

Realist evolutionary functionalism and extra-constitutional grounds for developing the common law of delict: A critical analysis of *Heroldt v Wills* 2013 2 SA 530 (GSJ)

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OPSOMMING

Regsrealistiese evolusionêre funksionalisme en ekstra-grondwetlike gronde vir die ontwikkeling van die gemeenregtelike deliktereg: 'n Kritiese ontleding van *Heroldt v Wills* 2013 2 SA 530 (GSJ)

In *Heroldt v Wills* is die gemenerereg ontwikkel om aan te pas by die veranderende behoeftes van die samelewing. Meer spesifiek het die applikant in hierdie geval daarin geslaag om 'n interdik te verkry om die respondent te dwing om lasterlike materiaal aangaande die applikant vanaf Facebook te verwyder. In hierdie artikel word die uiteindelijke beslissing ondersteun maar twee aspekte van die uitspraak word geïnterpreteer. Eerstens problematiseer die skrywer die evolusionêre funksionalistiese benadering (soos wat die Amerikaanse regsrealiste die begrip beskryf) wat die hof hier toepas. Die uitspraak weerspieël 'n evolusionêre funksionalistiese benadering in die sin dat die hof van mening is dat die reg moet aanpas volgens die funksionele behoeftes van die samelewing om sekerheid en stabiliteit in die gees van tegnologiese veranderings, gemeenregtelike suiwerheid en regsdoeltreffendheid te verseker. Hierdie benadering word in hierdie artikel as problematies beskryf omdat dit die indruk skep dat die gemenerereg op 'n onkontroversiële manier ontwikkel kan word in die rigting van 'n voorafbepaalde (deterministiese) evolusionêre baan waar politiese spannings tussen verskillende regsbelange geen rol speel nie. Tweedens problematiseer die skrywer die feit dat die Grondwet nie in hierdie uitspraak 'n substantiewe ideologiese rol in die gemeenregtelike ontwikkeling gespeel het nie. Om met hierdie probleem om te gaan word die vraag gestel of daar wel ekstra-grondwetlike gronde is waarvolgens die gemenerereg ontwikkel kan word en, indien daar wel so 'n grond bestaan, wat die verhouding tussen daardie grond en die Grondwet is of behoort te wees. Hierdie vrae word beantwoord deur 'n historiografiese studie van die gronde vir die gemeenregtelike ontwikkeling in die Suid-Afrikaanse konteks. Daarna word 'n kritiese ontleding van *Heroldt* aangepak waarin daar geargumenteer word dat die beslissing in *Heroldt* 'n sterker fokus op die Grondwet moes gehad het sodat 'n kritiese benadering tot die ontwikkeling van die gemenerereg toegepas kon word.

1 HEROLDT IN A NUTSHELL

In early 2012, Warren Heroldt became aware of a Facebook post (authored by his old friend Nicole Wills), implying that he is an irresponsible alcoholic who abuses drugs and is a bad father. Heroldt sought prohibitory and mandatory

interdicts, respectively ordering Wills to refrain from making any Facebook comments about Heroldt in future and to remove the post already made.¹

As to the prohibitory interdict, Willis J recognised that judges should avoid a crystal ball-*cum*-sledgehammer approach: judges should not place absolute prohibitions on the right to freedom of expression in a prospective manner. Perhaps some of the future comments of the respondent about the applicant could have valid grounds of justification that would best be evaluated at the specific juncture that they are made.² Even though the judgment is not articulated in these terms, I argue that this finding is defensible in light of section 36 of the Constitution.³ The limitations clause requires one to consider, among other things, the extent of the limitation of a specific right. For example, in *Mail & Guardian Media Ltd v Chipu NO*⁴ it was held that it would be very difficult to justify an absolute limitation of the right to freedom of expression in an open and democratic society, especially if there are other notionally less restrictive means of achieving the same goal.

As to the mandatory interdict, a more difficult issue arose. According to the old case of *Setlogelo v Setlogelo*,⁵ there are three requirements for the granting of an interdict. First, a clear right must be identified. Second, that clear right must have been unlawfully infringed. Third, there ought to be no similar protection that can be effected by another ordinary remedy – this requirement has been used to qualify an interdict as a remedy of last resort. Applying these requirements to the facts at hand, the court explained that the applicant had clear rights to dignity and privacy that were infringed without any grounds of justification, in other words, the infringement was unlawful.⁶ But it is with the third requirement where the applicant faces, at first glance, a material obstacle. The historically more consistent remedy that the applicant could rely on here would be to claim damages.⁷ Alternatively, the applicant could contact Facebook's administrators and request that they remove the defamatory post.⁸ Willis J indicated that the rationale for the historic reluctance to grant interdicts in defamation cases is the protection of the free flow of information or, in constitutional terms I would suggest, the protection of freedom of expression as complimented by the right to access to information. Willis J showed that this underlying policy was once informed by the financial and practical consequences of stopping the printing presses of media houses.⁹ It is the court's reasoning that society's needs and realities have changed due to the technological advancement and pervasiveness of electronic social media across the globe.¹⁰ Thus, this societal change is used

1 *Heroldt v Wills* 2013 2 SA 530 (GSJ) paras 1–2. For a general discussion of the case, see Neethling and Potgieter "The law of delict" 2013 *ASSAL* 793 836ff; Neethling "Facebook en persoonlikheidsbeskerming" 2014 *LitNet Akademies* 40 45ff; Roos and Slabbert "Defamation on Facebook: *Isparta v Richter*" 2014 *PELJ* 2845 2849ff; Singh "Social media and the *actio injuriarum* in South Africa – An exploration of new challenges in the online era" 2014 *Obiter* 616ff.

2 *Heroldt* paras 40–42.

3 Constitution of the Republic of South Africa, 1996.

4 2013 6 SA 367 (CC) para 91.

5 1914 AD 221 227.

6 *Heroldt* paras 26–30.

7 *Idem* para 31.

8 *Idem* para 38.

9 *Idem* para 34.

10 *Idem* para 31.

by the court as the justification for the common law's development and framework within which the law had to be developed so that the mandatory interdict could be granted to the applicant.

