TRANSFORMATIVE CONSTITUTIONALISM AND THE COMMON AND CUSTOMARY LAW

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ABSTRACT

A basic assumption of the Constitution, which finds expression in its ‘development clauses’ (ss 8(3) & 39(2)), is that South Africa cannot progress toward a society based on human dignity, equality, and freedom with a legal system that rigs a transformative constitutional superstructure onto a common and customary law base inherited from the past and indelibly stained by apartheid. We examine South African judges’ performance in implementing the development clauses through the lens of legal culture. A central concern is the potential of traditional South African legal culture to constrain the transformative project. South Africa has an advanced Constitution informed by the values of social interdependence and ubuntu, but its jurists continue to deploy traditional methods of legal analysis. Ironically, the United States has a classical liberal and individualist charter, but the Legal Realist tradition bequeathed American lawyers a storehouse of modernist legal methods well suited to South Africa’s transformative project. Surveying the cases over the first 15 years of the new dispensation, we find some leading judgments that demonstrate the capability of the courts to transform the common law and that provide glimpses of a more egalitarian, inclusive, and caring legal infrastructure. The chief disappointments are the absence thus far of a coherent exploration of the Constitution’s values or an explicit and sustained effort to develop new legal methodologies appropriate to transformative constitutionalism; the reluctance to interrogate the distributive consequences of private law rules in the routines of economic life; the emergence of a neo-liberal strand in constitutional application; and the lack of critical sharpness with respect to separation-of-powers issues. The inhibiting effect of mainstream legal culture is not entirely responsible for these difficulties, but concerns expressed a decade ago that the courts would be held back by the traditionalism of South African legal culture were well taken.

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‘The South African Constitution is different’ – it is a transformative constitution. The ‘Constitution is a document committed to social transformation’, as the Constitutional Court (CC or the Court) has emphasised on many occasions. The ‘Constitution has set itself the mission to transform society in the public and private spheres’. The Constitution of the Republic of South Africa, 1996 embraces an aspiration and an intention to realise in South Africa a democratic, egalitarian society committed to social justice and self-realisation opportunities for all. The text acknowledges that the new dispensation arose in a particular historical context and that the democracy it inaugurates and celebrates is permanently a work-in-progress, always looking forward, always subject to revision and improvement.’ This article explores the significance

1 Mahomed DP, as he then was, in S v Makwanyane 1995 (3) SA 391; 1995 (6) BCLR 665 para 262 (italics added).
2 'The Court', with an upper-case ‘C’, refers to the Constitutional Court or, where demanded by context, to the United States Supreme Court. All other courts and courts in general are indicated with a lower-case ‘c’. SCA indicates the Supreme Court of Appeal.
3 Montiwanà v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) para 81 (O'Regan J) (footnote and citations omitted). To similar effect, Chaskalson P stated that 'a commitment ... to transform society ... lies at the heart of our new constitutional order', Soobramoney v Minister of Health (KwaZulu-Natal) 1998 1 SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 8; and that '[t]he Constitution demands ... that our society be transformed ... to an open and democratic society based on human dignity, equality and freedom'. A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity As a Foundational Value of Our Constitutional Order' (2000) 16 SAJHR 193, 199. Langa DP, as he then was, wrote that the 'spirit of transition and transformation' toward 'a society based on democratic values, social justice and fundamental human rights ... characterises the constitutional enterprise as a whole'. Investigating Directorate: Serious Economic Offenses v Hyundai Motor Distributors (Pty) Ltd: In re: Hyundai Motor Distributors (Pty) Ltd v Smitt NO 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) para 21. Later as Chief Justice, Langa remarked that '[b]oth the Constitutional Court and other courts view the Constitution as transformative .... It is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution'. P Langa 'Transformative Constitutionalism' (2006) 17 Stellenbosch LR 35.
5 Henceforth 'Constitution' referring to the final Constitution. References to the interim Constitution, Act 200 of 1993, are identified as such.
6 See Constitution ss 1 & 7. See also Makwanyane (note 1 above) para 262 (Mahomed DP): The South African Constitution ... 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 .... What the Constitution expressly aspires to do is to provide a transition from [the] 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 colour, race, class, belief or sex' (quoting the interim Constitution, Postamble).
7 The Constitution's historically situated character was poignantly recognised in Azanian People's Organization v President of the RSA 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC). See, for example, para 50 ('constitutional journey from the shame of the past to the promise of the future'); para 42 ('[w]hat the Constitution seeks to do is to facilitate the transition to a new democratic order').
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of transformative constitutionalism for the development of the common and customary law. We look at how South African judges during the first 15 years of South Africa's democracy have understood the impact of a transformative constitution on the law governing relationships between private individuals and businesses.

I INTRODUCTION

(a) The lens of legal culture

Public discussion of legal transformation typically focuses on judicial appointments based on the imperative that the membership of the bench should 'reflect ... the racial and gender composition of South Africa'. There has been some, but less, discussion about the need for incoming and incumbent judges and lawyers to be schooled in and committed to constitutional values, particularly the values and spirit of the Bill of Rights. Both agendas are important, but a transformative constitution implies even more than a representative judiciary deeply committed to the values of the Constitution. An additional, urgent priority is to transform the judicial mindset – by which we mean what Justice Krieglèr memorably called the 'inarticulate premises, culturally and historically ingrained' that inform South African judges' and lawyers' training, outlook, analytical methods, and discursive repertoire.

A central concern of this article is the potential of traditional South African legal culture to constrain the transformative project. Soon after it took effect and in subsequent years, we and others warned that South

8 See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146, 150:
By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere'.

9 See, for example, S Cowen 'Judicial Selection in South Africa' (2010) unpublished paper.

10 Du Plessis v De Klerk 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) para 119 (Krieglèr J).

11 Klare (note 8 above); D Davis Democracy & Deliberation 100 (tenacity of a dormant legal tradition); D Davis 'Elegy to Transformative Constitutionalism' in H Botha, A van der Walt & J van der Walt (eds) Rights and Democracy in a Transformative Constitution (2003); D Davis 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 SAJHR 301.

African legal culture might hold back efforts to realise the Constitution’s egalitarian aspirations. We pointed to the disconnect between South Africa’s modernistic Constitution and its vintage canons of legal analysis steeped in common law and Roman-Dutch tradition, adulterated by the decades of apartheid.

By ‘legal culture’ or ‘legal consciousness’, we mean the characteristic legal values, habits of mind, repertoire of arguments, and manners of expression shared by a group of lawyers at a given, historically situated time and place. A legal culture takes its shape from its lawyer-participants’ shared experiences of training and socialisation, the basic concepts that organise their legal thinking and work, what they regard as appropriate methods of solving legal problems and generating legal knowledge, what counts for them as persuasive legal argument, what recurring discursive strategies and argumentative techniques they deploy, what types of argument – possibly valid in other disciplines such as political philosophy – they deem ultra vires the professional discourse of lawyers, what their view is of the appropriate role and demeanour of judges (and other key legal actors), what enduring political and ethical commitments influence their professional discourse, and what understandings of and assumptions about human possibility and social organisation they share. The discursive structure of a legal culture gives content to, but also constrains, the legal imagination of its participants, the types of questions they are capable of asking, and, therefore, the range of answers that they can provide.

Legal culture is semi-autonomous from political ideology (understood in conventional ‘left/right’ terms) and ethical or religious outlook. Judges who strongly disagree about the political issues of the day may share a common legal culture. For example, South African judges fervently committed to the transformative project frequently deploy traditional types and styles of argument, although they may reach different results than their more politically conservative colleagues. Similarly, many US judges considered politically conservative are quite adept at deploying styles of legal argument associated with more progressive approaches (such as context-sensitive balancing).

14 Indeed, similar concerns were raised even before the 1994 Constitution took effect. See, for example, N Haysom ‘Democracy, Constitutionalism & the ANC’s Bill of Rights for a New South Africa’ (1991) 7 SAJHR 102, 105 (‘[t]he problem of inheriting a judiciary and legal profession, overwhelmingly white and male and steeped in conservative legal tradition, will have to be addressed’).

15 It is not suggested that all lawyers in any given society at a particular historical moment share a common legal culture. Particularly in transitional times, legal cultures may diverge or fragment.

16 A random illustration is the plurality judgment of Justice O’Connor in O’Connor v Ortega 480 US 709 (1987). A public hospital discharged Ortega, a psychiatrist, for alleged misconduct, relying in part on incriminating evidence taken from his office desk. The Court was unanimous that the Fourth Amendment guarantees of the ‘[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures’ applied to the situation. The issue was whether the governmental employer had violated the Fourth Amendment by searching Ortega’s desk and seizing his papers and effects. There was no urgency about the search, because at the time the office was secured and Ortega was on administrative leave and barred from the premises. The plurality, which included most of the conservative wing of the Court, concluded that office searches by governmental employers need only meet diminished Fourth Amendments standards; for example, governmental employers should be excused from the ordinary requirements of a search warrant and probable cause. With only casual reference to precedent, the plurality reasoned that any legitimate
In the authors' experience, foreign visitors who become acquainted with South African legal culture often comment that certain of its distinctive features appear relatively independent of lawyers' race, gender, and political ideology. Certain types of legal argument appeal to South African lawyers who otherwise disagree sharply on conventional political questions. Outsiders regularly observe that surprisingly conventional assumptions about legal reasoning, the judicial role, and social and economic organisation inform South African legal discourse. Argument-styles and reasoning-chains accepted as persuasive here often seem unconvincing to sympathetic visitors. At the same time, South African lawyers often look with suspicion, if not disbelief, upon types of argument regarded as perfectly normal in other jurisdictions such as the US.

As a matter of degree, South African lawyers are somewhat more confident than their American colleagues that words and texts have intrinsic, self-revealing meanings. Legal interpretation here tends to be more literal and rule-bound, more devoted to stare decisis, and less contextual and purposive. Compared to US lawyers, for example, their South African counterparts tend to give more credence to bright-line, categorical distinctions and are less patient with grey areas. They incline toward greater faith that adjudicators possess neutral decision-procedures for determining the outcomes of legal cases and that judges acting in good faith are effectively constrained by these procedures from allowing personal or ideological considerations to infiltrate the decisional process. Put another way, South African lawyers tend to have somewhat greater faith that legal reasoning can be hermetically sealed off from politics.

South African jurists – even the most sophisticated and intellectually courageous – seem prone to formalist error, although US lawyers are surely guilty of their share. 'Formalistic', in this essay, does not refer to a jurisprudential theory (formalism). We use 'formalist error' (sometimes called 'abuse of deduction') to refer to a distinctive type of logical mistake. It occurs when a lawyer believes, or says she believes, that a particular authoritative legal norm (or concept or rule or principle) entails a specific legal result or conclusion, when, in fact, a qualified legal practitioner utilising accepted tools and canons of legal reasoning can generate one or more alternative results or conclusions that are also compatible with the norm. The fact that a governing norm is compatible in legal-reasoning

privacy interests and expectations of public employees 'must be balanced [against] the realities of the workplace' Ibid 721; that 'public employers must be given wide latitude to enter employee offices' Ibid 723; that a warrant requirement was 'simply unreasonable' Ibid 722; and that a probable cause requirement would 'impose intolerable burdens on public employers' Ibid 724. In other words, the plurality diluted the constitutional privacy rights of public employees by balancing them away against the plurality's purportedly hard-headed, realistic view of how governmental offices work and what operational efficiency requires. The dissenters, generally understood to comprise the liberal wing of the Court, would similarly have employed context-sensitive balancing to the problem, but on that basis would have reached conclusions more protective of employee privacy expectations.

terms with more than one outcome or application does not mean that the legal question cannot be answered or that any answer is as good as any other from a legal point of view. What it does mean – and it is ‘formalist error’ not to appreciate or acknowledge this – is that, by itself, the norm or rule cannot determine the legally correct answer; without more, the legal answer cannot be derived from the principle. To select the best or legally preferred conclusion from among the alternatives compatible with the norm, a decision maker must rely, consciously or not, upon reasons or considerations apart from and in addition to the norm itself. Such considerations might include the objectives intended to be served by a rule, insights regarding the social context, considerations of economic efficiency or human rights, beliefs about the goals of the legal system, or, indeed, beliefs about the good life. Formalist error is the conviction that a finely shaded conclusion of law can be logically and neutrally derived from an abstract legal rule or concept (for example, ‘dignity’, ‘contractual autonomy’, ‘property’, ‘reasonableness’, ‘free choice’) when in fact a conclusion of this kind must pass through numerous conscious or unconscious decisional stages intermediate between first principle and outcome, each of which is a port of entry for value-laden and context-driven choices.

US lawyers and other outsiders who become closely acquainted with South African legal discourse often comment that, as a matter of degree, South African jurists are more persuadable than their elite counterparts in the US or elsewhere that norms, concepts, and rules have ‘necessary entailments’. If we have accurately captured South African legal culture, at least in broad strokes, its characteristic intellectual instincts and routines are ill-suited to the new and unfamiliar tasks the Constitution assigns to the judiciary. As Frank Michelman perceptively concluded: “[n]o legal argument, contention, or proposal is rejectable today simply because it does not ‘sound’ right or ‘feel’ right to a well-brought-up South African jurist of the current generation.”

(b) Common and customary law in the new dispensation

This article examines judicial performance under the new constitutions to assess whether traditional South African legal culture has acted as a brake on legal and social transformation. Looking back after 15 years, it is obvious that significant progress has been made. Yet we remain apprehensive that the inbred formalism of the legal culture, and the absence here of a well-developed tradition of critical jurisprudence, may stultify efforts to renovate South Africa’s legal infrastructure in the manner envisaged by the Constitution.

18 The risk of formalist error is not the unique province of any particular ideological perspective or approach to legal work. All legal reasoning styles are prone to this type of mistake, including the transformative orientation advocated here. However, the transformative approach attempts to guard against formalist error by encouraging sensitivity to social context and a high degree of self-consciousness and candour about the implicit value-judgments made in the course of legal analysis.
The development of the common law is, of course, a field in which judicial law-making is normal. As all lawyers know, judges make some of the law in all representative democracies. The proposition would be trite were it not that mainstream legal discourse goes to considerable lengths to deny it. Occasionally the public are let in on the secret, but typically they are treated to fairy tales about how judges merely ‘discover’ and apply law in precise conformity with the legislative will.

However, the Constitution embodies a new understanding of judge-made law that is more faithful to reality and charged with implications for South Africa’s constitutional project. The Constitution confers significant powers and responsibilities upon South African courts to interrogate and renovate the common and customary law so as to promote the values expressed in the Bill of Rights. The power and obligation to develop the common law in this spirit

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20 Continental jurists often claim that judicial law-making occurs only in common law regimes. Recent research shows that the asserted contrast between civil and common law jurisdictions is over-stated. See, for example, M Lasser ‘Judicial (Self-)Portraits: Judicial Discourse in the French Legal System’ (1995) 104 Yale LJ 1325.

21 See, for example, the United States Supreme Court’s revealing dictum in *Sosa v Alvarez-Machain* 542 US 692, 725–9 (2004), comparing the contemporary with the classical view:

> [W]here a court is asked to state or formulate a common law principle in a new context, there is [now] a general understanding that the law is not so much found or discovered as it is either made or created. [...] We now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice.

The Court accepted that in the past two centuries the common law ‘lost’ some metaphysical cachet on the road to modern realism. Ibid 730.

22 During his confirmation hearings before the US Senate Judiciary Committee, Chief Justice John Roberts, a conservative nominee of then-President George W Bush, asserted that ‘[j]udges are like [baseball] umpires. Umpires don’t make the rules; they apply them’. ‘I Come Before the Committee With No Agenda. I Have No Platform’ *NY Times* (Sep 13 2005 late ed – final) 28 (transcription of statement of then Justice-designate Roberts). The analogy is charming, but false. Baseball umpires cannot simply apply the rules of the game; routinely, they must interpret the rules, a process which endows them with considerable, outcome-determinative discretion, see Robert Schwartz ‘Like They See ‘Em’ *NY Times* (6 Oct 2005 late ed – final) 37.

Justice Sonia Sotomayor, President Barack Obama’s first nominee to the Supreme Court, is widely assumed to be liberal or progressive. Sadly, political necessity required her to parrot the same clichés during her confirmation hearings. She described her judicial philosophy as ‘[s]implicity: fidelity to the law. The task of a judge is not to make law — it is to apply the law’. Quoted by Jeffrey Toobin ‘Answers to Questions’ *The New Yorker* (July 27 2009) 19. See also R Dworkin ‘Justice Sotomayor: The Unjust Hearings’ *NY Rev of Books* (Sep 24 2009) 37 (deploring the lost opportunity in the confirmation hearings to ‘improve public understanding’ and describing Sotomayor’s quoted statement as ‘empty’) and as ‘perpetuat[ing] the silly and democratically harmful fiction that a judge can interpret the key abstract clauses of the United States Constitution without making controversial judgments of political morality in light of his or her own political principles’.

23 ‘[J]udicial assertions of a lawmaking power, albeit a limited and circumscribed one, is nothing new ... What is novel is ... that this jurisdiction is to be exercised under the guidance of the catalogue of fundamental rights enshrined in the Constitution’. G Lubbe ‘Taking Fundamental Rights Seriously: The Bill of Rights and its Implications for the Development of Contract Law’ (2004) 121 SALJ 395, 402.

24 For ease of presentation, unless the context indicates otherwise, we hereafter use ‘common law’ to denote both common law and customary law.
is rooted in ss 39(2) and 8(3), which we call the development clauses. We believe that the Constitution’s new conception of the relationship between a constitution and common law will someday be heralded as one of the great legal innovations to emerge from South Africa’s transition to democracy.

South African jurists did not invent the concept of constitutional interrogation of common law rules. A version of this idea appears in other legal systems, including that of the US. However, the South African experience opens an entirely new chapter for at least two reasons.

First, the development clauses place South African judges under a duty actively to promote constitutional values, rather than merely to assure the conformity of judge-made law to constitutional strictures. They concern not merely the coherence of the legal order, but its character. They express the mandate that, in developing the common law, judges shall fulfil ‘the democratic values of human dignity, equality, and freedom’.

Second, re-imagining the common law is critically important to the success of the constitutional enterprise as a whole. The development clauses link the reworking of the common law to the transformative project of renovating South Africa’s legal infrastructure so as ‘to establish a society based on social justice and improved quality of life for all citizens’. The development clauses reflect the drafters’ understanding that progress toward the Constitution’s goals requires transformation, not only at the level of society’s overarching legal principles, but also of the countless, quotidian background rules that structure social and economic life, many of which are located in remote recesses of the common law. The drafters believed that transformation must build up from the legal substructure as well as flow downward from majestic constitutional

25 The pertinent language of s 39(2) provides that ‘when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’.

26 Section 8(3) provides that, when giving direct, horizontal effect to a right contained in the Bill of Rights, a court ‘must apply, or if necessary develop, the common law to the extent that legislation does not give effect to the right’.

27 See also s 173 (the Constitutional Court, Supreme Court of Appeal and High Courts ‘have the inherent power ... to develop the common law’).


29 Thebus v S 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) para 28 (‘the need to develop the common law under section 39(2) ... arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the “objective normative value system” found in the Constitution’).

