

# Section 39(2) and political integrity

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## I INTRODUCTION

This essay concerns the following question: can s 39(2) of the South African Constitution<sup>1</sup> be justified by Ronald Dworkin's notion of 'political integrity'?

To understand this question one must know what s 39(2) of the South African Constitution says and what Dworkin's notion of political integrity entails. Section 39(2) holds that 'when developing the common law . . . every court . . . must promote the spirit, purport and objects of the Bill of Rights'. Dworkin's notion of political integrity, most fully developed in his *Law's Empire*,<sup>2</sup> can be summarised in four points. First, political integrity is a property that a community's legal rules possess to a smaller or larger degree. Legal rules must here be understood as legal rules still in force: thus precedents that have not been overruled and statutes that have not been repealed.<sup>3</sup> Secondly, a community's legal rules possess political integrity in so far as they are 'consistent in principle'. The more consistent in principle the rules are, the more political integrity they possess, and the converse.<sup>4</sup> Thirdly, a community's rules are consistent in principle in so far as it is possible to justify them by principles that form a consistent set. As Dworkin puts it: a community lacks integrity if 'it must endorse principles to justify part of what it has done that it must reject to justify the rest'.<sup>5</sup> Fourthly, according to Dworkin, political integrity (in the sense explained) is a political virtue besides justice and fairness. In other words, it matters that a community's legal rules are just and fair (fair in the sense that they were produced by procedures that distribute power in the right way). But that is not all that matters. It also matters that the rules possess political integrity, that the rules are consistent in principle.<sup>6</sup>

Even one who understands the question that I have posed, namely whether s 39(2) can be justified on the ground that it promotes the political integrity of South Africa's legal rules, may nonetheless be puzzled that I should be asking it. Why, it may be wondered, should we look to political integrity in order to justify s 39(2)? After all, as Dworkin

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<sup>1</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

<sup>2</sup> Ronald Dworkin *Law's Empire* (1986).

<sup>3</sup> *Ibid* 217, 227.

<sup>4</sup> *Ibid* 134–5, 164–7, 184.

<sup>5</sup> *Ibid* 184.

<sup>6</sup> *Ibid* at 164–7.

readily acknowledges, political integrity is not the only political virtue. Besides political integrity, there are the well-known and widely-accepted virtues of justice and fairness. Some may be of the view that s 39(2) serves one or both of these virtues. That is, they may feel that, in so far as a court develops the South African common law so as to promote the spirit, purport and objects of the Bill of Rights, it makes South Africa's legal rules more just or more fair. Moreover, some may feel that that is a sufficient justification for s 39(2) and, consequently, that my question has little practical import.

The following three sections of this essay aim to dispel these doubts about the importance of the question that I have posed. The sections show that s 39(2) cannot, in fact, be justified on the basis of either justice or fairness. In section II, a distinction is drawn between two ways in which a rule can be used in order to justify a decision, both of which accord a role to the purpose (or, if you like, the 'spirit, purport and objects') of the rule. I call them 'concretisation' and 'analogical reasoning'. In section III, I demonstrate that s 39(2) requires private common law to be developed in the latter rather than the former fashion, ie, by analogical reasoning rather than by concretisation. Then, in section IV, I explain that, because s 39(2) requires private common law to be developed by analogical reasoning rather than concretisation, it cannot be justified by appeal to justice or fairness.

Sections V and VI of the essay then proceed to investigate whether political integrity can do what justice and fairness cannot, namely justify s 39(2). Section V shows why political integrity might appear to offer a justification. Section VI shows that appearances are deceptive here: it might be that s 39(2) cannot be justified by appeal to political integrity, for it might be that s 39(2) does not in fact promote the political integrity of South Africa's legal rules.

## II PURPOSE, CONCRETISATION, AND ANALOGICAL REASONING

In this section, I explain the difference between concretisation and analogical reasoning in the law, and the different role that purpose plays in each. Much of the explanation is unoriginal. Much of the explanation will, I hope, be uncontroversial. Consider an example used by both H L A Hart and Lon Fuller in their well-known debate, published in the *Harvard Law Review* of 1958.<sup>7</sup> The example is that of a rule forbidding one to drive a vehicle in a park. Assume, as Fuller does, that the purpose of this rule is to prevent either noisy or dangerous activities from taking

<sup>7</sup> H L A Hart 'Positivism and the separation of law and morals' 71 (1958) *Harvard LR* 593; Lon L Fuller 'Positivism and fidelity to law – A reply to Professor Hart' 71 (1958) *Harvard LR* 630.

place in the park.<sup>8</sup> Finally, imagine a park keeper burdened with the task of deciding which activities to prohibit and which to permit.

There are two ways that the park keeper could use the rule in order to justify a decision to prohibit a particular activity. One is to argue as follows:

- (a) The rule prohibits the driving of vehicles in the park.
- (b) In performing the activity in question, one is driving a vehicle in the park.
- (c) Thus, the activity in question is prohibited by the rule.

As Hart points out, it will at times be possible to establish (b), ie, that performing the activity in question is driving a vehicle, simply by relying on the ordinary (or conventional) meaning of the phrase ‘driving a vehicle in the park’.<sup>9</sup> However, as Hart also points out, that will not always be the case. Frequently, one will be able to establish (b), ie, that performing an activity is driving a vehicle, only by relying on further premises.<sup>10</sup> One of those further premises, and it is a further premise that is particularly emphasised by Fuller, is the rule’s purpose.<sup>11</sup> For example, ordinary meaning will probably not enable one to answer the question whether a motorised skateboard is a vehicle. However, given that the purpose of the rule prohibiting vehicles is to prevent noisy or unsafe activities, and that motorised skateboards are both noisy and unsafe, it could be argued that, for the purpose of the rule, motorised skateboards are (to be counted as) vehicles.