2 BUT WHAT IS THE PROBLEM WITH *HEROLDT*?

In this article, I problematise the above approach to common-law development that I argue can be described as being both "evolutionarily functionalist" (in the American legal realist sense of the word) and "constitutionally wanting".

The approach fits the realist paradigm of evolutionary functionalism in the sense that Gordon¹¹ understands it – that the law develops to satisfy the functional needs of society in that the law becomes more useful to society by bringing about certainty and stability in the spirit of technological change, common law purity and legal efficiency.¹² Like Gordon, I am to some extent critical of this approach because it assumes that the managers of law can deal with societal changes by developing the law at a level of political neutrality simply by relying on a self-revealing, obvious and politically-objective process of determining a coherent and harmonious version of the *boni mores*.¹³ Of course, I do not completely reject realism as a philosophical school and as a useful source of conceptual tools that can be used to fight against formalist legal thought that fails to recognise the contestability of law and the dangers of vacuous legal interpretation. However, the part of realist thought that I take issue with here is the assumption that the functional evolution of law is objectively deterministic and necessary.¹⁴ In other words, I reject the idea that a specific societal change provides a single option of how the law must be developed to accommodate that change. In contrast to this, I argue that various conflicting options, incompatible because of a hostility of varying social interests (read: political values), may be presented to a judge when faced with the reality that something in society has changed.¹⁵ This is because there is no uniform version of the "law and society interplay" and the incredible aspect of being human is not about blindly adapting to the current environment, but rather our ability to reimagine our world (and the law that regulates it) and to think beyond the present.¹⁶

Furthermore, the approach is constitutionally wanting because despite a number of remarks on the Constitution, the Constitution does not play a clear substantive and ideological role in the process of the common law's development. Extra-constitutional grounds are relied on to decide *whether* the common law should be developed and I hope to show here that extra-constitutional reasoning was employed in the actual process of *how* the common law was developed, resulting in an evolutionarily functionalist method for the common law's development. It will be my argument that the granting of a mandatory interdict instead of damages is defensible for a number of reasons. However, it is the extra-constitutional process of reasoning that leads the court to this conclusion that I will critique and illustrate how the analysis of the court could have been more constitutionally vivacious, which would have resulted in a more critical approach to the development of the common law.

11 "Critical legal histories" 1984 *Stanford LR* 57.

12 *Idem* 64.

13 *Idem* 68.

14 *Idem* 63.

15 *Idem* 70.

16 *Idem* 71.

In unpacking this problem, I firstly pose the questions whether our law supports the position that common law development can and should be sparked by extra-constitutional reasons and, if so, what the relationship is and should be between extra-constitutional and constitutional grounds for the common law's development. I answer this question by conducting a historiographic investigation into the grounds for common law development in South African law starting at the common law itself, followed by the legal positions under the 1993 and 1996 Constitutions respectively. With the above as backdrop, I then analyse the approach to common law development followed in *Heroldt*, arguing that the ground for development relied on in this case could have taken constitutional form and, at the very least, the actual development that was brought about could have (and should have) had brighter constitutional lustre in a way that perceptively responds to the concerns raised by Gordon in his theory on critical legal histories against evolutionary functionalism. I aim to indicate that the method and outcome of this case were not "necessary" (in the deterministic sense of the word), even though the outcome may be desirable.

3 GROUNDS FOR DEVELOPING THE COMMON LAW

3.1 Common law position

More than 100 years ago in *Blower v Van Noorden*,¹⁷ Innes CJ made it clear that the South African common law, and specifically the law of delict, could be developed by a court. Such developments would have to occur at times to "keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions".¹⁸ In this sense, the law is kept "alive" and "effective" through incremental changes effected by the courts, while acknowledging that "radical" changes to law are best dealt with by the legislature.¹⁹ The power that the old Supreme Court had to develop the common law stemmed from the fact that it had the inherent jurisdiction to regulate its own procedure and to adjudicate any unlawful infringements of rights.²⁰ I shall refer to the ground for development established in *Blower* as the "original ground for development".

This original ground for development was not constitutionally mandated. *Blower* was decided in August-September 1909 after the Anglo-Boer War had ended, but before the South Africa Act of 1909 created the Union. Terreblanche explains that during this time the Transvaal was granted "responsible self-government" with its own constitution by the British authorities.²¹ From a holistic reading of the Transvaal Constitution Letters Patent 1906, it did not make any reference to the development of the common law. The same can be said about the South African Constitutions of 1909,²² 1961,²³ and 1983.²⁴

The original, extra-constitutional ground for common law development remained imminent for many years to follow. For example, the philosophy on development laid out in *Blower* led to the highly influential decision in *Minister*

17 1909 TS 890.

18 *Idem* 950.

19 *Ibid.*

20 See Theophilopoulos *et al* *Fundamental principles of civil procedure* (2012) 57.

21 *A history of inequality in South Africa* (2002) 246.

22 South Africa Act of 1909.

23 The Republic of South Africa Constitution Act 32 of 1961.

24 The Republic of South Africa Constitution Act 110 of 1983.

*van Polisie v Ewels*²⁵ to the effect that “the stage of development” had been reached wherein the *boni mores* criterion would be used to determine the wrongfulness of omissions.²⁶ Two years before he took office as Chief Justice, Corbett also expressed his support for the fact that the common law should adjust to meet the “ever-changing needs of society”²⁷ and, by 1993, Van Aswegen provided an overview of 24 delictual cases where the rules of the common law were developed on the basis of policy considerations ultimately sparked by the original ground provided in *Blower*.²⁸

Even though American legal realist thought had not yet existed at the time, the principle in *Blower* emulates evolutionary functionalism in the way that I have described in the problem statement above: when society changes, judges need to change the common law accordingly in an objectively “natural and proper” way that is mystically apparent to the judiciary.²⁹ The way that the principles of common law development are expressed in *Blower*, *Ewels* and related cases creates the impression that the developments in question simply had to happen. It is not that the courts in these cases explicitly denied that the law’s development could have taken many different directions, but rather the failure to explicitly recognise different potentialities in the law’s development that gives these judgments the objective and deterministic ring of evolutionary functionalism. The unempirical nature of this approach in South African law has been criticised before.³⁰ However, I venture a step further and suggest that the unempiricism is not necessarily perfectly tameable as contradictions and varying possibilities in law (especially the law of delict) are very often present in legal materials no matter how hard we try to make the law seamless.³¹ Therefore, following the approach established in *Blower*, a judge would always be faced with a number of pushes and pulls on the questions of whether the law ought to be developed and, if so, how it should be developed even though that judgment creates the impression that these questions can be answered in a rather uncontroversial manner. At the brink of our democratic transition, an ideological dimension was added to these pushes and pulls on the thorny questions relating to the common law’s development.

