

*THE SECONDARY ROLE OF THE SPIRIT,
PURPORT AND OBJECTS OF THE BILL OF
RIGHTS IN THE COMMON
LAW'S DEVELOPMENT*

ANTON FAGAN*

WP Schreiner Professor of Law, University of Cape Town

I INTRODUCTION

The South African Constitutional Court endorses the following proposition:

According to the Constitution, the spirit, purport and objects of the Bill of Rights may be reasons for developing the common law.

The court has not expressly endorsed this proposition. But it is entailed by a claim that the court has made repeatedly, namely that the Constitution obliges every court to develop the common law whenever it does not accord with the spirit, purport and objects of the Bill of Rights. As the court put it in the *Carmichele* case:

'[W]here the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.'¹

Notwithstanding its endorsement by the Constitutional Court, the proposition is false. It is not so that the Constitution regards the spirit, purport and objects of the Bill of Rights as possible reasons for developing the common law. As possible reasons for developing the common law, the Constitution recognises only the following: (1) the rights in the Bill of Rights; (2) justice; and (3) the rules of the common law itself.

This does not mean that the Constitution does not accord the spirit, purport and objects of the Bill of Rights a role in the common law's development. It does. But the role is a secondary one. It is to serve as a tie-breaker when the rights in the Bill of Rights, justice and the rules of the

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¹ *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at 954A; see also at 955G–H, 956A–C. And see *S v Thebus & another* 2003 (6) SA 505 (CC) at 525D–F; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) at 429A–B; *Masiya v Director of Public Prosecutions, Pretoria & another* 2007 (5) SA 30 (CC) at 47D and 48D; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at 335C–D.

common law are indeterminate. In other words, when the rights in the Bill of Rights, justice and the rules of the common law justify not only one way, but rather several alternative ways, of developing the common law, the spirit, purport and objects of the Bill of Rights may provide reasons for preferring one of those ways of developing the common law over the others.

This then is the thesis of this article: contrary to the Constitutional Court's assertion, the Constitution does not regard the spirit, purport and objects of the Bill of Rights as reasons for developing the common law. Instead, it regards them only as tie-breaker reasons. That is, it regards them only as reasons for choosing between ways of developing the common law that are already justified by reasons that have nothing to do with the spirit, purport and objects of the Bill of Rights.

The article has five parts. Part I, which is this introduction, has set out the article's thesis in summary form. Part II, which is about to commence, elucidates that thesis by saying something about common law development and its possible justifications. Parts III and IV defend the thesis. Part III explains why, contrary to what is claimed by the Constitutional Court, the Constitution does not oblige courts to develop the common law whenever it falls short of the spirit, purport and objects of the Bill of Rights. Part IV explains why the Constitution, instead, regards the spirit, purport and objects of the Bill of Rights as mere tie-breakers in the common law's development. The final section of the article, part V, is for those readers who understand the thesis and are persuaded by its defence, yet feel a resultant sense of disappointment — because they believe that the spirit, purport and objects of the Bill of Rights *should* have a primary role in the common law's development. Part V shows that this belief is erroneous.

The final introductory point is terminological. The phrase 'the spirits, purport and objects of the Bill of Rights' is a mouthful. This article will thus speak simply of 'the objects of the Bill of Rights'.

II EXPLANATION

Common law is, in the main, judge-made law. It is, in the main, the law that judges make by giving reasoned decisions. For, in certain circumstances, the reason a judge gives for his or her decision becomes binding on others. And when it does, it acquires the force of law. It becomes a legal rule.²

In its *K* judgment, the Constitutional Court identified three ways that the common law could be developed.³ The first is where an existing common-law rule 'is changed altogether'. The second is where 'a new rule is introduced'. The third is where a court applies an existing common-law rule to a set of facts regarding which it is indeterminate, that is, a set of facts which, as the court put it, does not clearly fall either 'within or beyond the scope of [the] existing rule'.

² See François du Bois (general ed) *Wille's Principles of South African Law* 9 ed (2007) 64.

³ *Supra* note 1 at 429C–I.

The third of these requires qualification. In *K*, the Constitutional Court assumed that a court *necessarily* develops the common law whenever it applies an existing common-law rule to a set of facts regarding which it is indeterminate. That is not so. The legal philosopher Joseph Raz points out that English law has two ways of dealing with common law indeterminacy. One is ‘to regard the underdetermined law as a framework for further legal development filling in the gaps and charting out more and more detailed legal guidelines’. The other is ‘to hold that the law should remain underdetermined, the decision being left to the court to take afresh in every case’.⁴ South African law, likewise, makes a distinction between two kinds of common law rules: those that are developed by their application to facts regarding which they are indeterminate, and those that are not.

