

IN DEFENCE OF THE CONSTITUTIONAL COURT: HUMAN RIGHTS AND THE SOUTH AFRICAN COMMON LAW

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ABSTRACT

Section 39(2) of the South African Constitution is one of the primary tools through which the Constitution is intended to do its revolutionary work, by requiring that all legislation, common law and customary law be interpreted and developed in accordance with the spirit, purport and objects of the Bill of Rights. As a result of the Constitutional Court's interpretation of that section, the Constitution has had and will continue to have a rightly extensive and transformative impact on the law governing relations between private persons. Despite that impact, or perhaps because of that impact, certain commentators have called that interpretation into question. In this article, we explain that the South African Constitution ought to be interpreted holistically and teleologically. Once the nature of constitutional interpretation is properly understood, and once section 39(2) is then viewed through the appropriate interpretive lens, it will be seen that courts are indeed mandated to develop the common law, of their own accord if need be, in each case that comes before them. Furthermore, it will be seen that that development must promote the values of the Constitution as a whole (and not just of the Bill of Rights).

I INTRODUCTION

In a previous essay¹ in this Journal, we reviewed the body of Ronald Dworkin's work, from his *Taking rights seriously* to *Justice for hedgehogs*. We

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1 Drucilla Cornell & Nick Friedman 'The significance of Dworkin's non-positivist jurisprudence for law in the post-colony' (2010) 4(1) *Malawi Law Journal* 1.

showed that his thought has culminated in a defence of the rule of law as an aspirational ideal of legality, according to which law's integrity is a matter of fidelity to Dworkin's two principles of dignity. At the time we wrote that piece, the integrity of the South African Constitution was being seriously and publicly questioned, most noticeably by certain figures within the country's ruling party (in the wake of Jacob Zuma's corruption trial, and the scandal surrounding John Hlophe and the Constitutional Court). Thus, given the foundational role which integrity has played in Dworkin's thinking about the law, we thought it prescient to offer an interpretation of the South African Constitution through the lens of his work.

However, we also wrote from a concern with a different kind of attack on the Constitution, an attack from within the legal academy which seeks to undermine the impact of the Constitution on the 'private' law. In our present paper, we write to address that concern more directly. In particular, we write to defend the Constitutional Court's interpretation of section 39(2) of the Constitution. Section 39(2) is one of the cornerstones of South Africa's constitutional framework – indeed, it is one of the primary tools through which the Constitution is intended to do its revolutionary work, by requiring that all legislation, common law and customary law be interpreted and developed in accordance with the spirit, purport and objects of the Bill of Rights. As a result of the Court's interpretation of that section, the Constitution has had and will continue to have a rightly extensive and transformative impact on the law governing relations between private persons.

Despite that impact, or perhaps because of that impact, certain commentators have called that interpretation into question. A particularly fierce critic of the Court's section 39(2) jurisprudence is Professor Anton Fagan, who has argued against the Court's approach to constitutional interpretation in a series of papers concerned foremost with the law of delict.² We believe that Professor Fagan's arguments speak broadly for a particular academic view of the nature and purpose of the Constitution, and we therefore focus in this paper on an engagement with his criticisms of the Court.

Right at the outset we should say that we do not engage here with Fagan's doctrinal analysis of the principles of the law of delict. Much of what he writes about the state of the law on delictual liability is of great interest and importance. Indeed, continued doctrinal reflection on the common law is not only

2 Anton Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127(4) *South African Law Journal* 611; 'The Confusions of K' (2009) 126 *South African Law Journal* 154; Anton Fagan 'Reconsidering Carmichele' (2008) 125 *South African Law Journal* 659; 'Section 39(2) and political integrity' in Francois du Bois (ed) *The practice of integrity: Reflections on Ronald Dworkin and South African law* (2005) 117.

valuable in its own right, but is essential to the ongoing project of developing the law in line with the Constitution – before we can see how the law must be developed to accommodate constitutional values, we need a clear understanding of what the law presently requires. For example, Fagan argues that the law of vicarious liability, properly understood, requires judges to make value judgments when applying the law to new cases.³ If that is true, it opens an important space for constitutional principles to inform those value judgments, thus answering the important question of *how* the Constitution is to apply in the development of the law of vicarious liability.⁴

However, other arguments made by Fagan go to the questions of *whether* and to *what degree* the Constitution is to apply to the common law at all. It is with those arguments that we take issue, since we believe that the Constitution mandates that the common law be deeply infused with constitutional values.

According to Fagan, the Constitutional Court has misinterpreted the Constitution in several important ways, and has thus seriously misunderstood the role that the Constitution is meant to play in the development of the South African common law. Fagan makes two central arguments:

- (1) Properly interpreted, the Constitution does not place an obligation on courts, in each case before them, to develop the common law in accordance with constitutional values. For Fagan, constitutional values play a role only when independent reasons require the common law to be developed. Put differently, the fact that a development of the law will promote constitutional values is neither a necessary nor sufficient condition for developing the law in that way.⁵
- (2) In addition, and in any event, the relevant values to be applied to the common law are to be sourced in the Bill of Rights only. The Constitutional Court is therefore wrong to test the common law against the ‘values of the Constitution’ more generally.⁶

We disagree profoundly with both these claims. In our view, Fagan’s arguments proceed from an entirely mistaken view of the enterprise of constitutional interpretation. That, in turn, results in a flawed analysis of the

3 Fagan *Confusions of K*, above note 2.

4 *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) paras 54-56; *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) paras 28-30, 140-141.

5 Fagan *Confusions of K*, above note 2, 181-192.

6 *Ibid* 178-181.

meaning of section 39(2) of the South African Constitution specifically. In this article, we explain that the South African Constitution ought to be interpreted holistically and teleologically. Our view of constitutional interpretation is not only demanded by the Constitution itself, but is also widely supported in the literature on interpretation and constitutional theory, as well as in the practice of the Constitutional Court. Once the nature of constitutional interpretation is properly understood, and once section 39(2) is then viewed through the appropriate interpretive lens, it will be seen that courts are indeed mandated to develop the common law, of their own accord if need be, *in each case* that comes before them. Furthermore, it will be seen that that development must promote the values of the Constitution as a whole (and not just of the Bill of Rights).

If we are right, Fagan's argument is not merely a 'plain' reading of section 39(2). Instead, his argument is better cast as a normative argument against the influence of the Constitution on the common law, and more generally as an argument against precisely the kind of holistic and teleological interpretation we advocate in this article. Interestingly, however, Fagan avoids that kind of express normative argument about whether constitutional influence on the private law is a good or a bad idea. Rather, Fagan divorces the question of the proper interpretation of the Constitution from questions about the moral and political goals which different interpretations achieve. As will become clear, we part ways with Fagan precisely because we do not think these questions can be separated – rather, we demonstrate that questions of political morality are fundamental to constitutional interpretation.

Before turning to our discussion of constitutional interpretation, however, we offer a brief note on terminology. In this essay we want to try to move away from talk of the 'private law', preferring instead to speak of the Constitution's influence on the common law. We avoid reference to 'private law' largely because it is an unintelligible category. All positive law in modern legal systems has its source in the state – it is either made by legislatures or by courts, or (increasingly rarely) is the product of custom which will itself be given effect to by the courts when required.⁷ In this sense, 'private law' is an oxymoron, and continued reference to it confuses rather than illuminates.