3.2 Enter the 1993 Constitution

It was only with the dawning of the 1993 Constitution that the issue of common law development in South Africa became constitutionally infused.³² The novel impact of a bill of rights held the potential for the common law to be developed along new lines. The early case law on this issue was divided around the question

25 1975 3 SA 590 (A) 597.

26 See O’Regan “The best of both worlds? Some reflections on the interaction between the common law and the bill of rights in our new constitution” 1999 *PELJ* 1 4–5; and Du Bois “Getting wrongfulness right: A Ciceronian attempt” 2000 *Acta Juridica* 1 7.

27 “The role of policy in the evolution of our common law” 1987 *SALJ* 54.

28 “Policy considerations in the law of delict” 1993 *THRHR* 171.

29 Gordon 1984 *Stanford LR* 59.

30 See Du Bois 2000 *Acta Juridica* 3 8 and the authority cited therein.

31 See Zitzke “Stop the illusory nonsense! Teaching transformative delict” 2014 *Acta Academica* 53.

32 Constitution of the Republic of South Africa Act 200 of 1993.

of whether fundamental rights bound private parties among themselves,³³ but Kentridge J, writing for the majority of the Constitutional Court in *Du Plessis*, brought clarity with his highly technical and rigorously comparative reading of the 1993 Constitution.³⁴

The conclusion reached in *Du Plessis* was that a fundamental right could only be directly invoked by an individual against the state (with the purpose of having a common law provision struck down) but no such direct application was available to private parties engaged in a dispute *inter se*.³⁵ At most, the values embodied in the bill of rights would have had a “radiating” effect on the common law that applied to private disputes *inter se*, in the sense that section 35(3) of the 1993 Constitution enjoined a court to have “due regard to the spirit, purport and objects of [the bill of rights]” when it applied or developed the common law. The effect of fundamental rights would be “indirect” because the common law could not be declared unconstitutional and consequently struck down, but the common law could be incrementally developed in a manner that reflected the spirit, purport and objects of the bill of rights.³⁶ In this regard, Kentridge J relied on the case of *R v Salituro*³⁷ that indicated that Canadian judges have the power to develop the common law on social, moral and economic grounds, but that those judges were prohibited from striking down a common law rule. Canadian judges are simply instructed to interpret the common law “consistent with Charter principles”.³⁸

From this analysis of *Du Plessis* it would appear that the original ground established in *Blower* would survive in the new democratic dispensation. The “changing conditions” and the need for law to remain relevant to the society that it serves resonate with the “social, moral and economic” grounds for development that Kentridge J appropriated from *Salituro*. On one of the possible interpretations of *Du Plessis*, even though the common law primarily could be developed on moral, social and economic grounds, the 1993 Constitution was not completely irrelevant for developmental endeavours because at a secondary level any development and application of the common law had to accord with the new constitutional principles. I say this is but one of the possible interpretations of *Du Plessis*, because this theoretical distinction between primary and secondary levels of analysis in the common law’s development became blurred in some of the cases that followed on *Du Plessis* under the 1993 Constitution.

33 See the authority summarised in *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 32 and the early suggestions on this issue proffered by Strydom “The private domain and the bill of rights” 1995 *SAPL* 52.

34 See *Du Plessis* “Enkele gedagtes oor die historiese interpretasie van hoofstuk 3 van die oorgansgrondwet” 1995 *THRHR* 504; Van der Walt “Justice Kriegler’s disconcerting judgment in *Du Plessis v De Klerk*: Much ado about direct horizontal application (read nothing)” 1996 *TSAR* 732; Pringle “Broadening your horizons” 1996 *Juta Business Law* 167; Wolhuter “Horizontality in the interim and final Constitutions” 1996 *SAPL* 572; Woolman and Davis “The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and the final constitutions” 1996 *SAJHR* 361; Van der Walt “Perspectives on horizontal application: *Du Plessis v De Klerk* revisited” 1997 *SAPL* 1 and “Progressive indirect horizontal application of the bill of rights: towards a co-operative relation between common-law and constitutional jurisprudence” 2001 *SAJHR* 341.

35 *Du Plessis* para 49.

36 *Idem* paras 58–60.

37 (1992) 8 CRR (2d) 173 ([1991] 3 SCR 654).

38 *Du Plessis* para 61.

In *Rivett-Carnac v Wiggins*,³⁹ Davis AJ held that even though section 35(3) of the 1993 Constitution did not abolish the principle of *stare decisis*, it nevertheless required judges to carefully “examine the common-law rules afresh and, if necessary to ensure that the content thereof accords with the principles of [the Constitution]”.⁴⁰ Davis AJ relied on the work of Corbett cited above to explain that the “values and norms of society have now been reduced to written form”.⁴¹ Later it is stated even more explicitly that the Constitution gives content to the vague notion of the “changing mores of society” and, therefore, the Constitution is the guidebook to determining the *boni mores*.⁴² From this it can be deduced that the very idea of changing societal norms must be informed by the Constitution. Thus, *Du Plessis* was interpreted here to mean that the common law could be developed simply because it lacked constitutional muster. A very rigid and clear distinction between the “moral, social and economic” grounds for development and the 1993 Constitution’s role in the development of the common law was not adhered to as the former is shaped and given content to by the latter.