I will call the form of reasoning that I have just described ‘concretisation’. Concretisation comes into play when the ordinary (or conventional) meaning of a rule fails us. That is, it comes into play when, in order to apply a rule, we have to rely on further premises, such as the rule’s purpose. However, that does not mean that the ordinary meaning of a rule does not have a role in its concretisation. On the contrary, it is an essential feature of concretisation that ordinary meaning imposes the following twofold constraint. First, it limits the purposes that can be attributed to the rule. Thus, for example, it would be absurd to ascribe to the no-vehicles rule the aim of promoting (rather than preventing) noisy and dangerous activities. Secondly, it limits what can be done in pursuit of those purposes. Thus, for example, holding a ‘rave’ in the park certainly will be noisy. It probably will also be unsafe. Yet one could not hope to justify a prohibition on raves in the park by concretisation of the no-vehicles rule. For concretisation of the no-vehicles rule could only

<sup>8</sup> Fuller (n 7) 663.

<sup>9</sup> Hart (n 7) 607.

<sup>10</sup> *Ibid* 607–8.

<sup>11</sup> Fuller (n 7) 661–9.

justify the prohibition of things that could plausibly be counted as vehicles. Whatever else they may be, raves are not vehicles.

There is a second way in which the park keeper could use the no-vehicles rule in order to justify the prohibition of a particular activity. It goes like this:

- (a) The rule prohibits the driving of vehicles in the park.
- (b) In performing the activity in question, one is doing something very like driving a vehicle.
- (c) Thus, the activity in question should be prohibited.

The above form of reasoning, usually called ‘analogical reasoning’, is well established in the practice of law, and has been much analysed by legal philosophers.<sup>12</sup> Here I wish to make only two observations regarding it. The first is to draw attention to the indispensable role of purpose in analogical reasoning. This is most easily demonstrated by considering (b) in the argument above. It is trite that all objects, all activities, are similar in some respects but dissimilar in others. It follows that (b) cannot be asserting bare similarity between the activity in question and the activity proscribed by the rule, namely driving a vehicle. Rather, (b) must be asserting that the activity in question and the activity proscribed by the rule are similar in a particularly important or relevant respect. But what is to serve as the criterion, or test, of importance here? The answer is, of course, that the criterion is provided by the purpose (or rationale) of the rule. The role of purpose in analogical reasoning explains why the park keeper can, by analogical reasoning, justify banning raves but not nude sunbathing. The purpose of the no-vehicles rule, we said earlier, is to prohibit noisy or unsafe activities. Given this purpose, raves are indeed like vehicles: like vehicles, raves are both noisy and unsafe. However, relative to this purpose, nude sunbathing bears no resemblance to driving vehicles: one can do it in complete silence and with no threat of harm to others.

My second observation has to do with the role of ordinary (or conventional) meaning in analogical reasoning. As we saw earlier, the ordinary meaning of a rule imposes a dual constraint on its concretisation. It limits the purposes that can be attributed to the rule, and it limits what can be done in pursuit of those purposes. The ordinary meaning of a rule also has a role in the case of analogical reasoning. But the role is a lesser one. As in the case of a rule’s concretisation, so too in the case of analogical reasoning from a rule, the rule’s ordinary meaning imposes limits on the purposes that can be attributed to the rule. That explains

<sup>12</sup> For examples of such analysis, see Joseph Raz *The Authority of Law* (1979) 201–6; Cass R. Sunstein *Legal Reasoning and Political Conflict* (1996) 62–100; Larry Alexander *Legal Rules and Legal Reasoning* (2000) 179–227.

why the park keeper cannot, by analogical reasoning, justify a prohibition on nude sunbathing. However, unlike in the case of a rule's concretisation, in the case of analogical reasoning from a rule, the rule's ordinary meaning places no limits on the means by which those purposes can be pursued. That is why the park keeper can, by analogical reasoning, justify a prohibition on raves.

### III SECTION 39(2)

My aim in this section is to show that s 39(2) of the South African Constitution requires South African private common law (ie judge-made law regulating relations between private parties) to be developed by analogical reasoning from the Bill of Rights. Let me straight away concede that this reading of s 39(2) is not compelled by the ordinary meaning of the section. Section 39(2) says only that the common law is to be developed so as to promote the purpose(s) of the Bill of Rights. As we saw in the previous section of this essay, one can promote the purpose of a rule not only by analogical reasoning from, but also by concretisation of, the rule. One would therefore do no violence to the language of s 39(2) if one were to reject my reading of the section, and insist instead that it requires only that South African common law be developed by concretisation of the Bill of Rights. However, as I demonstrate below, though s 39(2) on its own does not compel my view as to what it requires, a contextual reading of the section does compel it. Once s 39(2) is viewed in the context of the Constitution as a whole (in particular s 8 thereof) and of the interim Constitution that preceded it (in particular s 35(3) thereof),<sup>13</sup> the view that it requires private common law to be developed by analogical reasoning from the Bill of Rights becomes hard to resist.

Let me start with s 35(3) of the interim Constitution, and with a claim about it that should be uncontentious. It is that s 35(3) requires only that private common law be developed by analogical reasoning from, and not that it be developed by concretisation of, the Bill of Rights. The substantiation for this claim is as follows:

- (a) Section 35(3) requires that the development of private common law be, in some way or other, influenced by the 'spirit, purport and objects' of the interim Constitution's Bill of Rights.
- (b) Private common law consists of rights against private parties rather than rights against the state. That is true by definition.
- (c) The interim Constitution's Bill of Rights consists of rights against the state rather than rights against private parties. That was

<sup>13</sup> Constitution of the Republic of South Africa Act 200 of 1993.

established by the Constitutional Court in the case of *Du Plessis v De Klerk*.<sup>14</sup>

- (d) Both concretisation of, and analogical reasoning from, the interim Constitution's Bill of Rights would take account of its 'spirit, purport and objects'. That is entailed by the explanation in the previous section of this essay.
- (e) However, since the interim Constitution's Bill of Rights consists only of rights against the state, its concretisation can only justify further rights against the state. It cannot justify any rights against private parties. Thus, concretisation of the interim Constitution's Bill of Rights cannot justify any development of private common law.
- (f) By contrast, notwithstanding that the interim Constitution's Bill of Rights consists only of rights against the state, analogical reasoning from the Bill of Rights can justify rights against private parties. A right against a private party could resemble, or be like, a right against the state. For despite their obvious differences, chief among them being the fact that one imposes duties only on the state and the other only on private parties, they could have a common purpose, namely to protect the identical interest(s) of the right-holder.
- (g) Thus, s 35(3) must be understood to require that private common law be developed by analogical reasoning from, rather than by concretisation of, the interim Constitution's Bill of Rights.