Some of the most important rules in South African law are of the latter kind. They are rules which are *not* developed when applied to facts regarding which they are indeterminate. An example is the rule for negligence. That rule, as every lawyer knows, contains two conditions. The first is that a reasonable person would have foreseen the possibility of harm. The second is that a reasonable person would have taken steps to guard against it. The Appellate Division first formulated this rule in the case of *Kruger v Coetzee*.⁵ Significant for this article, however, is the qualification which the court immediately added:

‘Whether [these conditions are met] must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.’⁶

In other words, according to the court, negligence was to be determined in each future case by direct application of the rule that it had set out. Of course, that would be possible only if the rule which the court had set out were the kind of rule which is *not* developed every time it is applied to a set of facts regarding which it is indeterminate. Otherwise there would be future cases wherein negligence would be determined, not by direct application of the rule which the court had formulated, but rather by application of one or more mediating rules developed by the application of that rule in one or more cases preceding, and with facts similar to those of, the future ones.⁷

In order to understand the thesis of this article, it is not enough to understand what it is for the common law to be developed. It is also necessary to understand the possible justifications for such development. The introduc-

⁴ Joseph Raz ‘Law and value in adjudication’ in Joseph Raz *The Authority of Law* (1979) 194.

⁵ *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E–F: ‘[Negligence] arises if — (a) a *diligens paterfamilias* in the position of the defendant . . . would foresee the reasonable possibility of his conduct injuring another . . . and would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.’

⁶ *Ibid* at 430G.

⁷ For a discussion of other such rules, see Anton Fagan ‘The Confusions of *K*’ (2009) 126 *SALJ* 156 at 186–92.

tion to this article mentioned four: the objects of the Bill of Rights, the rights in the Bill of Rights, justice, the common law. This section of the article will say something more about the first two; that is, the justification provided by a right in the Bill of Rights and the one provided by the objects of the Bill of Rights. For the difference between these two justifications is often misunderstood.

To explain the difference between the justification provided by a right in, and the one provided by the objects of, the Bill of Rights, this article will use an example from the well-known debate between H L A Hart and Lon Fuller.⁸ The example is that of a rule forbidding one to drive a vehicle in a park.⁹

This rule plainly justifies the prohibition of any activity that qualifies as the driving of a vehicle in the park. But how is it to be determined whether an activity does so qualify? As Hart points out, sometimes it will be possible to do so simply by relying on the ordinary (or conventional) meaning of the words ‘driving a vehicle in the park’ and what those words, given their ordinary meaning, logically imply.¹⁰ Thus, if I take my motorbike for a spin down the park’s avenues, or my 4x4 for a trial-run in its flower beds, I clearly am driving a vehicle in the park. Hart describes cases of this kind — cases that can be dealt with by having recourse only to ordinary meaning and logic — as cases falling within the ‘core of settled meaning’ of a rule.¹¹

However, as Hart also points out, it will not always be possible to establish whether an activity qualifies as the driving of a vehicle in the park simply by relying on ordinary meaning and logic. As Hart puts it, some activities will fall, not in the ‘core of settled meaning’ of the rule, but rather within ‘the penumbra of debatable cases in which [the words ‘driving a vehicle in the park] are neither obviously applicable nor obviously ruled out’.¹² How is one to establish whether such an activity, an activity falling within the ‘penumbra of uncertainty’ surrounding the rule, qualifies as the driving of a vehicle in the park? Only, as Hart explains, by relying on additional premises.¹³ One of those additional premises, and it is an additional premise that is particularly emphasised by Fuller, is the rule’s purpose.¹⁴

⁸ H L A Hart ‘Positivism and the separation of law and morals’ (1958) 71 *Harvard LR* 593; Lon L Fuller ‘Positivism and fidelity to law — A reply to Professor Hart’ (1958) 71 *Harvard LR* 630.

⁹ For earlier versions of essentially the same explanation, see Anton Fagan ‘Determining the stakes: Binding and non-binding bills of rights’ in Daniel Friedmann and Daphne Barak-Erez (eds) *Human Rights in Private Law* (2001) at 76–84 and Anton Fagan ‘Section 39(2) and political integrity’ in François du Bois (ed) *The Practice of Integrity* (2005) at 118–21.

¹⁰ Hart op cit note 8 at 607.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid at 607–8.

¹⁴ Fuller op cit note 8 at 661–9; but see also Hart op cit note 8 at 611–14, 627–8.

Imagine that the keeper of the park has to decide whether to prohibit the riding of motorised skateboards in the park. This is a penumbral case. For the question whether a motorised skateboard is a vehicle cannot be answered simply by recourse to the ordinary meaning of the word ‘vehicle’. That is, it neither clearly is the case, nor clearly is not the case, that a motorised skateboard is a vehicle. How is the park keeper therefore to proceed? According to Hart, he is to consider additional premises, among them the purpose of the rule. Assume, as does Fuller, that the purpose of the no-vehicles-in-the-park rule is to prevent noisy and dangerous activities.¹⁵ Assume further that motorised skateboards are both loud and unsafe. It would then follow that, for the purpose of the rule, motorised skateboards qualify as vehicles.