Following the basic tenor of the argument developed in *Rivett-Carnac*, in *McNally v M & G Media*⁴³ the court held that it was, in principle, possible that the common law strict liability of media houses in defamation cases had to be reconsidered in light of the introduction of freedom of expression in South Africa’s new human rights culture.⁴⁴ Nevertheless, it was only in *National Media v Bogoshi*⁴⁵ that the “common good”, as informed by the newly afforded importance to the right to freedom of expression (and the related interest that society has in the free flow of information), dictated that the strict liability of the media had to be relaxed.⁴⁶

The shortened version of the ground for common law development under the 1993 Constitution, on my interpretation, therefore is that the original ground for development in principle remained intact but had itself been developed to take cognisance of the fact that the morality of South African society was now informed by constitutional aspirations. In a sense, this approach mimics evolutionary functionalism as it still sees the need for the law to develop to be relevant for society. Nevertheless, this approach contains a vitally important change in thinking: judges are not simply required to keep the law up-to-date because of small changes in the community. Judges now had to envision a new path for the law with transformative constitutional aspirations that are inherently political and ideological in nature. The test for development no longer involved a tapping into the “objective and deterministic” *spiritus mundi* of white South Africa. The test now involved balancing conflicting rights and interests in the Constitution in a way that best promoted an open and democratic South Africa based on the values of human dignity, equality and freedom. To what extent has this position changed or remained the same under the 1996 Constitution?

39 1997 3 SA 80 (C).

40 *Idem* 87B–E.

41 *Idem* 87H–J.

42 *Idem* 89I–J.

43 1997 4 SA 267 (W).

44 *Idem* 275F–H.

45 1998 4 SA 1196 (SCA).

46 *Idem* 1210G.

3.3 The 1996 Constitution

One of the most interesting South African private law debates has taken place in the boxing ring of horizontality under the 1996 Constitution. As indicated above, under the 1993 Constitution most of the debate leading up to *Du Plessis* revolved around the question of *whether* fundamental rights should play a role in private relationships at all, with only a few observations on the mechanics of horizontality. Post-*Du Plessis* and after 1996, the debate shifted to the mechanics of *how* fundamental rights should impact private relationships regulated by the common law. The seminal case of *Carmichele v Minister of Safety and Security*⁴⁷ provided the blueprint for common law development in terms of the 1996 Constitution.

In *Carmichele* a unanimous court held, after surveying the totality of constitutional provisions that are in some way linked to the development of the common law, that “where 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”.⁴⁸ The court then proceeded to explain that “where a court develops the common law, the provisions of s 39(2) of the Constitution oblige it to have regard to the spirit, purport and objects of the bill of rights”.⁴⁹ Even though the court takes cognisance of the fact that courts should not usurp the role of the legislature, it notes the *Salituro* dictum that was adopted in *Du Plessis* to the effect that judges should not allow a rule whose social foundation has fallen away to be perpetuated, with the added qualification that South African judges have a vastly different responsibility when it comes to the development of the common law. This is so because our Constitution has radically altered the normative framework of our law and requires judges to be awake to the pressing need to ensure that the common law is consonant with this new framework.⁵⁰ The duty of judges to consider the constitutional validity of the common law as it stands is “general” in the sense that a court may, in some instances, raise the issue of its own volition.⁵¹

According to the court, a two-stage method is involved in the process of developing the common law. First, one considers whether the common law needs to be developed in light of the “s 39(2) objectives”.⁵² If the common law must be developed, the second stage involves an evaluation of exactly how the law should be developed to give effect to the section 39(2) objectives,⁵³ which could include, for example, either an accentuation of a specific aspect of a common law provision or a redefining thereof.⁵⁴

Complicating the issue, the court then proceeded to indicate that in the context of an enquiry into the wrongfulness of state omissions,

“[b]efore the advent of the [1993 Constitution], the refashioning of the common law in this area entailed ‘policy decisions and value judgments’ which had to ‘reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people’”;

47 2001 4 SA 938 (CC).

48 *Idem* para 33.

49 *Idem* para 35.

50 *Idem* paras 36–54.

51 *Idem* para 39.

52 *Idem* para 40.

53 *Ibid.*

54 *Idem* para 57.

but that these concepts “might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution”.⁵⁵ I argue that these statements cloud the grounds for development because they suggest, on the one hand, that the original ground for development is a relic of a pre-fundamental rights paradigm (suggested by the phrase “before the 1993 Constitution”), while on the other it does not unequivocally command the bolstering of the original ground with new constitutional values. The Constitution “might” play a role, but it is not to say that it must.

Thus, it is not completely clear whether constitutional non-compliance has replaced the original ground, or whether it acts in tandem with that ground (bearing in mind that in *Carmichele* it was proposed that the common law had to be developed ultimately because it was said to fall short of the section 39(2) objectives). I contend that there are at least three ways to deal with this ambiguity in *Carmichele* that I take further here. However, what all three approaches to the ambiguity have in common is the following: there is no academic or precedential authority (after *Du Plessis* at least) that completely rejects the possibility of the common law being developed on some type of Constitutional ground. In *Carmichele* it was held that the constitutional ground for development is based on section 39(2), but the reliance on that section can be and has been critiqued by employing an analytical reading of the Constitution which rather locates the authority for a constitutional ground for development in an integrated reading of sections 2, 8 and 173 in conjunction with Schedule 2 item 1 thereof.⁵⁶ Be that as it may, what *Carmichele* implies, in the broadest of terms that most authors agree to, is that at least one of the grounds for the common law’s development can be a constitutional one.

The first approach to the ambiguity is what I will call the “Faganian construction” that I base on Fagan’s thought-provoking work on the spirit, purport and objects of the bill of rights.⁵⁷ Even though Fagan does not specifically attack this segment of the judgment as ambiguous, in his reflection on section 39(2) of the Constitution he argues that three primary grounds exist for the development of the common law.⁵⁸ First, as per section 8 – and not section 39(2) – of the Constitution, he suggests that in order to further a right in the bill of rights, the common law may be developed. The second ground proposed by Fagan is grounded in section 173 and can be phrased that the common law should be developed if it is in the interests of justice to do so.⁵⁹ He suggests that the last ground for development is sparked by a rule of common law itself, as supported by section 39(3) of the Constitution that preserves common law rights and freedoms that are consistent with the bill of rights.⁶⁰ Even though Fagan does not provide a lengthy explanation of what he means with his statement that the common law can be developed

⁵⁵ *Idem* para 56.