In the recent case of *Carmichele v Minister of Safety and Security*, the South African Constitutional Court stated that 'there is no material difference between s 35(3) of the IC [interim Constitution] and s 39(2) of the [present] Constitution'.<sup>15</sup> If the Court is right about that, and if I am right about s 35(3), then I must also be right in claiming that s 39(2) of the present Constitution requires private common law to be developed by analogical reasoning. But is the Court right? Certainly, the wording of the two sections is roughly the same. That creates a strong case for the view that the sections have the same meaning. But it is not a conclusive case. For the contexts within which the two sections appear are dramatically different. As noted, the Bill of Rights in the interim Constitution only contained rights against the state. The same is not true of the present Constitution's Bill of Rights. Section 8 of the present Constitution unambiguously states that certain rights in the Bill of Rights are rights also against private parties. Given these different contexts, it is possible that s 39(2) differs in meaning from s 35(3), notwithstanding the similarity in their wording. It is possible, in other words, that s 35(3)

<sup>14</sup> 1996 (3) SA 850 (CC) at 877B–E.

<sup>15</sup> 2001 (4) SA 938 (CC) at 953I.

requires private common law to be developed by analogical reasoning, but that s 39(2) requires private common law to be developed in some other way.

Further reflection on s 8, and its implications, shows that this possibility does not in fact obtain. Indeed, further investigation shows that, far from s 8 providing a reason against viewing s 39(2) as requiring private common law to be developed by analogical reasoning from the Bill of Rights, it provides a reason for so viewing it. Section 8 does not only state that certain rights in the Bill of Rights are rights against private parties. It also states that private common law must be developed 'in order to give effect to' those rights.<sup>16</sup> The only way that this could happen is by concretisation of those rights. That is, s 8 in effect requires that private common law be developed by concretisation of those rights in the Bill of Rights that are rights against private parties. Of course, if s 8 requires private common law to be developed by concretisation of those rights in the Bill of Rights that are rights against private parties, then s 39(2) cannot be understood to require the same. That would render s 39(2) superfluous. That raises the question: if s 39(2) does not require private common law to be developed by concretisation of rights in the Bill of Rights that are rights against private parties, what does it require? It cannot require that private common law be developed by concretisation of rights in the Bill of Rights that are rights against the state. As we have already shown, that is an impossibility. The only possibility that remains is the one that I have suggested. Section 39(2) requires private common law to be developed by analogical reasoning from the Bill of Rights.

It is useful, I think, to distinguish two ways that private common law might be developed by analogical reasoning from the Bill of Rights. One is where the analogical reasoning proceeds from a right in the Bill of Rights that is operative against the state only. A right of this kind cannot of course influence the development of private common law by way of concretisation. For concretisation of a right operative only against the state cannot yield duties on private parties, and duties on private parties are the essence of private common law. However, a right that holds only against the state may influence the development of private common law by way of analogical reasoning. For it might be that, even though the right imposes duties only on the state, it serves a purpose that would also justify the imposition of certain duties on private parties.

I should immediately caution against a possible confusion here. It might be thought that, if a right serves a purpose that also justifies the imposition of certain duties on private parties, then that right cannot truly

<sup>16</sup> In s 8(3)(a).

be a right operative only against the state. Instead, the right falls to be identified as a right against private parties in terms of s 8(2). It is thus a right that is to influence the development of private common law by concretisation (in terms of s 8(3)(a)) rather than by analogical reasoning (in terms of s 39(2)). This is false, however. It would have been true, had the purpose underlying a right in the Bill of Rights been the sole determinant of whether the right is operative only against the state or also against private parties. But that is clearly not the case. The question whether a right in the Bill of Rights holds against private parties as well as the state depends also, and indeed primarily, on the constitutional text. It depends on the wording of the clause that creates the right, and the ordinary meaning of that wording. It is therefore quite possible for a court to find, on the one hand, that a particular right in the Bill of Rights operates only against the state (and not against private parties) and, on the other, that the purpose of the right would be served by imposing a duty on a private party.

The other way that private common law might be developed by analogical reasoning from the Bill of Rights is by analogical reasoning from a right in the Bill of Rights that is operative both against the state and against private parties. A right of this kind can of course influence the development of private common law by way of concretisation. But that does not preclude it from influencing the development of private common law also by way of analogical reasoning. Assume that the right to freedom of expression in s 16 operates both against the state and against private parties. A court may impose certain duties on private parties on the ground that the duties are required to protect others' freedom of expression – in that case the court is proceeding by concretising the right. A court may however impose certain duties on private parties solely on the ground that the duties serve the purpose of the right to freedom of expression (regardless of whether the duties serve the right itself) – in that event, the court is proceeding by analogical reasoning from the right.

#### IV NEITHER JUSTICE NOR FAIRNESS

In this section I show that, because s 39(2) requires private common law to be developed by analogical reasoning from the Bill of Rights rather than by concretisation thereof, it cannot be justified by either justice or fairness. To show this, I employ an example drawn from ordinary life. The example is not mine: Dworkin uses it to good effect in Chapter 5 of his book, *Life's Dominion*.<sup>17</sup>

<sup>17</sup> Ronald Dworkin *Life's Dominion* (1994) 134.

