fifteenth Amendment[125] made it clear that they applied to the states, the Thirteenth Amendment, which provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction" applied to everyone, states and individuals alike.[126] Further, § 2 of the Amendment, which gives Congress power to enforce the Amendment by appropriate legislation (called the "Enforcement Clause"), gave Congress the power to enact legislation that directly regulated the conduct of private parties. Although the Fourteenth Amendment did not itself apply to individuals, § 5 of the Amendment, like § 2 of the Thirteenth and Fifteenth Amendments, gave Congress the authority to "enforce, by appropriate legislation, the provisions of this article."

Just after the ratification of the Fifteenth Amendment, the Civil Rights Act of 1875 was introduced into Congress and passed some five years later. The Civil Rights Act of 1875 is noteworthy because it attempted to apply the Fourteenth Amendment to individuals by creating both criminal sanctions and a private right of action for the denial of the

> full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.[127]

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124. The Fourteenth Amendment requires due process of law, equal protection of the laws, and prohibits the denial of U.S. privileges and immunities by the states. U.S. CONST. amend. XIV.

125. The Fifteenth Amendment prohibits discrimination in the right to vote "on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV.

126. U.S. CONST. amend. XIII.

127. The introduction to the Act read:

> [w]hereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it

Section 2 of the Act provided for a right of action and a remedy of 500 dollars for every denial, as well as for aiding or inciting such a denial. Section 2 also provided that these offenses would constitute misdemeanors. The legislation was designed to protect individuals from the invasion of their rights by other individuals. It was deemed necessary because southern states, by allowing Caucasian citizens to discriminate in providing public accommodations, were not providing African-Americans with "equal protection of the laws," nor protecting them from the "badges and incidents of slavery," as the Amendments ostensibly required.[128]

Nonetheless, these provisions in the Civil Rights Act of 1875 were struck down as exceeding Congress's powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment in the *Civil Rights Cases*.[129] Justice Bradley, writing for the majority, held that the legislation was neither proper under § 5 of the Fourteenth Amendment nor under § 2 of the Thirteenth Amendment.[130] It failed under § 5 of the Fourteenth because the Amendment allowed only for legislation that regulated state conduct and not private conduct, and it failed under § 2 of the Thirteenth because the only private conduct that could be regulated under that Section was private conduct that amounted to slavery, involuntary servitude, or the "badges and incidents" of slavery.[131] Discriminating in the provision of public accommodations fell in-between; it was neither the state denying equal protection nor individuals practicing slavery or involuntary servitude.

Justice Harlan wrote a powerful dissent in that case, arguing that the Citizenship Clause in the Fourteenth Amendment gave African-Americans equal citizenship and that this required that they not be denied equal civil rights by either the state or private persons. Alternatively, given that places of public accommodation had always been subject to public regulation, their owners were, in effect, agents of the state. Further, he argued that Congress was correct in its determination that discrimination by owners of public accommodations, who were fulfilling public or quasi-public functions, constituted a "badge of servitude."[132]

It would take nearly a century before similar legislation would re-appear and

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> being the appropriate object of legislation to enact great fundamental principles into law . . . .

Civil Rights Act, 18 Stat. 335 (1875).

128. Congress passed a whole range of statutes during this time, including: 42 U.S.C. §§ 1982 (Property Rights of Citizens); 1983 (Civil Action for Deprivation of Rights); 1985(3) (Depriving Persons of Rights or Privileges); 18 U.S.C.A. §§ 241 (Conspiracy Against Rights of Citizens); 242 (Deprivation of Rights Under Color of Law); 28 U.S.C.A. § 1443 (Jurisdiction of Civil Rights Cases).

129. 109 U.S. 3 (1883). This is perhaps why the drafters of these Amendments did not provide for judges to develop common law actions to vindicate these rights.

130. *Id.* at 24.

131. *Id.* at 20-23.

132. *Id.* at 26-62.

the promises of the Thirteenth and Fourteenth Amendments would be realized through the application of the spirit of these Amendments to private persons. Although there was some early progress in the South with newly enfranchised black majorities,[133] that progress came to a halt through violence, intimidation, fraud, and eventual disenfranchisement.[134] From the end of the Civil War up to the 1950s, Black Codes and Jim Crow laws kept African-Americans segregated and in a state of servitude.[135] The Black Codes were written immediately after the Civil War and were intended to continue the practice of slavery and denial of civil rights by other means.[136] The Jim Crow laws, which were passed shortly thereafter, were passed in order to keep non-whites out of white public schools and separated from whites in public places, on public transportation, in hotels, inns, restrooms, and restaurants.[137]

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) started the process of dismantling the Jim Crow laws, but it was the Civil Rights Act of 1964 and the Voting Rights Act of 1965 that did the most to bring this era to an end. According to the Civil Rights Division of the U.S. Justice Department, "[t]he Voting Rights Act, adopted initially in 1965 and extended in 1970, 1975, and 1982, is generally considered the most successful piece of civil rights legislation ever adopted by the United States Congress."[138] It actually delivered on the

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133. Gabriel J. Chin & Randy Wagner note that there was considerable reconstruction progress with regards to voting, civil rights, and education in *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 80-83, 100-05 (2008). Nonetheless, progress in some of these areas was reversed by the end of the century and in others by the end of the first decade of the 20th century. *Id.* at 83-94, 101, 104-105.

134. *Id.* at 80-97. In addition to violence and intimidation, other mechanisms for depriving African-Americans the vote included poll taxes, literacy tests, criminal disenfranchisement, and voter registration.

135. Gabriel J. Chin and Randy Wagner make the important point that in many states in the South, African-Americans constituted a majority. *Id.* at 65-66, 80 (noting that "[i]n 1880, for example, African Americans were an absolute majority in Louisiana, Mississippi, and South Carolina; and were over 40% of the population in Alabama, Florida, Georgia, and Virginia, making African-Americans the largest single voting bloc in those states.").

136. The Civil Rights Act of 1866 which protected the right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, . . ." 14 Stat. 27, § 1 (1866) (current version at 42 U.S.C. §§ 1981-1982 (2006)), was passed in response to the deprivation of these rights in the Black Codes. *See* George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1397 (2008). The Act was passed again in 1870, after the passage of the Fourteenth Amendment. 16 Stat. 140 (1870).

137. *See* Olympia Duhart, *A Native Son's Defense: Bigger Thomas and Diminished Capacity*, 49 HOW. L.J. 61, 65-67 (2005) (describing the pervasive nature of segregation laws under Jim Crow).

138. *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INTRODUCTION TO FEDERAL VOTING RIGHTS LAWS (2008), http://www.usdoj.gov/crt/voting/intro/intro.php. The Voting

Fifteenth Amendment's promise of enfranchising African Americans.[139] The Civil Rights Act of 1964 provided statutory tort actions for discrimination in employment, housing, education, and public accommodations on the basis of race, sex, national origin, and religion.[140] Although Congress relied in part on § 5 of the Fourteenth Amendment in passing the 1964 Civil Rights Act, it was not upheld under the enforcement clauses of these Amendments but under the Commerce Clause in *Heart of Atlanta Motel v. United States* (1964).[141]

The narrow approach to the Thirteenth Amendment Enforcement Clause from the *Civil Rights Cases* was not abandoned until 1968. The Court in *Jones v. Alfred H. Mayer Co*. revived part of the 1866 Civil Rights Act to allow a claim by Mr. and Mrs. Jones against the Mayer Company for refusing to sell housing or land to the couple on the basis of Mr. Jones's race.[142] The applicable section provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[143] Although the Court in the *Civil Rights Cases* interpreted the provision to be limited to acts of discrimination under color of state law,[144] the Court in *Jones* held that private discrimination could constitute a badge or incident of slavery and that the legislation authorized lawsuits for purely private discrimination.[145]

In *Griffin v. Breckenridge*, the Court upheld a claim for damages against private persons under § 1984(3) for conspiracies that interfered with the right to travel.[146] In this case, two white residents in Mississippi stopped the car in which the five black plaintiffs were travelling, forced them out, and proceeded to beat them with clubs.[147]

Rights Act restored the vote to African Americans.

139. The introduction goes on to state, "[t]he Act codifies and effectuates the 15th Amendment's permanent guarantee that, throughout the nation, no person shall be denied the right to vote on account of race or color." *Id.*

140. Civil Rights Act of 1964, 42 U.S.C. §§ 2000 to 2000h-6 (2006).

141. 379 U.S. 241, 249-50 (1964).

142. 392 U.S. 409 (1968).

143. 42 U.S.C. § 1982.

144. *Civil Rights Cases*, 109 U.S. 3, 16-17 (1883).

145. 392 U.S. at 437-44. *See also id.* at 441 n.78 (overturning *Hodges v. United States*, 203 U.S. 1 (1906), which held that the Thirteenth Amendment enforcement clause did not apply to cases not involving slavery).

146. 403 U.S. 88, 97 (1971).

147. The complaint read:

> On July 2, 1966 defendants, acting under a mistaken belief that R. G. Grady was a worker for Civil Rights for Negroes, willfully and maliciously conspired, planned, and agreed to block the passage of said plaintiffs in said automobile upon the public highways, to stop and detain them and to assault, beat and injure them with deadly weapons. Their purpose was to prevent said plaintiffs and other Negro-

In the 1976 case of *Runyon v. McCrary*, the Court upheld 42 U.S.C. § 1981, prohibiting discrimination in the making and enforcement of contracts, in a case involving private schools that publically advertised for applicants, yet refused to consider or admit non-white children.[148] Although the holding in *Runyon* was limited by *Patterson v. McLean Credit Union* (1989),[149] which narrowly construed § 1981 to not apply to post contractual discrimination such as racial harassment on the job, Congress responded by overruling *Patterson* with the Civil Rights Act of 1991.[150]

1. Conclusions from the U.S. experience

As this brief sketch demonstrates, even within the U.S. model, the case for horizontal application in the context of racial discrimination is compelling,[151] and it would appear that by the late 1960s legislative developments had largely brought tort liability in line with the Civil War Amendments.[152]

Outside of the Civil War Amendments and the few rather narrow exceptions to the state action doctrine,[153] there are only two areas of private law

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> Americans, through such force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi, including but not limited to their rights to freedom of speech, movement, association and assembly; their right to petition their government for redress of their grievances; their rights to be secure in their persons and their homes; and their rights not to be enslaved nor deprived of life and liberty other than by due process of law.

Id. at 90.

148. 427 U.S. 160 (1976).

149. 491 U.S. 164 (1989).

150. *See, e.g.*, Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 939-40 (1993)

151. For this reason, the U.S. Supreme Court appears to find exceptions to the state action doctrine more readily in cases involving racial discrimination. *E.g.*, Shelley v. Kramer, 334 U.S. 1 (1948) (involving a state's judicial enforcement of racially restrictive covenants).

152. One may have wanted more, particularly earlier. For instance, although there were some early federal affirmative action cases where legislation was upheld as being remedial under § 5 of the Fourteenth Amendment, Fullilove v. Klutznick, 448 U.S. 448 (1980) (Burger, C.J., plurality opinion), subsequent cases have rejected this view and have held that such legislation must pass strict scrutiny, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

153. There were considerably more cases finding exceptions to the state action doctrine (the doctrine that the Constitution only binds the state) and, thereby, applying constitutional rights to non-state actors during the Warren Court era (1952-1969) than

that have been explicitly harmonized with the Constitution, namely defamation law[154] and punitive damages.[155] Defamation law was only brought into line with the Constitution's First Amendment values in 1964 in *New York Times Co. v. Sullivan.*[156] Prior to that point, defamation law was entirely a state law issue.[157] Prior to *Sullivan*, public officials could sue in defamation for the negligent publication of defamatory materials. The case itself was based on a suit by the police commissioner of Montgomery, Alabama against the New York Times for publishing an advertisement soliciting funds to help Martin Luther King Jr. in his criminal defense in Alabama. Suits like this were common and thought to be a means for suppressing political criticism. Thus, the Court in *Sullivan* held that, because of the chilling effects of the common law rule of defamation on freedom of expression and the robust exchange of ideas and information, the Constitution required that the rule be changed to require proof of actual malice (that the plaintiff knew the statement to be false or acted in reckless disregard of its truth or falsity) before the press can be sued in cases involving public officials.[158]

This degree of horizontal application and harmonization may appear paltry, but that is to be expected when the Constitution itself is drafted as a liberal Constitution. In other words, the reason there is so little harmonization is because there is not a great deal to harmonize. Given that the Constitution was drafted on the classical liberal model and was not designed to apply to private persons in their relations with one another, neither the rights in the Constitution, nor its spirit, objects, and purport are likely to help guide the development of the common law. In fact, outside of the Civil War Amendments, the spirit and purport of the Bill of Rights would appear to urge separate development. The Ninth and Tenth Amendments preserve other rights and powers that are exercised and developed at the state level and through the common law.