⁵⁶ This is my own patchwork derived from the views of Woolman “The amazing vanishing bill of rights” 2007 *SALJ* 762; Fagan “The secondary role of the spirit, purport and objects of the bill of rights in the common law’s development” 2010 *SALJ* 611; Bhana “The horizontal application of the bill of rights: A reconciliation of sections 8 and 39 of the Constitution” 2013 *SAJHR* 351; and Friedman “The South African common law and the Constitution: Revisiting horizontality” 2014 *SAJHR* 63.

⁵⁷ Fagan 2010 *SALJ* 611.

⁵⁸ *Idem* 622.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

because of the “rules of common law”, I argue that it is possible to interpret that statement as lending support to the original ground for development introduced in 1909. It therefore seems that Fagan would not support the suggestion that the original ground for the common law’s development has been abolished by *Carmichele* or the Constitution. Just to be clear, Fagan therefore suggests that the common law can be developed either for the sake of furthering a constitutional right, because of justice or because of the common law itself, and it is only after one has established that the common law should be developed for one of these reasons, that the secondary role of the “spirit, purport and objects of the bill of rights” kicks in because the application of section 39(2) is limited to “when” the common law is actually being developed.⁶¹ Fagan, I think, would therefore implicitly reject the reading of the ambiguous part of the judgment that regards the phrase “before the 1993 Constitution” as laying the original ground at common law to rest. However, there are critical legal scholars who have painted a very different picture to the Faganian construction.

For that reason, the second approach to the *Carmichele* ambiguity is what I shall refer to as the “critical construction”. The critics trash Fagan’s notion that “the interests of justice” can be regarded as a ground for development that is completely removed from the furtherance of a fundamental right. They suggest that the promotion of fundamental rights surely cannot be said to be so divorced from the promotion of justice that it is a separate ground for development.⁶² They criticise Fagan’s “positivist” reading for failing to comply with the purposive approach to constitutional interpretation that our Constitutional Court endorses.⁶³ Instead, the critics propose that the conclusion that I made about the position under the 1993 Constitution is the more defensible approach to the interaction between the Constitution and the original ground for development – in other words, that the original ground has itself been developed in the sense that our changing social fabric or *boni mores* should be informed and shaped by the Constitution.⁶⁴ Their argument is that there can be no other more important source of South African morality when compared to the supreme, transformative Constitution. I suggest that this is a point indirectly supported in *S v Makwanyane*⁶⁵ where it was held that, regardless of public opinion on the matter, capital punishment is in conflict with our supreme law that reflects our new democratic social fabric. That social fabric is not informed by the values of hatred and vengeance, even though those may factually exist in the minds and hearts of many South Africans, instead it is informed by a new culture of reconciliation. In a nutshell, even though we may still use the phraseology of the *boni mores* or the changing fabric of society, those phrases now mean our constitutionally informed morality.

61 *Idem* 621.

62 Roederer “Remnants of apartheid common law justice: The primacy of the spirit, purport and objects of the bill of rights for developing the common law and bringing horizontal rights to fruition” 2013 *SAJHR* 219 244 246–247.

63 Cornell and Friedman “In defence of the constitutional court: Human rights and the South African common law” 2011 *Malawi LJ* 1 3ff; Davis “How many positivist legal philosophers can be made to dance on the head of a pin? A reply to Professor Fagan” 2012 *SALJ* 59ff; and Roederer 2013 *SAJHR* 245ff.

64 Davis and Cheadle “The application of the 1996 constitution in the private sphere” 1997 *SAJHR* 44 45; Davis and Klare “Transformative constitutionalism and the common and customary law” 2010 *SAJHR* 403 424; Davis 2012 *SALJ* 64.

65 1995 3 SA 391 (CC) paras 87–89.

There is therefore, in effect, one very broad constitutional ground for the development of the common law, which may be expressed in different ways, but boils down to the fact that in deciding *whether* and *how* the common law should be developed, the Constitution should play an integral role.

Adding to the arguments presented by the critics, I propose that their interpretation is more consistent with the historical progression of the grounds for common law development than I have laid out thus far. Furthermore, even though critics are better known for pointing out uncertainties than solving them, the stance of the critical paradigm to the grounds for development can be utilised in a strategic manner to resolve the *Carmichele* contradiction pointed out above. My proposition is that the court in *Carmichele* could have meant (and in critical spirit, let me be clear that this is just a suggestion of what the indeterminate words of the court might mean) that before the 1993 Constitution a purely extra-constitutional version of legal morality was utilised as the ground for development, but that since then things have changed. Even though the phraseology in *Carmichele* is unfortunate in its suggestion that the role of the Constitution is tentative in determining the present-day social fabric of South Africa, it is possible that there are certain pre-1993 judicial pronouncements that could comfortably fit in the realm of the current normative framework of the Constitution. Certainly, a great deal of pre-1993 South African legal morality was warped and corrupt, but there may have been some judgments that were subversive to the oppressive political system of the day that may be used meaningfully in the democratic dispensation today. To determine to what extent past judgments are consistent with the Constitution, those indices of the *boni mores* would have to be justified constitutionally in each new case. In that sense then, the Constitution will not always dispose of every single precedent created before the Constitution came into effect. Thus, even though the critics argue that every precedent should be tested against the supreme law for compliance with it, the Constitution will not necessarily “supplement” or “replace” every single past manifestation of the *boni mores*. In this way, the Constitution stays central to the developmental exercise (where it plays a role both at the level of determining *whether* the law needs developing and, if it does, *how* it should be developed) and sense can be made of the ambiguity in *Carmichele*.