Say a friend asks me to go out and buy her a healthy lunch. Assume, as I think one must, that my friend's request reflects a judgement on her part that satisfaction of the request will serve her goals (or some of them). Say further that in response to the request I go out and purchase a chicken salad, in the belief that that is a healthy lunch. Moreover, say that I reached this belief by considering several premises not provided by the request alone: premises about the criteria for health and their satisfaction by the chicken salad. It seems to me that my action here is best described by saying that I have gone beyond my friend's judgement, but have done so only in order to give effect to it. It also seems to me that, if a chicken salad really is a healthy lunch, I have in fact succeeded in giving effect to my friend's judgement. It follows that, provided that a chicken salad really is a healthy lunch, I can justify my action (the purchasing of the chicken salad) by appealing to my friend's judgement.

Imagine now a somewhat different response. Instead of (or as well as) purchasing a chicken salad, I buy my friend a book on healthy living. Moreover, I do so for the following reasons. One: underlying my friend's request that I buy her a healthy lunch is a concern on her part to satisfy her goals (or some of them). Two: reading a book on healthy living will satisfy those goals: in fact, it will better satisfy those goals than will a chicken salad. Now, my friend may be very pleased to receive the book. But if she is not, I could hardly hope to placate her by saying: 'But I was only carrying out your request. I was only giving effect to your judgement.' The judgement that is reflected in her request is the judgement that a healthy lunch will satisfy her goals. It is not merely a judgement about what her goals are, but also a judgement about how those goals are to be pursued. Far from giving effect to this judgement, I have in fact bypassed it.

The above example shows that s 39(2) cannot have the same justification as s 8. My friend's request reflects a judgement on her part as to how her goals are to be pursued. Similarly, the rights in a bill of rights (be they rights against private parties or the state) represent a judgement by the constitution-makers as to how certain fundamental values or goals are to be achieved. When a judge develops private common law in terms of s 8, his action is comparable to the first of the responses that were described above. Section 8, as we have seen, requires a judge to develop private common law by concretising certain rights in the Bill of Rights. What am I doing when I purchase the chicken salad, if not concretising my friend's request for a healthy lunch? It follows that, just as I can justify my purchasing decision by appealing to my friend's judgement, so too a judge who develops private common law in terms of s 8 can justify his decisions by invoking the judgement of the constitution-makers. He can claim to have given effect to the constitution-makers' judgement, even

though (and in fact by) exceeding it. When a judge develops private common law in terms of s 39(2), there is no possibility of a similar appeal to the constitution-makers' judgement. When private common law is developed in terms of s 39(2), we have an action comparable to the second of the responses described above. As was explained earlier, the development of private common law in terms of s 39(2) proceeds by analogical reasoning. So does my second response. This means that, in the same way that my second response exceeds my friend's judgement without giving it effect, so the development of private common law in terms of s 39(2) exceeds the constitution-makers' judgement without giving that effect.

The fact that development of private common law in terms of s 8, but not s 39(2), gives effect to the constitution-makers' judgement means that s 8, but not s 39(2), can be justified on the ground of justice. It is of course possible that judges develop private common law according to their own moral judgement. Indeed, for most of its life, South African private common law was developed in precisely that fashion.<sup>18</sup> It follows that s 8 and s 39(2) are justified only if it is (in some way) better that private common law be developed as they require, than that it be developed in accordance with judges' own moral views. It certainly is better, if private common law developed in terms of these sections is likely to be more just (or more likely to be just) than private common law developed by judges following their own moral lights.<sup>19</sup> But what could make that so? There is only one possibility. It is that, when judges develop private common law in accordance with the requirements of s 8 and s 39(2), they give effect to a moral judgement, a judgement about justice, superior to their own.<sup>20</sup> For that to be the case, it is necessary (at the very least) that judges do actually give effect to someone else's moral judgement when they develop private common law in accordance with s 8 and s 39(2). As we saw above, this condition is met in the case of s 8. When judges develop private common law in terms of s 8, they give effect to the judgement of the constitution-makers. However, as we also saw above, the condition is not met in the case of s 39(2). When judges develop private common law in terms of s 39(2), they do not give effect to the constitution-makers' judgement. Nor do they give effect to the judgement of anyone else.

So, justice may provide a justification for s 8, but it does not provide a justification for s 39(2). What about fairness? Once again the fact that s 8,

<sup>18</sup> The South African Constitutional Court more or less acknowledges this in the *Carmichele* case (n 15) 954C–D.

<sup>19</sup> I am relying here on Joseph Raz's explanation of authority, in particular his 'normal justification thesis'. See Joseph Raz *Ethics in the Public Domain* (1994) 211–15.

<sup>20</sup> See Joseph Raz 'Intention in interpretation' in Robert P. George (ed) *The Autonomy of Law* (1996) 258–9.

but not s 39(2), gives effect to the constitution-makers' judgement is of critical importance. Fairness, as Dworkin describes it, concerns the distribution of political power.<sup>21</sup> One could put it another way: fairness is about whose judgement should count, and how much. That should make it obvious that, if s 8 and s 39(2) are to be defended on the basis of fairness, it must be because they cause private common law to be developed (wholly or in part) in accordance with the judgement of persons other than judges. However, as we have seen, while s 8 achieves this, s 39(2) does not. It follows that, while fairness can serve as justification for s 8, it cannot serve as justification for s 39(2).

To avoid confusion I should emphasise that, in speaking of 'the constitution-makers' judgement' in this section, I meant to refer only to the judgement that the constitution-makers exercised in creating the rights comprising the Bill of Rights. I did not mean to refer to the judgement that the constitution-makers exercised in creating s 39(2). My concern in this section was the justification of s 39(2). One cannot hope to justify s 39(2) on the ground that, in so far as judges follow s 39(2) (by developing private common law by analogical reasoning from the Bill of Rights), they give effect to the judgement that the constitution-makers exercised in creating s 39(2). That would amount to saying that s 39(2) is justified simply because the constitution-makers judged it to be so.