Although it can hardly be said that U.S. common law developed in light of the Constitution during this period, it did develop in light of broader democratic values. Those developments took place in the areas of consumer protection, products liability, comparative negligence, and the expansion of duty under the special relationships doctrine.[159] These developments made it easier for average

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during the Burger Court era (1969-1986) and Rehnquist Court era (1986-2005).

154. *See* New York Times v. Sullivan*,* 376 U.S. 254 (1964).

155. *See* Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093 (2005).

156. 376 U.S. 254.

157. In *Sullivan*, the Supreme Court acknowledged that prior to that point, the Constitution did not protect libelous publications. 376 U.S. at 268 (citing Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 & n.10 (1961)).

158. As Justice Brennan, writing for a unanimous court stated, "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive[.]'" *Id.* at 271-72 (quoting N.A.A.C.P. v. Button, 371 U. S. 415, 433 (1963)) (alterations in original).

159. *See* Roederer, *Tort Law in America, supra* note 78, at 683-84.

Americans to access the courts and obtain justice for the harms that they suffered. In other words, the common law was developing to protect the individual from the concentrated power of other persons, both corporate and natural, without the aid of the Constitution.

B. South Africa

While democratic progress was being made in the U.S. post-WWII, South Africa entered the period of Apartheid under National Party rule.[160] Under Apartheid rule, the government started passing legislation to systematically separate the people of South Africa, both physically and legally. Thus, it passed the Population Registration Act 30 of 1950, which classified South Africans as Black, Coloured, Indian, or White; the Group Areas Act 41 of 1950, which segregated cities and towns based on "racial" categories; the Prohibition of Mixed Marriages Act 55 of 1949 which prohibited marriage between Europeans and non-Europeans, the Immorality Act 23 of 1957, which prohibited sexual intercourse between races; and the Black Education Act 47 of 1953, the Indians Education Act 60 of 1965, and the Coloureds Education Act 47 of 1963, which segregated education for non-whites.[161] The NP government also passed laws that required non-whites to carry pass books that showed where they lived, who they worked for, and where and when they could travel for work.[162] Failure to have a passbook or being in a place not authorized under the pass laws could result in arrest and prosecution.

In addition to being denied the franchise, having to live on reservations or on the outskirts of cities, and having inferior health and educational services, the black South African worker was put at a severe disadvantage vis-à-vis her or his employer. Black workers were excluded from collective bargaining under the Labour Relations Act 28 of 1956. Employers were not required to recognize black unions. Black workers were not allowed to strike under the Bantu Labour (Settlement of Disputes) Act 48 of 1953,[163] and many skilled and semi-skilled jobs

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160. This is not to say that there was no racist legislation before the National Party came into power in 1948. Most black South Africans could not vote from the time of the Union Constitution in 1910, and those remaining in the Cape who could vote were struck from the role by the Representation of Natives Act of 1936. The Natives Land Act of 1913 restricted black ownership of land to 13 percent of the territory.

161. For a representative list of racist Apartheid legislation, see, e.g., Johan de Waal, *Constitutional Law*, *in* INTRODUCTION TO THE LAW OF SOUTH AFRICA 58 nn. 8-11 (C.G. Van der Merwe & Jacques E. du Plessis eds., Kluwer Law Int'l 2004).

162. Natives (Urban Areas) Consolidation Act 25 of 1945; Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952; Prevention of Illegal Squatting Act 52 of 1951.

163. MARTIN BRASSEY & GARTH ABRAHAM, EMPLOYMENT AND LABOUR LAW, A1:38 (Juta & Co. 1998).

were reserved for whites.[164] The systematic racial discrimination in the workplace was further entrenched by the absence of legislation providing for fair discipline and dismissal of workers. Under the common law, they could be dismissed for any reason whatsoever.

With this kind of legislation in place, it is no surprise that there was no strict liability or progressive legislation in the area of products liability, no provisions for class action law suits, no provision for contingency fees, much less any civil rights laws that allowed for fee shifting.[165] In South Africa, the rule was that the loser paid the winner's attorney fees. Should a black South African be brave enough to bring an action to Court, she or he would find that there was a separate table for her or his so-called "non-European" advocate.[166]

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164. For example, jobs were reserved under the Mines and Works Act 12 of 1911 and also the Industrial Conciliation Act 28 of 1956. *Id.*; David Woolfrey, Presentation at the University of Bophuthatswana Symposium: New Trends in International Law, *The Application of International Labour Norms to South African Law* (1987), *in* 12 S. AFR. Y.B. INT'L L. 135, 141 (1986–1987).

165. Although there are hundreds of fee-shifting statutes at the state and local level, the most expansive fee-shifting provisions are in the Equal Access to Justice Act, 5 U.S.C. § 504 (2006), which makes attorney fees available to prevailing parties in a whole range of actions against the federal government. *See* Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217 (1994). Fee-shifting statutes make an already pro-plaintiff fee regime even more pro-plaintiff. Note that the U.S. model, which was first articulated in *Arcambel v. Wiseman*, 3 U.S. 306 (1796), under which one generally pays her or his own legal fees, is itself based on the idea of aiding those with less resources to bring claims. The American model gets rid of the specter of being required to pay the defendant's legal fees, if one should lose. *See* Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV 291, 297 (1990) (American Rule "grew out of the notion that requiring each party to pay its own fees would increase access to the courts because impecunious plaintiffs could bring meritorious lawsuits without fear that they would be responsible for paying opposing counsel's fees"); *See also* Martin Patrick Averill, Comment, *"Specters" and "Litigious Fog"?: The Fourth Circuit Abandons Catalyst Theory in S-1 & S-2 by and through P-1 & P-2 v. State Board of Education of North Carolina*, 73 N.C. L. REV. 2245, 2252 (1995) (the American Rule "was originally viewed as a progressive change in the law" for this very reason).

166. The practice of segregating the courtroom so that "non-European" practitioners would have to represent their clients from a different table than that used by "European" practitioners was upheld in an opinion written by Chief Justice Steyn in *R v Pitje* 1960 (4) SA 709 (A) (S. Afr.). Nelson Mandela questioned the neutrality of the justice system when defending himself in the *Rivonia Treason Trials*. As he stated in his argument to have the magistrate in his case recuse himself, "I was developing the point that a judiciary controlled entirely by whites and enforcing laws enacted by a white parliament in which we have no representation, laws which in most cases are passed in the face of unanimous opposition from Africans, cannot be regarded as an impartial tribunal in a political trial where an African stands as an accused." *Black Man in White Court: Nelson Mandela's First Court*

While it is true that the same common law applied to blacks and whites, the common law rules were largely premised on the idea of free and equal people interacting in a free market. As stated above, the idea of freedom of contract prevailed. It prevailed to the extent that the Appellate division in *Lillicrap, Wassenaar & Partners v Pilkington Bros. (S.A.) (Pty.) Ltd.* held that "in general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end, they would define, expressly or tacitly, the nature and quality of the performance required from each party."[167] Whereas in the U.S. one can sometimes contract out of tort liability, here the Court held that if the parties wanted to preserve delictual liability, they should have put it in their contract.[168] The Court went on to contrast the liberal British approach to the duty of care with what it called South Africa's conservative approach to imposing legal duties.[169]

Two of the leading treatises on the South African law of delict claim that the fundamental premise of South African law is that harm or damages rest where they fall and that each person must bear the damage that he or she suffers.[170] Delict, as a subset of the law of obligations, is viewed as that area of law where responsibility to pay damages for the harm is shifted to another. Delictual liability, like liability under contract and unjust enrichment, is seen as an exception to the general rule that one is responsible for her or his own self only.

Thus, unlike in the U.S. where there was progressive legislation to remedy the legacies of slavery and where the common law made progressive strides towards protecting the rights of individuals from other individual persons and corporations, South Africa's private common law did little to protect the rights of the majority of South Africans from the concentrated power of white South African individuals and corporations. Rather, up to the time of the new constitutional dispensation, South Africa's private common law acted to further entrench the inequality and exploitation of the non-white population.

This lack of concern and protection for the majority of South Africans under its private law contrasted sharply with the post-Apartheid constitutions.

Statement - 1962, http://www.anc.org.za/ancdocs/history/mandela/1960s/nm6210.html (last visited May 20, 2009).

167. 1985 (1) SA 475, 500 (A) (S. Afr.).

168. *Id.* at 500-01.

169. *Id.* at 504. *See also Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd.* 2006 (3) SA 138 (SCA) (S. Afr.). Recently the Supreme Court of Appeal affirmed and applied *Lillicrap* (1) SA 475, and held that the plaintiffs did not have a cause of action for pure economic loss resulting from a design defect in their aquariums caused by the respondents. Justice Brand reiterated the dicta that the English approach was liberal with regards to the extension of a duty of care, while South Africa is conservative. *Id.* at 147 (quoting *Lillicrap* (1) SA at 504). The court saw no reason to "rescue a plaintiff who was in the position to avoid the risk of harm by contractual means[.]" *Id.* at 149.

170. NEETHLING ET AL., *supra* note 42, at 3; VAN DER WALT & MIDLEY, *supra* note 86, at 19.

South Africa's new constitutional era saw the full embrace of international human rights. In fact, Makau wa Mutua has described the South African Constitution as "the first deliberate and calculated effort in history to craft a human rights state–a policy that is primarily animated by human rights norms."[171]

If South Africa's new Constitution was founded merely on liberal values and civil and political rights, there would be an argument that the private common law of South Africa would not need to be developed in order to bring it into harmony with its Constitution. However, the values that inform South Africa's Final Constitution, as contained in the Founding Provisions, the Bill of Rights, and the Constitution as a whole, are not limited to the values of liberty or freedom from intervention. Rather, they include the values of dignity, substantive equality, and the elimination of discrimination. The extensive list of rights in the Bill of Rights includes not only traditional, liberal, negative, civil, and political rights, but also positive social, cultural, and economic rights.[172]

1. Conclusions from the South African Experience

As demonstrated above, Apartheid created the need to protect individuals from other private persons and corporations and, by and large, the private common law did not rise to the occasion. It did not develop to protect the majority of South Africans. With the demise of Apartheid and the beginning of the new constitutional era, and a new post-liberal transformative Constitution, this disconnection between the Constitution and private law is unsustainable. To the extent that slavery and post reconstruction laws in the South helped make the case for the need to go beyond the liberal model in the U.S. case, Apartheid makes an even more compelling case for a post-liberal Constitution which allows for the horizontal application and the harmonization of the common law with its fundamental values.

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171. Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 65 (1997).

172. Chapter 2 of the Final Constitution includes substantive rights under the following headings: Equality; Human dignity; Life; Freedom and security of the person; Slavery, servitude and forced labour; Privacy; Freedom of religion, belief and opinion; Freedom of expression; Assembly, demonstration, picket and petition; Freedom of association; Political rights; Citizenship; Freedom of movement and residence; Freedom of trade, occupation and profession; Labour relations; Environment; Property; Housing; Health care, food, water and social security; Children; Education; Language and culture; Cultural, religious and linguistic communities; Access to information; Just administrative action; Access to courts; and Arrested, detained and accused persons. S. AFR. CONST. 1996, ch. 2, §§ 7–39.