The third approach to the ambiguity is the “amalgamated construction” employed by the Supreme Court of Appeal that becomes apparent upon a joint reading of two cases following on *Carmichele*. This approach is considered “amalgamated” as it shows elements of both of the previous constructions. In *Minister of Safety and Security v Van Duivenboden*⁶⁶ a similar issue as to the determination of the wrongfulness of omissions by state functionaries arose. Reaffirming that wrongfulness is determined by the legal convictions of the community which can differ from society to society,⁶⁷ Nugent JA emphasised the importance of considering the legal convictions specifically prevalent in the South African community.⁶⁸ The South African community’s legal convictions “must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution”, because in order for a norm to have legal validity, it must be consistent with the Constitution.⁶⁹

⁶⁶ 2002 6 SA 431 (SCA).

⁶⁷ *Idem* para 13.

⁶⁸ *Idem* para 16.

⁶⁹ *Idem* para 17.

A few months later in *Van Eeden v Minister of Safety and Security*,⁷⁰ Vivier ADP was likewise faced with the challenge of giving content to the “legal convictions of the community”. In this regard, it was emphasised that the legal convictions of the community do not refer to the social, moral, ethical or religious convictions of the average person roaming the streets of South Africa. The determination of the legal convictions of the community refers to the convictions of legal policy makers such as judiciary and the legislature,⁷¹ which means that the “norms, values and principles contained in the Constitution” must necessarily be incorporated into the content of the *boni mores*.⁷² However, a new twist is added to this principle adopted from *Van Duivenboden*. The Constitution is not the “exclusive embodiment” of the *boni mores*. The *boni mores* criterion has not been abolished and will continue to keep the law of delict in step with the changing times. Even so, all principles and rules of delict must be consistent with the supreme law.⁷³

The inference that I draw from this is that the Supreme Court of Appeal is of the view that there may be aspects of the *boni mores* that are found extrinsic to the Constitution, but those aspects at least must be consistent with the Constitution. Yet, on a holistic perusal of the judgment and despite the comment militating against constitutional over-excitement, the *boni mores* in this case were determined in light of various constitutional provisions and not from extra-constitutional sources. As I alluded to above, if one reads *Van Duivenboden* and *Van Eeden* together, a combination of the Faganian and critical constructions may be observed. The amalgamated construction is in harmony with Fagan’s line of attack in that it does not regard the Constitution as the sole embodiment of our social fabric and shows reverence to the original ground for development at common law. Simultaneously, this construction has critical flair because it still recognises the supremacy of the Constitution albeit on slightly different terms when compared to the views that the critics hold on the matter.

With these three possible approaches to understanding *Carmichele*’s ambiguity on the grounds for common law development in mind, what is interesting is that at a glance over most cases where the common law of delict has been developed, it would appear that the dominant approach followed in that area of law is a critical construction. None of these cases unequivocally rejects the amalgamated construction developed by the Supreme Court of Appeal, but in all delictual cases that I have surveyed, except for *Heroldt* under scrutiny in this article and the case of *RH v DE*,⁷⁴ the Constitution was invoked as the primary ground for developing the common law with no reference to the possibility of extra-constitutional grounds entering the scene. Most recently in *DE v RH*, following its earlier judgments in *Barkhuizen v Napier*⁷⁵ and *Loureiro v iMvula Quality Protection*,⁷⁶ the Constitutional Court expressed its unequivocal support for a critical construction in that public policy *must* be determined with reference to

70 2003 1 SA 389 (SCA).

71 *Idem* para 10.

72 *Idem* para 12.

73 *Ibid.*

74 2014 6 SA 436 (SCA) which was overturned on appeal, as yet unreported *DE v RH* (CCT 182/14) [2015] ZACC 18.

75 2007 5 SA 323 (CC).

76 2014 3 SA 394 (CC).

the values enshrined in the Bill of Rights because the *boni mores* are “deeply rooted in our Constitution”.⁷⁷ It therefore appears that the realist version of evolutionary functionalism is not the general trend followed in the common law’s development. What, then, should we do with *Heroldt*?

4 A SPECIFIC ANALYSIS OF THE DEVELOPMENT IN *HEROLDT*

In *Heroldt*, the court took cognisance of the fact that the interrelated common law rights to privacy, freedom of expression and dignity have been confirmed in the Constitution,⁷⁸ and that the common law must be developed “in accordance with the principles enshrined in our Constitution”.⁷⁹ At first, one might read this as constitutional enthusiasm and predict a powerful, ideological argument on how the common law should be developed to better give effect to those constitutional rights or because the common law as it stands is deficient in promoting the objectives of the development clauses. However, the court quickly turned to extra-constitutional grounds to develop the common law and extra-constitutional logic for how it should be developed.

Willis J indicated that neither Justinian nor the constitutional drafters could have predicted the existence and impact of Facebook on our daily lives,⁸⁰ and that these technological (and concurrent social) changes require appropriate responses from the courts.⁸¹ After dedicating about 30% of the judgment to an exposition of the technological functioning of Facebook and related social networking sites,⁸² the court made it clear that the reason why the common law had to be developed in this case was because the court in *Setlogelo* back in 1914 could not have foreseen how quick, easy and cheap it would be in 2013 to interdict a respondent to remove a defamatory post on Facebook⁸³ – a situation that is markedly different to the practical and economic consequences for interdicting a newspaper to halt the printing press.⁸⁴ Thus, the law had to be developed to keep up with evolving technology and society and the ever-changing political and economic climate to ensure “credibility”, which will have the knock-on effect of ensuring “legitimacy”, “acceptance” and “obedience”, in that order.⁸⁵ Ultimately, the ground for the development in *Heroldt* was thus the socio-technological advancement that Facebook has brought about.

In addition to this (seemingly addressing the *whether* and *how* questions simultaneously), the court was of the view that the stance against the gratuitous granting of interdicts in cases involving personality infringements has always been informed by a concern about the “social consequences of stopping the free flow of information” *à la Bogoshi*.⁸⁶ The court went as far as to suggest that because of the importance of the free flow of information, a different outcome may have been reached if the respondent was a media house,⁸⁷ but here the

77 *DE* para 18.

78 *Heroldt* paras 7–26.

79 *Idem* para 8.

80 *Idem* para 7.

81 *Idem* para 8.

82 *Idem* paras 10–23.

83 *Idem* para 31.

84 *Idem* para 34.

85 *Idem* paras 31–32.

86 *Idem* para 34.