The legal philosopher John Finnis, following Aquinas, labels the form of reasoning employed regarding cases within the core of settled meaning ‘deduction’ and that employed regarding cases in the penumbra of uncertainty ‘determinatio’.¹⁶ Deduction and determinatio clearly are distinct processes of reasoning. For, as has just been explained, whereas deduction relies only on the ordinary meaning of a rule and its logical implications, determinatio relies on additional premises, among others the rule’s purpose. However — and this is critical — a rule justifies a decision no less when the decision is reached by determinatio of the rule than when it is reached by deduction from it. Thus, in our example, the no-vehicles-in-the-park rule justifies not only the park keeper’s decision to prohibit my motorbike and 4x4, but also his decision to prohibit the motorised skateboard, even though the latter decision is a determinatio of, rather than a deduction from, the rule.

At this point it is necessary to caution against a possible error. The error is to infer, from the fact that a rule may justify a decision by determinatio and the fact that determinatio of a rule may rely on the rule’s purpose, that there is no difference between, on the one hand, the justification provided by a rule and, on the other, the justification provided by the purpose of that rule. To mention this error is not to create a straw man. The error is made, for example, by former Wits law professor Christopher Roederer, in an article on the Bill of Rights and the common law.¹⁷

To see that the difference between the justification provided by a rule and that provided by its purpose is a real one, consider again the no-vehicles-in-the-park rule. And assume once more that the purpose of that rule is to prevent noisy and dangerous activities. Fireworks are both noisy and unsafe.

¹⁵ Fuller *ibid* at 663.

¹⁶ John Finnis *Natural Law and Natural Rights* (1980) 281–90; ‘The truth in legal positivism’ in Robert P George (ed) *The Autonomy of Law* (1996) 200–3. Finnis translates ‘determinatio’ as implementation, concretisation or specification.

¹⁷ Christopher J Roederer ‘Post-matrix legal reasoning: Horizontality and the rule of values in South African law’ (2003) 19 *SAJHR* 57 at 70, 75. According to Stu Woolman, this error is also made by the Constitutional Court in *Masiya* *supra* note 1: see Stu Woolman ‘The amazing, vanishing Bill of Rights’ (2007) 124 *SALJ* 762 at 768.

The *purpose* of the no-vehicles rule thus justifies their prohibition. A prohibition on fireworks could not, however, be justified by the no-vehicles rule itself. For, though the purpose of that rule may play a role in its determination, its determination could only justify the prohibition of things that could plausibly be counted as vehicles. Whatever else they may be, fireworks are not vehicles.

Most lawyers do not make Roederer's mistake. They do not dismiss as illusory the distinction, just drawn, between the justification that is provided by a rule (whether by deduction therefrom or determination thereof) and the justification provided by the rule's purpose. Schreiner JA, for example, clearly recognised the distinction in *Carter v McDonald*, when he said:

'It is often useful to examine the reason which probably gave rise to the rule, in order to discover the rule's limits, but the reason, even if certainly established, is not the same as the rule.'¹⁸

Once one grasps the distinction between the justification provided by a rule and that provided by its purpose, one should have no difficulty understanding the distinction between a justification provided by a right in, and one provided by the objects of, the Bill of Rights.

What is it for a common law development to be justified by a right in the Bill of Rights? It is, very simply, for the development to be justified by the same processes of reasoning as were employed by the park keeper when he prohibited the motor-bike, the 4x4, and the motorised skateboard. That is, it is for the development to be justified either by deduction from, or determination of, a right. Of course, the rights in the Bill of Rights are, for the greater part, what the legal philosopher Ronald Dworkin has called 'abstract' rights.¹⁹ They are framed in broad, general terms. Consequently, most common law developments will fall within the penumbra of uncertainty surrounding a right, rather than within its core of settled meaning. Thus, also, most common law developments, if justified by a right in the Bill of Rights, will be justified by determination of that right rather than deduction from it.

What, by contrast, is it for a common law development to be justified by the objects of the Bill of Rights? It may be for the development to be justified by the purposes of a *particular* right within the Bill of Rights. Here the process of reasoning is just like that of the park keeper when he prohibited the fireworks. Alternatively, it may be for the development to be justified by the purposes not of any individual right within, but rather of *all* the rights collectively constituting, the Bill of Rights. In this case, the process of

¹⁸ *Carter & Co (Pty) Ltd v McDonald* 1955 (1) SA 202 (A) at 211H. The distinction is also recognised by the legal philosopher Ronald Dworkin. In his article 'Hard cases', Dworkin distinguishes the 'enactment force' of a rule from its 'gravitational force'. Though Dworkin does not put it this way, the enactment force of a rule is just the ability of the rule itself to justify a decision, either by deduction or by determination. The gravitational force of a rule, by contrast, is the ability, not of the rule itself, but rather of its purposes, to justify a decision. See Ronald Dworkin 'Hard cases' in Ronald Dworkin *Taking Rights Seriously* (1977) 110–15.

¹⁹ Dworkin *ibid* at 93.

reasoning is again like that of the park keeper when he prohibited the fireworks, except that it is, in a sense, this process of reasoning ‘writ large’. It is the process of reasoning employed by the park keeper in the following elaboration on Hart and Fuller’s example.