However, there are other important reasons to avoid the terminology of private law. First, the idea of a private law obscures not only the role of the state in law creation, but also the responsibility of the state for what it prohibits and permits in interactions between private individuals. Secondly, subsuming

7 In South Africa, there is of course also the living customary law, which is given official recognition by the South African Constitution.

areas of the law such as the law of contract or law of delict under the category of 'private law' ignores the variety of ways in which governments can be involved as parties to contractual or delictual law suits, and thus ignores important ways in which the 'private law' might need to be developed to deal adequately with the government's rights and duties as a plaintiff or defendant in these kinds of cases. Indeed, the nature of the state plays a significant role in the reasoning of some of the Constitutional Court's decisions which develop the law of delict, and which we discuss throughout this essay.⁸ Drawing analogies between the state and private actors, as Fagan sometimes does, thus undermines the special character of the state's delictual liability. Finally, the notion of 'private law' wrongly implies that interactions between private parties can have no significant implications for human rights provisions, which are misconceived under that view as applying only to state-individual interactions.

For all these reasons, the Constitutional Court has rightly cautioned against the dangers of attaching consequences to 'concepts such as public law and private law when the validity of such concepts and the distinctions which they imply are being seriously questioned'.⁹ In the result, in this essay we eschew the use of 'private law' in favour of 'common law' – where we are concerned with laws regulating interactions between two non-state actors, we think it is better to say that in as many words. Of course, the common law deals with a wider category of interactions than just individual-individual relations (such as the common law of administrative law) – but our argument is general enough to describe the appropriate impact of the Constitution on those kinds of interactions too.

II CONSTITUTIONAL INTERPRETATION

In this section we offer four general points about the interpretation of constitutions. These points are not novel – rather, we consider them to reflect a broad consensus of academic opinion. After making these points, we go on to demonstrate that the way the Constitutional Court has construed its interpretive mandate is on all fours with the principles we have set out.

8 Our focus is on the liability of the state in *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC). However, the nature of the state and its constitutional duties to protect its subjects is equally of vital importance to the rationale of the Constitutional Court's decision in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC), and its recent decision in *F v Minister of Safety and Security & Another* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC), in which it extended the principle laid down in *K*.

9 *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) para 57.

The first point is about interpretation generally, and it is that most theorists now embrace, to a greater or lesser degree, Wittgenstein's central insight in *Philosophical investigations*. That insight, given an especially radical interpretation by Kripke,¹⁰ is that words are essentially just ink-marks on a page. Those ink-marks only become meaningful through the activity of interpretation. But there are no rules for how to interpret (or at least no rules which would not themselves depend on further rules, to infinite regress), so 'any interpretation still hangs in the air along with what it interprets, and cannot give it any support'.¹¹ Since we cannot escape our own language game, we are caught in a paradox, in that 'no course of action could be determined by a rule, because every course of action could be made out to accord with the rule'.¹²

As we have implied, theorists disagree about the extent to which Wittgenstein's paradox holds true across language: some theorists believe the paradox is pervasive, contributing to a 'radical' linguistic indeterminacy;¹³ others believe the paradox is more limited.¹⁴ But almost no one denies the paradox. That is, most people accept that, for the most part, the meaning of words and rules, and the instances to which they apply, cannot simply be known in advance of interpretation. In this regard, Timothy Endicott has described as 'a bizarre consensus among people who agree on nothing else' the view that the application of the law requires an interpretation of the law.¹⁵

In our view, it is therefore fair to state that most leading theorists now adopt accounts of interpretation which fall between two extremes. On the one hand, they avoid adopting such a radical view of linguistic indeterminacy so as to make it impossible for us to criticise anything as right or wrong. On the other hand, they avoid the rigid formalism of the kind of ordinary language philosophy associated with JL Austin (and Hart's adoption of it), according to

10 Saul Kripke *Wittgenstein on rules and private language* (1984).

11 Ludwig Wittgenstein *Philosophical investigations* (3 ed) (1973) § 198.

12 Ibid § 201. One solution to the paradox adopted by some theorists is to deny that there is a gulf between the meaning of a rule and its application; that is, they argue that there are ways of understanding without interpreting. See, for example, David Finkelstein 'Wittgenstein on rules and platonism' in Alice Cray & Rupert Read (eds) *The new Wittgenstein* (2000); Timothy Endicott *Vagueness in Law* (2000). On the paradox of analysis see also Nicola Lacey 'Analytical jurisprudence versus descriptive sociology revisited' (2006) 84 *Texas Law Review* 944.

13 Drucilla Cornell *The philosophy of the limit* (1992); Stanley Fish *Doing what comes naturally: Change, rhetoric and the practice of theory in literary and legal studies* (1989).

14 Endicott, above note 12; Finkelstein, above note 12; Martin Stone 'Focusing the law: What legal interpretation is not' in Andrei Marmor (ed) *Law and interpretation* (1995).

15 Endicott, above note 12, 11-12. Note that for Endicott this view goes too far, in that it includes instances of understanding which are not interpretive at all. This argument relies on the account of interpretation he defends there – not as understanding, but as a creative process for making choices between meanings of an expression or text (see 12-13).

which language consists to a significant degree of words with a core of settled meaning whose extension ('clear instances') can be determined without interpretation.¹⁶

Of course, in line with this consensus, it is recognised that the text (and more broadly, the history of a community's political decisions) has to play at least enough of a role so that the judge can sincerely consider her judgment to be an interpretation of *that text* or *those decisions*, rather than as an interpretation of something else completely.¹⁷ To use one example, the text of a constitution has to place enough of a constraint on the interpretive exercise so that an interpretation can count as an interpretation of *that* constitution, rather than as an interpretation of, say, Shakespeare's *Hamlet*. This constraining role of the text has been variously described by Raz as the 'conserving' aspect of interpretation, and by Dworkin as fidelity to the past political decisions of our community.¹⁸ However, most theorists now agree that the constraining role of the text will be relatively small.¹⁹

That then is the first point about constitutional interpretation: that giving meaning to constitutional provisions necessarily involves interpretive work.

Our second point – which is again supported by a general consensus – is that interpretation is a normative enterprise.²⁰ As we have just seen, linguistic conventions (whatever restraint they are capable of placing on the range of feasible interpretations) cannot finally resolve questions about whether, for example, affirmative action is required by an equality provision, or whether a trial is fair.²¹ Settling the meaning of these kinds of provisions involves *giving* them a meaning, which is to say that the text by and large cannot be rendered meaningful without the supplementary, evaluative work which is necessarily

16 JL Austin *How to do things with words* (2 rev ed) (1975); HLA Hart *The concept of law* (2 ed) (1997); HLA Hart 'Positivism and the separation of law and morals' (1958) *Harvard Law Review* 593; Lon Fuller 'Positivism and fidelity to law: A reply to Professor Hart' (1958) *Harvard Law Review* 630. See also Lacey, above note 12.

17 Aileen Kavanagh 'The idea of a living constitution' (2003) 16 *Canadian Journal of Law and Jurisprudence* 55, 58-60; Joseph Raz 'Interpretation without retrieval' in Joseph Raz *Between authority and interpretation* (2009); Ronald Dworkin *Law's empire* (new ed) (1998).

18 Joseph Raz 'On the authority and interpretation of constitutions: Some preliminaries: in his *Between authority and interpretation*, above note 17; Raz 'Interpretation without retrieval', above note 17; Dworkin, above note 17.

19 Raz 'Interpretation Without Retrieval', above note 17.

20 Ibid 262-263.

21 Aileen Kavanagh *Constitutional review under the UK Human Rights Act* (2009) 30; Kavanagh *Living constitution*, above note 17, 61; Endicott, above note 12; Raz 'Interpretation without retrieval', above note 17; Hart *The concept of law*, above note 16; Cornell, above note 13; Fish, above note 13; Dworkin, above note 17.

involved in interpretation.²² Thus, when judges disagree about the meaning of a particular legal provision that is mostly *not* because they do not understand the linguistic conventions of their community. Rather, their disagreement is about the right answers to moral questions (amongst other evaluative questions) – their disagreements are therefore couched in justifying or constitutive reasons about why a particular interpretation of a constitutional provision is the best interpretation.²³ This is why there is a difference between grammatical exegesis and constitutional analysis.²⁴

The two points about interpretation that we have offered thus far have led theorists to remark that interpretation has a Janus-faced quality: it has a backward-looking, conserving aspect which strives to remain faithful to the text being interpreted; and it has a forward-looking, innovative aspect which strives to offer an interpretation which is justified according to sound principles of political morality.²⁵ Given the Janus-faced nature of interpretation, the ultimate criterion for assessing the correctness of a legal interpretation is what makes for the best, most just judicial decision.²⁶ Put differently, we cannot finally judge whether an interpretation is good or sound in the absence of moral judgment about its significance.