87 *Idem* para 35.

applicant succeeded in obtaining the interdict compelling the respondent to remove the defamatory post from Facebook on the reasoning that no other similar remedy was available that would as effectively assist the applicant without “expense, drama, trauma and delay”, even though the standard remedy in cases of this nature would have been to award damages to the applicant.⁸⁸ The court’s view on the ground for developing the common law and the manner in which it was developed raises two issues that I take further here.

The first issue is the court’s decision to develop the common law on the basis of the “changing times” in an evolutionarily functionalist manner. I do not regard the law as being completely divorced from the society that it governs. Of course, society has an impact on shaping the law just like the law has a material impact on the lives of the people that are subject to it. However, the approach of evolutionary functionalism is subject to a few points of criticism that I borrow from Gordon. There is no “uniform evolutionary path” that the law follows across the world.⁸⁹ In other words, sometimes the same social circumstances (at different points in time and place) can produce different legal outcomes, so the law does not uniformly and objectively respond in a predetermined way to specific social conditions. The reason why legal outcomes can differ despite similar social changes in different places (or why different legal arguments present themselves in one place and at one time) is because the law’s development is not politically or ideologically objective.⁹⁰

Applying this critical approach to the common law’s development to the finding in *Heroldt*, the court was in reality confronted with choices as to *whether* and *how* the common law should be developed. It would be erroneous to assume that allowing the interdict here was the only possible response that the court could have given to the “changing times”. Perhaps the “changing times” could have dictated that because of the pervasiveness of social media and the potential for abuse of private power now in the hands of private individuals, a person who has defamed another on a social networking site should be required to pay a hefty sum in damages to the injured party. It is widely accepted that the functions of the awarding of damages for personality infringements include the fictitious reparation of a person’s bruised ego and a type of sanction against the injurious conduct that translates into a deterrent for potential committers of *injuria*.⁹¹ With that in mind, why not stick to the ordinary rule that an award for damages is the historically more consistent and more effective remedy to ensure that the South African people will be deterred from committing delicts on social media? The message to people using social media in South Africa could very well be that they can defame as they please as long as they remove it when someone complains with no consequences for the damage already done. If “changing times” is not an empirical standard that produces clear-cut and indisputable solutions to legal developmental problems, what actually determines a judge’s decision on why and how the common law should be developed?

For Gordon, the various possibilities that judges may have to choose from as to what route the common law should take unavoidably are influenced by ideology.⁹² This is consistent with the old critical perspective on law that the

88 *Idem* para 39.

89 Gordon 1984 *Stanford LR* 100.

90 *Idem* 101.

91 Neethling *Law of personality* (2005) 59–60.

92 Gordon 1984 *Stanford LR* 101.

options that legal problems give us are shaped around political foundations. For the early critics, the choice is either in favour of an individualistic outcome or an altruistic one.⁹³ Extending this basic theme here, the choice could involve supporting a particularly individualistic, capitalist, commodified vision of the forceful protection of a person's most intimate right, the right to human dignity, *versus* a more altruistic, reconciliatory and friendly vision of the restoration of harmony in the community. Even if a judge does not consciously attach a political dimension to their interpretation of law, it exists as an "inarticulate premise", as Dugard would call it.⁹⁴ Consequently, of course we can admit that the reality of Facebook presents the possibility of legal creativity to our courts. However, relying on economic, political, social and technological advancements cannot in and of themselves present clear reasons why the common law should be developed and certainly not why it should be developed in a specific manner either. Indeed it is true that sometimes the pattern that the law's development might follow seems consistent with recurring themes but critical insight into the issue shows that such a consistency exists as being "normal" exactly because lawyers are conditioned to believe that certain professional responses and modes of reasoning are "normal" according to a particular legal culture.⁹⁵ A critical approach to legal history involves a rejection of a belief in the normality and determinism of the law's development and replaces that belief with a hope of the possibility of the ability of human beings, not to adapt to their current circumstances, but to reimagine their current circumstances in a way that envisions a better social reality for all.

Let me further illustrate why the original ground for development (that is, the evolutionarily functionalist approach) should bow down to a constitutionally-inspired one. Our national political and social circumstances may at this stage of our history indicate that the extravagant use of state funds for personal purposes is quite acceptable and that checks and balances in our democracy can effectively be dealt with internally by the executive without unnecessary interference from third parties. On the other hand, the Constitution provides that accountability and the concomitant necessity for the separation of state powers are fundamental aspects of our constitutional democracy that aim to prevent the abuse of power.⁹⁶ It follows logically that the Constitution, being the supreme law, should be the standard against which the political and social climate is measured. Vague notions of society and technology cannot dictate what our legal morality must mean. We should not allow these extra-constitutional hashtags (without constitutional verification) to shape and give content to a constitutionally-mandated power that courts have to develop the common law. This is why the original ground for development at common law paints an inaccurately deterministic vision for our shared legal morality, which is also not the main approach used in the development of South African common law of delict today. The critical and amalgamated grounds for development are powerful because both, albeit in

93 For a more detailed explanation of the political tensions identified by the early critics, as applied to the law of delict in South Africa, see Zitzke 2014 *Acta Academica* 55–60.

94 "The judicial process positivism and civil liberty" 1971 *SALJ* 181 187.

95 See Gordon 1984 *Stanford LR* 101–102 and Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146 166.

96 On the importance of the value of accountability and its interplay with the separation of powers doctrine, see the observations made by Motale "Towards an appropriate understanding of the separation of powers, and accountability of the executive and public service under the new South African order" 1995 *SALJ* 503.

different ways, recognise the ideological tensions at work in answering the question whether the common law ought to be developed. Relying on Klare,⁹⁷ I argue that the moment that the Constitution enters this enquiry, the possibility is opened for a frank acknowledgement of the ideological and political task of legal interpretation involving the tension between judicial freedom and constraint, which many common lawyers regard as being inapplicable to “pure common law” matters.⁹⁸ In *Carmichele*, Ackermann and Goldstone JJ acknowledged that it was by no means apparent in what way the common law should have been developed in light of the Constitution and that various different options could have been pursued in this regard.⁹⁹ The inference that I make when reading Klare with *Carmichele* is that the Constitution can be used effectively to militate against the myopic and limiting approach of evolutionary functionalism. By using one of the alternative approaches to the original ground, law is not completely divorced from the materiality of South African society, but at the same time one recognises that there are ideological considerations as to whether those social changes should dictate concomitant legal change.