Imagine that the park keeper has a second rule to apply. It is that dogs are permitted in the park, provided they are kept leashed. Imagine, further, that the park keeper has to decide not only whether to prohibit motor-bikes, 4x4s, motorised skateboards and fireworks, but also whether to prohibit archery and the playing of drums. Imagine, finally, that the park keeper makes his decision by reasoning as follows: ‘The purpose of the no-vehicles and dogs-on-a-leash rules together is not to prohibit noisy activities (since leashed dogs still bark), but is to prohibit dangerous ones (since unleashed dogs may bite). Drums may be noisy, but they are safe, so I will permit them. Archery may be silent, but it is dangerous, so I will prohibit it.’

The distinction just explained matters. It matters because, just as the purpose of the no-vehicles-in-the-park rule justifies many more prohibitions than does the rule itself, so the objects of the Bill of Rights justify many more common law developments than do the rights therein. For example, s 27(3) of the Bill of Rights expressly recognises a right not to be ‘refused emergency medical treatment’. As yet, the question whether this right binds not only the state but also private persons is unsettled. Imagine, however, that the Constitutional Court were to determine, tomorrow, that this right binds only the state. Imagine also that, the day after that, the Supreme Court of Appeal were to create the following rule: a doctor who fails to stop at a motor vehicle accident and treat the victims commits a delict vis-à-vis any victim who suffers greater injury as a result. This would be a novel rule because, according to South African common law as it currently stands, a person does not commit a delict if he causes another person harm by a mere omission. As the Appellate Division put it in the *Munarin* case: ‘[I]f I happen to see someone else’s child about to drown in a pool, ordinarily I do not owe a legal duty to anyone to try to save it’.²⁰

As characterised by the Constitutional Court, the right not to be refused emergency medical treatment in s 27(3) could not justify this development of the common law. For, as was explained, a right justifies a development only in so far as the development is either a deduction from, or a determination of, the right. But that could not possibly be the case here, given that whereas the right in s 27(3) imposes duties only upon the state, the novel rule imposes a duty on private persons.

The development in question could, however, be justified by the objects of the Bill of Rights. As was explained a moment ago, a rule is justified by the objects of the Bill of Rights if it is justified by the purposes either of a particular right in, or of all the rights constituting, the Bill of Rights. Consider now the right not to be refused emergency medical treatment. It is

²⁰ *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 373E–F.

possible that the purposes served by this right, even if it is taken to be binding only on the state, are served also by imposing certain duties on certain private parties. And it is possible that one of those duties is the one created by the Supreme Court of Appeal, namely a duty on the part of doctors to go to the assistance of accident victims. But if this is possible, then it also is possible that the Supreme Court of Appeal's development of the common law, when imposing a novel duty of assistance on all doctors, is justified by the objects of the Bill of Rights, even though it cannot possibly be justified by any particular right in the Bill of Rights.

III REFUTATION

The aim of part II was to elucidate the article's thesis by explaining what common law development is and distinguishing its justification by the rights in, and objects of, the Bill of Rights. Now, in part III, the article moves on to the defence of that thesis. The defence starts with the Constitutional Court's claim that the Constitution obliges every court to develop the common law whenever it does not accord with the objects of the Bill of Rights.

The Constitution does not expressly impose this obligation. However, says the Constitutional Court, it does so by implication. Why? Because, in s 39(2), it expressly imposes on every court an obligation to promote the objects of the Bill of Rights whenever it is developing the common law.²¹ And because, in s 173, it expressly recognises that every court has the power to develop the common law whenever justice requires that.²² As the Court put it in *Carmichele*:

[I]t is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the [objects of the Bill of Rights], the Courts are under a general obligation to develop it appropriately.²³

Halton Cheadle disagrees. '[T]he wording of s 39(2),' he says, 'does not imply an obligation to develop'. As for s 173, says Cheadle, 'both logic and the rules of statutory interpretation set their face against deriving an obligation from a power'.²⁴ Cheadle offers no argument to justify his dissenting view,

²¹ 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

²² 'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

²³ *Supra* note 1 at 955G–H. See also *S v Thebus* *supra* note 1 at 525D–F; *K v Minister of Safety and Security* *supra* note 1 at 429A–B; *Masiya v DPP*, *Pretoria* *supra* note 1 at 47D and 48D; *Barkhuizen v Napier* *supra* note 1 at 335C–D.

²⁴ Halton Cheadle 'Application' in M H Cheadle, D M Davis and N R L Haysom *South African Constitutional Law: The Bill of Rights* 2 ed (2005) at 3–11n40a. Dennis Davis previously shared Cheadle's view: 'No reasonable construction of those two sections [i.e., s 39(2) and s 173] can support an obligation to develop the common law.' See Dennis Davis 'Interpretation of the Bill of Rights' in Cheadle, Davis and Haysom *op cit* at 33–10. But Davis claims to have changed his mind.

presumably because he regards its truth as self-evident. This section of the article is for those less perspicacious than Cheadle. It explains why he is right and the Constitutional Court wrong.