30 Constitution s 7(1).

31 President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3; 2005 (8) BCLR 786 (CC) para 36 (Modderklip-CC).

32 ‘[T]he Constitution demands a change in the legal norms and the values of our society’. Daniels v Campbell NO 2004 (5) SA 351; 2004 (7) BCLR 735 (CC) para 56 (Ngcobo J) (referring in part to the development of the common and indigenous law).
heights. A basic assumption underlying the Constitution is that South Africa cannot progress toward social justice with a legal system that rigs a transformative constitutional superstructure onto a common law base inherited from the past and indelibly stained by apartheid.33 Whatever 'attractive submorality'34 it may encapsulate, the common law as it stands today largely reflects, constitutes, and sustains existing social relationships, power structures, and inequalities. The common law’s cherished value of individual autonomy remains meaningless and unfulfilled in a society as radically unequal as South Africa, where millions live in conditions of absolute deprivation.35 Untransformed, the common law supports and shields this distributional status quo.36 Unless their legal foundations are transformed, social arrangements constituted (in part) by the common law will exercise a permanent inhibiting effect on the Constitution’s transformative project, possibly subverting it altogether.37

Alert to this danger, the drafters mandated a process of reconsideration and reworking of judge-made law in light of the Constitution’s transformative aspirations. ‘Development of the common law’ pursuant to s 39(2) is not about tinkering or consistency – it connotes a long-term project of fashioning common law foundations for a just and egalitarian society.38 The mandate of s 39(2) is to re-imagine all law in the spirit of ubuntu.39 As the late Mahomed DP, as he then was, wrote: ‘The common law is not to be trapped within the limitations of its past … It needs to be revisited and revitalised with the spirit of the constitutional values defined in … and with full regard to the purport and objects of [the Bill of Rights].’40

33 André van der Walt explores the implications of transformative constitutionalism for private law in Van der Walt (note 13 above) and other works, to which we are greatly indebted.
35 For further discussion, see S Woolman & D Davis ‘The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism & the Application of Fundamental Rights Under the Interim & Final Constitutions’ (1996) 12 SAJHR 361. This position is ably argued by C Roederer (note 13 above); see especially 465–7. He notes that ‘those who cannot afford to protect themselves in a risk-laden society are at a great disadvantage’ under a libertarian legal regime. See ibid 467; see also 520. Roederer astutely observes that the coexistence between South African common law and apartheid can be explained in part by the strong libertarian strand within South African common law and its exceptional regard for personal liberty and freedom of contract. See ibid 464.
36 As noted by Froneman J:

[The judge who fails to examine the existing law with a view to ensuring the effective realisation of constitutional rights and values … is not, as is often presumed by proponents of this course, merely neutrally and objectively applying the law … More often than not such a supine approach will effectively result in a choice for the retention of an unequal and unjust status quo.

Kate v MEC for the Department of Welfare, Eastern Cape 2005 (1) SA 141 (SE) para 16.

37 No inference is intended that the common law is inherently oriented to protecting the powerful and maintaining the distributional status quo. The whole point of the argument is that the common law has no inherent political tilt and cannot have one, because it is a jumble of contradictory tendencies and a terrain of contestation. Rather, the claim in the text is meant to be an empirical generalisation of the predominant effects of the existing common law and existing, untransformed methods of common law analysis.

38 See G Lubbe (note 23 above) 407 (‘optimal’); see also 402–3, 423.
39 ‘The spirit of ubuntu … suffuses the whole constitutional order’. Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (PEM) para 37 (Sachs J).
40 Du Plessis (note 11 above) para 86 (referring to the interim Constitution).
This is not to say that each common law problem has a unique, 'transformative' solution deducible from the Constitution's animating values. We do not contend that there is, for example, a single, fixed, 'ubuntu-version' of the doctrine of res ipsa loquitur waiting to be discovered by a legal analyst properly trained in 'transformation-speak', any more than there is a single correct formulation of res ipsa from an individualist, or libertarian, or other moral and social outlook. For one thing, our methodology is context-oriented. Moreover, the legal implications of a political philosophy are as indeterminate as are the concrete applications of a general legal principle. Section 39(2) is not an oracle. It does not and cannot determine solutions. What it concerns is how legal problems are framed and what animating values and sensitivities are brought to bear in resolving them. Nor does s 39(2) banish pre-transition values from common law development. Individualist values (autonomy, conscience, privacy, self-determination) endure in the new constitutional dispensation. All this said, a common law systematically re-imagined in the spirit of ubuntu and egalitarianism should look different from the existing regime.

Section 39(2) directs decision makers gradually but purposefully to develop new methods of approaching and new criteria for resolving common law questions. By a 'transformative methodology' we mean an approach to legal problems informed by the values and aspirations of the Bill of Rights and specifically by the constitutional aspiration to lay the legal foundations of a just, democratic, and egalitarian social order. Transformative legal methodology brings these values to bear on a context-sensitive view of the case seen in the light of all pertinent ethical and socio-economic considerations, as best these can be determined. Transformative methodology is attentive to the values of stability, predictability, and administrability. At the same time, the solutions it generates are not eternal; its results are always understood to be 'provisional', that is, as always being open to reconsideration and contestation as experience progresses, understanding deepens, and/or circumstances change. Transformative legal reasoning might point to one or more legal solutions to a common law problem that better promote constitutional values than does the existing doctrine. If so, s 39(2) requires judges to reach for and adopt such solutions.

South Africa's innovative approach to judge-made law did not originate in academic or jurisprudential theory. The brave and resourceful lawyers who acted for the liberation movement did so largely within the framework of a

41 See Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (O'Regan J) para 35 ('the broad goals of transformation can be achieved in a myriad of ways. There is not one simple formula for transformation').

42 Conversely, communitarian values have always informed the common law, albeit as an undertone. See D Kennedy 'Form and Substance in Private Law Adjudication' 89 Harvard LR 1685 (1976).

43 This is not an argument that the common law is or should be 'constitutionalised', in the sense that there is thought to be one, constitutionally required formulation for each and every common law rule. Section 39(2) provides a methodology, not a seal of approval. A court would rarely, if ever, conclude that a single formulation of a common law doctrine is the only one compatible with the Constitution. And in a transformative legal culture, even that decision would be 'merely provisional' and always subject to reconsideration as insight deepens or conditions change.
conventional legal grammar. Frequently they invoked the prestige of the common law as a shield against apartheid injustice. Jurisprudential coherence was the least of their worries. As will be seen, the development clauses found their way into the Constitution almost by accident, as a compromise-solution to the vexing political controversy surrounding the distinct question of ‘horizontal application’.

But the development clauses do not lack jurisprudential foundation. The rich tradition of US Legal Realism provides solid theoretical grounding for common law transformation of the kind envisaged by the Constitution. The intent and text of the Constitution are congruent with the basic tenets of this approach. Conversely, Realist insights explain why common law transformation is an indispensable component of South Africa’s constitutional project.

South African jurisprudence reveals few, if any, direct traces of US Legal Realist influence. Anti-formalist criticism of this kind is largely alien to South African legal thought. Yet if we could get a conversation going between substantive South African constitutional theory and anti-formalist criticism in the American Realist vein, the latter might usefully contribute to the former and vice versa. US constitutional law is largely grounded upon an old, classically liberal and individualist charter, mixed, as some maintain, with a dose of republicanism. At present, political conservatives have captured much of the US judiciary. Yet the American lawyer’s storehouse of legal methods contains a battery of modernist ideas and analytical technologies well-suited to South Africa’s transformative project. Conversely, South Africa has a futuristic Constitution informed by the values of social interdependence and ubuntu, but its jurists continue to deploy traditional, even antiquated methods of legal analysis.

(c) Judicial performance

How have South African courts responded to the mandate of the development clauses? The initial reaction was anemic outside the rarified field of defamation. Courts were slow to acknowledge their constitutional responsibility to develop common law foundations for a democratic, egalitarian, and socially just order. The belief persisted that the common law is self-contained and develops by its own, autonomous logic. Epochal changes were afoot in public law, but it was mostly business as usual in common law adjudication.44

The Constitutional Court’s well-known judgment in Carmichele45 marked a turning point. Carmichele laid a platform for significant law reform, particularly with respect to governmental responsibility for protection of women and children from third-party violence. Carmichele was followed by a remarkable series of judgments in the mid-2000s that rethought basic common law building blocks such as property, duty, and family. While not without difficulties, these

44 One might have thought that adoption of s 39(2) would cause law faculties immediately to set about revising how common law is taught. Efforts of this kind were long in coming.
45 Carmichele v Minister of Safety & Security 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (Carmichele-CC).
cutting-edge judgments comprise a significant jurisprudential achievement and an auspicious dawn of the project to transform South Africa’s private law.\textsuperscript{46}

Unfortunately, these transformative advances represent only one plot-line in a more complicated and ambiguous story. For one thing, judicial daring in the cutting-edge cases is largely confined to a few, albeit highly important, contexts – cases involving protective duties of the state,\textsuperscript{47} the legacy of apartheid land policy,\textsuperscript{48} and inclusion of outsider identity-groups.\textsuperscript{49} As will be seen, the judicial comfort-level with pushing the transformation envelope seems diminished or non-existent in many equally significant arenas, notably questions of economic distribution. Second, a curious ambivalence marks even the most innovative judgments. After venturing into new jurisprudential territory in a given case, a court will suddenly lapse into entirely traditional, formalistic legal argument.\textsuperscript{50} Jurists deeply committed to transformation reflexively fall back upon intellectual instincts inculcated in the course of their pre-constitution professional training and socialisation.\textsuperscript{51} Shattering insights and bold pronouncements often yield cramped results in deference to separation-of-powers platitudes. Separation-of-powers doctrine itself has proven resistant to the intellectual creativity evident in substantive constitutional decisions. And apart from a few, broad generalisations as in \textit{Carmichele}, the courts have made little effort to theorise the Constitution’s impact on the common law, to sketch the content of the constitutional vision of a free and equal society, or to develop methods of common law reasoning suitable to the new dispensation.\textsuperscript{52}

\begin{footnotesize}
\begin{enumerate}
\item These cases are cited and discussed in part V(e) below.
\item \textit{Rail Commuter Action Group v Transnet Ltd v/s Metrorail} 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (\textit{Metrorail-CC}); \textit{K v Minister of Safety & Security} 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) (\textit{K v Minister}); \textit{Modderklip-CC} (note 31 above); \textit{Modder East Squatters v Modderklip Boerdery (Pty) Ltd} 2004 (6) SA 40 (SCA); 2004 (8) BCLR 821 (SCA) (\textit{Modderklip-SCA}).
\item \textit{Zondi v MEC for Traditional & Local Government Affairs} 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC); \textit{Metrorail-CC} (note 47 above); \textit{Modderklip-SCA} (note 47 above); \textit{Modderklip-CC} (note 31 above); \textit{Jaftha v Schoeman} 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (\textit{Jaftha-CC}); \textit{PEM} (note 39 above).
\item \textit{Bhe v Magistrate of Khayelitsha} 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (\textit{Bhe-CC}); \textit{Minister of Home Affairs v Fourie} 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) (\textit{Fourie-CC}); \textit{Fourie v Minister of Home Affairs} 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA) (\textit{Fourie-SCA}).
\item See, for example, \textit{Jaftha v Schoeman} 2003 (10) BCLR 1149 (C) discussed in part V(a) below.
\item See generally H Corder & D Davis ‘Law & Social Practice: An Introduction’ in Corder (note 34 above). In a famous lecture, Chief Justice Corbett provided a classic statement of the importance of professional training and socialisation to judicial law-making. In explaining how a judge ascertains the relevant values and norms of the community, Corbett said that the judge would:

\begin{quote}
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draw upon his knowledge and experience gained as an educated, responsible and enlightened member of society, upon the contact with and insight into his fellow humans which his professional career has given him; and he would draw upon his continuing perceptions of the attitudes of the community around him.
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\item Not infrequently a court determines that the Constitution requires development of the common law and then adopts a doctrine embraced years ago in other jurisdictions on the basis of textbook common law reasoning (for example, expansive interpretations of respondeat superior). The reader can only speculate as to the court’s thinking on how the Constitution impacted its decision-making process in the particular case. Conversely, some approaches long adopted by common law courts elsewhere (for example, strict products liability) are held beyond the South African pale even in the context of a transformative constitution.
\end{enumerate}
\end{footnotesize}
Side-by-side with the frontier work of the Constitutional Court, some courts continue to issue judgments that cut against any sort of transformative project. The tension between these two trends goes relatively un remarked. Below the apex level (CC and SCA), most courts have yet to absorb the message that the development clauses cast the judicial role in a new light. In their prosaic work – in low-visibility cases in the fields of property, contract, delict, and commercial law – courts have hardly begun to undertake the far-reaching audit and renovation of South Africa’s judge-made legal infrastructure contemplated by the Constitution.

One sees glimmers of hope, even a few shafts of bright light, but thus far the development clauses have not initiated the paradigm-shift in legal culture that one would expect to ensue from the adoption of a transformative constitution. Decisions expressly developing the common law in terms of s 39(2) tell us precious little about the values, goals, and analytics of social change that ought to inform the exercise. We accept that everything cannot be accomplished overnight, especially in a case-law, litigation-dependent system. But courts must at least set themselves the task of crafting new precepts and decisional techniques consonant with the transformative project. Likewise, we accept that ‘the major engine for law reform should be the legislature and not the judiciary’ and that courts in a democratic society owe deference to the legislature (although this imperative is somewhat mitigated in the common law context involving rules of judge-made origin). But practical and institutional considerations alone cannot explain the resistance to change or the evident disconnect between transformative aspirations and judicial method. The principal cause is the inertial force of conventional legal culture.

Part II of this article discusses the origins, history, and our substantive reading of the development clauses. Part III links the development clauses to broader constitutional themes and suggests comparisons to US constitutional law and theory. In the hope of deepening comparative dialogue, part IV provides a précis of US critical legal realism highlighting the relevance of that tradition to questions of legal transformation in terms of s 39(2). Part V contains our account and assessment of development-clause jurisprudence during the first 15 years of the new dispensation.

II Provenance of the Development Clauses

(a) The horizontality debate

A majority of South Africans probably have never heard of the development clauses. Apartheid-era human rights manifestos made scant reference to a need for transformation of the common law. No such demand appears in the Freedom Charter (1955), the African National Congress (ANC)’s

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53 Carmichele-CC (note 45 above) para 36.
54 See Fourie-CC (note 49 above) para 167 (O’Regan J, dissenting in part) (with due regard for separation-of-powers values, the responsibility for the content of common law rules lies with the courts, and it is the duty of courts to ensure that the common law conforms to the Constitution).
'Constitutional Guidelines' (1988), or the ANC's Draft Bill of Rights (1990), nor did the idea crop up in the draft bill of rights circulated by the South African Law Commission (1989). Perhaps common law transformation is implicit in seeking an equal and just society, but if so, the point was seldom made until far along in the transition negotiations. The constitutional principles set forth in the interim Constitution do refer to the common and indigenous law — but only to guarantee that the final Constitution would recognise common and indigenous law subject to fundamental rights. Section 39(2) attracted no objection, indeed, hardly any mention, in the certification proceedings and judgments.

Although the drafting history is murky, the original development provision, interim Constitution s 35(3), appears to have been crafted to stake out a middle-ground in the 'application debate'. That debate concerned whether, in addition to binding government, the commands of the Bill of Rights should also have direct horizontal application, that is, whether the Bill of Rights should be understood to bind private parties. Opponents feared that inviting constitutional review of private, social relationships risked an Orwellian nightmare of ubiquitous governmental control over every aspect of personal life. Champions of horizontal application argued that, unless private parties were bound by constitutional norms, de facto apartheid would succeed

58 In a prescient 1986 working paper, Albie Sachs argued that ending apartheid would require dismantling the entire legal and institutional substructure upon which it stood, including the property-law regime. See A Sachs ‘Towards A Bill of Rights In A Democratic South Africa’ (1990) 6 SAJHR 1. He wrote that customary law is in need of 'progressive development'. Ibid 19. He did not discuss common law transformation, but the need for such was implicit in his understanding of the scope of institutional change necessitated by democratic, egalitarian transition. For example, in a passage concerning the post-apartheid relationship between a hypothetical Afrikaner businessman and a hypothetical African farm tenant, Sachs wrote: '[w]hat is certain is that the present deformed and unjust relationship between the [two], structured on legally protected arrogance and domination, will have to go'. Ibid 24.
59 Interim Constitution sched 4, XIII.
60 Interim Constitution s 35(3) provided that 'in the application and development of the common law ... a court shall have due regard to the spirit, purport and objects of [Chapter 3 on Fundamental Rights']. Interim Constitution s 33(2) additionally provided that no rule of common or customary law (or of legislation) 'shall limit any right entrenched' in the Bill of Rights except in accordance with the findings mandated by the limitations clause (interim Constitution s 33(1)).
61 The most comprehensive treatment of constitutional application and the surrounding debates is S Woolman ‘Application’ in Woolman et al (note 19 above) ch 31.
62 Krieger J characterised the fear that direct horizontality 'will result in an Orwellian society in which the all-powerful state will control all private relationships' as an 'egregious' and 'pernicious caricature', 'malicious nonsense preying on the fears of privileged whites', and a false message 'calculated to inflame public sentiments and to cloud people's perceptions of our fledgling constitutional democracy'. Du Plessis (note 11 above) para 120.
de jure apartheid. Erased from official policy, a privatised form of apartheid would emerge from the 'normal' patterns of ownership and economic and social interaction in the private sphere, with similarly destructive human consequences. Horizontalists pointedly asked why constitutional transformation should touch every other legal institution except the common law.

In the event, the Kempton Park negotiators reached a compromise. 'Direct horizontal application' was distinguished from a softer position, 'indirect horizontal application' (sometimes called 'seepage' or 'radiation'). This meant that, while the Bill of Rights would not bind private parties of its own force, courts would have regard to constitutional norms in fashioning and applying common and customary law rules applicable to relationships between private parties. To be sure, the distinction between direct and indirect horizontal application is not as sharp as first appeared, but it served its initial purpose. The primary motivation behind interim Constitution s 35(3) was to finesse the application controversy. Audit and renovation of the common law were merely subtexts. The ANC eventually receded from its preference for direct horizontal application and accepted a package consisting of indirect horizontal application (interim Constitution s 35(3)), plus a guarantee that Parliament could apply equality statutes to private persons and entities (interim Constitution s 33(4)).

The precise meaning of these and related provisions was far from clear. Interim Constitution s 7 was particularly nettlesome. It provided, on the one hand, that interim Constitution Chapter 3 (the Bill of Rights) 'shall apply to all law in force', and on the other, that Chapter 3 binds the legislative and executive branches, but apparently not the judiciary. Colourable arguments remained that the interim Constitution contemplated at least some degree of direct horizontality. Any lingering hope in that direction was quashed by the Constitutional Court's ruling that the fundamental rights contained in

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63 Mahomed DP expressed this fear in Du Plessis (note 11 above) para 85 ('those responsible for the enactment of the [interim] Constitution never intended to permit the privatisation of Apartheid'). See also Van der Walt (note 13 above) 662–4 (horizontalists feared emergence of privatised, de facto apartheid).


65 Compare ss 7(2) ('all law') & 7(1) (mentioning legislative and executive branches but not judiciary). But see interim Constitution s 4(2) (expressly stating that the interim Constitution binds all legislative, executive and judicial organs of state); interim Constitution 98(4) (decisions of the Constitutional Court bind all legislative, executive and judicial organs of state).

66 Didcott, Kriegler & Madala JJ believed that the interim Constitution had some direct horizontal purchase. See, for example, Du Plessis (note 11 above) para 128 ('the Constitution holds no hidden message of so-called verticality') (Kriegler J, joined by Didcott J); para 165 (Madala J) ('some of the rights in Chapter 3 lend themselves to direct horizontality while in respect of others, Chapter 3 is indirectly horizontally applicable'). While critical of Kriegler J's formulation, Johan van der Walt argued that interim Constitution s 35(3) was intended to subject the common law to direct constitutional review. See J van der Walt 'Horizontal Application of Fundamental Rights & the Threshold of the Law In View of the Carmichele Saga' (2003) 19 SAJHR 517. See also Woolman & Davis (note 35 above) 361–80; and J Sarkin 'The Common Law in South Africa: Pro Apartheid or Pro Democracy?' (1999–2000) 23 Hastings Int & Comp LR 1, 13 (stating that although the bill of rights 'was clearly vertical in ambit, there were arguments for its horizontal application').
Chapter 3 (the Bill of Rights) did not, as a general matter, have direct horizontal application.\footnote{See Du Plessis (note 11 above) para 62 (Kensridge AJ) ('Chapter 3 does not have a general direct horizontal application').}

The distinction between direct and indirect horizontal application soon came to mean different things to different people, and the varying formulations of the distinction do not easily map onto the contrast between the interim and final Constitutions. Ambiguity and confusion were inevitable given the break-neck pace of legal change in that period, making the drafters' accomplishments under the circumstances all the more remarkable. Moreover, the application question was entwined, and sometimes conflated, with the analytically distinct question whether a party constitutionally injured by a private party has a cause-of-action against the wrongdoer arising directly from the Constitution itself. American lawyers call claims of this type 'constitutional torts'. A constitution that directly binds private parties may give rise to causes-of-action and remedies for violations of its commands ('on-the-constitution claims'); but it is also possible for such a constitution to impose duties directly on non-governmental actors yet nevertheless be understood to provide for redress of violations by way of, or even exclusively by way of, statutory or common law ('off-the-constitution') causes-of-action. Whether a constitutional instrument directly binds private parties, and/or whether it creates causes-of-action for redress by its own force are certainly related questions, but they are logically distinct.