## V ANALOGICAL REASONING IN THE SERVICE OF POLITICAL INTEGRITY

In this essay so far, I have explained the difference between concretisation of, and analogical reasoning from, a rule. I have shown that s 39(2) of the South African Constitution requires the latter. And I have demonstrated that, because of that, s 39(2) cannot be justified by either justice or fairness. In *Law's Empire*, Dworkin argues that, besides justice and fairness, there exists a third political virtue that he calls political integrity. Can political integrity succeed where justice and fairness have failed? Can political integrity justify s 39(2)? For it to do so, two conditions must hold. First, s 39(2) must actually promote political integrity. Secondly, political integrity must really be a virtue. This essay deals with the first of these conditions.

There certainly are grounds for believing that s 39(2) promotes political integrity. Dworkin has for many years been a champion of analogical reasoning in law. Moreover, Dworkin's main reason for championing analogical reasoning in law is that it promotes political integrity. As has been explained, s 39(2) requires that private common law be developed by analogical reasoning. If political integrity is served

<sup>21</sup> Dworkin (n 2) 164.

by analogical reasoning in law and analogical reasoning in law is required by s 39(2), does it not necessarily follow that s 39(2) serves political integrity?

I am not the first to recognise Dworkin's commitment to analogical reasoning in the law. Joseph Raz has commented that 'Professor Dworkin's theory of adjudication is the most extreme case of total faith in analogical arguments'.<sup>22</sup> Larry Alexander makes a similar observation: 'Surely, Dworkin's domain is ARIL's [ie analogical reasoning in law's] natural home. Indeed, ARIL is the methodology that has secured Dworkin his empire in the law. Although Dworkin did not create ARIL, he took ARIL and harnessed it to his cause.'<sup>23</sup>

Dworkin's enthusiasm for analogical reasoning in law is already apparent in his 'Hard Cases'.<sup>24</sup> There he argues that statutes and precedents have not only what he calls 'enactment force' but also what he calls 'gravitational force'.<sup>25</sup> Expressed in the terminology that I have used in this essay, the enactment force of a statute or precedent is its ability to justify decisions by way of its concretisation. A statute or precedent's gravitational force, by contrast, is its ability to justify decisions by analogical reasoning from it. Using the terminology of this essay, the theory of adjudication that Dworkin proposes in 'Hard Cases' can thus be summarised by the following six propositions:

- (a) A judicial decision may be justified because it concretises a statute or a precedent. (As Dworkin puts it, both statutes and precedents have 'enactment force'.<sup>26</sup>)
- (b) A judicial decision may also, however, be justified because it is produced by analogical reasoning from the entire set of statutes and precedents. (Statutes and precedents have not only enactment force but also 'gravitational force'.<sup>27</sup>)
- (c) For a decision to be justified by analogical reasoning from the entire set of statutes and precedents, it is necessary and sufficient that it serve the same purpose(s) as is (are) served by the bulk of the statutes and precedents. (Statutes or precedents that do not serve the same purpose(s) as is (are) served by the bulk of the statutes and precedents Dworkin calls 'mistakes'. According to Dworkin, mistakes have no gravitational force. That is, a judicial decision cannot be justified by showing that it serves the same purpose as a mistake; nor does a

<sup>22</sup> Raz (n 12) 205.

<sup>23</sup> Alexander (n 12) 206.

<sup>24</sup> Reprinted in Ronald Dworkin *Taking Rights Seriously* (1977).

<sup>25</sup> *Ibid* 111–12.

<sup>26</sup> *Ibid* 107–9, 111.

<sup>27</sup> *Ibid* 111–12, 116–17, 121–2.

- judicial decision lack justification because it frustrates the purpose of a mistake.<sup>28</sup>)
- (d) A decision justified by concretisation of a statute or a precedent may conflict with a decision justified by analogical reasoning from the entire set of statutes and precedents. (This will happen where the statute or precedent being concretised is a mistake.)
  - (e) A decision justified by concretisation of a statute or a binding precedent takes priority over a conflicting decision justified by analogical reasoning from the entire set of statutes or precedents. (As Dworkin would put it: an ‘embedded mistake’ preserves its enactment force.<sup>29</sup>)
  - (f) However, a decision justified by concretisation of a non-binding precedent may be overridden by a decision justified by analogical reasoning from the entire set of statutes or precedents. (Ie, a ‘corrigible mistake’ loses its enactment force.<sup>30</sup>)

In *Law's Empire* Dworkin again emphasises the importance of analogical reasoning in law. The metaphor has changed: whereas ‘Hard Cases’ speaks of ‘gravitational force’, *Law's Empire* speaks of ‘the chain of law’.<sup>31</sup> But the basic point remains the same: a judicial decision may be justified on the ground that it serves the purpose(s) served by the bulk of a community’s statutes and precedents.<sup>32</sup> Of course, while ‘Hard Cases’ accords analogical reasoning an important role in adjudication, the role is nonetheless a limited one. As explained above, a decision justified by concretisation of a statute or a binding precedent takes priority over a conflicting decision justified by analogical reasoning from the entire set of statutes or precedents (this was proposition (e)). It follows that judges are to resort to analogical reasoning in two circumstances only. One is where concretisation of statutes and binding precedents leaves a so-called ‘gap’: ie, it provides no solution to the case at hand. The other is where concretisation of a non-binding precedent yields a decision contrary to the decision yielded by analogical reasoning: here analogical reasoning justifies overruling the precedent (this was proposition (f)). *Law's Empire*, it may be said, abandons these constraints on analogical reasoning. *Law's Empire*, it may be said, advances an approach to adjudication that is all analogical reasoning and no concretisation. I concede that much of *Law's Empire*, and especially chapter seven thereof, creates that impression. However, the impression can be maintained only as long as one does not finish reading the book. In the final chapter of the book, Dworkin makes

<sup>28</sup> *Ibid* 118–23.

<sup>29</sup> *Ibid* 121.

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

<sup>31</sup> Dworkin (n 2) 228, 238–9, 313.