IV. THE MECHANISMS FOR DEVELOPING THE COMMON LAW OF SOUTH AFRICA.

There are two mechanisms found in the text for bringing the common law in line with the Constitution.[173] The primary mechanism for this development can be found in § 39(2) of the Final Constitution.[174] Section 39(2) requires that,

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173. As the court in *S. v Thebus & Another* stated, "[t]he superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society." 2003 (6) SA 505 (CC) ¶ 31 (S. Afr.) (footnotes omitted). "That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution." *Id.* The common law itself has always had its own mechanism for development. For instance, contract law in South Africa contains the notions of good faith and public policy, while delictual liability can be expanded or contracted through the elements of wrongfulness (in South Africa this notion is referred to as "the legal convictions of the community"), reasonableness (or negligent breach of a duty), and legal causation (which is a mixture of foreseeability, the lack of a *novus actus interveniens*, and an all-things-considered evaluation of the justice of holding someone liable for a particular result). Under Apartheid, the primacy of the "free market" as regulator of the private domain also meant that South Africa followed what we would refer to as classical contract law, where freedom of contract and *pacta sunt servanda* were the prime public policy concerns, and "buyer beware" was the motto. It also meant that "freedom of contract" trumped over the legal imposition of duty under the law of delict. *See* Alfred Cockrell, *The Hegemony of Contract*, 115 S. AFR. L.J. 286, 287-89 (1998). It is completely possible to develop the common law through these doctrines without reference to the Constitution. For instance, the Supreme Court of Appeal in *National Media Ltd. & Others v Bogoshi* 1998 (4) SA 1196 (SCA), at 1210-11 (S. Afr.) substantially modified the rule laid down by the Apartheid Appellate Division in *Pakendorf en Andere v De Flamingh*, 1982 (3) SA 146 (A) at 156-158 (S. Afr.). *Pakendorf* changed the law of defamation to provide strict liability for media defendants who published defamatory material. *Id.* at 156-58. *Bogoshi* introduced a defense of reasonable publication for media defense based on the idea that *Pakendorf* got the balance of freedom of expression and dignity wrong on the day it was decided, not in light of the changes that took place with the end of Apartheid. *Bogoshi* at 1210-11. The Court in *Bogoshi* did, however, go through an interim section 35(3) analysis, which is the same as the Final Constitution's section 39(2) analysis, and came to the same conclusion. *Id.* The decision in *Bogoshi* was subsequently affirmed as being consistent with a section 39(2) analysis under the final Constitution as well as being consistent with a section 8(3) analysis. *Holomisa v Khumalo & Others* 2002 (3) SA 38 (T) at 68 (S. Afr.). The Constitutional Court affirmed the *Holomisa* decision by using a section 8(3) analysis in *Khumalo v Holomisa*, 2002 (5) SA 401 (CC) at 424-25 (S. Afr.). This was the first case to use section 8(2)-(3). *See* IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK (Juta & Co. Ltd. 2005) (1998) [hereinafter HANDBOOK]. "It is the Constitutional Court's first (and so far only) use of the direct horizontality provisions of the 1996 Constitution. It can be read as bringing to an end the long reign of indirect application of the Bill of Rights to the common law. It holds (although admittedly not in so many words) that the Bill of Rights must be applied directly to the common law wherever appropriate." *Id.* at 51-52.

174. As noted above, there was a similar provision in the interim Constitution. S. AFR.

"[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[175]

This mechanism allows for what is referred to as indirect horizontal application of the Constitution. Horizontal application is the application of the Constitution to conduct between private persons. This can be contrasted with vertical application. The traditional approach takes the vertical view, whereby constitutions are seen as applying to the conduct of the state in order to protect private persons. Section 39(2) is indirect, both because it does not apply specific provisions of the Constitution, but rather invokes the spirit, purport, and objects of the Bill of Rights, and because it does not directly apply itself, but rather applies through the interpretation and development of existing laws regulating individual conduct.

The Constitution also allows for the direct application of the Bill of Rights to individuals under § 8(1) and (2) which provides:

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Contrary to § 39(2), § 8(2) allows for the direct application of the Bill of Rights in the first sense above. It directly applies the Bill of Rights to natural and juristic persons. However, § 8(3) stipulates that the Bill of Rights does not apply directly in the second sense above. Section 8 (3) provides that:

> When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2),
> a) a court in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
> b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

Thus, even when the Court decides to directly apply the Bill of Rights under § 8(2), it is called upon to do so indirectly by consulting existing law, and then developing that law to give effect to the right or rights in question.

(Interim) CONST. § 35(3) 1993.

175. This includes S. AFR. CONST. 1996, as well as S. AFR. (Interim) CONST. 1993.

A. Which Approach is Better?

While some authors have consistently maintained that the direct approach is the best approach,[176] a number of South African scholars have argued that the work of § 8 can be accomplished equally well through the § 39 approach.[177]

In *The Amazing, Vanishing Bill of Rights*, Stu Woolman argues that the Constitutional Court's persistent refusal to directly apply the Bill of Rights under § 8, and its insistence on taking the § 39(2) approach, has resulted in the Court engaging in flaccid, rather than rigorous analysis.[178] He argues that by moving to a vague value analysis under § 39, the Court is effectively sitting as a court of equity, rather than a court of law; that it is undermining the Bill of Rights, rather than giving its provisions clear content; and that it is undermining the rule of law rather than supporting it through the development of clear rules that provide some level of certainty for future cases.[179] Woolman argues that in many recent cases,

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176. *See, e.g.*, Stuart Woolman & Dennis Davis, *The Last Laugh:* Du Plessis v De Klerk*, Classical Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions*, 12 S. AFR. J. HUM. RTS. 361, 365 (1996) [hereinafter Woolman, *The Last Laugh*]; Stu Woolman, *Application*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 31-4 to 31-5 (Stu Woolman ed., Juta & Co., Ltd. 2005) (2002) [hereinafter Woolman, *Application*]; *See also* Stu Woolman, *The Amazing, Vanishing Bill of Rights,* 124 S. AFR. L.J. 762-794 (2007) [hereinafter Woolman, *Vanishing*].

177. *See* HANDBOOK, *supra* note 173, at 50 ("In common law disputes between private parties, a direct application of the Bill of Rights will seldom offer significant advantages for a litigant over an indirect application. In most cases, a litigant will motivate for a change in the common law and it matters little whether a court is persuaded to do so with reference to an argument based on direct or indirect application."); Christopher J. Roederer, *Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law,* 19 S. AFR. J. HUM. RTS. 57, 71 n.75 (2003). In this work, I recognized that the section 8(3) approach is superior from the point of view of guidance to the courts as it calls attention to the possibility that while promoting one rights or set of rights, other rights may be infringed or limited. The section 8(3) approach directs the courts to ensure that any such limitation passes the section 36 requirements. Section 36 requires that any infringement of a right that takes place while developing the law to vindicate another right is "reasonable and justifiable in an open democratic society based on human dignity, equality and freedom." Something like this analysis should also be done in any evaluation of the appropriateness of the development of the common law under section 39 if that development limits other rights. The difference under section 39 is that this limitation analysis is done through the more fluid process of balancing the rights in order to come to the overall spirit, purport and objects of the Bill of Rights. Another difference is that section 39(2) allows for the development of the common law when persons are suing the state, while section 8 does not clearly address developing the common law when applying provisions to the state. It is not self evident that a violation of a right by the state will result in delictual liability. *See, e.g.*, *Zealand v Minister for Justice and & Constitutional Development & Another* 2008 (4) SA 458 (CC) ¶¶ 52-54 (S. Afr.).

178. Woolman, *Vanishing, supra* note 176, at 763.

179. *Id.*

the Constitutional Court's use of, and approach to, § 39(2) has rendered § 8(2) and (3) "surplusage" which contradicts the Court's holding in *Khumalo*.[180] In *Khumalo*, Justice O'Regan held that one could not read § 8(1) in such a way as to render § 8(2)-(3) superfluous, because the Constitution should not be interpreted in such a way "which would render a provision of the Constitution to be without any apparent purpose."[181]

Oddly enough, Woolman endorsed this very reading of §8(1), which would render § 8(2)-(3) superfluous.[182] Justice O'Regan was responding to an argument by the applicant (and endorsed by Woolman) in *Khumalo* to the effect that one could apply the Bill of Rights directly through § 8(1) without the need of going through sections 8(2) and 8(3) at all. The argument was that, since § 8(1) applied all law and bound the judiciary, it could be applied directly to laws governing private conduct in any case before the Court.[183] While Woolman has an argument for why §8(2) is not rendered purposeless by his reading of § 8(1), it is not very convincing, and no court has accepted the argument.[184]

Given that Woolman's approach to § 8(1) has been rejected by the courts, his fallback position is to argue that the correct approach to horizontal application must begin with § 8(2) to determine if a right in the Bill of Rights is applicable.[185] If there are one or more applicable rights, then one should turn to § 8(3) to develop the common law to give effect to the right(s) (assuming that the existing statutory or common law does not adequately give effect to the right(s)). If there is no applicable right in the Bill of Rights, then, and only then, should one turn to § 39(2) to interpret and develop the common law in light of the spirit, purport and objects of the Bill of Rights.[186] He argues that if the Court approaches the issue from the direction of § 39(2) first, there is nothing left for § 8 to do, and this violates the rule of non-redundancy.[187]

The idea, or rule, that one should not interpret a Constitution in such a way that renders provisions without a purpose, perhaps puts too much faith in the rational forethought of the drafters to create coherent and non-redundant text.

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180. *Id.* at 777.

181. *Khumalo & Others v Holomisa* 2002 (5) SA 401 (CC) at 420 (S. Afr.).

182. Woolman, *Vanishing*, *supra* note 176, at 773. *See also* Woolman, *Application, supra* note 172, at 31-64.

183. This would be similar to an expansive interpretation of *Shelley v. Kraemer*, 334 U.S. 1 (1948), whereby anytime the judiciary was involved in deciding what the law was, state action would be implicated.

184. Woolman, *Application, supra* note 176, at 31-64 to 31-65. Woolman's argument is that while section 8(1) applies to law, sections 8(2)-(3) apply to conduct that is not law. Woolman himself acknowledges that the distinction is not philosophically sound. *Id*. at 31-65.

185. Woolman, *Vanishing*, *supra* note 176, at 773, 777.

186. *Id.* at 777.

187. *Id.* at 776.

Here it is worthwhile to heed the lessons of the *bricoleur*.[188] The Interim Constitution included an application section (§ 7), but did not contain anything like § 8(2) or 8(3). It did have the equivalent of § 39(2) in § 35(3). It would have helped if the § 8(2) and (3) application provisions were more clearly integrated with the § 39(2) interpretation provision. While § 8(1) and § 39(1) have little connection, and could easily remain at opposite ends of the Bill of Rights, subsections 2 and 3 were perhaps left too far apart. Both §§ 39(2) and 8(2)-(3) were written from the perspective of ignorance as to their reach. They were intentionally drafted to allow the courts to incrementally fill in the scope of the Bill of Rights application to persons, the common law, and customary law. If one route to application swallows the other and achieves the same results, there is little reason to worry about unrealistic expectations of forethought on the part of the drafters, particularly when the provisions in question were specifically designed to allow for incremental, case-by-case development.

Although Woolman concedes that a "muscular" approach to § 39(2) could hypothetically provide rules of the type that Woolman believes a § 8 analysis is more likely to provide, he argues that the courts have not adopted such a muscular approach.[189] His main argument against allowing § 39 to do all the work is that it renders § 8 largely redundant and that it calls into question the very need for a Bill of Rights.[190] He goes so far as to argue that if § 39(2) and § 8 require the same mode of analysis, then why is a Bill of Rights with specific provisions necessary, as opposed to having a short list of goods based on the values of the Constitution?[191] His answer is that the framers intended to have two separate processes: one that works through the rights; freedoms and rules derived therefrom to determine if law or conduct is invalid; and one that does not require an analysis of whether a right needs to be vindicated nor permits a finding of invalidity.[192]

However, there is nothing in the text that forbids a court from "invalidating" existing law via the § 39(2) process. The only reason one might think that a § 39(2) process should not lead to a declaration of invalidity is if the § 39(2) process did not result in a constitutional ruling, or did not result in a decision that was based on the "supreme law of the Republic." Section 2, the supremacy clause, reads that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations

188. Mark Tushnet devotes several pages to the negotiations and last minute drafting of the South African Constitution in his section on Bricolage. Tushnet, *supra* note 49, at 1296-1300.

189. Woolman, *Vanishing, supra* note 176, at 766 n.6. He does note that only 7 of 23 decisions handed down up to October 2007 have included a direct application of a provision of the Bill of Rights. He does not mention which cases these are.

190. *Id.* at 769.

191. *Id.*

192. *Id.* Note that Woolman does not cite any authority for the view that this is what the drafters intended.

imposed by it must be fulfilled."

Contrary to the Constitutional Court's jurisprudence,[193] Woolman and a number of other authors have argued that the § 39(2) process is not a constitutional law process, but merely a common law process.[194] Woolman's view appears to rest on the idea, which has been endorsed by the Court, that the values enunciated in § 1, of The Founding Provisions do not give rise to enforceable rights.[195] He concludes from this that "rights give rise to rules and enforceable claims. Values do not."[196] Thus, according to Woolman, when the Court collapses the § 8 "rights" approach with a § 39(2) "values" approach, then one abandons legal rules for legal values.[197]

This result, however, does not logically follow. It confuses a mechanism or process for determining what the law is, with the outcome of that process or mechanism. If one reads § 8(2) and § 39(2) closely, the difference in the meaning between these two provisions reduces to a distinction between *giving effect to a right* through the development of the common law, and developing the common law in light of the *spirit, purport, and objects of the Bill of Rights*.[198] Both of these mechanisms can produce legal standards and legal rules. While the founding values themselves do not create legal rules, § 39(2) allows the courts to draw on those values (among others) to develop constitutionally mandated common law rules.