In one way of thinking, the difference between indirect and direct horizontal application is akin to the difference between leading by example and leading by command. Indirect horizontality meant, and meant no more than that, judges were instructed to consult the spirit and values of the Constitution, to see it as a source of guidance and inspiration, as they went about interpreting and applying non-constitutional law to private parties. In a close case, constitutional values might 'tip' the construction of an ambiguous common law norm one way or the other. By contrast, direct horizontality connoted the idea that judges would hold private parties accountable to constitutional norms and duties in the same way courts hold them accountable to ordinary laws. The ostensible appeal of this formulation was that, if horizontality were limited to the indirect type, the common law would retain a degree of autonomy from constitutional law.

A different way of conceiving the distinction between indirect and direct horizontality assumed that the Constitution is not merely a source of guidance and inspiration to the common law, but rather that the common law is directly subject to control by the Bill of Rights. The critical question was on what or whom does the Constitution exert its force? Everyone accepted that the Constitution directly regulates governmental action (vertical application), but beyond this, does the Constitution also directly regulate private conduct? Or, does the Constitution exert its force only on other sources of law (including the law upon which private parties rely in conducting their affairs)? Indirect
horizontality meant, and for some commentators, continues to mean, that the Constitution of its own force regulates only other, non-constitutional sources of law (such as the common law), whereas direct horizontality meant that the Constitution regulates private conduct as well as law.\(^{68}\)

In sum, in the first formulation of the debate, direct horizontal application meant that the Bill of Rights contains commands addressed to private individuals regarding how they should conduct themselves, whereas indirect horizontal application meant that the Bill of Rights merely influences private behaviour through the mechanism of its inspirational impact on the development of the common law. In the second formulation, direct horizontal application meant that the Bill of Rights operates on people, whereas in indirect horizontal application, the Bill of Rights steers private conduct by controlling the content of the common law.

Yet a third approach (or nuance) argued that the entire apparatus of distinctions between horizontal and vertical application, between indirect and direct horizontality, and so on, lost its utility once the final Constitution was entrenched.\(^{69}\) According to this approach:

The Bill of Rights ... binds ... private persons and thereby reaches their conduct. However, it does not regulate the conduct of private persons directly. Rather it regulates their conduct through the medium of an intermediate legal rule, whether of statutory or common-law origin. This is the South African Constitution's special genius: a right may bind a private person but the constitutional regulation of the person's conduct in terms of the right takes place through a law that gives effect to the right.\(^{70}\)

If the distinction sought to be drawn here – between constitutionally binding private parties but not directly regulating their conduct – seems exceedingly fine, this may perhaps be explained by a motive, attributed to the drafters, to combine horizontalist sympathies with an aversion to constitutional torts and constitutional litigation between private parties.

(b) The final Constitution

The Final Constitution changed the position. It is now settled that the common law is directly subject to constitutional review. The Supremacy Clause (s 2) provides that 'law ... inconsistent with [the Constitution] is invalid', and s 8(1), replacing the ambiguous interim Constitution s 7, makes crystal clear that the Bill of Rights applies to 'all law' and binds the judiciary. Moreover,

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68 For an early account of these ambiguities see H Cheadle & D Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 SAJHR 44, particularly 45–51 (arguing that the interim Constitution subjected the common law to constitutional control, while attributing to Du Plessis & Corder (note 64 above) the view that the interim Constitution provided only that the Constitution be a source of guidance and inspiration in common law development). For other accounts, see F Michelman 'On the Uses of Interpretive "Charity": Some Notes on Application, Avoidance, Equality, & Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 CCR 1 and Woolman (note 61 above).


70 Ibid 29 (italics in original).
the Supremacy Clause bluntly proclaims that all ‘law or conduct inconsistent with [the Constitution] is invalid’ (emphasis added).71 Going right to the point, s 8(2) expressly provides that a provision Bill of Rights binds a private party ‘if, and to the extent that, [the provision] is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’. In effect, the precise reach of constitutional obligation into the private sphere is determined case-by-case through a balancing test.72 However, the drafters were not prepared to leave any wiggle-room with respect to the fundamental right to equality. Interim Constitution s 33(4) had already authorised the enactment of anti-discrimination statutes binding upon private parties. Section 9(4) expressly and without qualification makes the prohibition of unfair discrimination found in the Constitution directly applicable to private parties.

At least as a formal matter, the application debate was now over, with victory going to the horizontalists.73 The Constitutional Court recognised as much in Khumalo v Holomisa.74 This is not to say that all conceptual difficul-

71 See also s 172(1) (‘a court ... must declare that any law or conduct that is inconsistent with the Constitution is invalid’) (italics added).
72 This approach was foreshadowed by the suggestion of Madala J that whether a particular fundamental right applies horizontally ‘depends on the nature and extent of the particular right, the values that underlie it, and the context in which the alleged breach of the right occurs’. Du Plessis (note 11 above) para 161 (footnote omitted).
73 The Constitutional Court has not definitively resolved the question whether on-the-constitution claims lie against private parties. It has expressed a strong preference for ‘ordinary’ statutory and common law (off-the-constitution) remedies for constitutional violations. However, it has expressly held open the possibility that constitutional torts against private parties may be necessary and available under certain circumstances.

Some scholars argue that the answer to the constitutional-tort question (with respect to private defendants) is abundantly apparent. Professor Michelman argues that, for the subset of cases in which the party-respondent is a natural or juristic person, that is, cases governed by ss 8(2) & 8(3), the Constitution instructs courts to proceed by way of re-examination of the common law (rather than by creating constitutional torts) where existing statutes fail to provide adequate redress. See Michelman (note 68 above) 1, 5–9, 15–8. (In Michelman’s view, the question of constitutional torts remains open where the defendant is a governmental actor.)

We believe the Constitutional Court is wise to withhold judgment on private constitutional torts. Cases as yet unforeseen might present the Court with compelling reasons to consider such remedies. For example, a case might arise in which the legislation purporting to give effect to a constitutional right includes a provision immunising private parties from liability for violations of the right or that bars a complainant from challenging the constitutional adequacy of the statutory remedy. This has actually occurred in the US, albeit in a situation where the constitutional obligation was binding only on governmental actors. In Schweiker v Chilicky 487 US 412 (1988), beneficiaries under a statutory scheme for distribution of welfare allotments were discharged from eligibility through procedures that, they alleged, violated their constitutional right to Due Process. The welfare statute established a process for challenges to its administration, but this statutory procedure did not permit claimants to raise constitutional complaints. The claimants therefore sought to adjudicate their constitutional claims the only other way they could, through the vehicle of a constitutional tort. In a decision that shocks the conscience, the US Supreme Court denied them an on-the-constitution claim, thereby leaving them with no forum at all in which to air their allegations. The Court purported to rely on principles of subsidiarity, although the term is not generally used in the US. For discussion, see K Klare ‘Legal Subsidiarity & Constitutional Rights: A Reply to AJ van der Walt’ (2008) 1 CCR 129, 138–54.
74 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) para 33 (‘it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by s 8(2)’).
ties were swept away. Many issues continue to remain blurry.\textsuperscript{75} Setting these nuances aside, and taking the benefit of hindsight, the big message was that in every case in which the Constitutional Court developed the common law pursuant to s 39(2), at least in principle it could reach and justify the identical result through a generous reading of ss 8(1) and 8(2) and without resort to a separate constitutional provision addressed to development. Insofar as it was intended to compromise the application debate, the rationale for interim Constitution s 35(3) disappeared with the final Constitution. Yet despite this, the drafters retained development language. Indeed, they included not one, but two, ramped-up development provisions – ss 8(3)\textsuperscript{76} and 39(2).\textsuperscript{77} The final Constitution must therefore be understood to have invested the development clauses with a new and more robust mission.\textsuperscript{78}

The permissive ‘shall have regard’ from interim Constitution s 35(3) has now become the more muscular ‘must promote’.\textsuperscript{79} Section 39(2) is not a

\textsuperscript{75} For example, jurists and scholars continue to debate whether the Constitution operates directly on the conduct of private parties in the manner of an ordinary law, or whether, properly understood, the Constitution operates directly only upon the law. If the latter, it is probably correct to say only that indirect horizontality won the day, not horizontality in general.

In her otherwise impressive judgment for a unanimous court, O'Regan J appeared to blur the distinction between constitutional application to private conduct and constitutional control of the law that regulates private conduct. See Khumalo (note 74 above) paras 30–3.

\textsuperscript{76} Section 8(3) reads:

When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) [concerning horizontal application], a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

In terms, s 8(3) refers only to development of common law, but not customary law, whereas s 39(2) applies to both common and customary law. The courts have not yet had occasion to determine whether s 8(3) nevertheless implicitly touches customary law and, if it does not, what legal difference this makes, if any. Similar interpretative questions may arise with respect to s 173, which provides that ‘[t]he Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power … to develop the common law’ but does not expressly refer to customary law.

\textsuperscript{77} Section 39(2) provides, in pertinent part: ‘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’. In addition to the common law development language, s 39(2) also decrees that courts must interpret legislation so as to ‘promote the spirit, purport and objects of the Bill of Rights’. While very significant in practical terms, this mandate is less of a jurisprudential novelty than the development clauses. The position is similar in the US, where ‘an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available’. \textit{NLRB v The Catholic Bishop of Chicago} 440 US 490, 500 (1979). This ‘cardinal principle’ is said to descend from the ancient case of \textit{Murray v The Charming Betsy} 6 US (2 Cranch) 44, 118 (1804) (Marshall CJ). See \textit{DeBartolo Corp v Florida Gulf Coast Building Trades Council} 485 US 568, 575 (1988). Note, however, that whereas s 39(2) calls for statutory interpretation to promote Bill of Rights values, the US rule aims more modestly at assuring that legislative interpretation is consistent with the Constitution.

\textsuperscript{78} For comparisons between interim Constitution s 35(3) and parallel provisions of the final Constitution, see D Davis ‘Interpretation of the Bill of Rights’ in Cheadle et al (note 69 above) 743, 749–50; S Woolman ‘Application’ in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) \textit{Constitutional Law of South Africa} 1 ed (1996) 10–56 to 10–61. See generally Woolman (note 61 above).

\textsuperscript{79} Section 39(2) should be read with s 7(2), which provides that the state ‘must … promote and fulfil the rights in the Bill of Rights’.
supremacy clause or provision merely requiring the common law to be consistent with the Constitution. Nor does it simply authorise courts to have resort to Bill of Rights values when traditional common law analysis does not suffice to resolve a knotty question. Section 39(2) requires more than that common law unfold within the constitutional framework or that the Constitution should 'steer' or 'orient' common law development. Judge-made law now has its own, specialised role to play in implementing the constitutional project. Post-1996, courts may not presume that the common law status quo is suitable for the new South Africa. By commanding the courts to develop the common law so as to promote the constitutional ambition, at a minimum the drafters must be taken to have declared that the existing common law provides an inadequate or incomplete foundation for the type of society the Constitution aspires to bring into being.

Moreover, although restricted in scope, s 8(3)(a) contains the germ of a new conception of the relationship between legislatures and courts, one that challenges traditional conceptions of separation-of-powers and suggests a more dialogic relationship between the branches. Section 8(3)(a) applies when a court determines that a provision of the Bill of Rights binds a natural or juristic person, that is, when the Constitution has direct horizontal application. In that situation courts are obliged to develop the common law, where necessary, so as to fill gaps in extant legislation giving effect to the constitutional right in question. That courts fill gaps is nothing new. Courts regularly fill interstitial gaps in statutes to carry out the legislature's goals and intentions, and they incrementally develop the common law within an overall duty of deference to the superior competence of the legislature. What is new in s 8(3)(a) is that at least under some circumstances courts are meant to make law so as to fulfil the constitutional vision where the legislature has failed to do so or has done so inadequately. Implicit is the power and obligation of courts to assess whether existing legislation (as filled out by the common law) adequately secures constitutional rights or is in need of a judicial jump-start. On occasion, it may be entirely legitimate and proper for a court to move out in front of the legislature. In giving effect to the Bill of Rights, it no longer suffices for courts passively to defer to the legislature.

In sum, the development clauses do more than supply interpretive guidance or rules of construction. They accord the courts an important role in fulfilling the constitutional project, they authorise a new law-making competency, and they identify the substantive principles that are to frame the exercise of these powers. The Constitution itself is now the overarching source and prime-mover of judge-made law, which is no longer encapsulated within an autonomous logic of its own.

The final Constitution contained two textual changes that may be thought at odds with this expansive reading of the development clauses. Interim Constitution s 35(3) had provided that courts must give due regard to the Bill

80 See Lubbe (note 23 above) 402–3, 423.
of Rights 'in the application and development of the common law'.\textsuperscript{81} In the final text, s 8(3)(a) distinguishes between 'application' and 'development', and s 39(2) applies 'when developing' the common or customary law, a formulation that omits 'application' and inserts 'when'. The textual distinction between 'application' and 'development' and the insertion of the qualifying 'when' might be read to narrow the circumstances calling for Bill-of-Rights-driven common law development by suggesting, first, that common law judges 'develop' the law only on certain, special occasions, not each and every time they work with the common law in resolving a case; and, second, that the strictures of s 39(2) apply only when judges perform the distinct operation of 'developing' the common law, but do not apply when judges perform other tasks such as 'applying' the law. Did the drafters intend a substantive distinction between 'development' and 'application'?\textsuperscript{82} Does the use of 'when' indicate that judges are obliged to promote the spirit, purport and objects of the Bill of Rights only in certain common law cases, but not in others?

For the reasons that follow, we believe the drafters did not intend these textual changes to narrow the operational scope of constitutionally-driven common law development or to limit the occasions on which it is to occur. We read 'application' of the common law to include all of the techniques of working with common law authorities in the context of a particular case, such as following, extending, limiting, distinguishing, and overruling precedent. The sum of case law outcomes generated by these techniques constitutes the 'development' of the common law. Application and development are not distinct mental operations or occasions, and the mandate of s 39(2) applies whenever a judge engages in any way with common law authority.

(i) When

The term 'when' is commonly used to refer either to a specific occasion or type of occasion ('when appearing in the courtroom, counsel must wear a black robe') or to a time-period, phase of activity, or a normal course of events ('when in practice, lawyers must keep themselves informed of new court judgments'). There is no textual barrier to reading 'when' to refer to general engagement with the common law process, rather than specific occasions upon which common law judges perform a certain one of their many tasks. The Constitutional Court has accorded the word the more general meaning. Thus, the Court states in \textit{Carmichele} that 'it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in pro-

\textsuperscript{81} Kriegler J said the purpose of the section was the Constitution 'is to permeate \textit{all} that judges do'. \textit{Du Plessis} (note 11 above) para 141 (italics added).

\textsuperscript{82} To complicate matters further, 'apply' and 'application' are used in legal discussion in two very different ways. 'Application' sometimes refers to the \textit{reach or bindingness} of law, specifically of the Bill of Rights (see, for example, s 8(1) (Bill of Rights applies to all law)). Alternatively, 'apply' and 'application' sometimes refer to a mental operation that occurs when a judge or lawyer analyses a problem (see, for example, interim Constitution s 35(3) (courts must have due regard to the spirit, purport and objects of the Bill of Rights in the application of the common and customary law)). It seems generally agreed that 'application' in interim Constitution s 35(3) refers to the latter meaning.
moting the section 39(2) objectives, the courts are under a general obligation
to develop it appropriately. In other words, whenever working with the
common law, courts must always and as an aspect of their normal operating
procedures assess extant doctrine in light of the spirit and goals of the Bill of
Rights.

The meaning given to ‘when’ by Carmichele may be grasped by an analogy
to the determination of the wrongfulness or unreasonableness of an act or
omission by reference to the concept of boni mores, that is, public morals,
values and sentiments or the legal convictions of the community. From time
to time courts condemn as wrongful acts or omissions that, under similar
circumstances in the past, had not been found to provide a basis for liability
in delict. The rationale for a decision of this kind is that the values and ethical
sentiments of the community have so substantially evolved that the prevailing
common law approach no longer comports with public morality. The court’s
recognition that the community’s legal convictions have changed over time
triggers the need to alter the common law. In this sense, we might say that a
court is authorised or obligated to develop the common law on those occasions
‘when’ the court recognises lack of harmony between existing doctrine and
public morality. Carmichele teaches that this is not the meaning to be given
to ‘when’ in s 39(2). A lack of harmony between the common law and Bill of
Rights values triggers a need to develop the common law in the s 39(2)-sense,
not the occurrence or perception of some process of historical evolution. To
be sure, our understanding of the Bill of Rights will evolve over time, result-
ing in changes in the common law. But s 39(2) development does not await
such evolution. Rather, courts are on all occasions and at all times obliged to
assure the harmony of the common law with the Bill of Rights. Thus, ‘when’
in s 39(2) means every occasion on which a judge works with the common
law, because on all such occasions she must apply her mind to the mandate of
s 39(2) to promote the spirit, purport and objects of the Bill of Rights.

The case for a more restrictive reading of ‘when’ assumes that courts in
common law cases may set the Bill of Rights aside from time to time, between
occasions when a common law rule is challenged as insufficiently promoting
its spirit, purport and objects. The impetus for this reading is an aversion to
constitutional litigation between private parties. Thus, Halton Cheadle takes
the position that a constitutional right ‘goes into hibernation’ once ‘validly
expressed as a statutory or common law rule’, and continues to hibernate until
the courts decide to develop the common-law rule further' (or legislation intervenes).\textsuperscript{86} Whatever its merits in the abstract, this approach does not survive the Constitutional Court's judgment in \textit{Carmichele}.\textsuperscript{87} Whenever a South African court resolves a case without invoking the Constitution, it renders a decision in a constitutional matter; namely, it implicitly certifies that the existing state of the law (whether grounded in statute or common law) gives constitutionally adequate effect to the Bill of Rights. Similarly, the conclusion that an appeal raises no constitutional matter is tantamount to a decision that the law as understood by the courts below passes constitutional muster. In short, the South African Bill of Rights never sleeps.

(ii) Application vs development

No distinction should be drawn between 'application' and 'development' when it comes to promoting the spirit, purport and objects of the Bill of Rights. 'Development', in reference to the common law, is not a neologism referring to a specialised form of judicial activity unique to the South African Constitution. Section 173 refers to development of the common law as an inherent power of the superior courts, suggesting that 'development' is an activity intrinsic to common law courts that is confirmed, but not inaugurated, by the Constitution.\textsuperscript{88} The notion that s 39(2) comes into play in common law adjudication only when a court turns its attention from 'application' to 'development' makes a hash of the text. The first clause of s 39(2) applies when a court 'interprets' legislation. Presumably a restrictive reading of s 39(2) that treats 'application' and 'development' as distinct judicial operations would necessarily treat 'interpretation' yet a third category. But that would lead to the absurd conclusion that South African judges are obliged to promote the spirit, purport and objects of the Bill of Rights when they interpret statutes, but not when applying them.

But suppose that common law 'application' and 'development' were intended to refer to distinct judicial practices, and that s 39(2) applies only to the latter. This cannot possibly mean that courts may refrain from promoting the spirit, purport and objects of the Bill of Rights when engaged in 'mere' law-application. Courts are bound to observe the Bill of Rights at all times. The Bill of Rights (expressly made binding on the judiciary) applies to all law, without qualification (s 8(1)). By virtue of s 8, anything a court does that results in a legal output, certainly any court judgment applying the common law, must answer to the Bill of Rights. This reading does not render s 39(2) superfluous. By adding 'must promote', the section embodies a premise that

\textsuperscript{86} Ceadle 'Application' (note 69 above) 29 n 30. One of the present authors formerly took this view. See Ceadle & Davis (note 68 above) 62–3 (legislation and common law rules giving effect to a right may 'crowd out' the right).