<sup>32</sup> *Ibid* 225–58.

it clear that adjudication is to be governed by what he calls ‘inclusive integrity’, rather than by what he calls ‘pure integrity’.<sup>33</sup> Pure integrity requires judges always to make the decisions that are justified by analogical reasoning. Inclusive integrity, by contrast, requires judges to make decisions that concretise (or give effect to) statutes and (binding) precedents, even when those decisions are in conflict with the decisions justified by analogical reasoning.<sup>34</sup>

As was explained in section II of this essay, in order to make a decision by analogical reasoning from a rule one must attribute a purpose to the rule. Dworkin has written a great deal about the way that purpose is to be attributed to statutes and precedents. His main claim in this regard has however remained more or less unchanged over the years: an attribution of purpose to a set of statutes and precedents is sound in so far as it ‘fits’ and ‘justifies’ them. A purpose fits a set of statutes and precedents to which it has been ascribed in so far as someone pursuing that purpose could have created the statutes and precedents.<sup>35</sup> A purpose justifies a set of statutes and precedents to which it has been ascribed in so far as it shows them to have moral value.<sup>36</sup> The claim that attributions of purpose to statutes and precedents are to be judged against these two dimensions, ie, fit and justification, is vintage Dworkin. It makes its appearance in embryonic form in ‘The Model of Rules II’<sup>37</sup> and appears almost fully-grown in ‘Hard Cases’. *Law’s Empire* introduces only two important developments. One is to clarify the relationship between fit and justification.<sup>38</sup> The other is to connect the claim that attributions of purpose to statutes and precedents must fit and justify them to a general theory of interpretation.<sup>39</sup>

Although, as I have explained, *Law’s Empire* introduces no significant changes in Dworkin’s account of how adjudication is to proceed, it does introduce a significant development as regards his justification of that account. In ‘Hard Cases’ Dworkin makes only the suggestive remark that ‘[t]he gravitational force of a precedent may be explained by appeal . . . to

<sup>33</sup> *Ibid* 405.

<sup>34</sup> *Ibid*. For further confirmation that Dworkin continues to accord an important role to concretisation in his account of adjudication, see his writing on constitutional adjudication.

<sup>35</sup> *Ibid* 230, 240, 242.

<sup>36</sup> *Ibid* 248–9, 256.

<sup>37</sup> Reprinted in Dworkin (n 24) 66–8.

<sup>38</sup> In his ‘Reply to Critics’ (in Dworkin (n 24) 340–2), Dworkin had seemed to suggest that fit operated only as a threshold requirement. A purpose could be attributed to a set of statutes and precedents only if it achieved a certain degree of fit. However, among the purposes that met the threshold, the choice was to be made purely on the basis of justification. In Dworkin (n 2) (246–7, 255–7), he seems to say that fit provides more than merely a threshold. The choice among the purposes that achieve the required degree of fit is to be made by weighing fit against justification.

<sup>39</sup> Dworkin (n 2) 52, 225.

the fairness of treating like cases alike'.<sup>40</sup> In *Law's Empire* this has matured into the idea that, in so far as judges make decisions justified by analogical reasoning from the entire set of statutes and precedents, they serve a distinct political ideal, an ideal beside justice and fairness, namely political integrity.<sup>41</sup>

In *Law's Empire* Dworkin devotes one and a half chapters to an explanation of political integrity's nature and value.<sup>42</sup> He devotes an entire chapter to an explanation of how analogical reasoning in law should proceed.<sup>43</sup> But he makes no attempt at all to explain just how political integrity is served by analogical reasoning from the full set of statutes and precedents. The omission is not an important one, however. It obviously is so that, if one adds rules to a set by way of analogical reasoning from the set, the expanded set will possess equal or greater political integrity than the original. To see this, consider a set of rules: A, B, C and D. Assume that B, C and D are consistent in principle, but A is not. If rule E is added to the set by way of analogical reasoning from the set, then E will be consistent in principle with B, C and D. Thus, a set in which 75% of the rules (B, C and D, but not A) are consistent in principle will have been changed into a set in which 80% of the rules (B, C, D and E, but not A) are consistent in principle. Since a set of rules possesses political integrity in so far as the rules are consistent in principle, analogical reasoning has produced an increase in political integrity of 5%.

## VI POLITICAL INTEGRITY AND VERTICAL ORDERING

In the previous section I explained the role that analogical reasoning has in Dworkin's account of adjudication. I also explained that, given that role, analogical reasoning does serve political integrity. If new precedents are added to a set of statutes and precedents by way of analogical reasoning from the set, the expanded set of statutes and precedents will possess equal or greater political integrity than the original. Section 39(2), as we saw earlier in this essay, requires that South African private common law be developed by analogical reasoning from the South African Bill of Rights. Does it not follow, then, that s 39(2) must necessarily promote the political integrity of South African law? Does it not follow, then, that I can show s 39(2) to be lacking in justification only by showing that political integrity is not the virtue that Dworkin claims it is?

No, it does not follow. Consider what happens when rule F is added to A, B, C and D, on the basis of analogical reasoning from A, a rule that is

<sup>40</sup> Dworkin (n 24) 113.

<sup>41</sup> Dworkin (n 2) 243, 257, 262, 263, 404, and 411.

<sup>42</sup> Chapters 5 and 6.

<sup>43</sup> Chapter 7.

inconsistent in principle with the rest. F will be consistent in principle with A, but not with B, C and D. Thus, a set in which 75% of the rules (B, C and D, but not A) are consistent in principle will have been changed into a set in which 60% of the rules (B, C and D, but not A and F) are consistent in principle. Because analogical reasoning here proceeded from a rule that was inconsistent in principle with the bulk of the rules, it produced a decrease in political integrity of 15%. As was explained in the previous section, Dworkin calls a legal rule that is inconsistent in principle with (ie, that does not serve the same purpose(s) as) the bulk of a community's legal rules a 'mistake'. Expressed in Dworkin's terminology, the point demonstrated is thus this: analogical reasoning from a mistake diminishes rather than promotes political integrity.