If one approaches the Constitution from the perspective of the South African tradition of reading legislation and constitutions according to the plain

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193. *See Carmichele v Minster of Safety & Sec. & Another* 2001 (4) SA 938 (CC) at 960-62 (S. Afr.); *NM & Others v Smith & Others* 2007 (5) SA 250 (CC) at ¶ 27 (S. Afr.).

194. Woolman, *Vanishing*, *supra* note 176, at 781-83; *see id.* at 782 n.40.

195. *Minister of Home Affairs v Nat'l Inst. for Crime Prevention and the Re-Integration of Offenders & Others* 2005 (3) SA 280 (CC) at 261 (S. Afr.). Section 1 provides a list of the Republic's founding values. It states:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

S. AFR. CONST. 1996, § 1.

196. Woolman, *Vanishing*, *supra* note 176, at 771-72.

197. *Id.*

198. It is important to note that § 8(2)-(3) deals only with the issue of applying the Bill of Rights to a natural and juristic person, while § 39(2) applies also to legislation, customary law and common law, including common-law crimes. Thus, § 39(2) has a much broader scope than § 8.

meaning of the text, then there is a superficial sense in which it makes sense to think that rules that are grounded in constitutional provisions are more constitutional, or more constitutionally firm than rules grounded in constitutional values. Resort to values, from this perspective, has a tradition of being viewed as extra-legal and as a suspect method of interpretation. This superficial privileging of textual provisions over values underlying the text breaks down when the textual provisions of the Constitution direct the interpreter to interpret the text in light of those values and to develop the common law in light of those values. This is precisely what § 39 does.

As noted, Woolman is not alone in holding the view that the § 39(2) process does not give rise to constitutional questions. Johan De Waal et. al. in the fourth edition of THE BILL OF RIGHTS HANDBOOK,[199] held the view that while direct application founds a constitutional cause of action which overrides normal law,[200] indirect application does not override normal law.[201] From this, they adopt the opposite conclusion from Woolman's, namely, they argue that a court should consider indirect application before direct application because the former is less constitutional and thus gives more scope to the legislature to do its democratic job.[202] The idea is that it is always better to decide a case without recourse to the Constitution, if possible, because it leaves the legislature the space to reform the law in accordance with its own interpretation of the Constitution.[203] The authors argue that because the Constitutional Court has the final say on what the Constitution means it should not put a straightjacket on the legislature (at least not in most cases).[204]

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199. HANDBOOK, *supra* note 173.

200. *Id.* at 63.

201. *Id.*

202. *Id.* at 66-67; *see also* HANDBOOK, *supra* note 173, at 50. It may appear that Iain Currie is holding contrary views. On the one hand, he believes that in most common law cases the outcome of § 39(2) and § 8(3) will be the same. However, he also holds on to the view that because § 8 involves "direct" application while section 39(2) involves indirect application, the former is more constitutional and should be avoided. He holds this view because he believes in the doctrine of constitutional avoidance, and because he thinks that § 8 more directly implicates the Constitution. However, since the Constitutional Court has determined that § 39(2) matters are constitutional matters, it makes little sense to hold on to the view that § 8 is "more" constitutional. This is a bit like the idea that one can be more or less pregnant.

203. HANDBOOK, *supra* note 173, at 66-67 (citing *S v Mhlungu* 1995 (3) SA 867 (CC) at ¶ 59 (S. Afr.) (Kentridge, AJ)).

204. *Id.* at 68-69. *See also* Chris Sprigman & Michael Osborne, Du Plessis *is Not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes*, 15 S. AFR. J. HUM. RTS. 25 (1999) [hereinafter *Private Disputes*]; Chris Sprigman & Michael Osborne, *Behold Angry Native Becomes Postmodernist Prophet of Judicial Messiah*, 118 S. AFR. L.J. 693, 699-708 (2001) [hereinafter *Behold Angry*]. Sprigman and Osborne see direct application as settling constitutional issues and thus pre-empting the legislature while indirect application is perceived as being non-constitutional, or simply

Like Woolman, de Waal et al. argue that direct application is about conflict between existing law and the Bill of Rights, which, if it exists, would result in a declaration of invalidity.[205] They claim that indirect application is not about conflict but about avoidance of conflict through interpretation and/or development of the common law.[206]

There is some truth to this view in the context of common law crimes. For example, one can contrast the direct application of the Bill of Rights to the common law crime of sodomy in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (1) BCLR 1517 (CC), with the Court's indirect application of the law to the crime of rape in *Masiya v Director of Public Prosecutions* 2007(5) SA 30 (CC), 2007 (8) BCLR 827. It is true that in the former case, the Court invalidated the common law of sodomy because it was inconsistent with the constitutional rights to dignity and equality, while in the latter case, the Court developed the common law rule with regard to rape by extending it from cases involving intentional, and nonconsensual vaginal penetration to a case involving the intentional, non consensual anal penetration of a woman.[207] The Court even took pains not to extend the rule beyond women to men because the case before the Court involved a female victim; while it indicated in dicta that it would extend the law to include men in a proper case before the Court, it also held that it should be left for the legislature to pass a more general law unless and until such a case was brought before the Court.[208] As the Court noted in *Masiya*, it would make little sense to invalidate the crime of rape for being under-inclusive (for not including nonconsensual anal penetration).[209] As it noted, this would be akin to throwing out the baby with the bath water.[210] The remedy of developing, or amending the law makes much more sense in this context.

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common law and thus amendable by Parliament. *Private Disputes*, *supra* note 204, at 28-30; *Behold Angry*, *supra* note 204, at 696. The authors state that the crucial difference between direct and indirect application is that "where a court applies the Bill of Rights indirectly, its judgment is a non-constitutional ruling, which the legislature may overturn, modify develop or elaborate by ordinary legislation." *Private Disputes*, *supra* note 204, at 28; *see Behold Angry*, *supra* note 204, at 703–04. The authors believe that while in the indirect case there can be a give-and-take relationship between the courts and the legislature in the direct case it is only the courts that speak. *Private Disputes*, *supra* note 204, at 30.

205. HANDBOOK, *supra* note 173, at 64-65.

206. *Id.* at 65.

207. *Masiya v Dir. of Pub. Prosecutions, Pretoria & Another* 2007 (5) SA 30 (CC) at 45-47 (S. Afr.).

208. *Id*. at 46-47, 52. Note that this failure to extend the development of the law to include men was strongly criticized by Chief Justice Langa and Justice Sachs in their concurring in part and dissenting in part decision. *Id.* at 60-65. Woolman likewise criticizes this aspect of the decision. Woolman, *Vanishing*, *supra* note 176, at 767.

209. *Masiya* (5) SA at 45.

210. *Id.*

While *Masiya* does avoid at least one type of conflict and allows the legislature some room to develop the law, it does not follow that the Court's ruling is less rule-like or less constitutional. It would be a mistake to think that its ruling would allow the executive, the legislature, or the courts below to come to a contrary result. If prosecutors refused to prosecute any of these cases, if the courts below refused to apply the new rule to cases before them, or if Parliament passed a law that limited the definition of rape to vaginal penetration only, this conduct and the law passed by parliament would conflict with and would eventually be found to be contrary to the decision in *Masiya.* Further, such laws and conduct would be found to be contrary to the Constitution and as such, would be struck down.

As noted above, Woolman argues that one has a basis in values while the other has a basis in textual rights provisions; and for this reason, he believes that the latter produces constitutional rules, while the former does not. Above I demonstrated that this argument breaks down because the mandate to give effect to the values of the Constitution is included in the Constitution's textual provisions. The distinction also breaks down in the other direction. The provisions in the Bill of Rights, as a general rule, are blends of rules and values.

For example, Woolman strongly criticizes the Court for its approach to the case of *NM & Others v Smith & Others*,[211] which involves the intentional and nonconsensual publishing of the applicant names and H.I.V. statuses in a biography.[212] The Court chose to develop the common law action of invasion of privacy to cover the case in order to promote the spirit, purport, and objects of the Bill of Rights, and in particular dignity and privacy. According to Woolman, the Court should have addressed the rights to privacy and dignity in the Bill of Rights directly, rather than indirectly.[213] What the Court did instead was address the rights to dignity and privacy as articulated in the law of delict, particularly under the *actio iniuriarum*, and in light of the constitutional values of dignity and privacy. The Court also looked to the value of freedom of expression in determining how far it would develop the action and in determining the amount of damages in the case. The Court cited and even quoted the language of the Bill of Rights provisions with regards to privacy,[214] but those provisions had little to offer

211. 2007 (5) SA 250 (CC) (S. Afr.).

212. Woolman, *Vanishing*, *supra* note 176, at 781.

213. *Id.* at 782-83. For some reason Woolman ignores the Court's treatment of the right to freedom of expression at ¶¶ 31, 43 (it also discusses dignity, equality, and freedom at ¶ 49), and especially ¶¶ 66-69, where it noted that that it was not changing one of the elements of the action from a requirement of intent to a mere requirement of negligence, thereby avoiding the chilling effect that such a change would have on freedom of expression through publication. It also addressed the issue of the chilling effect on freedom of expression of large damage awards in such cases at ¶ 73. This, in part, influenced the decision to award 35,000 rand to each of the three plaintiffs (approximately $3,500 at the current exchange rate).

214. *NM* (5) SA at ¶¶ 27 & n. 9.

in the way of creating rules to cover the situation. Section 10, The Right to Human Dignity, reads: "Everyone has inherent dignity and the right to have their dignity respected and protected." Section 14, The Right to Privacy reads:

> Everyone has the right to privacy, which includes the right not to have:
>
> a. their person or home searched;
> b. their property searched;
> c. their possessions seized; or
> d. the privacy of their communications infringed.

Section 10, The Right to Human Dignity provides little to no guidance for fashioning a rule, and the § 14 provisions, which largely deal with searches and seizures, appear to be written primarily with the state in mind. It is unclear how they might apply to persons in this case, or how the common law rules could be developed to vindicate the constitutional right in this case. They do not really address the common law right to privacy, which is much broader than this right. The Right to Human Dignity easily applies to persons, and it already does under the common law action for insult to dignity and to some extent in the action for invasion of privacy.[215] One can also look to other provisions in the Bill of Rights, for instance the provision on safety and security of the person, §12, which includes a right to bodily and psychological integrity. These provisions and rights could be cobbled together and balanced against the right to freedom of expression in § 16, which includes the "freedom to receive or impart information or ideas." These provisions do not, however, provide better guidance in developing a common law rule than the values of the Constitution. In fact, it is not likely possible to interpret and balance these provisions in a way that justifies the creation of a particular rule without recourse to constitutional values.

Although I agree with Woolman that the Court does not do a good job in its § 39 analysis, it is unlikely that it could have done a better job with a § 8 analysis. It is significantly more difficult to try to vindicate these constitutional rights, which were not written with horizontal application in mind,[216] than it is to

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215. Under the law of delict, the right to privacy is an independent action under the concept of *dignitas*. NEETHLING ET AL., *supra* note 42, at 354. There are two forms of the action, one relating to invasion of privacy, and the other relating to disclosure of private facts. *Id.* at 355. The requirements for such actions are abstract since what is required is that the invasion or disclosure was legally wrongful and there was no legal justification for the invasion or disclosure. The law in this area has been decided on a case-by-case basis with very few general rules.

216. *See generally* Penelope E. Andrews, *Incorporating International Human Rights Law in National Constitutions: The South African Experience*, *in* PROGRESS IN INTERNATIONAL LAW 835 (Russell A. Miller & Rebecca M. Bratspies eds., 2008). Although Andrews notes the wide range of international human rights that informed the drafting of the Constitution's Bill of Rights, she nowhere addresses the horizontal application of any of

start where the rights have already been developed to a point with horizontal application in mind. In other words, to the extent that these rights already exist in the private common law, it will often be much easier to develop them in light of the values of the Constitution than to try to develop rules to vindicate constitutional rights that were drafted to apply to the state.