\textsuperscript{87} \textit{Carmichele-CC} (note 45 above) paras 36, 69 (courts are at all times under an affirmative obligation to develop the common law as needed whether or not a litigant requests the court to do so).

\textsuperscript{88} See also \textit{In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC)} para 54 ("courts have always been the sole arm of government responsible for the development of the common law").
the drafters were keen to emphasise, and it directs courts to undertake a specific mission. The premise is that apartheid law consisted not merely of the statutory instruments and public policies that sustained the racist system; it also included the background rules of common law and modes of legal reasoning that propped up that system and which must now be re-evaluated in order to uproot and abolish apartheid. The mission of s 39(2) is to carry out that audit and re-invention of the common law.

Whatever semantic niceties may be teased out of the text, there can be no meaningful distinction between ‘application’ and ‘development’ of the common law, because the common law develops, however subtly, in every application. The notion that the common law can be ‘applied’ without being ‘developed’ assumes that the common law can acquire a fixed content at a particular moment in time that can be lined up against the facts in a subsequent case. This imagery cannot survive the insights of modern legal theory. The common law never acquires fixed content, even temporarily, because the common law is not an accumulation of self-explanatory texts. It is a set of historically and culturally encased practices. Common law rules and principles cannot acquire a frozen meaning capable of ‘mere application’ because words, cases, and rules are not self-defining. In Henk Botha’s marvellous phrase, rules and precedents cannot speak to us, they cannot inform us of their precise meaning or the scope and manner of their proper application. Words, rules, precedents, and ‘the facts’ have, and only have, culturally-situated meanings. Meanings emerge through culturally accepted practices of interpretation (for example, ‘legal reasoning’) in which the interpreter is a participant, never standing on an Archimedean platform of objectivity. Every application of a rule requires that the rule be interpreted, and the act of interpreting a rule brings the interpreter into the picture. When a judge ‘merely applies’ a precedent to familiar facts, she enacts her understanding of what the precedent means and what the facts signify. Even when the judge understands herself merely to be ‘applying’ a settled rule, she is engaged in a culturally specific, meaning-endowing practice that places her own stamp on and ‘constructs’ the law by which she understands herself to be constrained. She becomes partially responsible for constructing the rule.

These observations are basic Legal Realist insights, re-cast in the argot of contemporary critical theory. Using its own terminology, the Constitutional

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89 Halton Cheadle informs us that the word ‘application’ was omitted from the final Constitution in order to assure it a horizontalist reading. An argument made against a horizontalist reading of the interim Constitution was that interim Constitution s 35(3) (referring to common law application) would have been unnecessary if the interim Constitution had been meant to apply to private persons. ‘Application’ was omitted from s 39(2) to avoid a re-play of this argument with respect to the final Constitution. Cheadle ‘Application’ (note 69 above) 27. Note, however, that ‘apply’ was retained in the final Constitution s 8(3)(a).

90 H Botha ‘Self-Government’ (note 13 above) 13 n 4:

[A] judge cannot simply invoke the authority of the Constitution, as if the Constitution speaks to us directly, unmediated by the interpretations of relevant social actors and legal decision-makers. Judges must take responsibility for their decisions; they must articulate the political morality or social vision through which their readings of constitutional provisions are filtered.
Court has substantially accepted these claims, having in essence ruled that common law development occurs in the course of ordinary adjudication. In a notable judgment for a unanimous Court, O'Regan J grappled with 'the difficult question of what constitutes "development" of the common law for purposes of section 39(2)'.

'Development' plainly includes instances when courts expressly change a rule or introduce a new one. 'More commonly, however, courts decide cases within the framework of an existing rule'?

'Rule-following' comprises two possibilities, according to O'Regan J. First, 'a court may merely have to apply the rule to a set of facts which it is clear fall within the terms of the rule or existing authority', in which case, she says, no 'development' of the rule occurs; it is 'merely applied to the facts bound by the rule'.

Alternatively:

a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.

... The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such infusion is required .... The obligation imposed upon courts by section 39(2) of the Constitution ... require[s] courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.

By its own terms, K v Minister teaches that any case in which a court applies the common law to a new set of facts triggers s 39(2) obligations. Curiously, in light of the exceptional sophistication of her judgment, O'Regan J clings to a last outpost of pre-Realist thought, the notion that 'development' of the common law does not occur when a court applies a rule to a set of facts 'clearly falling' within its terms. This assumes that a court can discern the ambit of the rule and whether the new facts fit snugly within it without interpretive activity by judges and advocates. But this is never true, because rules and factual situations do not have and cannot have un-interpreted meaning.

In a given case, 99.9 per cent of South African lawyers might agree that a new fact-pattern clearly falls within the ambit of a given rule. If so, this consensus would not be produced by intrinsic, objectively knowable properties of the rule, the old facts, or the new facts. The consensus would reflect, and – because there is no other way to generate legal knowledge – can only reflect, these lawyers' interpretations of the rule and the old and new facts. Consensus of this kind occurs frequently because lawyers socialised in a particular legal culture or discursive community generally share common understandings of legal problems. But the meaning a legal community attaches to a rule or a set

91 K v Minister (note 47 above) para 16.
92 Ibid.
93 Ibid.
94 Ibid paras 16–7
of facts always stands open to question. One day a community member might have an insight causing her to appreciate the situation in a new way. However convinced we may be that facts of a case are ‘on all fours’ with a well-known rule, our conclusion is, in principle, epistemologically provisional. It reflects a judgment that is necessarily, if subtly, filtered through the sensibilities and outlook of the lawyers who make it. The operation of applying a rule to facts perceived as subsumed within the rule is epistemologically indistinguishable from declining to apply the rule because the facts are perceived to fall outside the ambit of an old rule (which the Court in \textit{K v Minister} acknowledged to be a form of common law development). The judge’s discernment of the facts is shaded by the mindset she brings to the exercise and by the legal context in which she is working.\textsuperscript{95} What the ‘facts’ are is always mediated by the legal context. In South Africa today, there can be no case in which the mindset with which the judge apprehends the ‘facts’ is not filtered by the Constitution. \textit{K v Minister} leads inescapably to the conclusion that the normative framework of the Constitution must infuse a decision to apply as well as a decision to depart from or extend a legal rule. We conclude that inclusion of the word ‘when’ in s 39(2) and the section’s omission of the word ‘application’ are without legal significance.\textsuperscript{96}

\section*{(c) Implications}

The full implications of the development clauses are only beginning to dawn 15 years after the Constitution was adopted. Earlier we argued that direct horizontal application by way of s 8(2) rendered the ‘seepage’ theory of the interim Constitution s 35(3) anachronistic. Almost any result sought to be accomplished by common law development can in principle be achieved, under the final Constitution, by a generous reading of ss 8(1), 8(2) and 8(3). Conversely, jurists and commentators began to conclude that robust invocation of common law development in terms of s 39(2) could in principle achieve much, if not all, of that for which the horizontalists fervently hoped.\textsuperscript{77} In principle, s 39(2) rendered direct horizontal application functionally superfluous – almost any result sought to be accomplished by way of direct application

\textsuperscript{95} It has long been understood that ‘what the facts are’ is always mediated by the legal purposes for which we are trying to determine them. For a classic statement of the point, see W Malone ‘Ruminations on Cause-In-Fact’ \textit{9 Stanford LR} 60 (1956).

\textsuperscript{96} Later in her judgment, O’Regan J, expressly attaches the s 39(2) mandate to ‘mere application’ of the common law, stating that ‘the existing principles of common-law vicarious liability must be understood and applied within the normative framework of our Constitution’, para 23, because the principles of vicarious liability are so obviously ‘imbued with social policy and normative content’. Para 22. But all legal principles are imbued with ethical and social policy implications, albeit these may be obscure. The difference between vicarious liability and other common law doctrines is not that the former are imbued with social policy and normative content, whereas the latter are not. The difference is only that the social policy and normative content is more visible with respect to vicarious liability.

\textsuperscript{97} André van der Walt was quick to discern this point. See A van der Walt (note 13 above) 666–7. See also A van der Walt ‘The State’s Duty to Protect Property Owners v the State’s Duty to Provide Housing: Thoughts on the \textit{Modderklip Case}’ (2005) 21 \textit{SAJHR} 144.
of the Bill of Rights to private conduct can be achieved indirectly through development of the common law. This perhaps explains why the courts so rarely invoke s 8(2).

This is not to say that common law development and direct horizontal application collapse into each other. For many legal purposes, it may be highly significant whether a litigant claims under the common law as bathed in the Constitution’s light or whether she claims under the Constitution itself. But whatever differences remain between common law actions and constitutional torts, these should not affect the substantive meaning of the Bill of Rights or the analysis of whether existing common law norms give full effect to constitutional rights. This is presumably what Langa CJ meant in saying ‘the distinction between direct and indirect application will seldom be outcome determinative.’

Not surprisingly, the passion driving the application debate subsided, which is regrettable insofar as this deflected attention from its central concern, namely, whether transformation of private law is necessary to prevent the emergence of de facto apartheid and the persistence of other systems and relationships of illegitimate domination. That the drafters declared that the Bill of Rights applies to ‘all law’ and that common law courts ‘must promote the spirit, purport and objects of the Bill of Rights’ does not mean the judiciary, advocates, the parties or legal educators automatically grasped the point

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98 The qualifier ‘in principle’ is essential to this claim. Whether direct horizontal application and common law development will in practice get to the same endpoint greatly depends on the vigour with which courts engage substantive constitutional values or, by contrast, the extent to which they allow traditional common law thinking to cloud their constitutional vision, the primary danger to which this article is addressed. For an important warning in this regard, see S Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 SALJ 762. See also S Liebenberg Socio-Economic Rights: Adjudication Under a Transformative Constitution 325 (2010).

99 A rare example is Napier v Barkhuizen 2006 (4) SA 1 (SCA); 2006 (9) BCLR 1011 (SCA) (Barkhuizen-SCA). The High Court found that the constitutional right of access to courts secured by s 34 applies horizontally in contractual relationships between private persons. Ibid para 4. Cameron JA, as he then was, affirmed the High Court’s premise that ‘contractual terms are subject to constitutional rights’. Ibid para 6. The Constitutional Court opted to resolve the appeal from the SCA’s judgment without reaching the question of direct horizontal application. Barkhuizen v Napier 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (Barkhuizen-CC).

Without extensive discussion, the Constitutional Court has indicated that negative duties implied from s 26(1) are binding on private persons and entities. Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) para 34.

Other courts have occasionally invoked direct horizontal application in passing. For example, Janse van Rensburg v Grieve Trust 2000 (1) SA 315 (C), extends seditionary actions to cases involving automobile trade-in agreements. This conclusion was supported by ‘principles of justice, equity, reasonableness and good faith inherent in our common law’, as well as ‘public policy (the ancient concept of boni mores . . .)’, and the need for flexible adaptation of doctrine to ‘the needs of modern commercial practice’. Ibid 325B-C. Van Zyl J added that ‘an extension of the application of the seditionary actions . . . is . . . consonant with spirit and values contained in the Bill of Rights’. Ibid 326D-H.

100 As previously noted, it is not yet clear whether the Constitution gives rise of its own force to causes of action against private parties. See note 73 above.

101 Barkhuizen-CC (note 99 above) para 186. See Du Plessis (note 11 above) (Kriegler J) para 137: “The intention of the drafters of the [interim] Constitution in enacting section 35(3) . . . seems clear. Even in those cases where the [Bill of Rights] do not directly apply, the rules of law applicable are to be informed by the ‘spirit, purport and objects’ thereof.”
and acted accordingly. Old mental habits die slowly. It is a tribute to the obduracy of common law thinking that it has taken so long for the implications of s 39(2) to sink in.

In a judgment of great significance for the evolving jurisprudence of common law development, the Constitutional Court scaled a major conceptual plateau with its doctrine of ‘legality’, the Court’s principal gloss on ‘the rule of law’ which is identified in s 1(6) as a foundational value of the new South Africa. At the core of the legality doctrine is a ‘unitary’ conception of South African law:

I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law .... There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

... [The common law, in so far as it has any application, must be developed consistently with [the Constitution], and subject to constitutional control.\footnote{Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte Application of The President of the Republic of South Africa 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) paras 44–5. Chaskalson P had particular reference to common law principles of administrative law and judicial review. The Constitutional Court subsequently made clear that principle of ‘constitutional control’ applies to all law, including all of the common law. See Barkhuizen-CC note 99 above para 15 (‘All law, including the common law ... is now subject to constitutional control’). See, for example, Investigating Directorate (note 3 above) para 21 (applying the prism metaphor to statutory interpretation).}

The clear import is that every legal question, including every common law or customary law question, must be interpreted and assessed through the ‘prism’\footnote{Laugh It Off Promotions CC v SAB International (Finance) BV v Sabmark International 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) paras 44 & 51 (statute must be interpreted through ‘the lens of the Constitution’).} or ‘lens’\footnote{The Court proceeded in Laugh It Off Promotions on the assumption that it had jurisdiction over the case, which in form involved the enforcement of a statute, because a constitutional matter within the Court’s jurisdiction is raised whenever an applicant urges that Bill-of-Rights values require a particular interpretation of the statute. Ibid para 27. Similarly, in NM v Smith 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) (Madala J) para 28, the Court took for granted that a claim grounded in delict involved a ‘constitutional matter’ within its jurisdiction because ‘[w]hile the claim falls to be dealt with under the actio iniurii, the precepts of the Constitution must inform the application of the common law’.

Section 167(3)(b) of the Constitution limits the jurisdiction of the Constitutional Court to the decision only of constitutional matters and related issues. As commentators have noted, the effect of the constitutional control doctrine is that any case raises a constitutional matter, provided a party or the court articulates a good faith argument that a statute or common law rule must be evaluated in light of the values of the Bill of Rights. See, for example, Woolman (note 61 above) 31–80 (‘every common law case – and any other exercise of judicial authority – is, potentially, a constitutional matter’).}

Michelman ‘Legality’ (note 19 above) 11–39. He summarises the position thus: ‘‘Supremacy of the Constitution and the rule of law’ [per s 1] signifies the unity of the legal system in the service of transformation by, under, and according to law’. Ibid 11–38.
‘brooding omnipresence in the sky’ with an autonomous logic grounded in transcendental reason or natural order. Every common law decision reflects a choice by the community (acting through the agency of the judge) to construct social and economic relationships in one particular way rather than another, with distinctive political, moral, and distributive implications. In South Africa, these choices must now be surfaced, audited and, as necessary, reshaped so as to promote the Constitution’s transformative project.

III CONVERGENCE IN CONSTITUTIONAL THEORY

The unitary conception of South African law arising from the ‘legality doctrine’ is a focal point that clarifies several thorny issues of constitutional theory. Moreover, it brings South African constitutional theory into harmony with some of the insights of US Legal Realism, as interpreted by contemporary critical legal theorists working in its shadow. This is particularly so regarding the public/private distinction.

In the implicit imagery of much of South African common law, private life is a ‘pre-legal’ or ‘law-free’ space. As initially conceived by some, the application debate concerned whether Bill of Rights norms should be imposed upon the conduct of private actors in this ‘pre-legal’ realm of social life. This way of thinking is unfaithful to the reality that people act, believe, and desire as they do in part because of the powers, authorities, immunities, expectations, and entitlements established by law and because of law’s cultural and ideological effects. Law is already present and active in the so-called ‘private’ realm of life before we can even ask the question whether the Bill of Rights should be brought in ‘from the outside’. Social life without statutes and constitutions is not a world of unrestricted liberty; it is a field organised, structured, and regulated by common and customary law.

High doctrinal and practical stakes may turn on how South African jurists ultimately resolve the questions whether the Bill of Rights operates only on

107 *Southern Pacific Co v Jensen* 244 US 205, 222 (1917) (Holmes J dissenting).
108 All this was glimpsed by Mahomed DP in what may someday be recognised as one of the most far-sighted dicta in all of South Africa’s constitutional literature:

> I am not persuaded that there is, in the modern State, any right which exists which is not ultimately sourced in some law, even if it be no more than an unarticulated premise of the common law ... Whatever be the historical origins of the common law and the evolutionary path it has taken, its continued existence and efficacy in the modern State depends, in the last instance, on the power of the State to enforce its sanction and its duty to do so when its protection is invoked by the citizen who seeks to rely on it. It is, I believe, erroneous to conclude that the law operates for the first time only when that sanction is invoked. The truth is that it precedes it and is indeed the ultimate source for the legitimisation of any conduct.

*Du Plessis* (note 11 above) para 79. Given the brilliance of this insight, it is disappointing that Mahomed DP’s *Du Plessis* judgment ultimately settled on a theory of indirect horizontal application (‘seepage’ of constitutional values into the common law). See *ibid* para 86.
109 This does not mean that ‘privacy’ and ‘liberty’ are meaningless concepts. The claim is that what a person can meaningfully experience privacy or liberty depends in significant part on the legal rules that influence and reflect the distribution of wealth and the community’s conception of what privacy ought to mean. Compare Sachs J in *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) para 116 (quoting Brennan J who was quoting Cardozo J) (italics omitted):
other sources of law; whether under some circumstances it directly regulates personal conduct; and, whether a private actor exercising a privilege granted by the common law may be conceived as a ‘governmental’ or ‘quasi-governmental’ actor. But once it is accepted that the background sanction of law plays a role whenever a private individual exercises power over another – say, when a seller of necessities raises her prices in the face of inelastic demand – then the law/conduct distinction retains only a dogmatic significance, and a somewhat metaphysical one at that. For substantive Bill of Rights purposes – that is, for purposes related to fulfilling ‘the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights’\textsuperscript{110} – it should matter little whether the event sought to be subjected to constitutional inquiry is conceived of as the governmental decision authorising the exercise of power (‘law’) or as the exercise of power by the private individual cloaked by the authority of a governmental decision (‘conduct’). Either way, governmental action (understood to include choices not to act) is sufficiently implicated in the episode to permit and demand constitutional inquiry.\textsuperscript{111}

Rules of law and conduct consisting of the lawful exercise of power by one (private) person over another are inextricably intertwined.\textsuperscript{112} Justice Kriegler’s otherwise extraordinarily insightful Du Plessis judgment was mistaken in asserting that ‘[u]nless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned.’\textsuperscript{113} By way of example, he says that so far as the Bill of Rights in the interim Constitution was concerned, a bigot may refuse to let a flat on grounds of race or gender, and an employer may refuse to engage staff on racist or sexist grounds, so long as

\begin{quote}
Just as ‘liberty must be viewed not merely “negatively and selfishly as a mere absence of restraint, but positively and socially as an adjustment of restraints to the end of freedom of opportunity”’, so must privacy be regarded as suggesting at least some responsibility on the State to promote conditions in which personal self-realisation can take place.
\end{quote}

\textsuperscript{110} Investigating Directorate (note 3 above) para 21.

\textsuperscript{111} This approach collapses the supposed distinction between ‘governmental action’ and ‘governmental inaction’. The fact that no rule constrains people’s behaviour in a given context does not mean government has taken no constitutionally reviewable action. The governmental action consists of the maintenance of a legal corpus that includes authorisations to act.

\textsuperscript{112} Cheadle contends that ‘the principal distinction for understanding the operation of the Bill of Rights is the one between law and conduct’. Cheadle (note 69 above) 29. The Bill of Rights ‘does not regulate the conduct of private persons directly ... [r]ather, it regulates their conduct through the medium of an intermediate legal rule, whether of statutory or common-law origin’. Ibid. The constitutional impact on private conduct ‘takes place through a law that gives effect to [a constitutional] right’. Ibid. See also H Cheadle & D Davis ‘Structure of the Bill of Rights’ in Cheadle et al (note 69 above) 4 (note omitted): ‘The conduct of a person is always tested against a statutory or common-law rule. It is this rule that is the subject of constitutional enquiry, whether in respect of the rule’s validity, its development or its limitation. Conduct never gives rise to a constitutional question: only the rule that governs or ought to govern that behaviour gives rise to such a question’. Despite that he draws a bright-line distinction between law and conduct, Cheadle’s formulation is not fundamentally at odds with the position taken here. His primary point is not that conduct is immune from constitutional control, but rather that the Constitution does not of its own force give rise to causes-of-action (‘constitutional torts’) against private parties. As previously noted, we view the question of constitutional torts as analytically distinct from the question of constitutional application. See text following note 67 above.