Raz, Dworkin, Cornell, Gardner, Derrida, Endicott – all these theorists agree that the primary role of the judge is to do justice.²⁷ That includes an appropriate fidelity to the past political decisions of a community, but that is not all it includes, and moreover, it only includes that fidelity *because* it has moral value. On this view, it is not just the forward-looking aspect of interpretation which is capable of promoting moral values. Rather, the backward-looking aspect serves the important (though not to be overstated) values of continuity and stability, of respecting people's autonomy by allowing them to plan in

22 John Gardner 'Legal positivism: 5½ myths' (2001) 46 *American Journal of Jurisprudence* 199, 221; Kavanagh *Constitutional review*, above note 21, 32-33.

23 Kavanagh *Living constitution*, above note 17, 61; Raz 'Interpretation without retrieval', above note 17; Dworkin, above note 17; Ronald Dworkin *Justice in robes* (2006) Ch 1.

24 Sachs J in *S v Mhlungu & Others* [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) para 121 fn 32; Feroz Cachalia et al *Fundamental rights in the new Constitution* (1994) Ch 1.

25 Gardner, above note 22, 222, who also notes this backward-looking and forward-looking aspects of interpretation.

26 Raz 'On the authority and interpretation of constitutions', above note 18; Dworkin, *Justice in robes*, above note 23, ch 1; Gardner, above note 22, 220.

27 Raz, *ibid*; Dworkin *Justice in robes*, above note 23; Drucilla Cornell 'Pragmatism, recollective imagination and transformative legal interpretation' in Drucilla Cornell *Transformations: Recollective imagination and sexual difference* (1993); Gardner, above note 22, 220; Jacques Derrida 'Force of law: The 'mystical foundation of authority' in Drucilla Cornell et al (eds) *Deconstruction and the possibility of justice* (1992); Timothy Endicott 'The impossibility of the rule of law' in Timothy Endicott *Vagueness in law*, above note 12. See also Kavanagh *Living constitution*, above note 17, 68.

accordance with law, and by respecting the moral authority of law-makers (where that exists).

However, doing the right thing means always holding open the possibility of adopting an innovative interpretation of a legal provision which will serve the ends of justice.²⁸ Thus, within a broadly stable legal framework, the job of the courts is to seek to do justice through interpretation.²⁹

Drawing all of these features of interpretation together, Raz argues that an interpretation (of a work of art) is:

an explanation of the work interpreted which highlights some of its elements and points to connections and interrelations among its parts, and between them and other aspects of the world, so that (1) it covers adequately the significant aspects of the work interpreted... and is not inconsistent with any aspect of the work; (2) it explains the aspects of the work it focuses on; and (3) in doing the above it elucidates what is important in the work, and accounts... for whatever reasons there are for paying attention to the work as a work of art of its kind.³⁰

The more successful an interpretation is in meeting these criteria, the better it is as an interpretation.

Applied to a constitution instead of a work of art, the account demonstrates three important things about constitutional interpretation: (1) a good interpretation of a constitution must render the component parts of a constitution consistent (so far as possible); (2) relatedly, a good interpretation of a particular part or provision of a constitution necessarily considers and interprets other parts or provisions of the constitution (especially if we assume that a particular interpretation is part of and contributes to a broader, shared practice of interpreting the constitution as a whole); and (3) that interpretation takes place against the purposes and values of the constitution, i.e. against conceptions of what makes the constitution valuable.

Importantly, then, a constitution cannot be read clause by clause, nor can any particular clause be interpreted without an understanding of the broader constitutional framework.³¹

The picture of interpretation we have offered thus far accords with the description of purposive interpretation famously given by Lord Wilberforce, and adopted by the South African Constitutional Court:

28 Kavanagh *Living constitution*, above note 17, 68.

29 Kavanagh *Constitutional review*, above note 21, 33.

30 Raz 'Interpretation without retrieval', above note 17, 259.

31 Sachs J in *Mhlungu*, above note 24, para 121 fn 32.

[J]udges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation. They lay down the law accordingly.³²

The third point we wish to make about interpretation is that the need for interpretation, as well as the intensity and pervasiveness of the evaluative considerations on which interpretation relies, are all the more acute in the particular context of constitutional interpretation (as opposed to the interpretation of ordinary statutes), given the broad language and moral concepts which constitutions necessarily adopt.³³

Fourthly and finally, substantive theories of the correct method of constitutional interpretation are necessarily parochial - whether they are justified or valid as theories depends in large part on the background of social, political and constitutional arrangements of the particular country in question.³⁴ Constitutions are very different from one another, countries have diverse bodies of constitutional law and constitutional practice, and there are very different understandings from place to place about the role of the constitution in life and law.³⁵ A theory of the correct method for interpreting a constitution must be sensitive to this.

These then are the general features of interpretation which we believe represent at least a minimum level of consensus amongst legal theorists. We turn now to demonstrate that the Constitutional Court's approach to interpreting the Constitution is in accordance with precisely this consensus.

First, the Court's interpretive approach pays adequate attention to the text of the Constitution itself, and to history more broadly. As Justice Kentridge stated in *S v Zuma*:

32 *James Buchanan & co Ltd v Babco Forwarding & Shipping (UK) Ltd* (1977) 2 WLR 107, 112, quoted in *Mhlungu*, above note 24, para 122.

33 Kavanagh *Constitutional review*, above note 21; Kavanagh *Living constitution*, above note 17; Raz 'On the authority and interpretation of constitutions', above note 18.

34 Raz, *bid*, 323-329; Philip Bobbit 'Constitutional Law and interpretation' in Dennis Patterson (ed) *A companion to philosophy of law and legal theory* (2ed) (2010) 133.

35 Raz 'On the authority and interpretation of constitutions', above note 18, 323-324. There are broad similarities here with the account of interpretation Dworkin offers in *Law's empire*, above note 17.

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. ... [E]ven a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.³⁶

The moral value of this 'conserving' aspect of interpretation was recognised by Justice O'Regan in *Bertie van Zyl*:³⁷

It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that rules be articulated clearly and in a manner accessible to those governed by the rules. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.³⁸

In support of this contention, she cited³⁹ the following passage from the Court's judgment in *Hyundai*:⁴⁰

On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.⁴¹

36 *S v Zuma & Others* [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA) paras 17-18. On the relevance of legislative history, see *S v Makwanyane & Another* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 (CC) paras 13-25.

37 *Bertie Van Zyl (Pty) Ltd & Another v Minister for Safety and Security & Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC).

38 *Ibid*, para 22.

39 *Ibid*, para 23.

40 *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* [2000] ZACC 12; 2001(1) SA 545[2000] ZACC 12; ; 2000 (10) BCLR 1079 (CC).

41 *Ibid*, para 24.