The provisions containing the rights to dignity and privacy are practically the same in the Interim Constitution, and that Constitution was not written with a horizontal application provision.[217] In other words, there was no equivalent provision to § 8(2) although there was an equivalent provision to § 39(2).[218]

The Court did not attempt a § 8 analysis because neither the parties nor the Court below attempted a § 8 analysis.[219] Although Professor Woolman criticizes the Court for its failure to engage in a § 8 analysis, he nowhere attempts such an analysis himself.[220]

Whether Woolman's criticisms are correct or not, the majority of cases addressing conflicts between the common law and the Constitution, since the end of Apartheid, have been § 39(2) cases.[221] According to the Constitutional Court:

> It needs to be stressed that the obligation of courts to develop the common law, in the context of the § 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in § 39(2), read with § 173, that where the common law, as it stands, is deficient in promoting the § 39(2) objectives, the courts are under a general obligation to develop it appropriately.[222]

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these rights.

217. Section 10 of the Interim Constitution, Human Dignity, provided that, "[e]very person shall have the right to respect for and protection of his or her dignity" while section 13, Privacy, provided that, "[e]very person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications." S. AFR. (Interim) CONST. 1993, §§ 10, 13.

218. S. AFR. (Interim) CONST. 1993, § 35(3).

219. The Court in *Carmichele v Minster of Safety & Security & Another* articulated how important it was for arguments of this sort to be developed from the trial court level all the way up through the appellate courts before reaching the Constitutional Court. 2001 (4) SA 938 (CC) at 960-961 (S. Afr.).

220. Having taught South African Constitutional Law and Delict for five and a half years and having written on it for over ten years, I am not sure I could make a decent section 8 argument in this case.

221. Woolman notes that only seven out of twenty-three cases handed down through to October 2007 employ the direct application of specific provisions of the Bill of Rights. Woolman, *Vanishing*, *supra* note 176, at 766 n.6.

222. *Carmichele* (4) SA at 955. Some commentators have argued that not much would change or need to be changed in the private common law. *See, e.g.*, Peter Kutner, *supra* note 57, at 363 ("In tort law and numerous other fields, one should expect a large measure of continuity with the past, not radical alteration of substantive law or applicable legal

B. What Does it Mean to Develop the Common Law in Light of the Spirit, Purport, and Objects of the Bill of Rights?

Now that we have arrived at this mandate, what does it mean? What is the spirit and purport of the Bill of Rights? What are its objects? While the Constitution includes some clues, it nowhere provides a definitive list of its objects and as the word implies, it probably would not be possible to capture its spirit in a definitive list. Although the Constitutional Court, the Supreme Court of Appeal, and various divisions of the High Court of South Africa have attempted to fulfill the mandate in the cases before them, no Court has attempted to comprehensively capture the clauses' meanings. It is probably unrealistic to expect this of the courts. What exists instead are varied judgments grappling with, on the one hand, existing rules, rights and duties under the common law and legislation, and on the other, a range of partially coherent partially competing values (sprit, objects, and purposes) of the Bill of Rights and the Constitution.[223]

The Constitution's textual clues can be found in the Preamble,[224] the

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philosophy."). *See also* P.J. Visser, *Some Remarks on the Relevance of the Bill of Rights in the Field of Delict,* 1998 J. S. AFR. L. 529, 536. It is still common for the Supreme Court of Appeal to ignore the mandate. For instance, Justice Brand in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd.* 2006 (3) SA 138 (SCA) (S. Afr.), followed the Apartheid precedent of *Lillicrap Wassenaar & Partners v Pilkington Bros. (S.A.) (Pty) Ltd*. 1985 (1) SA 475 (A) (S. Afr.), in holding that plaintiffs did not have a cause of action for pure economic loss resulting from a design defect in their aquariams caused by the respondents. Justice Brand addressed the issue in the case as covering the question of extending delictual liability by requiring a duty of care by the plaintiffs, but nowhere even mentioned § 39(2). Rather, the Court reiterated the dicta that the English approach was liberal with regard to the extension of a duty of care, while South Africa is conservative. *Id.* at 148. The court saw no reason to "rescue a plaintiff who was in the position to avoid the risk of harm by contractual means." *Id.* at 149. *See also Media 24 Ltd & Another v Grobler* Case No. 301/04 (SCA) at (June 1, 2005) (S. Afr.) (Farlam, JA), *available at* http://www.constitutionalcourt.org.za/Archimages/4041.pdf (involving the question of vicarious liability of an employer for the sexual harassment of one employee against another in light of the question as to whether the cause of action is precluded by either the Labour Relations Act 66 of 1995); *Lillicrap* (1) SA 475. Although the decision was correctly decided, in my opinion, by distinguishing *Lillicrap* and by not finding the cause of action precluded by the Labour Relations Act, the Court failed to engage section 39(2) or the constitutional values when making its determination. Acting Justice Farlam even adopted part of the holding in *Carmichele v Minister of Safety & Security* 2001 (4) SA 938 (CC) at 957 in order to determine liability, namely, "whether [the applicants] ought reasonably and practically to have prevented harm to the respondent: put differently, was it reasonable to expect [applicants] to have taken positive measures to prevent the harm?" *Media 24*, Case no. 301/04, at 16.

223. It is common for the courts to reduce the "spirit, purport and objects" of the Bill of Rights to values. *See infra* text accompanying notes 254-313 (discussing the notion of an "objective normative value system").

224. The Preamble of the Constitution Reads in part:

Founding Provisions,[225] and Chapter 2, The Bill of Rights. Clues can also be found in the structure of the Constitution and in the history of struggle leading up to its adoption. There are some clues in the academic literature, but for the most part, commentators avoid the question and simply follow the lead of the courts as they work through the application of the clause in the cases before them.

1. Values of the Bill of Rights Versus Values of the Constitution

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> We, the people of South Africa,
> Recognise the injustices of our past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity.
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-
>
> > Heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights;
> > Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> > Improve the quality of life of all citizens and free the potential of each person;
> > and
> > Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

S. AFR. CONST. 1993, pmbl.

225. Sections 1 and 2 of the Founding Provisions read:

> 1. Republic of South Africa
> The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> > a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> > b. Non-racialism and non-sexism.
> > c. Supremacy of the constitution and the rule of law.
> > d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.
>
> 2. Supremacy of Constitution
> This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

S. AFR. CONST. 1993, ch. 1, §§ 1, 2.

While § 39(2) directs courts to develop the common law in terms of the spirit, purport, and objects of the Bill of Rights, there is little to be gained from attempting to distinguish these values and aspirations from those that underlie the Constitution as a whole. In the case of *K v Minister of Safety & Security*,[226] Justice O'Regan looked to the values of the Constitution rather than merely the Bill of Rights in her treatment of developing the common law of vicarious liability under FC § 39(2). As she stated,

> The overall purpose of section 39(2) is to ensure that our common law is infused with the *values of the Constitution* . . . . The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the *values of the Constitution* are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.[227]

Although neither settled, nor exhaustive, the list of values that form the spirit, purport, and objects of the Constitution include:

1) Social justice and the advancement of human rights and freedoms (with an emphasis on human dignity, substantive equality, and non-discrimination);[228]

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226. 2005 (6) SA 419 (CC) (S. Afr.).

227. *Id.* at 439 (emphasis added).

228. Arguably, this set of values is the most important. It is found in the pre-amble, sections 1(a)–(b) and Chapter 2, the Bill of Rights chapter. Justice O'Regan has called it "[t]he leitmotif of our Constitution." *Kaunda & Others v The President of the Republic of South Africa & Others* 2005 (4) SA 235 (CC) at 298 (S. Afr.). In other words, it is the dominant recurring theme. The first mentioned value, "non-discrimination," should be stated as "non-unfair-discrimination," but this is an awkward phrase. Section 1(b) is worded as non-racialism and non-sexism. This may lead one to conclude that unfair discrimination based on race and sex are more strictly scrutinized under the law than other forms of unfair discrimination (as is the case in the U.S). This is not the case. Neither section 9, Equality, nor the jurisprudence of the courts supports this view. Section 9(5) applies the presumption of unfairness to discrimination on any of the 17 listed grounds (race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth). Once discrimination on one of these grounds is established, the burden shifts to the State to

2) Constitutionalism (including the supremacy of the Constitution);
3) The rule of law;
4) Democracy and accountability;
5) Separation of powers and checks and balances;
6) Co-operative government and devolution of power;
7) Transformation;
8) Ubuntu; and
9) Cosmopolitanism.

While it could be argued that some of these values are more concerned with the overall Constitution than the Bill of Rights, they really inform both. The values of the supremacy of the Constitution and the rule of law found in both §§ 1(c) and 2 of the Founding Provisions of the Constitution, as well as the values of accountability, responsiveness, and openness found in § 1(d) are part of the values of the Bill of Rights. Several of the reasons for judicial review are to promote these values, to entrench certain rights, and to place them beyond the influence of simple majority whim. This also promotes the rule of law over the rule of individuals or even the rule of Parliament. The Bill of Rights also provides for accountability, responsiveness, and openness.[229] These values, which underlie what has been referred to as a

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demonstrate that the discrimination was fair.

229. Accountability, responsiveness, and openness have become important values in the interpretation of legislation and the development of the common law under section 39(2), particularly in delict cases involving the state. *See, e.g.*, *K* (6) SA 419, where Justice O'Regan used these values from section 1 to argue that the courts need to address the doctrinal area of vicarious liability as one with normative implications that subject it to scrutiny under § 39 (2). As she states, "[d]enying that the principles bear such normative implications will only bedevil the exercise by rendering inarticulate, premises that in a democracy committed to openness, responsiveness and accountability should be articulated." *Id*. at 432-33. *See also Zealand v Minister for Justice & Const. Dev. & Another* 2008 (4) SA 458 (CC) ¶¶ 24-25 (S. Afr.) (Chief Justice Langa using the fundamental values of freedom and dignity from section 1 in conjunction with the right to freedom and security of the person (which includes the right not to be deprived of freedom arbitrarily or without just cause) to impose delictual liability on the state for holding a prisoner in a maximum security prison for five years after he successfully appealed his conviction); *id.* ¶¶ 24, 30 (the court also using the constitutional norm of accountability to inform its decision to apply delictual liability). *See also Faircape Prop. Developers (Pty) Ltd. v Premier, W. Cape* 2002 (6) SA 180 (C) (S. Afr.) (Davis, J.), *rev'd* 2003 (6) SA 13 (SCA) (S. Afr.)); *Van Duivenboden v Minister of Safety & Sec.* 2001 (4) All SA 127 (C) (S. Afr.) (Davis, J.), *aff'd* 2002 (6) SA 431 (SCA) (S. Afr.) (Nugent, J.); *Rail Commuter Action Group & Others v Transnet Ltd. t/a Metrorail & Others* 2005 (2) SA 359 (CC) (S. Afr.) (holding that Transnet Ltd. had a legal duty to keep its passengers reasonably safe from crime on its trains running in Cape Town), *reversing* 2003 (6) SA 349 (SCA) (S. Afr.) (holding that Transnet Ltd. did not have a legal duty to keep its

"culture of justification," are both hallmarks of the transformation and important objects of the Bill of Rights.[230] The values of the transformation, found throughout the Constitution, are also embodied in the Bill of Rights. Thus, the interpretation of legislation and the development of the common law and customary law that promotes these values also promote the spirit, purport, and objects of the Bill of Rights. When interpreting the Bill of Rights, § 39(1) requires the courts to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom" and to consult international law.[231] Since the interpretation of the Bill of Rights is accomplished by promoting the broader set of values, it would be peculiar to argue that they were not part of the values of the Bill of Rights themselves. Finally, Chapter 2, The Bill of Rights begins with § 7(1), which states that "the Bill of Rights is the cornerstone of democracy in South Africa." Thus, there can be little question that democratic government, accountability, and responsiveness are among the fundamental objects of the Bill of Rights, and its fulfillment requires attention to the values of §§ 1(c) and (d), which, after all, are the founding values of South Africa's democratic republic.

The first four values listed above are found in § 1 of chapter 1, Founding Provisions, but values 5 and 6 are not found anywhere in Chapter 1.[232] The value of cooperative government is most explicitly found in Chapter 3, "Co-operative Government," but the value or principle flows throughout the Constitution.[233] Similarly, the notion of separation of powers and checks and balances, while explicit in the 34 constitutional principles under principle VI,[234] is only implicitly

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passengers safe from crime, for that duty was one placed generally on the shoulders of the police services).

230. The idea that South Africa's new constitutional dispensation is based on a culture of justification is attributable to Professor Etienne Mureinik, who argued that the new dispensation is based on "a culture of justification—a culture in which every exercise of power is expected to be justified." Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 32 (1994).

231. It is optional for the courts to consider foreign law, although it is much more common for them to engage foreign law in their judgments than to consult international law.