To assume, as the Constitutional Court does, that an obligation to develop the common law whenever it fails to promote the objects of the Bill of Rights can be inferred from s 39(2) and s 173 is to assume the truth of the following proposition:

Where the law expressly obliges a person to bring about x if he performs y, and expressly recognises his power to perform y, it by implication also obliges him to perform y whenever by performing it he will bring about x.

But this proposition is not true, as the following example demonstrates.

In a conversation between two neighbours, the one says to the other: 'I cannot stop you from putting a second storey on your house. However, if you do, you must make sure that you enhance the appearance of this street.' The speaker here is explicitly making two assertions. The first is that his neighbour has the power to build a second storey. The second is that his neighbour is under an obligation, if he does build a second storey, to do so in a way that will enhance the street. If the proposition just mentioned were true, the speaker would by implication be making a third assertion as well, namely that his neighbour must build a second storey, if doing so would enhance the street. But the speaker clearly is *not* making the third assertion. For the speaker could have said what he did with perfect sincerity, although he believed that his neighbour ought not to build a second storey (even if it would enhance the street) because it would deprive him of privacy and a view. And the speaker would not have been contradicting himself had he expressed this belief by splicing a third sentence in between the other two: 'I cannot stop you from putting a second storey on your house. But you really ought not to do so. However, if you do, you must make sure that you enhance the appearance of this street.'

Another example makes the same point. A law professor writes the following on his Blog: 'The President certainly has the power to appoint the Judge President as Chief Justice. If he does so, he must ensure that the Judge President stops making unfounded allegations of racism against all and sundry.' If the proposition in question were true, the professor would by implication also be asserting that the President ought to appoint the Judge President as Chief Justice, if that would get the Judge President to stop making his unfounded allegations of racism. But the professor obviously is not making this further assertion. For he could, without self-contradiction, follow up the statement in question with this one: 'However, the President really ought not to appoint the Judge President as Chief Justice, for the Judge President is a man of doubtful integrity.'²⁵

²⁵ Here is a third example: A father says the following to his daughter: 'You are of course permitted to marry John. If you do, you must get him to finish that PhD of his.' If the proposition in question were true, the father would by implication be asserting that his daughter ought to marry John, if her doing so would get him to

So, the Constitutional Court's reason *for* concluding that the Constitution by implication imposes an obligation to develop the common law whenever doing so will promote the objects of the Bill of Rights is invalid. The focus now shifts onto a reason *against* that conclusion. It is the fact that s 39(2) requires a court to promote the objects of the Bill of Rights, not only 'when developing the common law', but also '[w]hen interpreting any legislation'.

The Constitutional Court has nowhere claimed that the words 'When interpreting any legislation every court must promote the objects of the Bill of Rights', as they appear in s 39(2), imply the inverse of what they express. It has not, that is, claimed that they impose an obligation on a court *to interpret* legislation whenever that would promote the objects of the Bill of Rights. In fact, the following passage from *FNB v SARS* suggests that the Court rejects this possibility:

'In the *Carmichele* case this Court held that . . . the courts are under a general obligation *to develop* the common law appropriately where it is deficient . . . in promoting the s 39(2) objectives. There is a like obligation on the courts, *when interpreting* any legislation . . . to promote those objectives.'²⁶

Moreover, there is good reason not to turn the sentence 'When interpreting any legislation every court must promote the objects of the Bill of Rights', as it appears in s 39(2), on its head. There is good reason, in other words, not to understand s 39(2) as imposing an obligation on a court *to interpret* legislation whenever that would promote the objects of the Bill of Rights. A statutory provision is either determinate or indeterminate regarding a legal question to which it applies. It is determinate if, given its ordinary meaning, it provides a complete answer to the question. It is indeterminate if, given its ordinary meaning, it provides a partial answer. Where a statutory provision is indeterminate, an obligation to interpret legislation whenever that would promote the objects of the Bill of Rights would be redundant. For, in this case, a court is in any event under an obligation to interpret the provision. It is in any event under that obligation because it is under an obligation to apply the provision and because the provision can only be applied by interpreting it. Where, by contrast, a statutory provision is determinate, an obligation to interpret legislation whenever that would promote the objects of the Bill of Rights would be either redundant or impossible to discharge. It is redundant if the objects of the Bill of Rights require the same meaning to be attributed to the provision as its ordinary meaning. It is impossible to discharge if they require a different meaning to

finish his PhD. But the father is not making this further assertion. Because he is not, he could not be accused of insincerity if he made the statement in question while believing that his daughter ought not to marry John (because she is too young or he is too poor). For further examples, see Fagan 'The Confusions of *K*' op cit note 7 at 181–4.

²⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another, First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at 787E–F (emphasis added).

be attributed: for to do that would not be to interpret the provision but rather to depart from it.²⁷

What does this have to do with the Constitutional Court's assertion that s 39(2) imposes an obligation to develop the common law whenever that would promote the objects of the Bill of Rights? In law, context matters.²⁸ And the immediate context of the sentence '*When developing* the common law every court must promote the objects of the Bill of Rights' is a section which also includes the sentence '*When interpreting* any legislation every court must promote the objects of the Bill of Rights'. The latter sentence, as has just been shown, is not understood by the Constitutional Court, nor could plausibly be understood, to imply the opposite of what it expressly states. It is not, and could not be, understood to impose an obligation *to interpret*. But if so, proper regard for the context wherein the sentence '*When developing* the common law every court must promote the objects of the Bill of Rights' appears suggests that this sentence, too, ought not to be taken to imply the opposite of what it explicitly says. That is, due regard for the context wherein this sentence appears suggests that it should not, as the Constitutional Court maintains, be understood to impose an obligation *to develop* the common law.

IV TIE-BREAKERS

Part III has shown that s 39(2) and s 173 of the Constitution do not have the implication attributed to them by the Constitutional Court. They do not, that is, imply that courts are under an obligation to develop the common law whenever it falls short of the objects of the Bill of Rights. Now, in part IV, the focus shifts onto two important implications which s 39(2) does have, but which have hitherto gone unnoticed.

The first implication is that, in order for the s 39(2) obligation to promote the objects of the Bill of Rights to arise, a court must be developing the common law for *independent reasons*, that is, reasons *other* than the objects of the Bill of Rights. The explanation of this is as follows. First, for the obligation to promote the objects of the Bill of Rights to come into existence, a court must be developing the common law. Development, in other words, is a pre-condition for the obligation. Secondly, if a court is developing the common law, it must be doing so for a reason: otherwise it would be acting irrationally. Thirdly, a court's reason for a development which triggers the obligation to promote the objects of the Bill of Rights cannot be that obligation itself: that would be circular. But if (1) the

²⁷ It may be objected that statutory provisions never are determinate. This is a mistaken, even absurd, view, and it is unlikely that anyone really believes it, let alone conducts himself accordingly. However, for present purposes there is no need to refute it. If statutory provisions never are determinate, an obligation to interpret legislation if and in so far as that would promote the spirit, purport and objects of the Bill of Rights always is redundant.

²⁸ See for example Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly* [2001] AC 523 para 28.

obligation to promote the objects of the Bill of Rights arises only if there is a development of the common law, and (2) that development must be for a reason, and (3) that reason cannot be the obligation to promote the objects of the Bill of Rights, then, by simple substitution, it follows that the obligation in question arises only if the common law is being developed for a reason that is independent from that obligation.

The Constitution recognises three such independent reasons. The first, explicitly recognised by s 8, is that the development is required by a right in the Bill of Rights. The critical subsections are 8(1) and 8(2). The effect of s 8(1) is that *any* of the rights in the Bill of Rights may justify a development of *public* common law (that is, common law imposing duties on the state). The effect of s 8(2), by contrast, is that it is for the *courts* to determine which, if any, of the rights in the Bill of Rights may justify a development of *private* common law (that is, common law imposing duties on private persons).²⁹

The second independent reason for developing the common law, explicitly recognised by s 173, is that the development is required by justice. Suffice it to state what the section says:

‘The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power . . . to develop the common law, taking into account the interests of justice.’

The third independent reason for developing the common law is implicitly acknowledged by s 39(3). It is that the development is required in order to give effect to a rule of the common law itself. Again, it is enough to set out the section:

‘The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law. . . .’

The second implication of s 39(2) follows from the first. Independent reasons for developing the common law are either determinate or indeterminate. They are determinate if they justify one way of developing the common law and no other. An example would be where the only way to give effect to a particular right in the Bill of Rights is by abolishing common law rule x and replacing it with rule y. They are indeterminate, by contrast, if they justify several incompatible ways of developing the common law. For example, a right in the Bill of Rights can be given effect either by abolishing

²⁹ The recognition of the rights in the Bill of Rights as reasons for common-law development is not in any way dependent upon s 8(3). The only effect of that subsection is to place a constraint on the development of private common law. It requires that, where a right in the Bill of Rights justifies two or more alternative ways of developing private common law, a court must choose the development that is least disruptive of existing doctrine. To put it another way, the point of s 8(3) is to conserve rather than transform existing private common law.

rule x and replacing it with rule y, or by retaining rule x and supplementing it with rule z.³⁰

Where independent reasons for developing the common law are determinate, the objects of the Bill of Rights have no role to play at all. The reason is this. The objects of the Bill of Rights either require the same development as is required by independent reasons, or require a different one. In the former case, if the court adopts the development that is required by independent reasons, it will satisfy the condition which s 39(2) sets for the obligation to promote the objects of the Bill of Rights to arise. However, the obligation will be superfluous, as it will require exactly what is in any event required by independent reasons. In the latter case, an obligation to promote the objects of the Bill of Rights would make a difference, were it to arise. But it would not arise. To prefer the development that best promotes the objects of the Bill of Rights over the development that is required by independent reasons would be to treat the independent reasons as invalid or defeated. But if the independent reasons are invalid or defeated, the condition that has to obtain in order for the obligation imposed by s 39(2) to arise is no longer satisfied. For it would not be the case that the court is developing the common law for independent reasons.