\textsuperscript{113} Du Plessis (note 11 above) para 135.
neither 'invoke[s] the law to enforce or protect their bigotry'\textsuperscript{114} Whatever the drafters may have intended, the argument is unsatisfying. It is metaphysical fiction to imagine that the racist landlord exercises no legally-backed power over the prospective tenant unless and until the landlord calls in the police to escort an insistent flat-seeker off the premises.

In the same way, when a seller of necessities raises her price in the face of inelastic demand, she exercises power over the buyer. She is able to do so because, and only because, the common law of property, contracts, and torts permits her to do so (to the extent of her market power) and simultaneously bars the needy from escaping the seller's power by, for example, seizing her inventory. The effects of a legally authorised exercise of private power such as this can be experienced by others as every bit or even more oppressive than the exercise of governmental power.\textsuperscript{115} If 'all law' must answer to the Bill of Rights, it is both appropriate and obligatory to subject to constitutional interrogation all of the background legal rules that structure the particular market so that the seller is positioned to charge the elevated price. The approach underlying s 39(2) – that all rules of law that influence behaviour and consciousness should be fashioned so as to accord with and promote constitutional aspirations – is analytically superior to the residual formalism of the traditional approach, which refers application questions to artificial and unpersuasive distinctions between 'law' and 'conduct' and between 'public' and 'private' power.\textsuperscript{116}

The Constitutional Court has placed South Africa on the threshold of a new and original jurisprudential synthesis that will eventually weave together a contemporary understanding of the public/private distinction, as just discussed, with three other, leading problems of constitutionalism: (1) the extent to which contemporary state must assume protective duties and fulfil affirmative obligations to provide for social welfare; (2) whether bills of rights should contain social and economic rights and whether the latter are justiciable; and, (3) what the relationship is between constitutional goals and private-law development, the key concern of this article.

The questions of horizontal application, affirmative governmental protective duties, and the justiciability of socio-economic rights converge in the following

\textsuperscript{114} Ibid.

\textsuperscript{115} See Woolman & Davis (note 35 above) 385, 387, 399 & 399 n 115.

\textsuperscript{116} To avoid misunderstanding, we again emphasise that this claim – that public and private power merge into each other in the common law setting – does not entail the Orwellian conclusion that 'privacy' and 'autonomy' are insignificant or chimerical values. 'Privacy' and 'autonomy' remain values central to a free society. In South Africa, they are constitutionally protected. The claim advanced here is that whether, in a given situation, a person's privacy and/or autonomy have been improperly invaded ('improper' in normative and social policy terms) should not turn on whether the actor causing the invasion is governmental or non-governmental; rather, it should turn on substantive judgments about the contextual meaning of privacy and autonomy, when their importance to human flourishing is sufficient to override any countervailing constitutional values (such as equality), and how they must be protected from intrusion, whether governmental or non-governmental. See generally L Henkin 'Shelley v. Kraemer: Notes for a Revised Opinion' (1962) 110 U Pennsylvania LR 473; FE Olsen 'The Myth of State Intervention in the Family' (1985) 18 U Michigan J of Law Reform 833–64.
way. Most people in South Africa and in the US experience welfare through the consumption of goods and services they or household members purchase in market transactions with money they earn in market transactions. Common law rules structure all such transactions with consequences for the relative distribution of power and welfare. This is equally true whether the community through government has ‘acted’ (by establishing a rule that authorises or forbids specified conduct) or by its ‘inaction’ has elected not to protect those on the receiving end of authorised conduct. The substantive contours of the common law therefore bear some responsibility for the outcome of all of these transactions which, in both countries, yield a highly unequal distribution of welfare. For millions of people in both countries, market-based distribution of welfare results in an absolute level of deprivation. In South Africa, those who fare poorly in the struggle for welfare may challenge the background rules that produce such outcomes as violating the Constitution’s socio-economic rights provisions. The present configuration of the private law background must be understood to reflect a series of choices by the community because any of these rules could be fashioned differently. Therefore, the question arises whether the prevailing rule-set produces a constitutionally unacceptable distribution of basic, life-sustaining goods. If so, government violates the Constitution unless it undertakes to rearrange the background rules so as to yield a constitutionally adequate level of access to the minimum components of human welfare.

The position is the same in the US, at least as an abstract matter. The Federal Constitution has limited horizontal application, imposes protective duties on government only in narrow circumstances, and does not entrench socio-economic rights in any obvious way. Unlike the South African Constitution, the US Constitution does not enumerate a bundle of basic goods essential to human welfare that the community must provide. But the US Constitution does contain an equality clause, added in 1868 after the Civil War. Gary Peller and Mark Tushnet have cogently argued that if we take a post-Realist perspective, the seemingly vast conceptual difference between the enforcement of South Africa’s socio-economic rights guarantees and proper application of the equality clauses of the US Constitution narrows considerably. Although the courts have been reluctant to draw this conclusion, constitutional interrogation of the common law as to its impact on the social distribution of well-being is not only possible, but mandatory in the US:

The question of social welfare rights is analytically the mirror image of the state action doctrine [the US term for ‘vertical application’]. The issue of the existence of social welfare rights arises only when someone challenges the economic consequences flowing from the distribution of background rights on the ground that the distribution has not produced a constitutionally acceptable apportionment of the nation’s material resources. To say that there are social welfare rights, then, is to say that the Constitution makes the consequences of the distribution of background rights vulnerable to challenge, in the same way that a finding of state action means that effects flowing from the distribution of background rights are vulnerable to constitutional challenge.\textsuperscript{117}

In this sense, the US Constitution can be understood to incorporate a legal commitment to social provision of the basic requirements of human well-being.\textsuperscript{118}

This conclusion positions the US just a small conceptual step away from positive duties of the state, such as are expressly assumed in the South African Constitution.\textsuperscript{119} The argument is by now familiar: (a) background rules of common law are artefacts that could be fashioned differently than they are at present, (b) enforcing them 'as is' constitutes governmental action, (c) the particular structure of background rules in place produces distributive consequences, (d) those who lose out in the struggle for well-being may justly ask courts to test whether the common law hurdles placed in their way are constitutionally unacceptable in light of the commitment to equality, and (e) if so, government violates Equal Protection unless it rearranges the background rules so as to guarantee that the poor enjoy a level of access to resources and welfare that is at least minimally adequate to withstand an equality challenge.

\textbf{IV CRITICAL LEGAL REALISM IN A NUTSHELL; OR, WHY COMMON LAW TRANSFORMATION IS INDISPENSABLE TO THE SOUTH AFRICAN CONSTITUTIONAL PROJECT\textsuperscript{120}}

The discussion of constitutional application, common law development, and the 'legality doctrine' in South Africa has many points of connection with the intellectual path of US Legal Realism. Coming from different times and a distant place, critical legal realism provides the rudiments of a legal methodology congruent with the project of common law transformation embraced by South Africans in the development clauses. As South African judges confront the exciting, if daunting, agenda imposed by the development clauses, they will want to draw upon any and all potentially helpful intellectual resources. We respectfully suggest that they would do well to become conversant with

\textsuperscript{118} Professor Michelman reached a similar conclusion 40 years ago in his justly celebrated article 'Foreword: On Protecting the Poor Through the Fourteenth Amendment' (1969) 83 Harvard LR 7.

\textsuperscript{119} As is well known, the US Supreme Court rejects the argument that the Equal Protection and Due Process clauses impose affirmative, protective duties upon government. See Deshaney v Winnebago County Department of Social Services 489 US 189, 196 (1989) ('the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual'); Harris v McRae 448 US 297, 317–8 (1980) (government not obligated to fund poor women's exercise of the constitutional right to reproductive freedom) ('although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realise all the advantages of that freedom').

\textsuperscript{120} This overview is as much for the convenience of US readers as those in South Africa and elsewhere. Legal Realism dwells in a strange twilight-zone in the US today. Its teachings were mainstreamed and are deeply embedded in the collective unconscious of US lawyers. Every American law student absorbs Realist insights by osmosis. However, as an intellectual movement, Realism went into retirement after World War II. The Realists' progressive orientation is now forgotten, and their texts are no longer studied. Today, Legal Realism is customarily presented to US students in a bland, stylised version drained of critical purchase. Although most of the original adherents were centre-left politically, Realist analytical techniques are equally deployed today by liberal and conservative jurists.
the ideas about law and society and the anti-formalist analytical techniques pioneered by the Legal Realists.

The following précis of critical legal realism makes no pretense of providing a systematic or nuanced account. We describe the approach in the idiom of contemporary critical legal theory, reserving the terms 'Legal Realism' and 'the Realists' to denote the work of originators, which mostly dates from the first half of the 20th century. We begin with the anti-formalist approach to legal analysis, proceed to some basic theses about the legal construction of the social order, and conclude by showing why this approach reveals transformative possibilities within law.

(a) Legal outcomes are under-determined by legal reasoning

So-called 'legal reasoning' consists of the practiced use of a conventional, culturally specific repertoire of rhetorical strategies and argumentative techniques deployed to produce the appearance of the legal necessity of an outcome. For every argument or argument-type, the rhetorical repertoire found in most modern legal cultures usually contains an equally respectable, although equally formulaic, maxim or argument-type cutting in the opposite direction ('courts must follow precedents on point'; 'courts are not bound by distinguishable precedents').

The rhetorical conventions embraced by a particular legal culture at a particular historical moment are understood by its participants both to generate and to constrain legal analysis and outcomes. Lawyers deploying the conventional routines of legal reasoning often find that the legal authorities and texts are not infinitely plastic, and that they exhibit qualities of rigidity and firmness. Sometimes an authority simply will not yield to a skilled lawyer's best efforts to interpret it in a certain way. Most or even all participants in a legal culture may agree that only one interpretation of given materials is legally plausible. On the other hand, the analytical conventions and legal materials do not constrain as rigidly as is often imagined. Conventional work with legal


122 Beginning in the mid-1970s, critical legal theorists revived and elaborated on the Realists' work. The 'crits' borrowed Realist analytical technologies, added a progressive, normative agenda, and integrated Realist teachings with modernist and postmodernist social thought.

123 OW Holmes' essay 'Privilege, Malice and Intenti' (1894) 8 Harvard LR 1 is sometimes identified as a nominal point of origin. Holmes borrowed directly from this article in writing his famous dissenting judgment in Vehlein v Gunter 167 Mass 92, 44 NE 1077 (Massachusetts Supreme Judicial Court 1896) (holding that peaceful labour picketing is an enjoinable tort). Legal Realism gained influence as an academic movement in the first half of the 20th century. Leading figures included Felix Cohen, Morris Cohen, Jerome Frank, Robert Hale, Karl Llewellyn, and future Supreme Court justices William O Douglas and Felix Frankfurter.

materials often reveals them to be pliant and filled with gaps, conflicts, and ambiguities. A 'gap' is a situation of uncertainty as to which authoritative norms, if any, govern a particular legal problem. A 'conflict' is a situation in which two or more conflicting lines of authority can be shown by respectable legal argument to govern a problem. An 'ambiguity' is a situation of uncertainty as to the meaning and/or application of a norm.

Realist anti-formalist analytics revealed the pervasiveness of gaps, conflicts, and ambiguities in field after substantive field of law. The Realists demonstrated that the accepted canons of legal decision-making (deduction, adhering to precedent, weighing the equities, etc) cannot entirely close the gaps, resolve the conflicts, or make the ambiguities go away. For this reason, legal outcomes are often 'indeterminate' or 'logically under-determined' by existing rules, authorities, and decision-procedures. Properly trained and acculturated members of the legal community can derive different, even conflicting, conclusions from the rules and authorities utilising perfectly respectable legal reasoning techniques.

It bears emphasis that the thesis of the indeterminacy of legal reasoning is modest. It is not claimed that legal reasoning is always indeterminate or that the tools of legal reasoning can never yield a result that lawyers will agree is legally correct. It is certainly not a claim that an authority or text can be given any meaning a legal interpreter wishes to impose on it. Rather, the point is merely that often enough, outcomes appear to be indeterminate. Our notion of legal indeterminacy primarily concerns what lawyers perceive or experience with respect to the materials, the tools of legal reasoning, and the outcomes. It is not a metaphysical thesis about inherent qualities of language, reason, or texts.

In the presence of gaps, conflicts, and ambiguities, judges decide cases in the only way they can – by making intermediate judgments or choices ('intermediate', that is, between premise and outcome) that are inevitably influenced by the decision maker's (socially-constructed) sensibilities and (controversial) assumptions about political morality and social organisation. The formalist's vice, so the Realists argued, lies in her faith that, by deduction or some other neutral decision-procedure she possesses, she can derive determinate solutions to legal problems from agreed legal premises without reliance upon contestable, intermediate choices. A judge may not be aware that the outcomes she decrees turn on such choices. She may in all sincerity believe she renders judgment as the legal authorities require. If so, her belief and her denial of her own agency are mistaken.

The element of value-laden choice in adjudication is not necessarily illicit. It does not automatically mean that judges exceed their rightful authority by injecting arbitrary or purely personal convictions into the process. A judge's moral convictions and sensibilities play, and cannot but play, a routine role in legal decision-making. It is an interesting question whether the values to which judges have resort in deciding cases are properly described as 'legal' or 'extra-legal' or sometimes one, sometimes the other. Once, perhaps off-handedly, Sachs J referred to morality, fairness, social values, equitable principle as
'extraneous factors' to a legalistic approach. By contrast, Ronald Dworkin assimilates values and principles to legal discourse. He argues that judges must construct principles of political morality that best explain a society's accumulated legal materials and that point toward solutions that will make its legal regime morally the best that it can be. We do not think it necessary to address this question for present purposes. Even taking the most expansive view of what counts as legal argument, at a certain point the epistemologically and culturally bounded sensibilities, experiences, and world-views judges bring into adjudication by way of their intermediate choices must overflow the repertoire of legal reasoning. At that point, judges place their own imprint on the law. In one way of speaking, judges make the law that they say they are bound to follow. And this poses a problem for the legitimacy of adjudication in modern representative democracies that take as a first principle that 'the major engine for law reform should be the legislature and not the judiciary'.

Karl Llewellyn's illuminating discussions of precedent and stare decisis provide a classic illustration of Legal Realist analytics. In the conventional wisdom, a system of adherence to precedent is commonly thought to have the virtues of carrying forward the accumulated wisdom of the past, promoting legal stability and predictability, guaranteeing equal treatment of like cases, and restricting judges to their proper role in terms of institutional competence and separation-of-powers. Precedent-following can achieve these desiderata because it is a decision procedure, a method of resolving cases. By hypothesis, precedent-following constrains choice, so the decision maker is not left at large. This is what it means to say that she is 'bound' by past authorities.

Llewellyn showed that stare decisis is not truly a decision procedure but a repertoire of rhetorical strategies designed to persuade a decision maker either that she is bound by prior authorities or that she is free to depart from them. Even in the most traditional understanding, the principle of stare decisis as applied to a given case may either constrain the judge or give her freedom of motion. For one thing, 'in any case doubtful enough to make litigation respectable the available authoritative premises — i.e., the premises legitimate and impeccable under the traditional legal techniques — are at least two, and ... the two are mutually contradictory as applied to the case in hand'. But the fundamental source of tension between constraint and freedom is that

125 PEM (note 39 above) para 33 (referring with approval to an SCA decision).
126 This is because the decision maker herself plays an indispensable role in constructing the legal materials through choices she makes about how to deploy her interpretive energies. See generally, Kennedy Critique (note 17 above).
127 Carmichele-CC (note 45 above) para 36. Much jurisprudential writing in the US in the second half of the 20th century concerned post-Realist efforts to find ways to subordinate judicial action — once the Realists had revealed the pervasiveness and significance of judicial law-making — either by restoring the fiction of seamlessness or, alternatively, by devising new decision-procedures seeking to confine judicial choice and/or to confine the scope of the gaps, conflicts, and ambiguities to marginal or interstitial questions.
129 Llewellyn 'Some Realism' (note 128 above) 1239.
stare decisis actually contains two, potentially conflicting mandates. The decision maker is duty bound to adhere to a past authority – but only when past authority is on point. If the past authority is distinguishable, it does not bind the decision maker. But it is often quite easy to distinguish a precedent based on factual differences deemed significant to the case at hand. Thus, an advocate or decision maker need not abandon stare decisis in order escape the binding ties of unfavourable precedent. Stare decisis itself provides the skilled practitioner with a scalpel to cut free. At the same time, the holding of the prior case is often said to encompass the reasons necessary to reach its result. This aspect of predecential reasoning gives skilled practitioners tools with which to build upon and expand the scope of favourable precedents. Stare decisis comprises two, equally legitimate and dogmatically correct operating procedures – distinguishing and extending precedent. In any given case, these steering mechanisms point in opposite directions.

Thus, the injunction to ‘follow precedent’ is an indeterminate command, not a decisional algorithm. It is an invitation to deploy a catalogue of conventional argumentative strategies. Applying common law rules to a new case requires interpretation and judgment concerning the facts here and in the earlier case, the meaning of the prior case, and the meaning of the new context. The stare decisis tool-kit contains numerous rhetorical manoeuvres (such as ‘the precise facts of the case control its meaning’), each of which is cancelled by an equally valid counter-manoeuvre (for example, ‘extract and apply the ratio decidendi’). But the method of reasoning from precedents does not contain its own criteria for determining which approach, which interpretation, which rhetorical gambit to adopt in a particular case. The conventions of legal reasoning may provide guidance in making these choices, but frequently their capacity to steer the decision maker to a conclusion runs out. Resolution of the case then becomes a matter of judgment upon which contestable ethical and political considerations inevitably bear.

(b) Legal concepts are not self-defining and cannot determine outcomes

Building-block legal concepts such as property, consent, reasonableness, causation, and so on, are not self-defining. They do not ‘speak’ to us. The meanings of legal concepts are always conventional, that is, specific to a particular legal culture. But even within a legal culture, the meaning of core legal concepts is elastic (although not infinitely so). One reason is that many basic legal concepts reflect or incorporate conflicting values. To give the concept operational significance in a particular case therefore requires making a judgment about which of the embedded, competing values to prefer in the circumstances – a judgment that must rely on considerations and intuitions external to the legal concept itself.

130 See generally F Cohen ‘Transcendental Nonsense & the Functional Approach’ (1935) 35 Columbia LR 809, 809–21 (‘the heaven of legal concepts’).
For example, ‘private property’ embodies the idea that an owner may use her property in a self-interested manner, but it also embodies the idea that an owner is entitled to be protected from the uses others make of their property. This necessarily means that ownership carries with it some duties to use one’s property to protect neighbours or even strangers who own no property. Which aspect of property should predominate in any instance – the self-interested or the altruistic – is always a matter of judgment. Indeed, it is always a judgment of public policy, so that ‘private property’ is a misleading phrase.\textsuperscript{131} The indeterminacy of the concept of private property does not mean that it is impossible to make such judgments or that anyone’s judgment is as good as anyone else’s. But it does mean that the concept of private property by itself cannot tell us whether, in a particular case, I may use my land without regard to the interests of others, or whether I must so use my land as to respect the interests of others. Purporting to draw a ‘deduction’ or ‘entailment’ from the concept of property always involves circular reasoning. Put another way, ‘[i]t is incorrect to say that the judiciary protect[s] property; rather they call property that to which they accord[ ] protection’.\textsuperscript{132} A statement in the form ‘it is in the nature of private property that an owner may (or must) do X’ always contains formalist error.