If the critical approach had been employed in *Heroldt*, the same result could have been reached because the heart of the Constitution and our new political dispensation would bleed for litigants who wish to reconcile and make peace instead of attempting to financially destroy each other through a battle for damages.¹⁰⁰ Twisting the phraseology of section 8, the granting of an interdict instead of damages would give better effect to the fundamental rights of the applicant when compared to an order for damages. If the amalgamated approach had been employed here, one could argue that the socio-technological change brought about by Facebook has opened the space for interdicts to be practical and effective in cases dealing with social media, but this practical point only deserves legal recognition because better effect can be given to the Constitution’s transformative vision by granting the interdict. However, there is a further problem in the reasoning in *Heroldt*.

The second issue with the approach in *Heroldt* is the invalid policy argument offered as the rationale for the common law’s development. As I indicated above, the policy reason provided by the court for developing the common law here is the “historic importance” afforded to the free flow of information in cases involving the media (according to the court, as per *Bogoshi*) as contrasted to the current situation where a private individual is the wrongdoer. This policy decision played out as an argument in favour of the granting of an interdict where the wrongdoer is a private person, but a suggestion was made to the effect that the interdict would not be granted where the wrongdoer is a media house. This argument is fallacious for two reasons. First, *Bogoshi* cannot be invoked as authority for a long-alleged history of media freedom. Any good South African media law textbook starts off with a recognition of the importance of the media in an open and free democracy as contrasted to pre-1994 South Africa.¹⁰¹ Historically, it would be

97 Klare 1998 *SAJHR* 149.

98 Zitzke 2014 *Acta Academica* 55ff.

99 *Carmichele* para 57.

100 I draw here specifically on the work of Klare and Davis 2010 *SAJHR* 411 who regard the development clauses of the Constitution as a mandate for the infiltration of the value of *uBuntu* into all forms of law, including the common law. See also Himonga, Taylor and Pope “Reflections on judicial views of *uBuntu*” 2013 *PELJ* 370 and their interpretation of *uBuntu* as a reconciliatory value opposed to vengeance and domination.

101 See Milo and Stein *A practical guide to media law* (2013) vi.

more consistent to present a case for the fact that the Constitution brought about a transformed consciousness of the role that a responsible media has to play in ensuring public access to information and good governance. It is erroneous to view access to information and freedom of the press as principles with a long-standing track record in our country. I think the stronger policy argument applicable to the facts and issues of this case would be that in the past our law commodified dignity to the extent that it could virtually only be protected in monetary terms to bring solace to the injured party. Today our law finds itself in a new normative framework founded on the value of reconciliation and the establishment of a community that coexists peacefully despite our differences and, for that reason, our law needs development. The ease of effecting this ideological change through the law applicable to the case at hand is but one of the bolstering considerations as to why the law should be developed, but these technological considerations are not our primary concern. Thus, the change in technology has created the opportunity and the space for the law to be developed – it has sparked the opportunity for a new set of facts to be presented to a court for the first time – but it is not the reason for the need for legal development. The need for development is established on ideological, constitutionally transformative grounds. My suggestion is not completely in conflict with the judgment read as a whole. Willis J recognised the important role that the law could play in building friendships and restoring harmony instead of destroying already damaged relationships further by the imposition of delictual damages as remedy. This, I argue, is the actual crux of the policy considerations in the case at hand and this should have been the more coherent and effective constitutional reasoning of the court in *Heroldt*. The second reason why I disagree with the policy argument presented by the court on freedom of expression and access to information is because of the unfair distinction that is made between private persons and the media. To recap, due to the fact that South African citizens have a right to the free flow of information and media freedom, the court suggests that the media, when publishing information electronically, will possibly not be interdicted to remove injurious content from the web. Taking a step back, one will recall that the test in *Setlogelo* requires a court to determine whether a legal interest has been infringed and then whether that infringement is unlawful. If we bear in mind that the media is allowed to publish infringing content that is reasonable or content that is true and in the public interest, it is strange to think that the media should be allowed to publish wrongfully injurious material (that is, without a valid legal excuse) simply because South African citizens have an interest in having a free flow of information. That free flow of information is always limited by the rights of other persons to dignity and privacy which is why unreasonable infringements or those made either untruthfully or without any public benefit can lead to a successful delictual claim. Surely, the media should not be allowed to wrongfully infringe on the personality rights of others and simply pay damages as an *ex post facto* remedy, while private individuals are not entitled to commit wrongful infringements to start off with. An opposite finding would be incompatible with the equality clause as it would effectively empower the media to abuse its influential and far-reaching publishing power.¹⁰² The same rule should apply to all infringers of personality rights: because our Constitution now requires people to live in peaceful harmony instead of in comfortable structures of domination, a wrongdoer may be interdicted to either be prevented from

102 See s 9 of the Constitution.

publishing unlawfully injurious content or to remove unlawfully defamatory material already published, even though the possibility of damages might in principle still exist.

5 CONCLUDING THOUGHTS

To tie things together, the outcome in *Heroldt* is welcomed and sits comfortably in the normative framework of our Constitution. However, the court failed to recognise that the law does not develop along politically objective and deterministic grounds. By failing to explicitly recognise that the common law's development presents us with competing answers to the questions of *whether* and *how* the common law should be developed, like the early cases on the topic where the original ground for development at common law was applied, the court failed to recognise that the law's development occurs along a trajectory of competing political interests. Consequently, the judgment appears to be evolutionarily functionalist as the American legal realist historians have thought about the development of law. My suggestion is that the invocation of the Constitution in both the *whether* and *how* questions of common law development holds the potential to open up the possibility of a clearer recognition of the political nature of law – an idea that was foreign to pre-apartheid and apartheid South Africa where legal positivism reigned supreme – which is at least a small step in the direction of culturing a critical approach to the common law's development and historiographic studies under a transformative dispensation.