Where independent reasons for developing the common law are indeterminate, the objects of the Bill of Rights do have a role to play. But the role is a limited one. Imagine that there are several ways to develop the common law applicable to a dispute before a court, each of which gives effect to a right in the Bill of Rights, or a precept of justice, or a rule of the common law. If so, the right, the precept of justice, or the common law rule provides a reason for each of those ways of developing the common law, but not for developing it in one of those ways rather than any other. It is at this point that s 39(2) comes into its own. It provides a tie-breaker. For it requires the court to choose, from among the several ways of developing the common law, each whereof is supported by independent reasons, the development that best promotes the objects of the Bill of Rights.

In sum, the fact that s 39(2) obliges a court to promote the objects of the Bill of Rights only if it is developing the common law for independent reasons entails that the objects of the Bill of Rights play a *secondary* rather than *primary* role in the development of the common law. Where independent reasons uniquely justify a particular development of the common law, the objects of the Bill of Rights do not come into consideration at all. And that is so even if the development required by independent reasons does not optimally promote, or frustrates rather than promotes, the objects of the Bill of Rights. By contrast, where independent reasons justify several developments of the common law, the objects of the Bill of Rights must be considered, not in order to supplant those developments with another, but

³⁰ To make this concrete, imagine that x imposes strict liability for a particular form of harm-doing, y imposes fault-based liability instead, and z creates a new absence-of-wrongfulness defence.

only to choose between them. Even here, therefore, the development required by the joint operation of independent reasons and s 39(2) might not optimally promote, or might frustrate rather than promote, the objects of the Bill of Rights. For the only effect of s 39(2) could be to select among several developments, all whereof are sub-optimal regarding, or even contrary to, the objects of the Bill of Rights, the one which is least so.

V DISAPPOINTMENT

Some readers may accept the thesis which this article has explained and defended, yet be disappointed by it. They may agree that the Constitution accords the objects of the Bill of Rights only a secondary, tie-breaker role in the common law's development, yet believe that it would have been better had it accorded them a primary role instead. This final section shows any such disappointment to be misplaced.

Let us return once more to Hart and Fuller's example. Assume that the no-vehicles-in-the-park rule was made by a local authority. Assume further that the rule reflects a judgement on the local authority's part that prohibiting vehicles in the park will serve certain ends or goals. Then compare the park keeper's decision to prohibit motorised skateboards with his decision to prohibit fireworks.

As was explained earlier, the first of these decisions — that is, the decision to prohibit motorised skateboards — is a determination of the rule. It was reached by considering not only the ordinary meaning of the rule and its logical implications, but also additional premises, including the rule's purpose. The additional premises may not have been in the contemplation of the local authority. There is therefore a sense in which the park keeper reached beyond, or exceeded, the judgement of the authority that is reflected in the rule. However, provided that the additional premises were true, the park keeper's decision nonetheless was in accordance with, or gave effect to, that judgement. Indeed, there would have been no way that the park keeper could have given effect to that judgement other than by relying on those additional premises.

The same cannot be said of the second decision, that is, the decision to ban fireworks. The basis for this decision, to recall, was not the no-vehicles rule itself, but rather the purpose attributed to that rule by the park keeper. Here again, therefore, the park keeper has gone beyond the judgement of the authority that is reflected in the no-vehicles rule. But this time the park keeper has not in any sense given effect to, or acted in accordance with, that judgement. For the judgement that is reflected in the no-vehicles rule is not merely a judgement that certain goals are worth pursuing, but also a judgement that those goals are to be pursued in a particular manner, namely by prohibiting vehicles in the park. Far from giving effect to this judgement, the park keeper's decision to prohibit fireworks simply bypassed it.

This points to a critical difference between the justification provided by the objects of the Bill of Rights and that provided by the rights therein.³¹ In the same way that the no-vehicles rule represented a judgement by the local authority as to how certain ends were to be pursued, so every right in the Bill of Rights represents a judgement by the constitution-makers as to how certain fundamental values are to be achieved. It follows that, when a judge develops the common law by determination of a right in the Bill of Rights, he can justify his decision by invoking the judgement of the constitution-makers, just as the park keeper could justify his prohibition of motorised skateboards by appealing to the local authority's judgement. The judge, that is, can claim to have given effect to the constitution-makers' judgement, even though (and in fact by) exceeding it.

There is no possibility of a similar appeal to the constitution-makers' judgement when a judge develops the common law so as to promote the objects of the Bill of Rights. When a judge develops the common law so as to promote the objects of the Bill of Rights, his action is comparable, not to the park keeper's decision to prohibit motorised skateboards, but rather to his decision to ban fireworks. That is, in the same way that the park keeper's decision to ban fireworks exceeded the local authority's judgement without giving effect to it, so a judge's development of the common law in order to promote the objects of the Bill of Rights exceeds the *constitution-makers'* judgement without giving effect to *that*.