232. HANDBOOK, *supra* note 174, at 7 (referring to the "[b]asic principles of the new constitutional order"). This includes only principles 2 through 6 in its list, and although cooperative government and devolution of power is listed, the Chapter does not address them. *Id*. Similarly, in 1 I. CURRIE & J. DEWAAL, THE NEW CONSTITUTIONAL AND ADMINISTRATIVE LAW § 3 (2002), Currie & DeWaal address what they call the "Basic Features of the New Constitutional Order," which includes these same features or principles. Note, they leave out many of the values explicitly mentioned in § 1 of the Constitution.

233. *See* Stuart Woolman, Theunis Roux & Barry Bekink, *Co-Operative Government in* CONSTITUTIONAL LAW OF SOUTH AFRICA, *supra* note 176, at 14-1.

234. "There shall be a separation of powers between the legislature, the executive, and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness." S. AFR. (Interim) CONST. 1993, sched. 4, § IV.

embodied throughout the Final Constitution.

The broad values of social justice and human rights are found in the Preamble § 1, and are entrenched in Chapter 2, the Bill of Rights.[235] Arguably the most foundational values behind those rights are found in § 1, which include the advancement of human rights and freedoms, human dignity, substantive equality,[236] and non-discrimination.

These values are also bound up with the value of transformation.[237] The value of transformation is embodied in the struggle to rid South Africa of Apartheid and its vestiges, and can be found in the text of the Preamble of the Final Constitution. That principle includes the value of moving from a society with an "unjust past" to a "society based on democratic values, social justice, and fundamental human rights," which is concerned with "[i]mprov[ing] the quality of life of all citizens and free[ing] the potential of each person."[238] As the late Justice Mahomed stated in *S v Makwanyane & Another*:

> In some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African

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235. The Bill of Rights is not an exhaustive list of the rights that exist in South Africa. Section 39(3) provides, "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill." S. AFR. CONST. 1996, ch. 2, § 39(3).

236. Section 1(a) refers to "the achievement of equality" which entails the notion of substantive equality. Substantive equality, like "the advancement of human rights," is an affirmative goal and requires more than non-discrimination. The goal of substantive equality is a goal for all persons in South Africa, but of course those persons and groups who have been denied equality or became disadvantaged by unfair discrimination are in the most need of positive steps taken on their behalf. *See* S. AFR. CONST. 1996, ch. 2, § 9(2). The value of transformation is also embodied in these affirmative goals.

237. *See Soobramoney v Minister of Health, KwaZulu-Natal,* 1998 (1) SA 765 (CC) at 771-72 (S. Afr.) (Chaskalson, CJ) ("We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. . . . These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.").

238. G.E. Devenish views the non-justiciable Preamble as setting forth foundational values. G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN CONSTITUTION (1998). He, following Rautenbach and Malherbe, sees the Preamble as part of the principles or values that inform the interpretation of all provisions of the Constitution as well as legislation, customary law and the development of the common law under § 39(2). *Id.* at 32. HANDBOOK, *supra* note 173, at 13-16 and CURRIE & DEWAAL, *supra* note 232, at 82, 89, refers to the preamble when addressing the foundational principles or basic features of democracy. They are not, however, referring to the transformative value mentioned above but the value of a "democratic and open society."

> Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution.[239]

More recently Ngcobo, J. stated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & Others*:[240]

> South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the Interim Constitution, which was designed
>
> > to create a new order . . . [based on equality] in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms.
>
> This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognises the

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239. 1995 (3) SA 391 (CC) at 487 (S. Afr.). Karl Klare has argued that the new South African constitutionalism is a post liberal, redistributive, egalitarian and caring form of constitutionalism. Karl E. Klare, *Legal Culture and Transformative Constitutionalism,* 14 S. AFR. J. HUM. RTS. 146, 150-53 (1998). Klare was writing in the context of the Interim Constitution, but the Final Constitution is no less progressive. *Id.* He notes the following elements found in the Interim Constitution in support of his view: 1) social rights and substantive equality; 2) affirmative state duties; 3) horizontality; 4) participatory; decentralized and transparent governance; 5) multi-culturalism; and 6) historical self-consciousness. *Id.* at 153-55. All of these values can be found in the Final Constitution. *See also* Woolman, *The Last Laugh, supra* note 176; Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. HUM. RTS. 248 (1998); Hugh Corder, *Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985-2000*, 118 S. AFR. L.J. 772 (2001); Arthur Chaskalson, *The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order*, 16 S. AFR. J. HUM. RTS. 193 (2000); Dikgang Moseneke, *The Fourth Bram Fischer Lecture: Transformative Adjudication*, 18 S. AFR. J. HUM. RTS. 309 (2002); Christopher J. Roederer, *Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law*, 19 S. AFR. J. HUM. RTS. 57 (2003); Roederer, *Democracy*, *supra* note 6.

240. 2004 (4) SA 490 (CC) at 523 (S. Afr.) (quoting S. AFR. (Interim) CONST., pmbl.) (*quoted in Kaunda v President of the Republic of S. Afr*. 2005 (4) SA 235 (CC) at 281 n.6 (S. Afr.) (Ngcobo, J., concurring); *id.* at 298 (O'Regan, J., concurring in part and dissenting in part).

> injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental rights.' This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.'

Although there may be considerable dispute over what the principle or value of transformation entails,[241] there is no dispute that it is a value or principle that animates the entire Constitution.[242]

This value is linked with the values embodied in the notion of *ubuntu*, which was a part of the post-amble of the Interim Constitution and is derived from traditional African values.[243] As Pieterse writes, "[t]he Nguni word *ubuntu* represents notions of universal human interdependence, solidarity and communalism which can be traced to small-scale communities in pre-colonial Africa, and which underlie virtually every indigenous African culture."[244] In *S v Makwanyane*,[245] Justice Langa articulated:

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241. What the value entails is largely dependent on what the evil of Apartheid entailed, for this, by definition, is what is in need of transformation. For instance, was the libertarian approach to private law part of the evil or problem, or was the problem the distortion of the libertarian system? My view is that both were part of the evil. My view is that the Apartheid cancer did spread to private law and that to the extent that it did not infect private law, the private law, with its libertarian values, acted as a carrier and facilitator of Apartheid values and policies, perpetuating the inequities of Apartheid. Further, the development of private law was arrested under Apartheid and finally, even if some areas of private law were not infected by the Apartheid cancer, many of the values that animated private law under Apartheid are inconsistent with the values, goals and aspirations of the democratic transformation of South Africa. *See* Roederer*, Democracy, supra* note 6, at 453-496.

242. Frank I. Michelman, in *The Rule of Law, Legality and the Supremacy of the Constitution, in* CONSTITUTIONAL LAW OF SOUTH AFRICA, *supra* note 176, at 11-38 argues, "'[s]upremacy of the Constitution and the rule of law' signifies the unity of the legal system in the service of transformation by, under, and according to law." Thus, according to Michelman, even the values of § 1(c) are infused with the transformational objective.

243. G.E. Devenish treats *ubuntu* as implicit in the foundational values of § 1. DEVENISH, *supra* note 238, at 33. Devenish correctly points out that the Constitutional Court in *S v Makwanyane* has referred to the concept as one that underlies the Constitution and informed its treatment of the issue of the constitutionality of the death penalty throughout the judgment. *Id.* at 33-34. *See S v Makwanyane* 1995 (3) SA 391 (CC) at 446, 480-86, 500-03 (S. Afr.).

244. Marius Pieterse, "*Traditional" African Jurisprudence*, *in* JURISPRUDENCE 438 (Christopher Roederer & Darrel Moellendorf eds., Juta & Co., Ltd. 2004).

245. (3) SA 391.

> [*Ubuntu*] is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[246]

Early in the Court's history, Justice Sachs called on the Court to pay due regard to the values of all sections of South African society when interpreting the Constitution. As he stated:

> In broad terms, the function given to this Court by the Constitution is to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution . . . . Whatever the status of earlier legislation and jurisprudence may be, the Constitution speaks for the whole of society and not just one section. . . . The preamble, post-amble and the principles of freedom and equality espoused in §§ 8, 33 and 35 of the Constitution require such an amplitude of vision . . . . The secure and progressive development of our legal system demands that it draw the best from all the streams of justice in our country . . . . Above all, however, it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice.[247]

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246. *Id.* at 481. Justices Mahomed, *id.* at 488, and Mokgoro, *id.* at 501, also addressed the meaning of the concept, both emphasizing the notion of humaneness and reciprocity, and the latter emphasizing the centrality of the notion to the development of South Africa's democracy.

247. *Id.* at 514. He does go on to note that the task will not be easy, as he states,

> "[r]edressing the balance in a conceptually sound, methodologically secure and functionally efficient way will be far from easy. Extensive research and public debate will be required. Legislation will play a key role; indeed, the Constitution expressly acknowledges situations where legal pluralism based on religion can be recognised (§ 14(3)), and where indigenous law can be applied (§ 181). Constitutional Principle XIII declares that '. . . (i)ndigenous law, like common law, shall be recognised and applied by the courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically

However, since Justice Sachs' attempt in *Makwanyane* to explore the relation of traditional values to the question of the constitutionality of the death penalty, references to indigenous values or traditional values as informing an interpretation of the Constitution are scarce.[248] In fact, when there is a conflict of values, it will most often be the case that traditional values must conform to other values in the Constitution. As Justice Ngcobo stated in *BHE & Others v Magistrate, Khayelitsha & Others*:

> "[o]ur Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society." And indigenous law must reflect this change.[249]

The value of cosmopolitanism is one of the more controversial values on this list.[250] Nonetheless, it is a value that finds expression in the Preamble, the Bill of Rights, and the interpretive provisions of §§ 39 and 233. This value is squarely captured in the opinion of Justice O'Regan in *Kaunda v President of the Republic of South Africa* when she stated:

> our Constitution recognises and asserts that, after decades of isolation, South Africa is now a member of the community of nations, and a bearer of obligations and responsibilities in terms of international law. The Preamble of our Constitution states

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therewith.'"

Id.

248. *But see N.K. v Minister of Safety & Sec.* 2005 (6) SA 419 (CC) (S. Afr.) (O'Regan, J.) (where she drew on these values). In *N.K.*, O'Regan addressed the fact that the notion of vicarious liability is not alien to the South African customary law tradition, for under customary law the Kraalhead is liable for all the delictual acts of inhabitants of the Kraal. *Id.* at 434 n.30. *Dawood & Another v Minister of Home Affairs & Others* 2000 (1) SA 997 (C) (S. Afr.) (Van Herden, J.) refers to the protection of the family as a value underlying and sustaining traditional values. *Id.* at 1034 (citing and quoting from the African Charter on Human and People's Rights, art. 18, ¶ 1 (1986) (providing that "(t)he family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health,"); *id.* art. 18, ¶ 2 ("(t)he State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.")).

249. 2005 (1) SA 580 (CC) at 657 (S. Afr.) (quoting *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC) ¶ 56 (S. Afr.)).

250. There is no South African work that treats this as a foundational value or as part of the spirit, purport and objects of the Bill of Rights.

> that the Constitution is adopted as the supreme law of the Republic so as to, amongst other things, "build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations." Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Courts, when interpreting the Bill of Rights, "must consider international law" and, when interpreting legislation, must prefer any reasonable interpretation consistent with international law over alternative interpretations that are not.[251]

The value of cosmopolitanism came with the transition. It is part of the break from the Apartheid regime which both isolated and marginalized itself and which was marginalized and ostracized by the international community. The re-integration into that community was part of the struggle to rid South Africa of Apartheid; those in the struggle reached out to that community, not only for political support but for the normative support that comes from international human rights. The Constitution directs those interpreting its provisions to look to both international and to comparative law,[252] not as an afterthought, but because international and comparative law inspired the provisions of the text.[253]

C. An Objective Value System, or a Grab Bag of Values?

Given the range of values composing the spirit, purport and objects of the Bill of Rights, it is fair to query whether this forms a coherent set of values or is simply a grab bag of partially cohering and partially conflicting spirits, purports, and objects. The values are many and varied enough that one can take either tack with them. For instance, it is possible to weave all of these values together in the service of one or more conceptions of justice. I think it is easier to weave them together under a social democratic conception of justice[254] than a libertarian

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251. *Kaunda v President of the Republic of S. Afr*. 2005 (4) SA 235 (CC) at 299 (S. Afr.). For a treatment of the Court's use of international law see Devika Hovell & George Williams, *A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa*, 29 MELB. U. L. REV. 95 (2005).