However, the Court has also stressed that the Constitution must be interpreted in a way which is generous and purposive,⁴² precisely because adopting a formalistic, ‘ordinary language’ approach will restrict the Constitution’s transformative potential.⁴³

A generous approach is concerned with giving the Constitution and the rights within it as broad a reach as possible.⁴⁴ The nature of a purposive approach, on the other hand, was explained by the Court with reference to decisions of the Canadian Supreme Court, which adopted a similar approach to constitutional interpretation:

[T]he proper approach to the definition of the rights and freedoms guaranteed by the *Charter* [is] a purposive one. The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought *by reference to the character and the larger objects of the Charter itself*, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, *to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter*.⁴⁵ (Our emphasis)

In line with this approach, the Constitutional Court has held that the Constitution ‘must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, [and] other provisions of the Constitution itself’.⁴⁶

The Court therefore adopts a teleological approach to interpretation,⁴⁷ consistent with the view of interpretation set out above, in which the constituent parts of the Constitution are interpreted so as to cohere with one another,

42 See *Makwanyane*, above note 36, para 9.

43 Heinz Klug ‘South Africa: From constitutional promise to social transformation’ in Jeffrey Goldsworthy (ed) *Interpreting constitutions: A comparative study* (2007) 296; Denis Davis *Democracy and deliberation: Transformation and the South African legal order* (1999) 24–30.

44 *Zuma*, above note 36, paras 14–15.

45 *R v Big M Drug Mart* (1985) 13 CRR 64, 103, cited in *Zuma*, above note 36, para 15. See also *Hunter v Southam Inc* [1984] 2 SCR 145.

46 *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 16; *Makwanyane*, above note 36 paras 9–10.

47 See further the judgment of Ackermann J in *Du Plessis & Others v De Klerk & Another* [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (CC); George Devenish *Interpretation of statutes* (1992); Etienne Mureinik ‘Administrative law in South Africa’ (1986) 103 *South African Law Journal* 615.

and to further the purposes of the Constitution as a whole.

Furthermore, the Constitutional Court is conscious that its interpretive task must be understood in the light of South Africa's particular history and its present conditions, as well as in the light of the unique nature of the South African Constitution itself:

In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. ... Such a jurisprudential past created what the postamble to the Constitution recognized as a society 'characterized by strife, conflict, untold suffering and injustice.' What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting 'future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.'⁴⁸

In *Mhlungu*, Justice Sachs directly addresses the relationship between this history and constitutional interpretation in South Africa:

We are a new court, established in a new way, to deal with a new Constitution. ... We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights.⁴⁹

Importantly, he added that:

the question of interpretation [is] one to which there can never be an absolute

48 *Makwanyane*, above note 36, para 261 (per Mahomed J). See also Klug, above note 43, 314-315. That the Court understands the localized nature of a theory of constitutional interpretation is evinced also by its approach to foreign law, to which it resorts freely but adopts cautiously, as the constitutional dispensations of other countries, and their social realities, are very different to those in South Africa.

49 *Mhlungu*, above note 24, para 127.

and definitive answer and that, in particular, the search of where to locate ourselves on the literal/purposive continuum or how to balance out competing provisions, will always take the form of a principled judicial dialogue, in the first place between members of this court, then between our court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large.⁵⁰

As these last three quotes indicate, it is of great interpretive importance that the Constitution was expressly intended to usher in a legal revolution – a moral regeneration of law (including the private law) so as to build a harmonised jurisprudence derived from and justified in terms of the principles of political morality espoused by the Constitution.⁵¹ This purpose is part of what makes the Constitution valuable, and any justifiable interpretation of the Constitution must make sense of and further that purpose. Furthermore, as this last quote also tells us, the responsibility for developing a just and coherent constitutional jurisprudence rests not just with courts but also with legal academics, who must participate in a constructive dialogue with courts and other persons and institutions about which interpretations of the Constitution will best realise its transformative purpose.

III THE MEANING OF SECTION 39(2)

In the light of the account of constitutional interpretation we have set out thus far, we turn now to address what we believe to be the proper interpretation of section 39(2), and engage with Fagan's own interpretation of that section. Section 39(2) of the Constitution provides:

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.

Fagan argues that on a proper interpretation of section 39(2), a court is not under an obligation to develop the common law in each case that comes before it. Rather, only when a court decides to develop the common law for

50 Ibid, para 129.

51 Klug, above note 43, 276; LWH Ackermann 'The legal nature of the South African constitutional revolution' (2004) *New Zealand Law Review* 633; Pius Langa 'Transformative constitutionalism' (2006) 3 *Stellenbosch Law Review* 351, 352; Dikgang Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *South African Journal of Human Rights* 309; Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 31.

reasons *independent* of its potential constitutional non-compliance does section 39(2) specify that the development should promote the objects of the Bill of Rights. Section 39(2) therefore imposes only a 'conditional obligation to promote the values of the Bill of Rights – the condition being that the court is developing the common law'.⁵² Mere deviation from the Constitution is not a sufficient reason for a court to develop the common law, and section 173 (which gives a court the inherent power to develop the common law) does not change the situation.

In this section of our paper, we dispute Fagan's view by arguing that section 39(2) does indeed impose a non-conditional obligation on courts to develop the common law in line with the Constitution in each and every case. Put simply, we believe Fagan is wrong to assume that we can discuss the development of the common law (for the purposes of section 39(2)) independently of its potential non-compliance with the Constitution. What counts as development of the common law can only be determined by reference to the demands of the Constitution, and how the common law might be developed to meet those demands.

In this regard, our point of departure is the statement by the Court in *Carmichele* that the obligation imposed by section 39(2) encompasses two branches of inquiry, which 'cannot be hermetically separated from one another'. One inquiry involves considering whether the existing common law matches up to constitutional objectives. The other inquiry involves a determination of how the common law is to be developed to meet constitutional objectives, if it falls short of them: perhaps a common law rule should be overturned entirely, or extended to encompass new facts, or limited to exclude facts, or perhaps legal reform should be left to the legislature, and so on.

We say more below about the different ways in which the common law might be developed to promote constitutional values. The essential point for present purposes is that the interplay between these two lines of inquiry shows that Fagan is wrong to assume that we can understand what constitutes a development of the common law for the purposes of section 39(2) in isolation of arguments about the circumstances under which the Constitution requires the common law to be developed. In short, we cannot understand what constitutes a development of the common law without understanding when the Constitution requires the common law to be developed.

In the course of our argument we seek to deal with two separate but related issues. First, in the next sub-section, we discuss the relationship between *justifications* for developing the common law and the *means* for developing the

52 Fagan *Confusions of K*, above note 2, 183.

common law. In making that point, we aim to show that Fagan's narrow conception of what constitutes 'development' of the common law is inadequate as an interpretation of section 39(2). Thereafter, we discuss the extent of the obligation on courts to test, of their own accord, the common law against the Constitution.

A When is/must the common law (be) developed?

Section 39(2) states that a court must promote the values of the Bill of Rights 'when developing the common law'. This immediately raises the question: when is a court developing the common law? In other words, what are the conditions under which a court can be said to be 'developing' the common law, such that its mandate to develop the law in accordance with the Bill of Rights is triggered?

Fagan's argument gets off to a wrong start by assuming that section 39(2) specifies the conditions of its own application. Indeed, as was recognized in *Thebus* and *K*, section 39(2) does not itself state 'what triggers the need to develop the common law or in which circumstances the development of the common law is justified'.⁵³ Therefore, in order to understand the obligation imposed by section 39(2), it must be read with other relevant sections of the Constitution, in the light of the purposes which the Constitution seeks to achieve.

For starters, as the Court itself has held on previous occasions, section 39(2) must be read with section 173, which tells us that courts at least have the power to develop the common law if they so choose. However, neither of those sections tells us the conditions under which the common law must be developed – section 173 only tells us that the courts *can* develop the common law,⁵⁴ and section 39(2) only tells us what must happen *when* they do (that is, they must develop it in line with the Bill of Rights).

How then do we know *if* the common law must be developed? A crucial part of the puzzle lies in section 8 of the Constitution, which provides that '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, *the judiciary* and all organs of state' (our emphasis). As Justice O'Regan explained in *K*:

In addition to section 39(2) of the Constitution, section 8 of the Bill of Rights makes it plain that the judiciary is bound by the provisions of the Bill of Rights in

53 *S v Thebus & Another* 2003 (10) BCLR 1100 (CC) at para 27; *K*, above note 8, para 16.