This suggests that whether s 39(2) promotes the political integrity of South African law depends, crucially, on whether the South African Bill of Rights is or is not consistent in principle with the bulk of South African law. It depends, that is, on whether the Bill of Rights is or is not a 'mistake', in the sense that Dworkin uses the word. If it is inconsistent in principle, if it is a mistake, then developing private common law by analogical reasoning from it, as s 39(2) requires, will diminish rather than promote the political integrity of South African law. It will do so in the same way that proceeding from A by analogical reasoning yielded a set of rules (A, B, C, D and F) that had less political integrity than the original set (A, B, C and D).

The following objection might be raised to the preceding argument. 'It is quite true that, if A is inconsistent in principle with B, C and D, and F is established by analogical reasoning from A, then A, B, C, D and F will have less political integrity than A, B, C and D. However, it does not follow that, if the South African Bill of Rights is inconsistent in principle with the remainder of South African law, and a new precedent is established by analogical reasoning from the Bill of Rights, then the political integrity of South African law will be compromised. For there is a critical difference between A, B, C and D, on the one hand, and the South African Bill of Rights and South African law, on the other. A has the same status as B, C and D: all four rules are 'on a level'. The South African Bill of Rights, by contrast, is 'fundamental'. It is of a higher order – it has greater authority – than the rest of South African law. Analogical reasoning from a rule that is of a higher order, or has greater authority, than the rest of the rules in a set promotes the political integrity of that set, even if the rule (from which the analogical reasoning proceeds) is inconsistent in principle with the rest. Thus, where A has greater authority than B, C and D, and F is established by analogical reasoning from A, the set A, B, C, D and F has greater political integrity than the set

A, B, C and D, even if A is inconsistent in principle with B, C and D. Thus also, given that the South African Bill of Rights has ultimate authority in South African law, analogical reasoning from the Bill of Rights will promote the political integrity of South African law, even if the Bill of Rights is inconsistent in principle with the rest of South African law. It follows that, contrary to what was asserted above, s 39(2) promotes the political integrity of South African law regardless of whether or not the Bill of Rights is inconsistent in principle with the remainder of South African law.'

The objection stands or falls by the following proposition: the political integrity of a set of rules is promoted by analogical reasoning from a rule in the set with greater authority than the rest even if the former is inconsistent in principle with the latter. Does Dworkin endorse this proposition? He certainly has never done so explicitly. Has he done so by implication?

In 'Hard Cases' Dworkin appears to endorse a closely related proposition, namely that analogical reasoning is justified when it proceeds from a rule that has greater authority than others, even if the rule is inconsistent in principle with them. For, in 'Hard Cases', Dworkin argues that analogical reasoning from a set of legal rules must take account of any 'vertical ordering' within the set.<sup>44</sup> In other words, it must take account of 'layers of authority; that is, layers at which official decisions might be taken to be controlling over decisions made at lower levels'.<sup>45</sup> The way that analogical reasoning is to take account of vertical ordering is by prioritising the purposes attributable to rules higher in the hierarchy over purposes attributable to rules lower down.<sup>46</sup> Thus, where a purpose attributable to a rule at the top of the hierarchy is at odds with a purpose attributable to the rules at the bottom, analogical reasoning is to pursue the former in preference to the latter.

The proposition that Dworkin endorses in 'Hard Cases' does not entail the proposition that the objection relies upon. It could be true that analogical reasoning is justified if it proceeds from a rule that has greater authority than the other rules in a set (even though it is inconsistent in principle with them), yet be false that analogical reasoning under such conditions promotes political integrity. For it could be that analogical reasoning in such circumstances is justified for reasons other than that it promotes political integrity. Indeed, in 'Hard Cases' Dworkin could not have had political integrity in mind as a justification. For at the time that 'Hard Cases' appeared Dworkin had not yet identified political integrity as a political virtue.

<sup>44</sup> Dworkin (n 24) 117.

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

<sup>46</sup> *Ibid.*

So 'Hard Cases' contains neither an explicit nor an implied endorsement of the proposition that the objection relies upon. But what about *Law's Empire*? Political integrity is one of the centrepieces of *Law's Empire*. Moreover, in *Law's Empire* Dworkin makes it clear that political integrity provides the justification for analogical reasoning in law. However, nowhere in *Law's Empire* does one find anything resembling the claim in 'Hard Cases' that analogical reasoning must take account of vertical ordering. More than that, in *Law's Empire* Dworkin argues that analogical reasoning should take account of 'local priority'.<sup>47</sup> Whereas analogical reasoning that takes account of vertical ordering is top-down, analogical reasoning that takes account of local priority seems to be bottom-up. Whereas the former prioritises the purposes of rules at the top of a hierarchy, the latter seems to prioritise the purposes of the rules at the bottom.

It is thus uncertain whether Dworkin supports the objector's proposition, ie, the proposition that the political integrity of a set of rules is promoted by analogical reasoning that proceeds from a rule that has greater authority than, but is inconsistent with, the rest. Should Dworkin support the objector's proposition? Is the objector's proposition sound? I believe not.

The objector's proposition contains a notion that has hitherto been left unanalysed. It is that of a rule having 'ultimate authority' within (or 'greater authority' than the rest of) a set of rules. How exactly is the notion of 'ultimate authority' to be understood? One possibility is that, in saying that a rule has ultimate authority within a set, one is saying something about the rule's gravitational force. That is, one is saying something about the strength of the justification that analogical reasoning from the rule provides. One might be claiming that analogical reasoning from the rule provides a stronger justification for the addition of new rules to the set than does analogical reasoning from, and/or concretisation of, the other rules in the set. One might also be claiming that analogical reasoning from the rule sometimes justifies the extinction of other rules in the set. It seems to me that the objector cannot define the notion of 'ultimate authority' in this way if he also wishes to justify s 39(2) on the basis that it promotes the political integrity of South African law. If 'ultimate authority' is so defined, the South African Bill of Rights does of course have it. It has it by virtue of s 39(2). But then it follows that to claim, as the objector does, that s 39(2) promotes the political integrity of South African law because the Bill of Rights has 'ultimate authority', is to claim that s 39(2) promotes the political integrity of South African law because s 39(2) exists. Were the objector then to go on and claim that

<sup>47</sup> Dworkin (n 2) 250–4, 402.

s 39(2) is justified because it promotes the political integrity of South African law, he would in effect be claiming that s 39(2) is justified because it exists. That obviously is absurd.