Similarly, ‘freedom of contract’ encapsulates both the value of personal liberty and autonomy, on the one hand, and, on the other, a regulatory policy of constraint on liberty in order to protect legitimate expectations (interests typically invoked by the phrase ‘commercial certainty and predictability’). In every contract judgment, the court must strike a balance between the promisor’s freedom-of-action and the promisee’s expectations and reliance. Contractual freedom does afford private parties a zone of liberty in which to order their own affairs, but to defend it in strictly libertarian terms without attending to the regulatory side of contract is unpersuasive. The promisee in every contract case proclaims fidelity to private ordering while invoking the power of the state to coerce the promisor. We may tell a losing defendant that her own liberty and autonomy are vindicated by the court’s judgment enforcing the contract, but what she experiences is that the sheriff seizes her property if she does not pay up. As Morris Cohen pointed out long ago, whether the government should deploy its power in this way is always a question of public policy.\textsuperscript{133}

\textsuperscript{131} ‘Property [is] a symbol for the conclusion that certain patterns of behavior are to be enforced between people for the benefit of society as a whole’. Student Note ‘Unemployment As A Taking Without Just Compensation’ (1970) 43 Southern California LR 488, 490. See F Cohen ‘Dialogue on Private Property’ (1954) 9 Rutgers LR 357, 371 (‘the existence of private property presupposes not only sovereignty but some predictable course of sovereign action’).

\textsuperscript{132} W Hamilton & I Till ‘Property’ (1933) 12 Encyclopedia of Social Science 528, 536.

\textsuperscript{133} See M Cohen ‘The Basis of Contract’ (1933) 46 Harvard LR 553, 586:

The law of contract ... through judges, sheriffs, or marshals, puts the sovereign power of the state at the disposal of one party to be exercised over the other party .... From this point of view, the law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction.
The standard utilitarian argument for enforcing voluntary agreements is that doing so maximises aggregate social welfare. But contract litigation arises because a previous agreement is no longer utility-maximising for one of the parties, or because one can no longer afford to perform. Many agreements that would be welfare-enhancing are not made due to well-known forms of market failure. Whether blanket enforcement of all agreements under these circumstances enhances aggregate welfare is a complicated empirical question.\textsuperscript{134} In any event, no contract regime enforces all agreements, and no contract regime compels a breaching defendant to make good the full extent of the consequences of her breach.\textsuperscript{135} Undoubtedly this is due in part to an intuition that contract enforcement under some circumstances produces sub-optimal outcomes. Contract law contains many excuses for non-performance, limitations on damages when a breach has occurred, and doctrines permitting recovery by breaching plaintiffs. Whether, when, and to what extent it is appropriate for the state to impose its coercive power on a contract defendant in order to vindicate the plaintiff's freedom of action is always a question of judgment that must appeal to policy considerations and intuitions external to the idea of contractual freedom. Which aspect of free contract should prevail in a given case, the autonomy side or the regulatory side, cannot be \textit{deduced} from the concept of contract.

(c) Legal constraint is an experience or interpretation, rather than an intrinsic property, of the applicable legal materials

That the tools of legal reasoning are indeterminate does not mean that it is merely a facade or that its conventions provide no guidance to or constraints upon decision makers. Similarly, that building-block legal concepts are not self-defining does not mean they are not often endowed with meanings so settled as to appear intrinsic. Thus, a legal tradition may exercise a highly constraining force upon judges in democratic societies in which fidelity to law is a powerful norm.

Legal outcomes are therefore often highly predictable (legal practice as we know it would be impossible were this not the case). The vast majority of participants in a legal culture might agree that a specific legal problem yields but one 'correct' or 'defensible' outcome. Lawyers commonly describe this consensus by observing that the legal materials and reasoning conventions \textit{require} this outcome, as though the outcome were preordained by intrinsic properties of the materials and reasoning techniques. In fact, the consensus of opinion reflects \textit{not} an intrinsic property of the materials, but rather the lawyers' \textit{belief} that the legal materials require this outcome and afford no leeway to reach a different result in good faith. The consensus among them

\textsuperscript{134} See Singer (note 121 above) 484–5.
\textsuperscript{135} LL Fuller & WR Pernue's great article 'The Reliance Interest in Contract Damages: I' (1936) 46 Yale LJ 52, demonstrated that the extent to which any given contract regime vindicates the expectation interest boils down to 'no more than a series of economic policy choices by the state'. B Mensch 'Freedom of Contract as Ideology' (1981) 33 Stanford LR 753, 760 (footnote omitted).
is not a property but an interpretation of the legal authorities. The lawyers in this community experience legal reasoning and the materials as constraining the resolution of the problem.

In principle these same authorities seen in a new light might yield a different solution. An advocate's or judge's conviction that she is legally constrained is capable of dissolving upon reconsideration or further argument, opening new possibilities for advocacy and decision. We do not say this occurs every day, nor do we suggest that texts do not matter. Texts matter a great deal, and often the best efforts by the most able lawyers cannot yield a convincing or even plausible alternative interpretation at odds with the accepted wisdom. We say only that experience of the dissolution of constraint and of the appearance of new interpretive possibilities can and does happen. Even without legal upheaval of the type that has occurred in South Africa, the meaning of a long-settled rule or case occasionally unfreezes, and the authority comes to be understood in a new way.

Legal authorities do not have any discursive significance apart from the evolving meanings lawyers impress on them through interpretive practices. An uninterpreted legal authority may have a physical existence — a case report collecting dust in the library — but it cannot be said to have a meaning until a legal actor works with the authority using the culture's repertoire of argumentative conventions. A legal actor cannot even be sure in advance which authorities bear on a given legal problem; this determination is itself influenced by the interpretive activities performed by the decision maker. Because uninterpreted legal authorities have no meaning, the decision maker to some extent constitutes the law that constrains her. Legal practices comprise a semi-plastic medium in which judges and advocates make claims and choices that are structured by authorities and argumentative conventions, but cannot be determined entirely by them. Accumulated, these choices have the distributive and cultural effects to be described below.

(d) Legal norms and outcomes are under-determined by social structure and political ideology

A particular 'type' of society, whether capitalist, socialist, etc, does not tightly determine the legal regime in place. The law/society relationship is much more indeterminate, in somewhat the same way that the legal authority/legal outcome relationship is indeterminate. A social or economic institution — say, a market for the purchase and sale of labour power in a capitalist society — can be structured in a wide variety of ways based on different, foundational legal rule-sets. These rule-sets may have quite different distributive consequences as between workers and employers.\(^{136}\) In a general way, one might attribute the content and distributive effects of a particular rule-set — for example, the law

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136 See generally R Unger 'The Critical Legal Studies Movement' (1983) 96 *Harvard LR* 561, 567–70 (critique of the idea that a type of social organisation comes with a built-in, predetermined legal structure) and 660–5 (critique of the idea of meta-historical determination of history and social life).
of contractual offer and acceptance in late 19th century Britain – to the type of society in which it appears (industrial capitalism, in this example). But the attribution would tell us very little of interest about the shape and content of the rules. Moreover, the claim would be circular, because one cannot provide a coherent description of late-19th century British industrial capitalism – the social type to which the content of the rules is attributed – without discussing the legal rules that partially construct and constitute that social type.

Similarly, the legal implications of a general political viewpoint, say, ‘conservatism’ or ‘leftism’, are relatively indeterminate. As Duncan Kennedy argues, rule choices emerge from ‘interaction between the legal materials, understood as a constraining medium, and the ideological projects of judges [or advocates]’. The resulting legal decisions ‘should be understood neither as simply the implications of authority nor as the implications of the ideological projects, but as a compromise’. 137

(e) **Adjudicators bear responsibility for the social impact of their decisions**

The point of the indeterminacy critique is not that responsible judges cannot decide cases in a reasoned, non-arbitrary manner. Critical legal realists believe that reasoned and principled decision-making, that is to say, distinctively legal decision-making, is possible and desirable. The point is that the solution to legal problems always involves patent or implicit choices referable to or influenced by norms, values, ideas, sensibilities, and experiences external to the corpus of legal authorities and reasoning procedures. This is a normal aspect of legal decision-making, not an illicit deviation from fidelity to law.

Adjudicators bear responsibility for these choices and the impact they have upon the texture of social life and the distribution of power and well-being. A judge’s choices are informed by the values, sensibilities, and experiences she brings to her work with the legal materials. In South Africa after 1996, common law decision-making must be inspired by the Constitution’s transformative aspirations, as best the judge understands them. The legislature in particular and the public in general can only monitor and assess judicial action and hold judges accountable to the constitutional vision if judges are self-aware and candid about the extra-legal values and sensibilities that inform their choices. 138

(f) **Legal rules and practices often play a significant role in constructing social life**

Societies do not have a ‘natural’ form of organisation. They are organised (or ‘constituted’) by humanly crafted and culturally transmitted norms, dis-

137 Kennedy *Critique* (note 17 above) 19.
138 ‘The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines .... Under a transformative constitution judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values .... This approach to adjudication requires an acceptance of the politics of law’. Langa ‘Transformative Constitutionalism’ (note 3 above) 353.
courses, and practices which, in modern societies, are frequently embodied in legal rules. These norms, practices, and rules affect human conduct and experience. The relationships that fill daily life – family, employment, buying and selling – are always already legal relationships. All institutions, power relationships, and interactions in contemporary societies are at least partially constituted by rules of law.¹³⁹

For example, no market can exist without legal ground rules that define capacity to contract, allocate property entitlements, distinguish voluntary exchange from coerced transfer, divide the outputs of joint productive activity, and so on. There is no such thing as ‘the’ market. There are only ‘markets’, discrete institutional arrangements, each structured by a particular set of background rules. Likewise, there cannot be a ‘free market’, if by that is meant a market unregulated by law. Legal decision makers do not face a choice between ‘staying out of’ or ‘intervening in’ markets. Law is always ‘in’ from the start. The important questions are what approach the law should take in constructing and regulating markets and with what effects.

Similarly, families and family life are structured by ‘taken-for-granted’ background norms, which in modern societies are embodied in legal rules.¹⁴⁰

The family is regulated by numerous legal rules that determine what constitutes a family, who may marry, how decisions are taken within families, which family members have capacity to contract or own property, in what ways parents may control children, and so on. Thus, no family is ‘independent of’ or ‘autonomous from’ the state, if by that is meant a family the composition and inner workings of which are unregulated by law.

The socially constitutive power of law is equally at work when it establishes an entitlement or obligation as when it refrains from doing so, thereby privileging legal subjects to act in certain ways that affect the lives of others. The emptiness of the traditional act/no-act distinction is a point of more than semantic importance in systems that attach constitutional obligations only to governmental action. If we set its self-description aside and consider its impact on people’s lives, the common law routinely exerts communal power even without judicial enforcement, court cases, or legal disputes. People take decisions in the shadow of common law rules. There is no natural, ‘pre-legal’ domain of social interaction in modern societies untouched by law. Law is endogenous to human choice and behaviour. Because there is no ‘law-free’, background field of social life, the community makes a choice – it takes regulatory action – when it omits to place limits or obligations on some aspect of social or economic interaction. Consequently, as André van der Walt neatly puts the point, ‘every social practice … in some way relies upon and is

¹³⁹ As previously noted, the judgments of Mahomed DP & Kriegler J in Du Plessis (note 11 above) state versions of this thesis.

¹⁴⁰ See, for example, Volks NO v Robinson 2004 (6) SA 288 (CC); 2005 (5) BCLR 446 (CC) paras 112–8 (Mokgoro & O'Regan JJ) (marriage is regulated and constructed by law and has significant legal consequences); Fourie-CC (note 49 above) para 63 (Sachs J) (stating that marriage ‘brings the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain’, relying on the paragraphs from Volks NO just cited).
sanctioned by a legal rule that can – in suitable circumstances – be subjected to constitutional review.\textsuperscript{141}

A assaults his wife B. No liability ensues because the jurisdiction observes a strong doctrine of interspousal tort/delictual immunity. So advised, B files no action against A. The local police make no intervention. No court is ever called upon to adjudicate A’s conduct or enforce a sanction against him. In the traditional perspective, no governmental action has occurred.\textsuperscript{142} Conventionally, A’s conduct is considered without reference to the immunity rule, similar laws perpetuating the subordination of women, and the effects of such rules on popular and police attitudes toward gender violence. But if social and historical context are brought into the picture, a connection can be drawn between longstanding common law doctrine and A’s conduct.\textsuperscript{143} That for centuries the legal system placed little or no inhibition on spousal abuse contributed something to male socialisation. Surely the incidence of abuse would be lower if the legal culture had consistently treated it as wrong, illegal, and actionable. It should not matter whether we classify interspousal delictual immunity as a species of governmental action or as a governmental omission to impose liability. If the jurisdiction has a constitution committed to gender equality, the presence of the delictual immunity in the common law backdrop can and should be subjected to constitutional scrutiny for compatibility with the equality guarantee.\textsuperscript{144}

(g) **Rules of law dispose distributive stakes**

The legal ground rules of social and economic interaction often significantly affect distributive outcomes in the transactions and relationships (for exam-

\textsuperscript{141} Van der Walt (note 13 above) 665 (commenting on Johan van der Walt).

\textsuperscript{142} The US Congress enacted the Violence Against Women Act of 1994 (VAWA), PL 103–322, 108 Stat 1902, containing measures to suppress violence against women including a provision permitting women raped or assaulted by men to bring civil claims in federal court against perpetrators. Congress is clearly competent to legislate in this field if the crime occurs on federal property, is committed by a federal agent or person acting under colour of federal law, or involves interstate movement. But the vast majority of such crimes are committed by private individuals at a single situs located outside of federal enclaves. Congress concluded after extensive study that federal intervention was needed because state and local governments had failed to act vigorously against gender-based crimes. It based its competence in part on the Fourteenth Amendment, which authorises Congress to enforce the Equal Protection Clause. But the Fourteenth Amendment applies only vertically to governmental actors; it does not reach private conduct. The Supreme Court struck down as unconstitutional VAWA’s civil-remedies provision. *US v Morrison* 529 US 598, 619–27 (2000). The rationale was that no governmental action is involved in the rape or sexual assault of a woman by a man, and therefore the civil-remedies provision was not a valid exercise of Congress’s power to enforce the constitutional guarantee of gender equality.

\textsuperscript{143} In a brilliant judgment that foreshadowed *Carmichele-CC* (note 45 above), a lower federal court held that a city’s policy or practice of police non-response to domestic violence was based on archaic cultural and legal attitudes toward women and therefore violated the equality guarantee of the Fourteenth Amendment to the US Constitution. *Thurman v City of Torrington* 595 F Supp 1521 (DConn 1984). This teaching of *Thurman* may not have survived the subsequent decision in *DeShaney* holding that government has no affirmative, constitutional duty to protect individuals from harm at the hands of third parties (see note 119 above).

\textsuperscript{144} US courts have found that interspousal tort immunity rules discriminate against women in violation of the constitutional guarantee of equal protection of the law, even where the immunity rule is gender-neutral in form. See, for example, *Moran v Beyer* 734 F2d 1245 (7th Cir 1984).
ple, employer/employee, owner/neighbor, landlord/tenant, seller/consumer, husband/wife) that implicate the pursuit of well-being (sustenance, income, knowledge, fulfilment, etc). Defining entitlements, privileges, and liabilities one way rather than another may produce quite different consequences for the distribution of power and welfare and, therefore, for people's lived experience and quality of daily life. For example, the particular rule-set in place may favor employers vis-à-vis employees, sellers vis-à-vis buyers, or landlords vis-à-vis tenants. With differently formulated background legal rules, we would observe over the long run different power relationships and a different distribution of welfare.

Private law rules empower some actors while disempowering and subordinating others. As just noted, the long history of interspousal immunities empowered actors like A to the distinct disadvantage of B and others similarly situated. Much of private law establishes ground rules that determine how one acquires assets and how one may use one's assets and legal endowments in interaction with others. P, a landowner, negatively affects the interests of Q, a malnourished, homeless person, when P denies Q's request for rent-free access to her property and/or edible yield. Though grievous harm may result, even death, P is nevertheless privileged to refuse Q's request pursuant to the public policy decisions embodied in the common law of property, namely, that owners may exclude strangers and that, if push comes to shove, the local authorities will use force to uphold the privilege to exclude.

Similarly, the law of contract privileges an employer to deny workers access to what they require for life (opportunities to earn income by producing value) unless the workers agree to accept the employer's wage offer. That is, a system of 'free' contract endows the employer with significant power to coerce prospective employees. Of course, where law immunizes industrial action from liability or affirmatively protects it, public policy grants the workers a reciprocal coercive power, namely, an entitlement to withhold what the employer requires (profit-generating labour power) unless the employer agrees to the workers' wage demands. The wage-level is neither unilaterally imposed by the employer, nor does the employee 'freely' consent to it. Normally employers' offers and workers' decisions are constrained by very real economic pressures. The wage bargain actually reached in a given case reflects the relative balance of the employer's and the workers' legally authorised powers to coerce each other.

Courts will only enforce agreements that are entered 'freely'; coerced arrangements do not have the sanction of law. But in a realistic view, all bargains combine aspects of choice and aspects of coercion.\(^{145}\) Contract doctrines such as fraud, duress, undue influence, and unconscionability supposedly show us the bright line between 'freely chosen' and 'coerced' or 'un-free'

\(^{145}\) Traditional contract doctrine 'arbitrarily excluded economic pressure from the legal definition of duress. That exclusion concealed the fact that coercion, including legal coercion, lies at the heart of every bargain'. Mensch (note 135 above) 764 (italics in original) (relying on classic Legal Realist texts).
bargains unworthy of enforcement. In fact, these doctrines mark the blurred, porous, and ever-shifting boundaries between coercive behaviours the community is prepared to accept as normal and those that it is not. When a court announces that it will withhold enforcement because a particular bargain resulted from 'coercion' rather than voluntarily agreement, the court is using the ostensibly fact-based concept of coercion as an emblem for a moral conclusion it has reached that it would be unfair to enforce the bargain under the circumstances. To paraphrase Hamilton and Till, it is incorrect to say that the courts enforce voluntary bargains but deny enforcement of coerced bargains; rather, they call 'voluntary' or 'consensual' the bargains they enforce, and call 'coerced' those which they are not prepared to enforce.

As the Realists taught, so-called 'freedom of contract' consists of negotiation conducted and agreements made within a governmentally structured framework of mutual pressure and coercion. The offeree consents to a bargain in order to avoid the negative consequences the offeror may inflict upon her by withholding what the offeror owns and the offeree desires or needs. However, the offeror may also desire or need what the offeree has. What we call a 'price' is a metric of the relative strength of the coercive powers law puts at the parties' disposal, respectively. A seller's revenue is the sum of the prices that others are willing to pay in order to induce her to refrain from utilising her legally granted power to withhold access to what she owns. The social distribution of

146 See, for example, JP Dawson 'Economic Duress – An Essay in Perspective' (1947) 45 Michigan LR 253, 287 ('[d]ocuments of duress are intended to raise precisely the question whether it is "rightful" to use particular types of pressure for the purpose of extracting an excessive or disproportionate return'). See generally R Hale 'Bargaining, Duress, & Economic Liberty' (1943) 43 Columbia LR 603.

147 See note 132 above.

148 See, for example, J Dawson 'Economic Duress & the Fair Exchange In French & German Law' (1937) 11 Tulane LR 345, 345:
The system of 'free' contract described by nineteenth century theory is now coming to be recognized as a world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond with reality. As 'welcome fiction is slowly displaced by sober fact, the regime of 'freedom' can be visualized as merely another system, more elaborate and more highly organized, for the exercise of economic pressure.

149 See M Cohen 'Property & Sovereignty' (1927) 13 Cornell LQ 8, 12:
[T]he law of property helps me ... to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.

150 See Mensch (note 135 above) 764 (footnote omitted):
Coercion is inherent in each party's legally protected threat to withhold what is owned. The right to withhold creates the right to force submission to one's own terms. Since ownership is a function of legal entitlement, every bargain (and, taken collectively, the 'natural' market price) is a function of the legal order – including legal decisions about whether bargained-for advantages should be protected as rights. It is therefore wrong to dissociate private bargaining from legal decision making: The results of the former are a function of the latter.
income reflects the relative balance of the legal powers of coercion granted by law to the various members of the community.\textsuperscript{151}

To achieve greater equality and more widely dispersed and abundant opportunities for self-realisation, a society must carry out an equality-seeking renovation of its legal infrastructure.\textsuperscript{152} In South Africa today, the background rules of property, contract, delict, domestic relations, and other fields have incomparably more impact on the distribution of the goods, services, and well-being than the socio-economic rights provisions of the Bill of Rights. Future common law decisions will either ratify the prevailing social distribution of well-being or alter it, and in this way, the approach taken to common law development will either stifle or promote the Constitution's transformative aspirations.