54 Fagan *Confusions of K*, above note 2, 183-184.

the performance of its functions. The *cumulative effect of these constitutional provisions* is to create an expressly normative legal system founded on the norms articulated in our Constitution.⁵⁵ (Our emphasis)

Note that this statement is as clear a demonstration as one could ask for of the Constitutional Court's commitment to a teleological interpretation of the Constitution. Furthermore, and of relevance to our present purpose, the reliance on section 8 explains the circumstances under which the judiciary must promote the Bill of Rights: that is, *always*. If part of a court's function is to apply the law, and it applies law which is unconstitutional, it has breached its section 8 obligation to be bound by the Bill of Rights. Thus, section 8, together with sections 39(2) and section 173, helps us to understand the role that the Constitution envisages for the courts: not only do they have the inherent power to develop the common law in line with the Bill of Rights, but they *must* exercise that power in each and every case in order to avoid breaching their constitutional mandate, and to further the Constitution's vision of a transformed legal order.

Our argument is supported by the legislative history of section 8. It will be recalled that the equivalent section of the interim Constitution omitted reference to the judiciary: 'This Chapter shall bind all legislative and executive organs of state at all levels of government'.⁵⁶

The omission of the judiciary in that section was interpreted as highly significant in *Du Plessis v De Klerk*, the case which dealt with the effect of the Bill of Rights on the common law regulating affairs between private persons (what is usually termed as 'horizontal application' of human rights). Specifically, the relevant provision of the interim Constitution was interpreted so as to diminish the effect that the Bill of Rights was intended to have on the private law.⁵⁷

Against this background, the decision by the Constitutional Assembly to include the judiciary in section 8(1) of the final Constitution can only be understood as a reaction to the fear, roused by *Du Plessis*, that the Constitution would leave relations between individuals largely untouched by its transformative values, thus allowing apartheid to live on in the 'private' sphere.⁵⁸

55 *K*, above note 8, para 15. See also of *Carmichele*, above note 4, para 33, where sections 7, 8, 39(2) and 173 are read together to generate the obligation to develop the common law.

56 Section 7(1) of the interim Constitution.

57 See *Du Plessis*, above note 47, paras 45, 47, 76. Cf Ackermann J's comments on this point at para 93ff.

58 This break from the interim Constitution is explicitly recognised in *Carmichele*, above note 4, para 34. See also Spitz & Chaskalson *The politics of transition: A hidden history of South Africa's*

It is clear then that the final Constitution is intended to have an extensive impact on the common law. Indeed, the significant jurisprudential contribution of *Carmichele* and *K* is that they embody precisely this transformative impact. Therefore, *whenever* a court is dealing with the common law, it *must* test the common law against the demands of the Bill of Rights. If the common law falls short of those demands, it must be developed. Only that interpretation of section 39(2) can deliver the Constitution's promise of a legal system founded on dignity, freedom and substantive equality between individuals.

It is on the basis of this interpretation that Moseneke DCJ described in *Thebus* two instances of common law 'development' for the purposes of section 39(2): the common law is (must be) developed either when it is inconsistent with a specific constitutional provision, or when it falls short of the Constitution's 'objective normative value system' (ie the spirit, purport and objects of the Bill of Rights).

Thus, the central inquiry in any dispute involving the common law is this: whether the outcome that results from an application of the common law as it stands is consistent with the demands of the Constitution. If that outcome is at odds with the constitutional scheme, then the common law must be developed.

That this is the right inquiry is borne out, for example, in *Carmichele*, where the Court held that the absence of a cause of action for the applicant offended constitutional values. The common law had therefore to be developed so as to recognise her cause of action. The same process of reasoning is evident in *K*. The applicant's argument there was that 'if, on a proper application of the ordinary common-law rule of vicarious liability, the state is not liable for the applicant's damages, then that rule should be developed'. The Court agreed with the applicant that an absence of liability on the state in the circumstances was not in accordance with the Constitution. Therefore, the common law had to be developed to provide for liability.

Understanding the Court's reasoning in this way also helps us to understand why the Court found in favour of the applicant in *Carmichele* and *K*, but found against the applicant in *Phoebus Apollo*.⁵⁹ It should be recalled that in both *Carmichele* and *Phoebus Apollo*, the litigants had failed to raise constitutional arguments in the lower courts, and the courts had not raised such argument of their own accord. What accounts for the difference between

negotiated settlement (2000) 269ff; Lourens Du Plessis 'Learned staatsrecht from the heartland of the Rechtsstaat' (2005) 8(1) *Potchefstroom Electronic Law Journal*.

59 *Phoebus Apollo Aviation CC v Minister of Safety & Security* [2002] ZACC 26; 2003 (1) BCLR 14; 2003 (2) SA 34 (CC).

Carmichele and *Phoebus Apollo* is that the application of the existing common law in *Phoebus Apollo* did not lead to a constitutionally deficient outcome. Indeed, the Constitutional Court held, and the parties agreed, that the law as applied by the Supreme Court of Appeal was in accordance with constitutional values.

This simple point – that the common law is developed (for the purposes of section 39(2)) whenever it is changed to meet constitutional demands – is apparently complicated by the Court's enumeration (in *Thebus* and *K*) of the *means* by which the common law can be developed to meet those demands. The Court states that the common law can be developed by, for example introducing a new rule or significantly changing an old one.⁶⁰ It can also be developed by extending the ambit of a rule to include a new set of facts, or limiting the ambit to exclude those facts.⁶¹

However, this is not a complication at all. Having described *when* the common law is developed, the Court is simply describing *how* it can be developed. As we stated above with reference to *Carmichele*, these two inquiries cannot be strictly separated, but they are in principle distinguishable.

Unfortunately, Fagan confuses the two inquiries, which leads him to make the argument that a court does not 'develop' the common law whenever it applies an existing common-law rule to a set of facts regarding which it is indeterminate. According to Fagan, when the Constitutional Court claimed the contrary in *K* – that such application *does* constitute 'development' for the purposes of section 39(2) – it made a 'jurisprudential mistake'.⁶²

Fagan's use of the term 'jurisprudential' here is ambiguous, as he makes two arguments against the Constitutional Court's interpretation of section 39(2).⁶³ First, he relies on Joseph Raz to distinguish between common-law rules which are developed by their application to facts and those which are not. Second, Fagan relies on a series of cases in which this distinction has been adopted by the Supreme Court of Appeal (albeit not in these terms). It is unclear which of these arguments is intended to highlight the Constitutional Court's 'jurisprudential mistake', so we address both of them here.

Let us begin with the argument about the distinction as practised by the South African courts. Here, it is essential to understand two points. First, a practice by the Supreme Court of Appeal in terms of which some rules are said to be 'developed' by their application to facts – ie that the scope of the rule itself

60 *K*, above note 8, para 16, read with *Thebus*, above note 53, para 28.

61 *K*, above note 8, para 16.

62 Fagan, *Confusions of K*, above note 2, 190.

63 *Ibid*, 184-192.

is enlarged, such that more cases in future will fall under its precedent – while others are left ‘undeveloped’ – ie are applied afresh to each new set of facts without creating a precedent – cannot definitively answer the question of what constitutes ‘developing the common law’ for the purposes of section 39(2). Whatever meaning ‘developing’ is to have for section 39(2) must be construed from a reading of that section itself, informed by a holistic interpretation of the Constitution in the light of its fundamental purposes. Shared conceptual practices amongst ordinary people and by the courts may of course be relevant to that construction, but they cannot be determinative.