252. S. AFR. CONST. 1996, ch. 2, § 39(b)-(c). Justice Sachs, in his opinion in *S v Makwanyane*, called on the courts to equally consult traditional African values as well as international values when considering whether the death penalty was cruel, inhuman and degrading punishment. 1995 (3) SA 391 (CC) at 487-92 (S. Afr.).

253. *See, e.g.*, Jeremy Sarkin, *The Development of a Human Rights Culture in South Africa*, 20 HUM. RTS. Q. 628 (1998).

254. I have argued that the progressive social democratic reading of the Constitution is not only a plausible reading, but is the best reading of the Constitution in *Race Cards, Academic Debate and Progressive Liberal Scholarship: What is a Liberal Anyway*, 118 S.

conception of justice, but even under historically sensitive libertarian conceptions of justice, the history of Apartheid would justify a significant level of redistribution to make up for the unjust acquisition and transfers of property that took place during Apartheid.[255] In other words, even libertarians would need to recognize the need for transformation. They would, however, have a difficult time with all the provisions on socio-economic rights, positive state duties, and especially horizontal application.[256] The social democrat or progressive would be much more comfortable with these provisions.

Nonetheless, it is always possible to take the route of the critical scholar and argue that it is really all up for grabs and that one can make an equally plausible argument for any number of orderings of these values. For instance, the Founding Provisions make special reference to freedom, equality, and dignity. It is often the case that more than one of these values or principles applies in any given case where the common law is in need of development. Is there a pecking order here? Do some values trump others?[257] There are many ways to balance

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AFR. L.J. 708, 716-717 (2001).

255. For instance, under Robert Nozick's *Conception of Justice in* ANARCHY, STATE AND UTOPIA (1974).

256. This is, in part, why Chris Sprigman and Michael Osborn argue that the answer to the question, "when are rights in the Bill of Rights applicable to persons," is "almost never." *See Private Disputes*, *supra* note 204.

257. Some tout equality as the prime value. For instance, Justice Kriegler stated in *President of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) at 34 (S. Afr.) that "[t]he South African Constitution is primarily and emphatically an egalitarian constitution . . . [I]n the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle." *See also* Klare, *supra* note 239, at 151, 153); Albertyn & Goldblatt, *supra* note 239 (criticizing the Court for substituting dignity for equality in its equality jurisprudence). Others tout dignity as the prime value. For instance, former Chief Justice Arthur Chaskalson acknowledges that there are conflicting values in § 1 that need to be balanced, and his method of balancing them puts dignity in the prime spot. Chaskalson, *supra* note 239, at 201-204. In addition to playing this mediating role, Chaskalson interprets equality, (even substantive equality) as being fundamentally concerned with providing equal dignity. *Id.* at 202-203 & n.44 (citing several Constitutional Court cases involving equality, some Canadian cases, the Declaration on the Elimination of All Forms of Racial Discrimination (1963), and LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1416 (2d ed. 1988)). Acting Justice Cameron, in his concurring opinion in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 35 (S. Afr.), appears to privilege freedom and dignity in his attempt to shed light on why the court was hesitant to import the concept of *boni mores*, or the legal convictions of the community, into the law of contracts. He failed to even mention equality in this analysis. While noting that the concept of *boni mores* is now to be replaced with the "appropriate norms of the objective value system embodied in the Constitution," *id.* at 35 (quoting *Carmichele* 2002 (4) SA at 962), he went on to hold that the concept does not "give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith." *Id.* According to Acting Justice Cameron,

these principles. One way would be to privilege one or more of the values or objects of the Constitution, and to reduce the other values or objects of the Constitution to servicing the other values or objects.[258] Another way would be to simply balance them on a case-by-case basis, in light of the outcome that one desires. Although one can utilize this second approach, and although there are arguments to the effect that this has been the approach of the Constitutional Court, this approach fosters a problematic attitude. One can always find indeterminacy, incoherence, and irrationality in the law. There is always fodder for the *bricoleur*, and while finding and exploiting indeterminacy and incoherence in the law can sometimes be advantageous, especially for lawyers and their clients, it is not generally a laudable goal for the judiciary. It too simplistically reduces law to politics, and undermines any legitimate role for the judiciary.

In this vein, the members of the first Constitutional Court for South Africa (the first court in South Africa to exercise full judicial review) were eager to demonstrate that they were not political actors, but judges applying the law. Thus, as Justice Kentridge stated in *S v Zuma & Others*:

> While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.[259]

Although Justice Kentridge avoided any reference to an "objective value system," the concept surfaced the next year in a concurring opinion written by Justice Mahomed in *Du Plessis & Others v De Klerk & Another*.[260] The notion that South Africa's Constitution contains an "objective value system"[261] draws

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this is because contractual autonomy is said to embody both the values of freedom and dignity, although presumably not equality? He thus concluded that, "[t]he Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom,' and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity." *Id.*

258. In either case, two questions are important, namely: (1) which set and balance of values best coheres with the constitutional text, the history of the struggle leading up to its drafting, and subsequent decisions of the Courts; and (2) which set and balancing of values places the Constitution in the best light.

259. 1995 (2) SA 642 (CC) at 652 (S. Afr.).

260. 1996 (3) SA 850 (CC) (S. Afr.).

261. There is not much to be gained from debating the question of whether or how "objective" the value system underlying the Constitution is in fact. The value system is contested and while I think there are better and worse answers to the question of what

attention to the idea that the Constitution is not merely a grab bag of various subjective values, or merely a forum for various special interests and political parties to fight for their agenda. Rather, the concept indicates that the values in the system are somehow objective and they form a coherent whole – or a system. Since this early articulation, the concept has been used in numerous cases in which the courts have attempted to fulfill the § 39(2) mandate. While no case has yet outlined the parameters of the concept, the cases draw from a whole range of values found within this system.

The Court can be criticized for operating in what Alfred Cockrell describes as the land of rainbow jurisprudence, where all the values of the South African rainbow are seen as functioning together in happy harmony.[262] In the decisions below, the concept is often invoked, but there is little critical assessment of its meaning or scope. Rather than confront the potential conflicts and limits of the numerous values within the system, the courts sometimes appear to simply pick-and-choose the values that support their conclusions.

As noted above, the first indication that the South African Constitution embodied an "objective normative value system" was in the concurring opinion of Mahomed, JP in *Du Plessis*.[263] Although he does not explicitly adopt the view, he implied it when drawing from the German approach to horizontal application. As he stated, "the basic rights entrenched by the GBL [German Basic Law] not only establish subjective individual rights but an objective order of values or an objective value system ('eine objektive Wertordnung')."[264] This objective order of values in the German system "acts as a guiding principle and stimulus for" all three branches of government."[265]

The notion is not mentioned again until *Carmichele v Minister of Safety & Security & Another*[266] where the Court stated:

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values are foundational, there is no "objective" way to settle the question.

262. *See* Alfred Cockrell, *Rainbow Jurisprudence,* 12 S. AFR. J. HUM. RTS. 1 (1996). This is also one of Woolman's criticisms. Woolman, *Vanishing*, *supra* note 176, at 762-63.

263. (3) SA 850.

264. *Id.* at 899 (citing 7 BVerfGE 198 at 203-07; 35 BVerfGE 79 at 112-14; Von Münch/Kunig Von Münch/Kunig Grundgesetz-Kommentar Band 1 (1992) Vorb Art 1-19 Rn 22, 31). Here, Mahomed, JP compared the German approach to horizontal application for the purposes of showing that the Interim Constitution's Bill of Rights should be applied indirectly (in their radiating capacity) to persons, rather than directly. *Id.* at 899-900. He does not explicitly tell us that the interim Constitution embodies an "object value system" nor what that system entails. *Id.* He does point out, as he did in *S v Makwanyane & Another*, that, "'(i)n reaction to our past, the concept and values of the constitutional State, of the 'Regstaat' . . . are deeply foundational to the creation of the 'new order' referred to in the preamble (of the Constitution)." *Id.* at 901 (quoting *Makwanyane* 1995 (3) SA 391 (CC) at 454 (S. Afr.)).

265. *Id.* at 900 (quoting 39 BVerfGE 1 at 41).

266. 2001 (4) SA 938 (CC) (S. Afr.). *Carmichele* involved the question of whether the South African Police and Prosecutor could be held delictually liable for failing to oppose the bail of a dangerous sexual offender (in spite of numerous pleas by concerned

> Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:
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> > The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.[267]

The Court went on to state that "[t]he same is true of our Constitution."[268]

The contrast mentioned by the Court is one between constitutions that embody "defensive subjective rights of the individual" and those that embody an "objective value system." This way of formulating the contrast is peculiar. The contrast is not really between subjective rights and objective values, but a contrast between a constitution (e.g. like that in the U.S.), that primarily focuses on negative liberties, or rights against government interference, and a constitution that envisions government interference based on a system of "objective" values. The contrast is between a purely liberal constitution that at most embodies a thin conception of the good for society,[269] and a fuller blown republican constitution which has a thicker conception of the good at which society is to aim.[270] On the liberal view, the government and court are at most neutral referees, whose job it is to ensure that players play by the rules of the game. On the liberal view, courts should be hesitant to intervene and develop the common law, for this would be like the referee joining the game for one side. Thus, a judiciary with this mindset could avoid the strictures of § 39(2) by simply avoiding developing the common law. However, the Court in *Carmichele* held that § 39(2) not only required that the courts consult this "objective value system" if and when they decided to develop the common law, but that they were required to consult it proactively to see if in fact the common law was in need of development, and then to develop it

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parties) which resulted in a vicious attack by the offender on Ms. Carmichele. *Id.*

267. *Id.* at 961 (quoting 39 BVerfGE at 41); *Du Plessis* (3) SA at 900 (S. Afr.)) (same).

268. *Carmichele* (4) SA at 961 (citing *S v Acheson* 1991 (2) SA 805 (NNHC) at 813 (S. Afr.) (Mahomed, AJ)).

269. *See, e.g.*, John Rawls' use of the notion in A THEORY OF JUSTICE (1971) (note that Rawls is not a classical liberal (not libertarian) in his views, but is a welfare liberal).

270. *See, e.g.*, Habermas, *Three normative models of democracy*, *in* BENHABIB, DEMOCRACY AND DIFFERENCE (ed. 1996) (contrasting liberal and republican theories of democracy with the idea of deliberative democracy).

accordingly.[271] In other words, part of the value system includes courts getting involved in shaping the law to conform to this value system. The Constitution is not merely another doctrinal area of the law, but permeates all the law.

What is the view of "the good" at which the law is to aim? Although the Court does not directly address the question, it at least tells us what it replaces. The Court contrasted the English and the German approach to the constitution, and noted that under the German approach, the German Basic Law has a "radiating effect" on the "general clauses" of the German Civil Code.[272] In South Africa, the idea is that the objective value system embodied in the Constitution should come in to replace or supplement and enrich the existing "policy decisions and value judgments" reflecting "the wishes . . . and the perceptions . . . of the people" and "society's notions of what justice demands,"[273] and this enriched value system should then radiate through the common law. This can be contrasted with the English and American approach which does not generally view the constitution as having a radiating effect on the common law. Rather, constitutional law is often seen as a separate doctrinal area of the law.

In the *Carmichele* case, the Court did not limit itself to the values detailed in the Founding Provisions in deciding if the police had a duty towards Ms. Carmichele. Rather, the Court looked to values found in the Bill of Rights provisions regarding the rights to life, dignity and freedom and security of the person,[274] and in the South African constitutional provisions that point towards a positive duty to prevent harm.[275] The Court found that these duties are accentuated in the case of women, both because of the historically vulnerable place of women within South African society,[276] and because of South Africa's international obligations under the Convention on the Elimination of all Forms of Discrimination Against Women.[277] Thus, the Court draws on a range of foundational values, from transformation for South African women and cosmopolitanism, to the promotion of the various specific rights in the Bill of Rights that are in play.[278] The Court nowhere claimed that the values it drew on

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271. *Carmichele* (4) SA at 955.

272. For instance, through clauses referring to 'good morals,' 'justified,' 'wrongful,' 'contra bonos mores,' 'good faith,' etc. *Id.* at 962.

273. *Id.* (quoting *Minister of Law & Order v Kadir* 1995 (1) SA 303 (A) at 318 (S. Afr.).

274. *Id.* at 957.

275. *Id.* at 957-58. Such positive duties with regards to the police can be found in both the Interim Constitution, the Final Constitution, and in the Police Act. *Id.* at 964-65.

276. *Id.*

277. *See Carmichele* (4) SA at 965 n.67.