This has an important implication for the notion that the objects of the Bill of Rights should play a leading part in the common law's development. Contrary to what formalism supposes, it is in fact perfectly legitimate for judges to develop the common law in accordance with their own moral convictions. Why? Because, as Schreiner JA made plain in *Daniels v Daniels*, what matters ultimately is that the common law be just.³² And because one way to achieve that is by allowing judges to develop the common law according to their own moral judgements. Some may question the second of these claims. But it must be true. For it would be false only if judges were morally wrong more often than they were morally right — and that is implausible.³³

The fact that it is legitimate for judges to develop the common law in accordance with their own moral convictions — because that is a possible route to a just common law — has an important consequence. It means that it

³¹ For earlier attempts to explain this difference, see Fagan in Friedmann & Barak-Erez (eds) *Human Rights in Private Law* op cit note 9 at 84–88 and Fagan in Du Bois (ed) *The Practice of Integrity* op cit note 9 at 124–7.

³² *Daniels v Daniels*, *MacKay v MacKay* 1958 (1) SA 513 (A) at 522D–G.

³³ It may be objected that it is counter-majoritarian for judges to develop the common law in accordance with their own moral convictions. But this objection confuses judges' striking down of statutory provisions, which certainly is counter-majoritarian, with their development of the common law, which certainly is not. See Anton Fagan in Friedmann & Barak-Erez (eds) *Human Rights in Private Law* op cit note 9 at 84–5.

makes sense for judges to develop the common law by determination of the rights in the Bill of Rights or in accordance with the objects of the Bill of Rights, only if these ways of developing the common law are more likely to produce a just common law than is a judge following his own moral lights.³⁴ But what could make that so?

There is only one possibility. It is that, when judges develop the common law by determination of the rights in, or in accordance with the objects of, the Bill of Rights, they give effect to a moral judgement, a judgement about justice, superior to their own.³⁵ For that to be the case, it is necessary (at the very least) that judges are actually giving effect to someone else's moral judgement when they develop the common law in these two ways. As has been explained, this condition is met when a judge develops the common law by determination of a right in the Bill of Rights. For in that case, the judge is giving effect to the judgement of the constitution-makers. However, the condition is not met when a judge develops the common law so as to promote the objects of the Bill of Rights. For, in this case, the judge does not give effect to the constitution-makers' judgement, nor anyone else's.

This does not mean that common law development in accordance with the objects of the Bill of Rights is entirely without value. To the extent that judges develop the common law in accordance with the objects of the Bill of Rights, they ensure that the common law and the Bill of Rights are coherent: that they are, as Dworkin puts it, 'consistent in principle'.³⁶ Dworkin thinks that this kind of coherence has value: it is, he claims, a 'distinct political virtue beside justice'.³⁷ Dworkin may be right. But even if he is, it does not follow that coherence has the *same* value as justice. It clearly does not. If you doubt that, ask yourself which you would rather live under: a regime of laws all whereof pursue a single, consistent set of evil purposes, or a regime of laws pursuing an inconsistent set of purposes, most whereof are good, but some whereof are bad?

And that — to conclude — is why the fact that the Constitution relegates the objects of the Bill of Rights to a secondary role in the common law's development is a cause for celebration, not lamentation. Coherence matters a lot less than justice. Because of that, the objects of the Bill of Rights matter a lot less to the common law's development than do the rights in the Bill of Rights and the moral convictions of judges, past and present. The Constitution would have got this ranking wrong had it — as the Constitutional Court believes — regarded the objects of the Bill of Rights as reasons for developing the common law alongside the rights in the Bill of Rights.³⁸ But

³⁴ 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.

³⁵ See Joseph Raz 'Intention in interpretation' in George (ed) *The Autonomy of Law* op cit note 16 at 258–9.

³⁶ Ronald Dworkin *Law's Empire* (1987) 134–5, 167, 184, 227 and 228.

³⁷ Dworkin *ibid* at 166.

³⁸ The Constitutional Court is not alone in believing this. Johan de Waal, Iain Currie, Frank Michelman and Stuart Woolman believe it too. See Johan de Waal &

the Constitution does not get the ranking wrong. It does not get it wrong because it does not regard the objects of the Bill of Rights as reasons for developing the common law at all, but only as reasons for choosing between developments that are already justified by the rights in the Bill of Rights, justice or the rules of the common law. The fact that the Constitution gets this ranking right is one of its great achievements.³⁹ Because it is a great achievement, it should not be undone by continued judicial misinterpretation of ss 39(2) and 173.

Iain Currie 'Application of the Bill of Rights' in *The Bill of Rights Handbook* (2005); Frank Michelman 'On the uses of interpretive "charity": Some notes on application, avoidance, equality and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1; Stuart Woolman 'Application' in Stuart Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* (2005).

³⁹ It is an achievement that sets it apart not only from the interim Constitution, but also from constitutions elsewhere.