The second point to note is that the Constitutional Court is the highest authority on the interpretation of the Constitution.⁶⁴ Thus, whatever weight is to be given to the interpretation of common law development by the decisions of lower courts cited by Fagan – *even if* those were expressly interpretations of section 39(2), which they are not – it is the Constitutional Court that must adjudicate finally on the appropriate interpretation of the Constitution. That includes not only the proper interpretation of section 39(2), but also the appropriate method of interpretation for the Constitution as a whole.

In the result, the practice of the Supreme Court of Appeal cited by Fagan cannot explain to us why the Constitutional Court has made a ‘jurisprudential mistake’ in its interpretation of section 39(2).

What then of his reliance on Raz? As Fagan rightly points out, the passage⁶⁵ he relies on from Raz is offered as a *description* of how legal practice in England deals with indeterminate legal rules.⁶⁶ Sometimes a legal standard is left deliberately underdetermined, such that the court or jury must apply the standard afresh in each case, and sometimes the standard is elaborated by specifying more detailed guidelines, which function as precedent. However, Fagan makes the mistake (which Raz does not) of inferring from this description a *conceptual* claim about what it means to ‘develop the common law’.

Furthermore, and more importantly, it is clear from our discussion of constitutional interpretation earlier in this article that Raz himself would accept our primary argument: that whether the Constitutional Court’s interpretation of section 39(2) is right or wrong depends on a moral justification centred on a proper reading of that section in the context of other relevant constitutional provisions and the Constitution’s fundamental purposes. In this regard, we have argued that the Constitutional Court’s interpretation of

64 Section 167(3)(a) of the Constitution read with section 167(7).

65 Joseph Raz *The authority of law* (2ed) (2009) 193-194.

66 For the purposes of the present argument, we ignore the implications arising from disputes about the degree to which legal rules are indeterminate.

section 39(2) is internally coherent, harmonises with the rest of the Constitutional text, and is crucial to furthering the important transformation the Constitution seeks to achieve in the common law.

B When must a court test the common law against the Constitution?

Thus far we have argued that a court develops the common law every time it tests the common law against the demands of the Constitution, and changes the common law to meet those demands. The question which then arises is this: when (under what circumstances) must a court test the common law against constitutional demands? Should it do so only when constitutional compliance is raised as an issue by litigants? Or should it investigate constitutional compliance of its own accord, even when the litigants neglect the issue? And if the court is indeed under a general obligation to conduct this investigation, under what circumstances will the Constitutional Court grant an appeal when the lower court has failed to fulfill that obligation?

Fagan argues that a court is not required to test the common law against the Constitution in each and every case that comes before it. For Fagan, the Constitutional Court is wrong to interpret section 39(2) as imposing a 'non-conditional' obligation to develop the common law in each and every case.

We disagree with Fagan precisely because the very significance of the *Carmichele* decision, and why it is rightly viewed as a landmark judgment, is that it recognises and gives substance to the Constitution's demand for a radically transformed common law. To that end, the *Carmichele* judgment states that courts are under a 'general obligation' to develop the common law whenever it falls short of constitutional demands.⁶⁷ That obligation is not discretionary, and arises whether or not the litigants themselves raise constitutional issues.⁶⁸

Carmichele therefore places a strict and extensive obligation on courts to develop the common law in accordance with the Constitution. This is how the judgment was interpreted in *K*:

The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in

67 *Carmichele*, above note 4, para 39.

68 *Ibid*, paras 36, 39.

issue, but in all cases where the incremental development of the rule is in issue.⁶⁹

This is also how the judgment was interpreted recently by Yacoob J in *Everfresh*:

A court should *always be alive* to the possibility of the development of the common law in the light of the spirit, purport and objects of the Bill of Rights. The development of the common law would otherwise be no more than a distant dream. A court should *always be at pains* to discover whether the development of the common law is implicit in a case. If, in the particular circumstances, it appears to a court that section 39(2) is implicitly raised and that the common law might have to be developed, that *court has no choice* but to embark upon that inquiry.⁷⁰ (Our emphasis)

Of course, against this unambiguous and consistent vision for the Constitution's impact on the common law we must contrast some seemingly contradictory statements by the Court to the effect that there are some instances in which courts are not obliged to test the common law against the Constitution.⁷¹ It is on these statements which Fagan relies in support of his argument.

In our view, however, these statements can be interpreted consistently with the progressive interpretation of *Carmichele*, so long as we understand that the effect of *Carmichele* is to set out a *general* principle that a failure by a lower court to consider constitutional compliance of the common law is a ground for review. That general principle is subject to some limited exceptions, which is what accounts for the Court's qualifications of the *Carmichele* holding.

These exceptions can be gleaned from the Court's decisions in *Carmichele*, *Phoebus Apollo* and *Everfresh*. The proper interpretation of these decisions is that a failure to consider the Constitution is a ground for review, unless: (i) constitutional non-compliance is not implicit in the applicant's case – that is, where the outcome sanctioned by the existing common law does not implicitly offend the Constitution's objective normative value framework;⁷² and/or (ii) the applicant is unlikely to succeed in her case, even if the common law is appropriately developed; and/or (iii) it would not be in the interests of justice to have constitutional arguments made in the Constitutional Court for

69 *K*, above note 8, para 17.

70 *Everfresh Market Virginia (Pty) Ltd v Shoptrite Checkers (Pty) Ltd* (2012) (1) SA 256 (CC) para 34.

71 *Carmichele*, above note 4, para 39; *Everfresh*, above note 67, paras 32 and 76.

72 *Carmichele*, *ibid*, para 40; *Everfresh*, *ibid*, paras 31-32.

the first time (which includes considerations of fairness to the litigants);⁷³ and/or (iv) the kind of law reform required is more suited to the legislature than the courts. These exceptions ensure that the common law is ‘developed in a way which meets the section 39(2) objectives’, but also ‘in a way most appropriate for the development of the common law within its own paradigm’.⁷⁴

In the result, we agree with the claim made by Justice Laurie Ackermann at a symposium⁷⁵ on *Carmichele* to the effect that the judgment of the Supreme Court of Appeal in that matter was set aside because that court ‘failed to apply its mind’ to the question of whether the Constitution required the law of delict to be developed.

Fagan, however, considers Justice Ackermann’s assertion to be mistaken, for it has the implication that any ‘straightforward application of a common-law rule’ can be taken on appeal purely because the court in question failed to consider whether the Constitution required that rule to be changed or developed.⁷⁶

Now, of course, it could never be the case that the Constitutional Court would allow leave to appeal against a judgment *solely* because the judgment fails to consider the applicability of the Constitution. In addition, and by long-established practice of the Constitutional Court, the Court only allows leave to appeal when it is in the ‘interests of justice’ to do so, and that includes a consideration of whether the applicant’s case bears reasonable prospects of success. If the applicant would fail regardless of the constitutional issues at stake, the Court usually denies leave to appeal, so as to save applicants being used as a means to the end of constitutional test cases.

However, if the applicant bears reasonable prospects of success, the

73 It is worth mentioning here that some of concerns relating to the interests of justice here arise not in respect of the obligation on courts to test the common law for constitutional compliance, but rather in relation to a different obligation – the obligation on litigants to raise constitutional issues as early as possible in litigation (see *Carmichele*, above note 4, para 41). This obligation has been justified as giving higher courts the benefit of a lower court’s reasoning, empowering lower courts to participate in the development of constitutional jurisprudence, and ensuring that opposing litigants have a fair opportunity meet the constitutional case. The Constitutional Court has repeatedly confronted difficult questions which arise when both of these obligations are not met (when both litigants and lower courts fail to raise constitutional issues), but we should not let issues arising under the litigant’s obligation confuse the nature of the court’s obligation. The qualifications the Court has issued in respect of failures by litigants to raise constitutional issues timeously should not be understood as qualifications of the duty on courts to test the common law against the Constitution.

74 *Carmichele*, above note 4, para 55.