278. *Minister of Safety & Sec. v van Duivenboden* 2002 (6) SA 431 (SCA) at 444-46 (S. Afr.) (Nugent, JA) (following *Carmichel*e, and quoting the language of the Court with regards to the Constitution's "objective value system."). Justice Nugent focuses in on the value of providing effective, transparent, coherent and accountable government. *Id.* at 445-46. However, he does not locate these values in § 1(d) of the Final Constitution, but in §

were the only foundational or constitutional values. It made no attempt to address all the values, but rather picked and chose those values that were helpful to resolving the present case.

Similarly, Justice O'Regan in *Kaunda*, states that the Constitution "embodies 'an objective, normative value system' as is asserted in the opening clause of the Constitution . . . ."[279] Although she begins with this reference to § 1, and notes, as did Mahomed JP in *Makwanyane,* that this governs the conduct of all three branches of government,[280] in the paragraphs that follow, she draws on the values of transformation[281] and cosmopolitanism.[282] Both of these values are seen as contributing to the foundational value of protecting and promoting human rights[283] and all of this influenced her assessment as to whether the South African government owed the petitioners a duty to provide them diplomatic protection.[284] They similarly influenced her view that it was appropriate for the Court to issue a declaratory order regarding the government's obligations in this regard.[285]

In *S v Thebus & Another*,[286] Justice Moseneke mentioned the concept of the "objective normative value system" when addressing a challenge to the common purpose doctrine in criminal law (conspiracy law). The complainants argued that by severing the requirement for a causal connection between the defendant and the crime committed, the defendant's rights to freedom and dignity were infringed.[287] In determining if these rights had been infringed, the Court noted that they could only be limited for just cause and that "[t]he meaning of 'just cause' must be grounded upon and consonant with the values expressed in § 1 of the Constitution and gathered from the provisions of the Constitution."[288]

41(1) (the Principles of Cooperative Government) and in the Interim Constitution. *Id.*

279. *Kaunda v President of the Republic of S. Afr*. 2005 (4) SA 235 (CC) at 298 (S. Afr.) (concurring in part and dissenting in part). *Kaunda* involved the issue of whether the Constitution required that the government respond to requests by its citizens for aid when they were arrested outside of the country in Zimbabwe and detained there under conditions that were alleged to violate international human rights norms. *Id.*

280. *Id.*

281. *Id.* at 298-99 (drawing on S. AFR. CONST. 1998, pmbl. & § 1).

282. *Id.* at 299 (drawing on the Preamble, the political history leading up to the Interim Constitution and Final Constitution and South Africa's international law obligations).

283. *Id.* at 298-99. Here, she draws on the Preamble, and sections 1 and 7(2).

284. *Id.* at 313-17.

285. *Id.* at 315.

286. 2003 (6) SA 505 (CC) ¶¶ 27-28 (S. Afr.).

287. *Id.* ¶ 34.

288. *Id.* ¶ 39 (citing *S v Boesak* 2001 (1) SA 912 (CC) at 925-26 n.57 (S. Afr.)). In a similar vein, acting Justices Farlam and Navsa, in their partially dissenting opinion in *Transnet Ltd t/a Metrorail & Other v Rail Commuters Action Group & Other*, used the idea of an "objective value system" to give a broader interpretation to "public interest" than that given by the majority and other concurring opinions. 2003 (6) SA 349 (SCA) at 379 (S. Afr.) (quoting *Carmichele* 2001 (4) SA 938 (CC) at 961, 967, 968 (S. Afr.)).

However, the Court did not explicitly draw from § 1 nor other provisions in the Constitution, but rather alluded to the legitimate interest in deterring criminal conspiracies as a way of deterring crime.[289]

Davis, J in *Geldenhuys v Minister of Safety & Security & Another*,[290] in a case involving the death of an inmate, also drew on the Court's decision in *Carmichele* noting both the need for an effective remedy and for the common law to be developed in accordance with the matrix of the Constitution's objective normative value system.[291] He took pains to emphasize not only the preamble and § 1 language of establishing a society based on human dignity, equality, and freedom as well as "institutions of government which are open, transparent and accountable to the people whom they serve,"[292] but also the transformative values of the Constitution. As he stated:

> The content of this normative system does not only depend on an abstract philosophical inquiry, but rather upon an understanding that the Constitution mandates the development of a society that breaks clearly and decisively from the past and where institutions that operated prior to our constitutional dispensation had to be instilled with a new operational vision based on the foundational values of our constitutional system.[293]

He eloquently recounted how the facts of the present case recall the grim past of the "systematic destruction of human dignity of people who were in the custody of the police."[294] As he stated, "[t]hat was our past and it can no longer be our future, for if it is, then the wonderful aspirations and magnificent dreams contained in the Constitution will turn to post-Apartheid nightmares."[295]

Justices O'Regan and Sachs, in their partially concurring and partially dissenting opinions in *S v Jordan*,[296] confronted the issue of whether provisions of the Sexual Offences Act, making prostitution illegal, were unconstitutional because they embodied and enforced a particular view of private morality.[297] Justices O'Regan and Sachs argued that the "Constitution . . . does not debar the State from enforcing morality" because the Bill of Rights is "founded on deep

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289. *Id.* at 373.

290. 2002 (4) SA 719 (C) (S. Afr.).

291. *Id.* at 728 (citing *Carmichele* 2001 (4) SA at 960-61).

292. *Id.*

293. *Id.* As he later noted, "[t]he transformation of our legal concepts must, at least in part, be shaped by memory of that which lay at the very heart of our apartheid past." *Id.* at 729.

294. *Id.* at 728.

295. *Id*. at 728-29.

296. 2002 (6) SA 642 (CC) (S. Afr.).

297. *Id*. at 682-83.

civic morality,"[298] and that deep civic morality is found in the language from *Carmichele* regarding the Constitution's "objective value system."[299] The upshot is that, "[t]he State has accordingly not only the right but the duty to promote the foundational values of the Interim Constitution." One of the most important of these is to "create a new order in which all South Africans will be entitled to citizenship in a democratic constitutional State in which there is equality between men and women."[300]

The question was not whether the act was created with unconstitutional values, but whether today it could be justified by a set of moral views that engendered the constitutional values.[301] They concluded that, "[i]n our view, the Act does overall continue to pursue an important and legitimate constitutional purpose, namely the control of commercial sex."[302] Further, they were not convinced "that the overall purpose of the legislation is manifestly inconsistent with the values of our new order."[303]

Acting Justice Cameron, in his concurring opinion in *Brisley v Drotsky*,[304] attempted to shed light on why the court was hesitant to import the concept of *boni mores* or the legal convictions of the community into contract law.[305] While noting that the concept is now to be replaced with the "appropriate norms of the objective value system embodied in the Constitution,"[306] that concept does not give the courts "a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith."[307] This is because contractual autonomy is said to embody both the values of freedom and dignity, at least when stripped of its "extreme excesses."[308] He thus concluded that, "[t]he Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom,' and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and

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298. *Id.* at 683.

299. *Id.* (quoting *Carmichele v Minister of Safety & Sec. & Another* 2001 (4) SA 938 (CC) at 962 (S. Afr.)).

300. *Id.* at 683-84 (citing S. AFR. (Interim) CONST. 1993, pmbl.). Chapter 1 of the Interim Constitution was titled "Constituent and Formal Provisions" rather than "Founding Provisions," and while it contained sections on the national symbols, languages and supremacy of the Constitution, it did not contain a section on citizenship, nor on constitutional values as found in S. AFR. CONST. 1996, § 3.

301. *Jordan*, (6) SA at 684, 687-88.

302. *Id.* at 687.

303. *Id.* at 688.

304. 2002 (4) SA 1 (SCA) (S. Afr.).

305. *Id.* at 35. The concept provides the content for the element of wrongfulness in delict.

306. *Id.* (quoting *Carmichele* (4) SA at 962).

307. *Id.*

308. *Id.*

dignity."[309] Although Cameron AJ does not shed much light on the objective value system, it is clear from the discussion that the system does include the values of freedom and dignity as found in §1, but less clear that it includes the value of equality.

Finally, in *S v Ndhlovu & Others*,[310] Acting Justice Cameron again referred to the "norms of the objective value system."[311] Here it was used to determine if the scheme in § 3 of the Law of Evidence Amendment Act 45 of 1988 (which conflated admissibility of hearsay evidence with its reliability) was compatible with those norms and, thus, the Final Constitution. He determined that the statute's fundamental test, the "interests of justice," and the criteria it posits to determine if the test was satisfied, did comport with the Constitution and its values.[312] Cameron AJ noted that, "[i]n making the admission of hearsay evidence subject to broader, more rational and flexible considerations, the 1988 Act's general approach is, moreover, in keeping with developments in other democratic societies based on human dignity, equality and freedom."[313]

CONCLUSION

The cases examined above are less than satisfactory if one is looking for a single comprehensive and coherent fount of justice for working South Africa's common law pure. Nonetheless, it is not only unreasonable, but perhaps undesirable, to expect that the courts and commentators would all agree on a conception of justice that best fits and justifies South Africa's Constitution. Most of these lawyers and judges were educated under a radically different legal system in which spirits, purports and objects were largely eschewed, and where justice was often snuck in at the margins and through various cracks in the system. We should applaud the fact that there is passionate debate about the values that underlie the Constitution and the Bill of Rights, and that so many people are struggling to fulfill the § 39(2) mandate. It is unfortunate that there are still numerous advocates and judges who have not heeded the mandate to scrutinize existing law for its congruence with the spirit, purport, and objects of the Bill of Rights. It must be acknowledged, however, that this is rather lofty and difficult business. As Aristotle cautioned long ago:

> [M]en suppose that it requires no special wisdom to know what is just and unjust, because it is not difficult to understand the things about which the law pronounce. But the actions

309. *Id.* at 36.
310. 2002 (6) SA 305 (SCA) (S. Afr.).
311. *Id.* at 317 (citing *Carmichele* (4) SA at 962).
312. *Id.* at 320.
313. *Id.* (discussing S. AFR. CONST 1996, §§ 39(1)(c) & 36(1)).

> prescribed by law are only accidentally just actions. How an action must be performed, how a distribution must be made to be a just action or a just distribution – to know this is a harder task than to know what medical treatment will produce health.[314]

As I argued above, I think it is more daunting to approach the application of the Constitution directly through § 8 because it forces lawyers and judges to attempt the uncharted territory of trying to determine if, and how, rights, which were largely designed to apply to the state, should apply to private persons.[315] I think it is less daunting to start with the existing common law and to scrutinize it in light of the values embodied in the Constitution.

The conscientious academic, advocate, and judge is not justified in picking and choosing the values that she or he likes the most, feels most comfortable with, or which best support the conclusion that she or he wants. The Constitution directs otherwise. The Constitution challenges those whom it touches to harmonize the Constitution with all of South African law, including private law. This challenge would make little sense if the Constitution was not in harmony with itself, or if it could not be interpreted as embodying a coherent spirit, purport and set of objects. Section 39(2) is premised on that possibility. Thus, the conscientious jurist should attempt, as much as possible, to reconcile all of the values of the Bill of Rights and Constitution when interpreting and developing the law.

These values can be reconciled. They overwhelmingly support a caring, egalitarian, transformative conception of justice that has drawn from the very best of human rights traditions. Civil and political rights are not separate from, nor in conflict with, socio-economic rights. Both sets of rights are advanced when each is advanced. Although freedom and equality are often in tension, properly conceived, they too complement, rather than undermine, one another. Although rights and liberties can be put in jeopardy by the state, the history of Apartheid demonstrates that rights and liberties can also be put in jeopardy by individuals and corporations. The strict separation of private and public domains, as well as the conservative libertarian approaches to "private" law simply are not consistent with the values of the new constitutional order.

In conclusion, it may be asserted that this bucks the trend away from common law legal "developments," or as Fredrick Schauer, puts it, "the failure of the common law."[316] In the U.S., and perhaps around the world, the celebrated

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314. ARISTOTLE, NICHOMACHEAN ETHICS, Book V, ch. 9, 311 (H. Rackham trans., 1934).

315. It should be noted that the bulk of South African lawyers had no exposure to constitutional rights, much less the horizontal application of constitutional rights, during their formal education.

316. *See* Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765 (2004).

role of the common law appears to be waning in favor of statutory law. While in the U.S. judges appear more constrained in their law making powers,[317] South Africa's Constitution is calling on judges to reinterpret and develop the common law anew. While people may have become disillusioned at the notion that judges can somehow "find" the law, or develop it by drawing from a fountain of justice that is "out there," South Africa's Constitution is less utopian. It asks judges to draw from the fountain of justice that informs the spirit, purport, and objects of its Bill of Rights.

317. *See id.*