\textbf{(h) Rules of law dispose cultural and ideological stakes}

Legal practices and discourses create and privilege meanings that contribute to the store of culturally-available symbols and artefacts that comprise the medium in which people interpret their experiences. To the extent they are salient and diffused in society, legal discourses and practices orient consciousness and construct identities. For example, legal practices that treat women in certain ways and legal discourses that explain and justify such treatment induce people to believe that such treatment is appropriate to the identity of 'being a woman'.\textsuperscript{153}

Historians have identified instances in which the cultural and psychological impact of legal discourses spread to grass-roots level. In times of social conflict or change, legal discourses can be repositories of emancipatory aspirations and values. The more familiar cultural effect of law is to legitimate the status quo, that is, to induce people to believe that existing social arrangements are fair or, at any rate, the best we can do. Elite legal discourses 'naturalise' background rules that sustain the social status quo. In so doing, they function as legitimating ideology.

\textsuperscript{151} See R Hale 'Coercion & Distribution In a Supposedly Non-Coercive State' (1923) 38 Pol Sci Q 470, 478:

The distribution of income ... depends on the relative power of coercion which the different members of the community can exert against one another. Income is the price paid for not using one's coercive weapons.

\textsuperscript{152} Madala J articulated this fundamental point in his dissenting judgment in \textit{Du Plessis} (note 11 above) para 163:

The extent of the oppressive measures in South Africa was not confined to government/individual relations but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics of a previously racist society.

\textsuperscript{153} This strand of argument concerning the 'legal constitution of the subject' did not figure prominently in the work of the Legal Realists. It was received into the critical realist approach in recent decades, reflecting the influence of modernist social theory.
(i) Many legal rules reside in the background

Many legal rules that play a role in structuring social and economic life are pushed very far into the background of legal and popular consciousness — so far that such rules are virtually invisible and not recognised as legal rules at all. Even lawyers tend to forget that each and every common law rule is a humanly-crafted artefact. An example is the default rule of property law by virtue of which the employer owns the commodities produced through the joint activity of management and labour. There is nothing natural or eternal about this principle of social organisation; it was centuries in the making. A similarly invisible rule is the default principle of family law that parents have custody of their children and determine the children’s place of residence. It takes mental effort to recall that this is, in fact, a legal rule. This rule makes obvious sense under most circumstances, yet it may produce negative consequences in some situations. For example, some children might suffer unnecessary abuse because this elementary rule of family law discourages relatives, friends, and neighbours from acting appropriately to rescue children from domestic violence.

(j) Transformative possibilities flow from the distributive and culturally constitutive power of law

Because they are historically contingent human products, not eternal truths carved in stone, rules of law can be brought out of the background and into the foreground, where their distributational and ideological consequences can be spotlighted. As appropriate, the rules can be revised so as to aim for more egalitarian and solidaristic outcomes. The rules can be renovated to reflect the ethos of ubuntu. Casting a critical light on background rules also unfreezes and destabilises their coded ideological content, a process that opens intellectual and cultural space for projects of re-visioning and transformation. Of course, the rules in place can be assessed from any normative vantage point, but here we are concerned with the Constitution’s foundational commitment in s 7(1) to promote ‘the democratic values of human dignity, equality and freedom’.

V Long Walk to Transformative Common Law Development

South African courts’ 15-year work-product in the field of common law development evidences a confusing array of approaches, among which we identify two polar tendencies — a ‘traditional approach’ committed to common law fundamentalism;\(^\text{154}\) and a ‘transformative approach’ that has generated some of the finest judgments of the South African courts under the new dispensation. Our use of the word ‘approach’ is not meant to suggest a coherent or theorised methodology so much as a set of inchoate attitudes, often implicit. The most

\(^{154}\) Moseneko DCJ used the phrase ‘stoutly minimalist’ to characterise the Constitutional Court’s early reluctance to infuse constitutional values into the common law. See Moseneko (note 4 above) 7.
common approach today is ‘ambivalent’ or ‘polyglot’, alternately speaking the discordant languages of transformation and tradition. Ambivalence about common law development marks even the most far-sighted judgments.

The competing tendencies have developed in parallel rather than chronological order. True, the traditional approach dominated in the early years, whereas most of the transformative judgments have appeared more recently. But some early cases showed flashes of insight pointing toward a transformative approach, and conversely, the traditional approach is still very much alive and well today. Strictly for expository convenience, we divide our discussion of development-clause jurisprudence into three parts covering, respectively, judgments prior to the Constitutional Court’s decision in Carmichele, the turning point in the Constitutional Court’s approach to common law development represented by Carmichele itself, and post-Carmichele judgments.

(a) The traditional approach: constraints of the legal culture

That courts were initially reluctant or unable to let go of common law moorings is hardly surprising. What bears examination is the tenacity and cultural weight of conventional assumptions about legal reasoning and process. Exaggerated devotion to the common law tradition still greatly influences South African jurists of all political persuasions.

The dominant understanding of the development clauses in the early years combined elements of ordinary professional caution, discomfort with the transformative project, and lack of recognition that the interim and final Constitutions placed the common law in permanent, on-going dialogue with human rights principles. There were notable exceptions. Some apex jurists read the Constitution to mandate that the common law be ‘revised and revised’.

A few lower courts got the message. Significant progress was made in bringing the law of defamation into greater congruence with the

155 Carmichele-CC (note 45 above).
156 See, for example, Du Plessis (note 11 above) para 86 (Mahomed DP). See also Shabalala v Attorney General of Transvaal 1996 (1) SA 725; 1995 (12) BCLR 1593 (CC), paras 26 & 28 (Mahomed DP for a unanimous court reiterating his view in Makwanyane that the IC represents a ‘radical and decisive break’ from that which is unacceptable in the past). Note, however, that in the same judgment, Mahomed DP could perceive no constitutional issue in the question ‘[w]hether a Court interpreting the Constitution is bound by the principles of stare decisis to follow the decision of a superior Court; or whether such a Court may hold that a decision of such superior Court (other than the Constitutional Court) is per incuriam because it incorrectly interprets the Constitution’. See ibid paras 4 & 7.
157 See, for example, Froneman J in Gardener v Whittaker 1995 (2) SA 672 (E) para 6; 1994 (5) BCLR 19 (E) (‘all common law rules now subject to constitutional audit, decided under interim Constitution s 35(3)); Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W); 1996 (6) BCLR 836 (W), 850D-E (Cameron J) (‘[t]he directive in [interim Constitution] section 35(3) in my view therefore requires the fundamental reconsideration of any common law rule that trenches on a fundamental rights guarantee’); Rivett-Carnac v Wiggins 1997 (3) SA 80 (C); 1997 (4) BCLR 562 (C) (Davis AJ), 569D-F (the Constitution ‘mandates each court to examine the common law rules afresh and if necessary to ensure that the content thereof accords with the principles thereof … Whatever the outcome of the enquiry, a court is required to undertake this form of constitutional audit in terms of the obligation imposed on all courts by section 35(3) of the [interim] Constitution’).
newly entrenched commitment to freedom of expression. But for the most part, courts found little in the new Constitutions that caused them to rethink conventional assumptions about the common law.

Some judgments were simply in denial. A memorable example is Mhembu v Letsela. Pursuant to the Black Administration Act and subordinate regulations, Mhembu applied the customary law principle of male primogeniture to bar an African girl from succeeding to her deceased father’s estate. A unanimous SCA accomplished the remarkable feat of perceiving no tension between this result and the new constitutional ethos. The court found it ‘difficult to see’ how the regulations could possibly be characterised as unreasonable or discriminatory (and therefore ultra vires at common law). The court also declined an invitation to develop customary law in terms of interim Constitution s 35(3). Because the case might involve retroactive application of the interim Constitution, the Mhembu court was bound to enquire whether gross injustice could be avoided only by retroactive application. The court could perceive nothing in the status quo suggesting injustice, gross or otherwise. No such myopia afflicted the Constitutional Court several years later when it described the Black Administration Act as ‘a cornerstone of racial oppression, division and conflict in South Africa’ and declared unconstitutional the legal provisions applied in Mhembu, including male primogeniture.

If the theme of Mhembu is denial, Ellis v Viljoen boldly proclaimed that the development clauses meant nothing. The Constitution provides in s 26(3) that ‘no one may be evicted from their home ... without an order of court made after considering all the relevant circumstances’. A High Court had had the temerity to suggest that this constitutional guarantee might affect pleading and proof in common law eviction cases. The Ellis court disagreed, concluding that the constitutional prohibition of unjust and arbitrary evictions added nothing to the common law:

[The right of ownership as recognised before the Constitution has not been affected by the Constitution .... No necessity arises to restrict rights of an owner against an illegal occupier

158 See, for example, National Media Ltd v Bogoshi 1998 (4) SA 1196 (SCA); 1999 (1) BCLR 1 (SCA); Khumalo (note 74 above).
159 The poster-child for the traditional approach is Potgieter v Killian 1996 (2) SA 276 (N); 1995 (11) BCLR 1498 (N). See, for example, at 1514C-D (the interim Constitution intended no more change in the common law than necessary).
160 2000 (3) SA 867 (SCA).
161 Originally the Native Administration Act 38 of 1927.
162 Mhembu (note 160 above) para 24.
163 See Du Plessis (note 11 above) para 20.
164 Bhe (note 49 above) para 61.
165 See generally ibid. See also Mosenaka v Master, High Court, 2001 (2) SA 18; 2001 (2) BCLR 103 (CC) para 20 (quoting Ngcobo J in Ex Parte Western Cape Provincial Government; In Re: DVB Behusings (Pty) Ltd v North West Provincial Government 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) para 1). (Black Administration Act is ‘an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy’).
166 2001 (4) SA 795 (C); 2001 (5) BCLR 487 (C) (full bench).
167 Ross v South Peninsula Municipality 2000 (1) SA 589 (C).
to ‘promote the values that underlie’ the Constitution or to ‘promote the spirit, purport and object of the Bill of Rights’ .... If the Legislature in the Constitution or elsewhere intended a change in law or in equity, it should have made itself clear.168

In the traditional mindset, common law analysis is an autonomous, self-contained paradigm, with its own logic and syntax, and its own, immanent rationality. Some commentators warned against the danger that constitutional discourse might ‘invade’169 or ‘colonise’170 the common law. The view was that, although it is regrettable that high-profile constitutional decisions sometimes emit ‘political’ overtones that strain the legitimacy of judicial power, courts must seek to preserve their authority by nurturing the mythos that common law adjudication, at least, is an apolitical, professionalised discipline.

Apolitical, but not value-neutral. The traditional approach sees the common law as a repository of universal ideals of justice and human dignity lately celebrated under the banner of human rights. Immanent within the common law is a teleological capacity to wring out its errors, flaws, and iniquities. Yes, to be sure, legislative and executive excess during apartheid stained the common law, but the core values survived the dark years unscathed. These core values intrinsic to the common law are fully consistent with the Constitution, and indeed, common law thinking ought to inform constitutional interpretation.171 Suitably cleansed, and perhaps seasoned with a dash of new-fangled human rights thinking, the common law can, post-1994, continue its telic march toward justice.

The unstated but highly implausible premise is that apartheid marked the common law with skin-deep blemishes but did not deeply contaminate it.172 A few aberrations aside, pre-apartheid common law was untouched by racism, sexism, or class hierarchy. Few jurists thought to enquire whether pre-apartheid South African common law possessed traits or vulnerabilities that permitted apartheid to flourish; few asked whether the common law inherited by South Africa from the legal regimes of the colonial powers might be inconsistent with the type of society the Constitution aspires to bring into being. Few acknowledged the myriad of ways that South African common law, with its libertarian streak, privileged the value of private ordering and empowered the already powerful (whites, the wealthy, men) to dominate the marginal and excluded. Rather, the view was that democratic transition had freed judges to return to their true calling, namely, the neutral elaboration of principles of justice immanent in the common law. In due course, they would excise

169 See, for example, PJ Visser ‘A Successful Constitutional Invasion of Private Law’ 1995 (58) THRHR 745.
170 See, for example, D van der Merwe ‘Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity’ 2000 (1) TSAR 12.
171 See, for example, Potgieter (note 159 above) 1533A (stating that entrenchment of a constitutional right of free expression in interim Constitution s 15 added little to common law); and 1527f–1528A (stating that ambiguous terms in the Constitution should be interpreted in congruence with their common law meanings).
172 See Potgieter (note 159 above) 1520–I (apartheid common law is mostly uncontaminated).
the apartheid blemishes. According to a familiar metaphor, apartheid was an encapsulated, non-metastasised tumour surgically removed in 1994 from the otherwise healthy and resilient body of the common law.

The Constitutional Court's first judgment, Zuma v S,173 is emblematic of common law reverence. A provision of the Criminal Procedure Act174 placed an onus on the accused to establish that a confession had been extracted involuntarily. Kentridge AJ held for a unanimous court that this reverse onus unjustifiably breached the rights of an accused to a presumption of innocence and to remain silent, as guaranteed by interim Constitution s 25. Detailed, comparative study led him to conclude that the presumption of innocence and right of silence derive from centuries-old principles of English law,175 which 'lie at the heart of important rights embodied in section 25.'176 These rights had long been part of South African law until eroded by apartheid:

The concepts embodied in [interim Constitution s 25] are by no means an entirely new departure in South African criminal procedure. The presumption of innocence, the right of silence, and the proscription of compelled confessions have for 150 years or more been recognised as basic principles of our law, although all of them have to a greater or lesser degree been eroded by statute and in some cases by judicial decision.177

In substance, Kentridge AJ held that the common law, stripped of apartheid incrustations, would eventually have produced the same result as that mandated by the Constitution. In his view, the common law, suitably cleansed, embodies universal values, many of which are now conveniently catalogued in the Constitution. The Constitution's primary mission was to purge South African law of racism and other injustices introduced during the apartheid era. Once that process is completed, the common law core is eminently suitable to the needs of a democratic South Africa. The judgment reads as though constitutional entrenchment of fair-trial rights would have been unnecessary had apartheid not interrupted the common law's natural evolution.

These themes are echoed in the judgment of Ackermann J in Du Plessis.178 Finding that the interim Constitution did not reach directly into relationships between private actors, Justice Ackermann was at pains to insist that this conclusion did not mean that the new legal regime was helpless to prevent a resurgent, privatised apartheid. The common law could be developed, he argued, to include the foundational values of the constitution: for "[t]he common law of this country has, in the past, proved to be flexible and adaptable, and I am confident that it can also meet this new constitutional mandate."179

Judgments of the period opined that the drafters did not contemplate a wholesale revision of the common law and remarked with approval that

173 1995 (2) SA 642 (CC); 1995 (4) BCLR 401.
175 Zuma (note 173 above) para 25.
176 Ibid para 29. See ibid para 33 ("[t]he common law rule on the burden of proof is inherent in the rights specifically mentioned in' interim Constitution s 25).
177 Ibid para 12.
178 Du Plessis (note 11 above).
179 Ibid para 110.
the interim Constitution intended no more change in the common law than necessary.\textsuperscript{180} No evidence in the text or drafting history was provided for this interpretive maxim; it was taken as self-evident. For example, Kentridge AJ wrote that ‘the lawgiver did not say that courts should invalidate rules of common law inconsistent with [interim Constitution] Chapter 3 or declare them unconstitutional. The ... courts are to do no more than have regard to the spirit, purport and objects of the Chapter’\textsuperscript{181} He approvingly cited a Canadian case for the view that indirect horizontal application such as required by interim Constitution s 35(3) is simply a reminder to courts of their ‘inherent jurisdiction ... to modify or extend the common law in order to comply with prevailing social conditions and values’.\textsuperscript{182} Likewise, the High Court in \textit{Amod v Multilateral Motor Vehicle Accidents Fund}\textsuperscript{183} read s 39(2) to be restricted in ambit: ‘[i]t is not intended that [courts] have a general power of development of the common law to “promote the spirit, purport and objects of the Bill of Rights”, independently of giving effect, when applying a provision of the Bill of Rights to a natural or juristic person, to “a right in the Bill ... to the extent that legislation does not give effect to that right”’.\textsuperscript{184} The Constitutional Court understood the High Court to have held that the development clauses allow courts ‘merely to amplify existing legal principles ... where the common law was silent in giving effect to a particular right and where legislation did not make good this deficiency’, but that they do \textit{not} authorise courts to develop the common law by voiding an established doctrine that might be out of tune with the Bill of Rights.\textsuperscript{185} The latter power, the High Court held, was reserved to the legislature; the court could ‘find no provision in the new Constitution which indicates that the legislature intends that a court is to have legislative powers’.\textsuperscript{186} Davis AJ, as he then was, felt obliged as an acting judge to follow a ‘cautious’ approach in applying interim Constitution s 35(3): ‘the Constitution could never have envisaged such a fundamental rejection of precedent so as to empower an individual judge to overturn decades of precedent developed by the Appellate Division’.\textsuperscript{187}

When courts felt that it was necessary to adjust the common law in light of the new dispensation, this was typically accomplished by invoking ‘general clauses’ such as boni mores rather than by explicitly developing the common law in terms of interim Constitution s 35(3) or s 39(2). A noteworthy example

\textsuperscript{180} See, for example, \textit{Potgieter} (note 159 above) 1514C–D.

\textsuperscript{181} \textit{Du Plessis} (note 11 above) para 60.

\textsuperscript{182} Ibid para 61 (citing \textit{Hill v Church of Scientology of Toronto} (1995) 126 DLR (4th) 129 (Supreme Court of Canada)).

\textsuperscript{183} 1997 (12) BCLR 1716 (D) (\textit{Amod-HC}).

\textsuperscript{184} Ibid 1722H–J. Thus, the High Court read s 39(2) as having application only in connection with development of the common law as envisaged in ss 8(2) & 8(3).

\textsuperscript{185} \textit{Amod v Multilateral Motor Vehicle Accidents Fund} 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) para 9 (\textit{Amod-CC}).

\textsuperscript{186} \textit{Amod-HC} (note 183 above) 1723H.

\textsuperscript{187} \textit{Rivett-Carnac v Wiggins} (note 157 above) 569D–E. But note that immediately following this comment, Davis AJ affirmed that the interim Constitution mandated a constitutional audit of all common law rules (see the language quoted in note 157 above).
is Mahomed CJ’s judgment for the SCA on remand from the Constitutional Court in *Amod.* The question was whether the Multilateral Motor Vehicle Accidents Fund was liable for loss of support if the surviving spouse had married in accordance with Islamic law (or customary law), and the marriage was not recognised as a valid union at common law. (In terms of the relevant statute, the Fund was liable only if support would have been required under the common law in the absence of the statute.) Mahomed CJ ruled that Amod’s decedent owed a duty to support flowing from a solemn marriage entered in accordance with a recognised faith, and that, consistent with the boni mores of society, this duty deserves legal recognition including absorption into the ambit of the Fund’s statutory liabilities. Mahomed CJ declined the claimant’s invitation to develop the common law and expressly rejected reliance upon interim Constitution s 35(3) or s 39(2). The Chief Justice insisted his result merely reflected a ‘proper application of common law principles’ in light of the new ethos of tolerance, pluralism, and religious freedom which, he said, was consolidated in the community even before adoption of the interim Constitution. In short, the court held that the common law had already evolved to the point of incorporating the new ethos prior to the transition to democracy. This elegant fiction promoted the myth that the common law works itself pure with little or no assistance from the Constitution.

The same sleight of judicial hand appeared in *National Media Ltd v Bogoshi*, an early assault on an existing common law rule. Defamation law raised substantial obstacles to freedom of expression during the apartheid era. An important example was *Pakendorf*, which introduced the principle of strict liability into defamation law as applied to the media — a newspaper found to have published defamatory material could escape liability only by proving that its impugned statements were true. In *Bogoshi*, Hefer JA held: ‘[i]f we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*’. Judge Hefer concluded that the appropriate test is that a media publication containing false defamatory allegations should not be deemed an unlawful act if it is found to have been reasonable, in the circumstances of the case, to publish the particular facts at that time and in the manner of the impugned publication.