75 The symposium took place at the University of Cape Town on 24 April 2008 under the auspices of the uBuntu Project. This comment is reported by Fagan in *Reconsidering Carmichele*, above note 2, 671.

76 Fagan, *ibid*, 671.

'mere' failure to consider the applicability of the Constitution certainly is sufficient to grant leave to appeal. We cannot see what is objectionable about that. The Constitution states that all law and conduct inconsistent with its purposes and provisions is invalid. To ensure the speedy uptake of its transformative purposes, the Constitution places a duty on each court to consider whether the law it is applying is constitutionally compliant, whether compliance is specifically raised by the parties or not. That is the radical and powerful moment of the Constitutional Court's judgment in *Carmichele*.

Before we leave behind our discussion of *Carmichele*, one final aspect of Fagan's argument bears mentioning. In relation to *Carmichele*, Fagan argues that there is a sphere of common-law reasoning which lies beyond the reach of the Constitution, and that a failure to consider the impact of the Constitution in that sphere is not reason in and of itself to invalidate law. According to Fagan, the Constitutional Court should not have overturned the judgment of the Supreme Court of Appeal in *Carmichele*, because the key findings of the Supreme Court of Appeal were based on 'non-constitutional reasons'.⁷⁷ The two 'non-constitutional reasons' on which Fagan focuses are as follows: (1) the control prosecutor had done all that her job required of her; and (2) there was no 'special relationship' between the prosecutor and the rape victim. For Fagan, neither of these reasons is unconstitutional (as they do not conflict with the Constitution), but they are 'non-constitutional, as their validity is wholly independent of the Constitution'.⁷⁸

Fagan's argument here is gravely mistaken. Section 2 of the Constitution provides that the Constitution is the supreme law of South Africa, and any law or conduct inconsistent with it is invalid. In other words, under the South African Constitution, there is no such thing as a non-constitutional reason. No reason can be valid independently of the Constitution.⁷⁹

Precisely because of this, the Constitutional Court held that the Supreme Court of Appeal, in its assessment of these two 'non-constitutional' reasons, should have taken account of the state's constitutional duty to protect the public in general (especially women) against violent crime. Thus, the Constitutional Court, quite rightly in our view, denied that the Supreme Court of Appeal's reasons can be valid independent of the Constitution. Indeed, having regard to the demands of the Constitution, it transpired that those reasons were invalid, which is precisely why the judgment of the

77 Ibid, 660.

78 Ibid, 661.

79 See also *Thebus*, above note 67, para 24, and *Pharmaceutical Manufacturers Association of SA & Others: in re: Ex parte Application of the President of the RSA & Others* 2000 (3) SA 241 (CC) para 44.

Supreme Court of Appeal was overturned.

Fagan believes that the Constitutional Court was mistaken to suggest, in light of the state's constitutional duty to safeguard the public, that the conduct of the policemen or prosecutors was unreasonable, and to suggest that it would be reasonable to impose liability.⁸⁰ In support of this claim, Fagan compares the interrelationship between the citizens, the state and the policemen/prosecutors to the interrelationship between children at a play-school, a private security company employed by the school to protect the children, and a security guard employed by the company.⁸¹ Whether the security guard has conducted himself reasonably in protecting the children cannot, on Fagan's view, be determined by reference to the contractual duty owed by the security company to the school. The fact that an employer owes someone a duty does not entail that its employees are under that duty too.⁸²

Whatever the merits of this analogy,⁸³ it is clear that it seriously misconstrues the relationship between the state and its subjects under the South African Constitution. Indeed, the bizarre implication of Fagan's analogy is that the state (viewed as some abstract entity) can have a duty to protect its subjects, but policemen (the only personnel through which the state could fulfill its duty) do not necessarily have that duty. This shows how the analogy with commercial labour contracts attempts to draw a rigid boundary between the state and its functionaries, and thus obscures the special nature of the state and its duties in a constitutional order.

In the result, Fagan's argument does not explain (as it purports to) the nature of the state's constitutional duty to protect its subjects; rather, the effect of his argument is to deny that the state has that duty altogether.

IV CONSTITUTIONAL VALUES

In this section, we turn to address Fagan's second major argument against the *K* judgment: namely, that the values relevant to the development of the common law are sourced only in the Bill of Rights, and not (as the *K* judgment put it) in the Constitution more generally.

Fagan's argument here turns on an analogy with a medical professor who asks his student to explain the function of the heart. If the student replies by

80 Fagan *Reconsidering Carmichele*, above note 2, 661-662.

81 *Ibid.*, 664-667.

82 *Ibid.*, 665.

83 Just one of the problems it faces is identifying who or what is analogous to the playschool in the citizen/state/policemen relationship.

saying: 'I have been asked to explain the function of the body. Let me therefore start with the liver,' we would think that the student has made a serious mistake about the nature of the question.⁸⁴

Fagan claims that the student's mistake is precisely the Constitutional Court's mistake in *K*, where, in the process of considering the 'spirit, purport and objects of the Bill of Rights', it referred to, and sometimes equated that phrase with, the values of the Constitution more generally.⁸⁵ For example, citing section 39(2), the Court stated that 'Our Constitution requires a court when developing the common law to promote the spirit, purport and objects of the Constitution.'

According to Fagan, it is erroneous to treat these phrases as interchangeable:

Just as the heart is not the body, but merely one part thereof, so the Bill of Rights is not the Constitution, but merely one chapter in it. ... [I]t was a mistake for the Constitutional Court to equate the values of the Constitution with those of the Bill of Rights.⁸⁶

The trouble with Fagan's argument is that it seeks to erect a clear boundary between the Bill of Rights and the rest of the Constitution. Such an approach is inconsistent with the teleological approach to constitutional interpretation which we set out above. Furthermore, Fagan's approach would result in intolerable interpretive difficulties which fly in the face of much of our current constitutional practice.

To see this, let us first recognise that Fagan's analogy oversimplifies the complex and mutually reinforcing relationships between the various parts of the Constitution. Of course Fagan is right that the question 'What is the function of the heart?' is not identical with the question 'What is the function of the body?'. Similarly, the question 'What are the values of the Bill of Rights?' is not identical with the question 'What are the values of the Constitution?'.

But there are other important ways in which these types of question are related. Significantly, one cannot give a meaningful answer to the question 'What is the function of the heart?' without a relatively extensive understanding of the answer to the question: 'What is the function of the body?'. An essential part of our understanding of the heart is the way that it contributes to

84 Fagan *Confusions of K*, above note 2, 179.

85 The phrases said to be deployed interchangeably include 'the spirit, purport and objects of the Constitution', 'constitutional norms' and 'the normative influence of the Constitution'. See Fagan, *ibid*, 179-180.

86 *Ibid*, 180.

the overall functioning of the body. Of course, one could learn a definition of the heart's function from a medical textbook by rote, but one would not have *understood* the definition one was offering unless one understood the concepts it deploys, which in turn require an understanding of the body's function.

In the same vein, we cannot develop a meaningful account of the values embodied in the Bill of Rights without understanding the contribution it makes to the values of the Constitution. To see that this is so let us consider some of the difficulties that would arise if we adopted Fagan's strict separation between the Bill of Rights and the rest of the Constitution.

The first difficulty that would arise is that we would have no reason to invalidate law and conduct on the basis of a conflict with the Bill of Rights. Within the Bill of Rights itself, section 7(2) requires that the 'state must respect, protect, promote and fulfill the rights in the Bill of Rights'. But neither that section nor any other section in the Bill of Rights says what a court must do when it finds that the state has failed to fulfill that obligation. Similarly, while section 8 states that '[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state,' it does not say what follows from the fact that it applies or binds.