There is however another possibility. In saying that a rule has ultimate authority within a set one might be saying something about the rule's enactment (rather than gravitational) force. That is, one might be saying something about the strength of the justification that is provided by the rule's concretisation (rather than by analogical reasoning from the rule). One might be claiming that concretisation of the rule provides a stronger justification for the addition of new rules to the set than does analogical reasoning from, and/or concretisation of, the other rules in the set. One might also be claiming that concretisation of the rule sometimes justifies the extinction of other rules in the set.

Can the objector define 'ultimate authority' in this second way and still defend s 39(2) on the ground that it promotes the political integrity of South African law? The Bill of Rights has ultimate authority, also if ultimate authority is defined in this manner. It has it, however, not by virtue of s 39(2) but rather by virtue of s 8. For it is s 8, and not s 39(2), that deals with the enactment force of the Bill of Rights, that is, with the ability of the Bill of Rights to justify, through its concretisation, the development and modification of the rest of South African law. It follows that, if 'ultimate authority' is defined in this manner, the objector's claim that s 39(2) promotes the political integrity of South African law because the Bill of Rights has ultimate authority, amounts to the claim that s 39(2) promotes the political integrity of South African law by virtue of s 8. Now combine that with the further claim that s 39(2) is justified because it promotes the political integrity of South African law. The result is that the justification of s 39(2) is made to depend upon the existence of s 8.

This is a problematic outcome for the objector. The objector offers a response to my claim that s 39(2) promotes the political integrity of South African law only if the Bill of Rights is not a mistake, that is, only if the Bill of Rights is not inconsistent in principle with the bulk of South African law. The response is that s 39(2) promotes the political integrity of South African law regardless of whether or not the Bill of Rights is consistent in principle with the bulk of South African law, because the Bill of Rights has ultimate authority within South African law. According to the objector, in other words, s 39(2) promotes the political integrity of South African law because the way that the political integrity of South African law is to be promoted is sensitive to a particular ranking of legal rules (or legal sources) in South African law. That ranking, it now turns out, is determined by s 8. As was explained earlier, s 8 ranks South Africa's legal rules or sources for the purpose of concretisation. As was also explained earlier, the justification for concretisation is justice and fairness.

If the ranking created by s 8 is defensible, therefore, it must be on the basis that it serves one or both of these virtues. That creates a puzzle which, I suspect, the objector might find difficult to solve. Given that political integrity is, as Dworkin emphasises, ‘a distinct political virtue beside justice and fairness’,<sup>48</sup> why should the way that the political integrity of a community’s law is to be promoted be sensitive to a ranking of legal rules the justification whereof is that it serves justice and fairness?

## VII CONCLUSION

The previous section established that s 39(2) promotes the political integrity of South African law only if the South African Bill of Rights is consistent in principle with the bulk of South African law. Is the Bill of Rights consistent in principle with the bulk of South African law or is it rather a mistake?

On this question, South African judicial opinion seems to be divided. In the case of *Holomisa v Argus Newspapers Ltd* Cameron J (now JA) tended towards the view that the Bill of Rights is inconsistent in principle with the bulk of South African law.<sup>49</sup> In the judgment, Cameron J wrote of ‘the revolution the Constitution has wrought in our legal fabric’,<sup>50</sup> and claimed that whereas our legal system previously ‘did not treasure at its core a democratic ideal’,<sup>51</sup> ‘the Constitution plants new values at the roots of our legal system’.<sup>52</sup> However, in the case of *National Media Ltd and others v Bogoshi* Hefer JA appeared to lean towards the opposite view.<sup>53</sup> In this case, as is well known, Hefer JA changed the South African law of defamation so that it now accords significantly greater protection to freedom of expression. However, Hefer JA did so on the basis that the values of the common law, conformably with the values of the Bill of Rights, required the change. Moreover, in justifying the change, Hefer JA in terms says: ‘[I]t makes no difference that South Africa has only recently acquired the status of a truly democratic country. Freedom of expression, albeit not entrenched, did exist in the society that we knew at the time when *Pakendorf* was decided.’<sup>54</sup>

I do not intend to express a view in this essay as to whether the South African Bill of Rights is or is not consistent in principle with the bulk of South African law. Instead, I wish to conclude this essay by drawing attention to a dilemma that seems to be created by the analysis of s 39(2) that has been presented in this essay. According to that analysis, s 39(2)

<sup>48</sup> Dworkin (n 2) 166.

<sup>49</sup> 1996 (2) SA 588 (W).

<sup>50</sup> At 598B.

<sup>51</sup> At 604J.

<sup>52</sup> At 604H–I.

<sup>53</sup> 1998 (4) SA 1196 (SCA).

<sup>54</sup> At 1210F.

cannot be justified by an appeal to justice or fairness, but might be justified on the ground that it promotes the political integrity of South African law. Assume, then, that Cameron J is correct: the Bill of Rights is inconsistent in principle with the bulk of South African law. In that event, as has been shown, s 39(2) does not promote the political integrity of South African law. Assume, contrariwise, that Hefer JA is correct: the Bill of Rights is consistent in principle with the bulk of South African law. In that event, s 39(2) is surely redundant. This is in fact demonstrated by the *Bogoshi* judgment.

In the end, s 39(2) appears to be caught between Scylla and Charybdis. For s 39(2) to promote the integrity of South African law, the Bill of Rights must be consistent in principle with the bulk of South African law. But if the Bill of Rights is consistent in principle with the bulk of South African law, then s 39(2) is superfluous. We are left with the conclusion either that s 39(2) is justified but redundant, or that it makes a difference but is lacking in justification.