In short, the Bill of Rights does not contain a provision which spells out its *primary* object – that is, to invalidate law or conduct inconsistent with the rights it enshrines. Now surely the spirit, purport and objects of the Bill of Rights includes or presupposes (or at least is only intelligible by reference to) the premise that law inconsistent with the rights it enshrines is invalid. Yet that premise is not to be found in the Bill of Rights itself (even if it is implicit within it). To know that the Bill of Rights has that function (and thus to know something crucial to the interpretation of the Bill of Rights, not least of all because knowing that function helps courts to understand how they should interpret and apply the Bill of Rights) we must do precisely what Fagan's tell us we are wrong to do – that is, we must look to provisions which are located *outside* of the text of the Bill of Rights to interpret the text *within* the Bill of Rights.

If indeed we have regard to section 2 of the Constitution, we will see that it provides that the Constitution 'is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. It is only this section which tells us that the Bill of Rights embodies a test of legal validity. Furthermore, we must look to section 172(1)(a), which states: 'When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. It is only this section which explains that courts are under a duty to declare laws invalid when they fail that test of validity.

That then is the first difficulty with Fagan's approach – that the Bill of Rights is reduced to a set of toothless standards without any objects at all. The second difficulty with Fagan's approach is that it prevents the courts from using the rest of the Constitution in order to provide substantive meaning to the rights in the Bill of Rights, which in turn undermines the development of a coherent human rights jurisprudence and denies the state and private actors the possibility of being better informed about what the Bill of Rights requires of them.

To see that this is so, let us return to the Court's judgment in *K*. The central issue in *K* was whether the law of vicarious liability was consistent with the applicant's right to freedom and security of the person, and in particular, the right to be free from all forms of violence from either public or private sources.⁸⁷ Naturally, resolving this issue required the Court to give content to the right to freedom and security of the person. Of course, part of that content is derived from the section 7 injunction on the state to 'respect, protect, promote and fulfill the rights in the Bill of Rights'. But that does not take us very far, since we still want to know what it would mean for the state to respect and protect the right in question.

To give content to that right, the Court referred to section 205(3) of the Constitution, which provides that:

The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

As Fagan rightly points out,⁸⁸ this provision plays a significant role in elaborating the meaning of the right to freedom and security of the person in *K* – section 205(3) tells us that it is the duty of the police, in the course of their employment, to ensure the safety and security of all South Africans and to prevent crime. That role is clear from the following passage of Justice O'Regan's judgment:

In sum, the opportunity to commit the crime would not have arisen but for the trust the applicant placed in them because they were policemen, a trust which harmonises with the constitutional mandate of the police and the need to ensure that mandate is successfully fulfilled. When the policemen – on duty and in uniform – raped the applicant, they were simultaneously failing to perform their

87 The case also raised issues relating to the rights to dignity, privacy and substantive equality (see *K*, above note 8, para 14).

88 Fagan, *Confusions of K*, above note 2, 180-181.

duties to protect the applicant. In committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed by the policemen and the purposes of their employer. This close connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.⁸⁹

Fagan states that the constitutional basis for the duty of the police to protect members of the public 'certainly is not the Bill of Rights'.⁹⁰ In other words, the Bill of Rights (on Fagan's view) does not require the state to establish a police force; and if it does, the Bill of Rights leaves the police free to terrorise members of the public.

That is an extraordinary claim. Indeed, according to courts in other jurisdictions and established academic opinion, the very *raison d'être* of the right to freedom and security of the person is to prohibit the state from harming its citizens, and to require it to prevent citizens from harming each other.⁹¹ Furthermore, we feel it is necessary to point out that Fagan is writing these statements against the background of a country in which the police historically brutalised citizens because of their race under apartheid. Fagan's statement would be horrifying in any country; but in South Africa it constitutes a mockery of the vast majority of the population, and those who struggled to bring this Constitution into being (let alone of the Court which on a daily basis has tried to give it life). This is not just a debate about hearts and livers and bodies, although Fagan is right to remind us that it is hearts that were cut out and livers mutilated – it is about the horrifying history that this Constitution has a mandate to transform as far as possible in the name of the substantive revolution.

To return to our point, none of this is to say, of course, that section 205(3) is irrelevant to the state's duty to respect and protect its citizens' physical

89 K, above note 8, para 51.

90 Fagan, *Confusions of K*, above note 2, 181.

91 See, for example, *Osman v United Kingdom* Application 23452/94; (2000) 29 EHRR 245 para 116, in the context of the European Convention on Human Rights. See also Liora Lazarus 'The right to security - Securing rights or securitizing rights' in Colin Murray et al (eds) *Examining critical perspectives on human rights* (2011) 160: 'Thus, we should argue that a duty correlative of a right to security can mean only the development of structures and institutions capable of responding to and minimising 'critical and pervasive threats' to human safety, namely absence from harm in the most central, physical sense of harm to person.' Note that she also adds: 'Importantly, the right to security must be grounded in dignity, equality and liberty'. See also Alistair Mowbray *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Oxford, 2004); Sandra Fredman *Human rights transformed: Positive rights and positive duties* (2008).

security – in fact, above we argued precisely the reverse. Instead, what it demonstrates is how misleading it is to attempt to interpret the Constitution section by section. This is why section 39(1) of the Bill of Rights specifically enjoins courts, when interpreting the Bill of Rights, to ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’. As the Constitutional Court has stated many times before, those values are to be sourced in the Constitution, read as a whole. Without this holistic, teleological approach to constitutional interpretation, the demands of the Bill of Rights will remain vague, and unable properly to regulate law and conduct in South Africa.

Finally, and once again, while the question ‘What are the values of the Bill of Rights?’ is not *identical* with the question ‘What are the values of the Constitution?’, it is essential to note that it is impossible (on the view of interpretation we advocate) for these questions to have *conflicting* answers.⁹² Indeed, that there cannot be such conflicting answers, that there is a mandate not to generate conflicting answers is what Dworkin means by integrity. The Bill of Rights cannot enshrine substantive equality while the rest of the Constitution protects only formal equality; the Bill of Rights cannot promote economic redistribution while the rest of the Constitution entrenches laissez-faire capitalism; the Bill of Rights cannot be interpreted as restraining state power while the remainder of the Constitution is interpreted as allowing the state to act free of constraint. Rather, basic principles of statutory interpretation, not to mention the future of the Constitution’s transformative project, require that all parts of the Constitution be interpreted together to achieve a harmony of purpose. If that is so, the Constitutional Court is absolutely correct to refer liberally to the values of the Constitution when considering the values of the Bill of Rights.

V CONCLUSION

In this article, we have defended the Constitutional Court’s interpretation of section 39(2) against arguments which ultimately diminish the impact of the Constitution on the common law. We have argued, on the basis of the Constitution’s text and purposes, and the Constitutional Court’s judgments, that section 39(2) places a general obligation on courts to test the common law against the demands of the Constitution in each and every case that comes before them.

One might, of course, choose to disagree with this conclusion as a

92 Cf Fagan, *Confusions of K*, above note 2, 180.

normative matter, and argue that section 39(2) ought not to be interpreted in this way, or ought to be amended. In favour of that contention one would have to offer arguments of political morality as well as of practicality. We have offered some such arguments throughout this article, since we are of the view that we cannot divorce the interpretation of section 39(2) from contestations between competing visions of who we are and what we might become.

On the basis of the view of constitutional interpretation we have presented here, and on the basis of the interpretation of section 39(2) we have offered in reliance on that view, the Constitutional Court has gotten it absolutely right. Of course there are times when the Court's reasoning could be clearer, but that is true of any court writing about any area of the law. Indeed, part of our responsibility as legal academics, particularly in respect of the South African constitutional order, is to participate in an ongoing dialogue with courts so as to contribute as best we can to their efforts to build a coherent and just body of jurisprudence worthy of the Constitution's vision of a new South Africa premised on what was always denied under apartheid – the dignity of every person, and thus their equal worth and freedom as citizens.