Hefer JA then stated: ‘in the present case I have not sought to revise the common law conformably with the values of the interim constitution. I have done no more than to hold that this Court stated a common law principle wrongly in *Pakendorf*’. There followed a perfunctory analysis of s 35(3) from which he concluded that, to arrive at the correct result, the common

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188 *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (*Amod-SCA*).
190 Bogoshi (note 158 above).
191 *Pakendorf v De Flamingh* 1982 (3) SA 146 (A).
192 Bogoshi (note 158 above) 1210H.
193 Ibid 1216E.
law need not be altered by way of constitutional ‘development’. Rather, all
that was necessary in the instance was the time-honoured method of ordinary
common law reasoning. The implication seems to be that the Pakendorf
would eventually be overruled by the normal progress of common law method, with
or without a new Constitution. This is implausible given the relatively static
nature of South African common law and the fact that dramatic changes of
this kind were few and far between prior to 1994.

The irony is that Hefer JA’s judgment replicates the structure of analysis
demanded by s 35(3). It begins with a statement of the existing rules of com-
mon law and then examines whether the prevailing legal regime is compatible
with the relevant constitutional values, here, freedom of speech, privacy, and
dignity. Having found to the contrary, he then formulated a new rule congru-
ent with the constitutional values previously articulated. Put simply, the SCA
found that an existing principle of common law subverts the constitutional
principle of free expression, revised the rule to eliminate the tension with
the Bill of Rights, and then claimed that this was an ordinary evolution of
the common law not requiring the mediation of constitutional principles.
The judgment almost reads as though the 1994 and 1996 Constitutions, once
having severed the binds of apartheid, thereafter became tangential to future
common law evolution, merely offering occasional, helpful interpretive
pointers.

Of course there is nothing wrong with informing common law doctrine
with constitutional values. We would prefer to see much more of this. And
courts might have good reasons to prefer infusing constitutional values into
common law rules rather than making constitutional doctrine or setting down
constitutional parameters as to the form the common law must take. In Amod,
for example, the fantasy that the ordinary development of South African com-
mon law prefigured the constitutional transition permitted the court to avoid

194 In this connection, we are puzzled by Cameron JA’s judgment in Tswelopele Non-Profit Organisation
v City of Tshwane Metropolitan Municipality 2007 (6) SA 511. Government authorities evicted
about 100 people from rudimentary dwellings they had constructed on vacant land and destroyed
their building materials. When the case arrived at the SCA, it was indisputable that ‘[t]he eviction
violated the law and the Constitution’. Ibid para 2. The key question was what remedy the occupiers
should receive. As Cameron JA eloquently noted: ‘though the Constitution speaks through its norms
and principles, it acts through the relief granted under it’. Ibid para 17. Counsel had suggested
application of the mandament van spolie suitably developed. The court observed that ‘[s]ome pre-
constitutional authority supported using the mandament to make the spoliator reconstruct what he
had destroyed’. Ibid para 22. However the weight of academic commentary ‘disfavoured the way
the mandament was extended’ in these judgments. Ibid para 23. To avoid deploying the mandament
in a doctrinally anomalous and perhaps historically inaccurate way, the court thought it ‘best to
leave a common-law institution untouched, and to craft a new constitutional remedy entirely’. Ibid
para 20. Cameron JA’s judgment is imaginative and humane and without question arrived at a just
outcome. What is difficult to understand, particularly in view of the Constitutional Court’s recent
emphasis on subsidiarity, is the choice to craft a special, somewhat vague constitutional remedy
rather than enlisting the common law in service to the constitutional project (even at the risk of
introducing some doctrinal untidiness). This reluctance seems particularly surprising in the consti-
tutional era in that at least some judges were able to rework the common law to achieve progressive
results during apartheid. See ibid (citing, for example, Fredericks v Stellenbosch Divisional Council
1977 (3) SA 113 (C) (Diemont J)).
ruling on whether the interim Constitution applied retroactively to a claim arising in 1993. 195 Framing high-stakes issues as though they were ordinary common law problems might have the salutary effect of easing anxious and reluctant jurists into the constitutional era. 196 What we object to is the courts’ reluctance to acknowledge what they are doing and their pretending that the values of the Bill of Rights values were latent in South African common law all along.

That said, it is quite a different matter for a court to convey that an outcome merely reflects an unfolding of the common law’s immanent logic, as though the Constitution were an extraneous factor. The South African Constitution is not a tangential datum providing some evidence regarding the mysterious evolution of community values. The Constitution commands that the common law promote the values of the Bill of Rights, whether or not the internal logic of the common law points in that direction. The centrality of common law development to the Constitution’s transformative project gets lost when we assume that the Constitution merely supplements the common law, more so when courts are reluctant to acknowledge its influence at all. Resting judgments on legal fictions obscures the underlying ethical and social choices that they reflect and enact. What Davis J said about contractual principles applies to all common law doctrine: ‘the task is not to disguise equity or principle but to develop contractual principles in the image of the Constitution’. 197

Veneration of the common law generally encompasses its analytic techniques (the vaunted ‘common law method’) as well as its supposedly in-dwelling substantive values. As a result, a large majority of development-clause judgments, both before and after Carmichele, employ conventional and often formulaic styles of legal reasoning. Although numerous decisions affirm that values derived from the Constitution must be infused into the common law, there is little recognition that this project might require the invention and refinement of new methods of legal reasoning and training. The dubious premise is that the traditional methods of legal reasoning are value-neutral and therefore, perhaps unlike the substantive law, do not require significant revision consonant with the aspirations and challenges of South Africa’s historic transition. To the contrary, it seems doubtful that the analytical tools that many judges acquired as law students during the apartheid era are adequate to accomplish the Constitution’s transformative project.

Common law development cases regularly display two forms of traditionalist legal analytics – an exaggerated and uncritical obeisance to stare decisis, and a tendency toward formalistic abuse of deduction. In the early

195 There was an indication in Amod-SCA that the court’s choice not to rely upon interim Constitution s 35(3) and/or s 39(2) may have been due to a desire to avoid addressing the question whether either section could be applied to a dispute that arose before the interim Constitution took effect. See Amod-SCA (note 158 above) para 29.

196 The penchant for basing major doctrinal changes on general common law clauses and down playing the Constitution also reflected a jurisdictional turf-war between the Constitutional Court and the SCA. See Michelman ‘Legality’ (note 19 above) 11–16 to 11–23.

197 Mort NO v Henry Shields-Chiat 2001 (1) SA 464 (C) 475C–D.
post-transition years, courts were reluctant to enquire whether something of significance to the common law occurred in 1994 or 1996.\textsuperscript{198} For example, in considering whether the common law of defamation needed development in light of the new constitutional values of freedom of expression, Du Plessis J wrote: '[t]here is nothing in [interim Constitution] section 35(3) to suggest that this Court is not, as it always has been, bound by precedent.'\textsuperscript{199} The court declined to reconsider the strict liability principle for media cases announced in the apartheid-era Pakendorf case,\textsuperscript{200} stating that it could not depart from Pakendorf unless it was first determined that each and every precedent relied upon in that case was no longer binding in light of the Constitution:

To introduce a new standard of culpability in the context of free and fair political activity will not only entail a rejection of the strict liability principle, but will also be contrary to our entire common law of defamation in terms of which animus iniuriandi is required as a standard of culpability. That this court cannot do.\textsuperscript{200}

Even now, most South African jurists refer to the rule of stare decisis as though it provides a determinate decision procedure, rather than a bundle of conflicting rhetorical strategies.\textsuperscript{202}

Similarly, judgments in the traditional vein are prone to abstract and formalistic reasoning divorced from social context, as illustrated by the High Court's judgment in Jaftha,\textsuperscript{203} delivered nearly two years after Carmichele. Jaftha-HC tested whether the forced sale of a poor, judgment-debtor's home pursuant to a warrant of execution,\textsuperscript{204} in order to satisfy a trivial debt, can be squared with the constitutional right of access to adequate housing guaranteed by s 26(1). The claimants argued that s 26(1) should be interpreted to provide some protection from execution on a person's sole residence. (In US terminology, the claimants were seeking a 'homestead' exception or exemption.) The High Court found no constitutional problem in the challenged aspects of the

\textsuperscript{198} Van Eeden v Minister of Safety & Security 2001 (4) SA 646 (T) (Swart J) 658D ('[t]he law of delict is to be found in the law of delict').
\textsuperscript{199} McNally v M & G Media (Pty) Ltd 1997 (4) SA 267 (W); 1997 (6) BCLR 818 (W), 824B–C.
\textsuperscript{200} Pakendorf (note 191 above).
\textsuperscript{201} McNally (note 199 above) 825C–D.
\textsuperscript{202} See text accompanying note 129 above. In Ex Parte Minister of Safety & Security (In Re: S v Walters) 2002 (7) BCLR 663 (CC), Kriegler J for a unanimous Court expressed anxiety about according binding authority to preconstitutional precedents. See para 60. That point aside, the Constitutional Court slapped the wrist of a High Court for imagining that it might vary from an SCA decision on a constitutional question, and it sang the praises of stare decisis in uncritical terms worthy of a first-year student. See paras 55–60. See generally S Woolman & D Brand 'Is There a Constitution in This Classroom? Constitutional Jurisdiction after Walters and Afrax' (2003) 18 SA Public Law 38; Woolman (note 61 above) 31–95 to 31–96 ('the Constitutional Court and the Supreme Court of Appeal have deployed the doctrine of stare decisis in manner that dramatically curtails the ability of the High Courts to use the Bill of Rights, generally, and FC s 39(2), in particular, to develop the common law').
\textsuperscript{203} Jaftha v Schoeman 2003 (10) BCLR 1149 (C) (Jaftha-HC).
\textsuperscript{204} In terms of the Magistrates' Courts Act 32 of 1944.
sale-in-execution process. On appeal, the Constitutional Court unanimously disagreed.\textsuperscript{205}

Van Reenen J’s judgment for the High Court reads as though it were actually written by two different judges engaged in a cordial but long-running jurisprudential debate. It began in a modernist voice, carefully articulating the interpretive principles to be employed in giving legal meaning to fundamental rights — namely, that the constitutional text must be analysed in social and historical context and in light of the drafters’ purposes in enshrining the right; that fulfilment of s 26(1) goals must ‘take account of different economic levels in our society’; and that ‘[t]he content and ambit of [the s 26(1)] right may vary from person to person, place to place and time to time because of the different social strata and economic levels prevailing in our society.’\textsuperscript{206} He noted that s 26 imposes both negative and positive duties on the state, and he took as settled that at least ss 3 of s 26 applies horizontally.\textsuperscript{207} Finally, he revealed his intention to examine the actual consequences of sale-in-execution of one’s home, not merely its formal aspects.\textsuperscript{208} An ardent realist could not ask for more.

Suddenly all was forgotten when it came to applying these interpretive guidelines. The remainder of the judgment canvassed no aspect of the social context, class disparity, or real-life consequences. Instead, the court sought to persuade that the sale-in-execution of the judgment-debtor’s home would not be the cause of the judgment-debtor’s subsequent homelessness. Van Reenen J paused to note that a mere sale-in-execution does not disturb formal ownership by the debtor; transfer of ownership requires additional paperwork. But even on the assumption that poor judgment-debtors who suffer sales-in-execution of their homes invariably lose ownership, and therefore rights of use or occupation, nevertheless their resulting homelessness is not attributable to the forced sale. Once she loses ownership, the judgment-debtor has a choice either ‘to vacate the property voluntarily or simply continue to occupy it without having entered into any contractual or other arrangements with the purchaser’. In the former case, ‘loss of access to housing … is the result of a volitional act on the part of the judgment debtor and not the execution process’. In the latter, the debtor will be holding over, ‘in which case the new owner [or a sheriff contractually bound to provide vacua possessio] will be obliged to institute legal proceedings for the eviction’, which proceedings are subject to the requirements of Prevention of Illegal Eviction Act (herein ‘the PIE Act’).\textsuperscript{209} Accordingly, Van Reenen J concluded:

\textsuperscript{205} \textit{Jafta-CC} (note 48 above). Note that \textit{Jafta, Metrorail} (note 47 above), and several other cases we discuss here and later in this article turned on statutory law, not common law, and therefore are not development-clause cases as such. Section 39(2) comes into play in these cases only with respect to its language about interpreting legislation. However, these cases are relevant to our argument because, as will be seen, the Constitutional Court’s (and sometimes the SCA’s) treatment of them involved extensive revision of basic common law building blocks, such as the concept of private property.

\textsuperscript{206} \textit{Jafta-HC} (note 203 above) paras 35 & 39.

\textsuperscript{207} Ibid para 40.

\textsuperscript{208} Ibid para 42.

If the judgment debtor is evicted from immovable property that constitutes his or her home and in the process is deprived of the right of access to that particular residential unit, such eviction will not have been brought about by the execution process but by separate legal proceedings instituted by the new owner based on a causa totally independent of the proceedings pursuant to which the execution had taken place.  

This argument is not much different from saying that an innocent traveller’s loss of his cash is not due to the highwayman’s pistol pointed at his head accompanied by the statement ‘your money or your life’, but rather is caused by the travellers’ volitional act of handing over his purse. Contemporary lawyers are not wont to think the traveller’s volition breaks the causal chain of the highwayman’s duress. In any event, neither the debtor’s ‘free choice’ to vacate, nor subsequent eviction proceedings, had any obvious relevance to the problem. The social context in which the case is embedded, and which we were told should be central to a proper analysis, is poverty – if the debtor could afford to pay the rent, presumably she could have afforded to satisfy the small debt. In the lived reality of poor South African debtors, either voluntary departure or departure at the behest of the sheriff is virtually inevitable. There may well be valid arguments of social policy, judicial administration, and/or separation-of-powers why legislative adjustment, for example, by amending the PIE Act, is a better way to address small-debtor homelessness than by implying a homestead exemption from the Constitution. But the court does not suggest such arguments or offer reality-based reasons to draw a conclusion of constitutional significance from metaphysical observations about free will and causal chains.

Formalist reasoning also appears prominently in the respective judgments of Howie and Cloete JJA and Streicher JA in the SCA decision in Metrorail. Also delivered nearly two years after Carmichele. The central question was whether a semi-public railroad agency owes a duty to take reasonable measures to protect passengers from criminal elements plaguing commuter trains. Both judgments accept a conventional, bright-line public-private distinction and find that railroad companies clearly fall on the private side of the line notwithstanding that they are publicly chartered in order to provide public services.

The claimants advanced several theories to raise a protective duty – that such a duty arises from the railroad’s enabling statutes, construed in the spirit of the Bill of Rights; that it can be found in the law of delict, suitably informed by the new constitutional ethos; that it is imposed by the Constitution itself; and/or that this duty is implied in the contract of carriage. The plurality was

210 Jaafra-HC (note 203 above) para 46.
211 As OW Holmes famously observed, consent and volition are perfectly consistent with duress. See Union Pacific Railroad Co v Public Service Commission of Missouri 248 US 67, 70 (1918);
It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.
212 Transnet Ltd v Metrorail v Rail Commuters Action Group 2003 (6) SA 349 (SCA); 2003 (12) BCLR 1363 (SCA) (Metrorail-SCA). Farlam & Navsa JJA concurred, but on the distinct ground that the plaintiffs’ evidence was insufficient to sustain their claims.
not impressed by any of these arguments and criticised the High Court for permitting the action to go forward.\textsuperscript{213}

Howie and Cloete JJA read the enabling statutes to concern the public’s transport needs, which, they said, do not include passengers’ personal security. With dizzying circularity, this was said to follow self-evidently from the fact that Parliament enacted the statutes (during apartheid) to promote transportation, not to provide personal security. The judges made the briefest pause to consider whether the constitutional rights to life, dignity, freedom, security, and movement might be relevant, but this inquiry ended quickly with the non-sequitur that these constitutional values have no bearing on a railroad case because s 205(3) assigns the job of protecting life, security, freedom, and so on, to the police.\textsuperscript{214} That the police have this role does not entail the conclusion that a railroad agency does not also have security duties within its sphere of operation. Common law development in terms of s 39(2) was cited only to justify an extremely grudging reading of the statutes – narrow statutory construction was favoured on the deliciously ironic theory that someday common law development will magically take care of the social ills connected with commuter-rail violence.\textsuperscript{215} That black commuters have no choice but to ride these trains because of apartheid ‘spatial planning’ received no attention.

Streicher JA also gauged the extent of the railroad agencies’ duties by reference to the allocation of responsibility for security in apartheid-era statutes.\textsuperscript{216} He absolved the transport agencies of any constitutional duties regarding personal security on the reasoning that railroads are not protection services and therefore their security-duties, if any, must be found in private contract. The very question to be decided was whether railroad companies have constitutional duties concerning personal security. One cannot answer that question by simply asserting that railroads have no such duties.

To summarise this part of the discussion, the dominant approach to the development clauses in the first years of the new dispensation limited them to an emergency role in exceptional cases. This sensibility is still influential today.\textsuperscript{217} Courts presumed that the common law and the Constitution were

\textsuperscript{213} The Constitutional Court in turn reversed, finding that the railroad agencies have positive obligations under their enabling statutes, bathed in the light of the Constitution, to take reasonable security measures. \textit{Metrorail-CC} (note 47 above) paras 84, 106, 111.

\textsuperscript{214} \textit{Metrorail-SCA} (note 212 above) paras 17–8.

\textsuperscript{215} Ibid para 19.

\textsuperscript{216} Ibid paras 16–8 (separate opinion of Streicher JA).

\textsuperscript{217} For a recent example, consider \textit{Grobler v Msimanga} [2008] 3 All SA 549 (W), in which the High Court relied on a supposed presumption that an act of Parliament ‘does not alter the common law more than necessary’ (para 136) in interpreting the landmark PIE Act (note 209 above). The court stated that ‘it could never have been the intention of the legislature to provide a discretion to a court to refuse an eviction order if a property owner is entitled to such an order, and therefore ... the intention of the legislature was never to vary the common law in this regard’ (para 180). It is difficult to imagine a statute as to which the court’s interpretive assumptions are less apt. \textit{Grobler} was called to our attention by Liebenberg (note 13 above) 473.
in harmony until the opposite was shown. One court recently held that the challenger bears the onus of establishing a patent inconsistency between the common law and the Bill of Rights. Pre-constitutional rules of common law not in direct conflict with a provision of the Constitution (or public policy) were deemed binding. Courts generally adjudicated on the basis of extant law unless a party raised a constitutional concern; they did not feel bound to raise such concerns on their own motion. Prior to Carmichele, development-clause judgments made almost no effort to sketch out in substantitive terms the social vision, assumptions, and values signified by the phrase ‘spirit, purport and objects of the Bill of Rights’. The question whether the development clauses call for crafting new analytics and legal reasoning techniques was not even asked.

(b) The promise and shortcomings of Carmichele

Francois Coetzee had already been charged with the rape of another woman when he viciously assaulted Alix Jean Carmichele, but he had been released on his own recognisance pending trial. The prosecuting authorities concurred in this disposition although they knew, but did not alert the magistrate, that Coetzee had a prior conviction for indecent assault and a history of violence and sexual misconduct, and that he had recently shown inappropriate interest in Carmichele. Carmichele sued the police and prosecution in delict on the grounds that they had wrongfully failed to protect her by allowing her assailant’s release. The High Court granted absolution from the instance in favour of the defendants, and the SCA agreed. Remarkably, seven years into the new dispensation, neither court detected any signal in the Constitution suggesting the need for a reassessment of the current state of the common law. Section 39(2) is not even cited in the SCA judgment; the only references to the Constitution are background points on the right of accused persons to be released on bail.

The Constitutional Court, speaking through a joint judgment of Ackermann and Goldstone JJ, used Carmichele’s appeal to render its first and still most robust statement on s 39(2). The Court moved far in the direction of, but stopped short of adopting the concept of a constitutional ‘audit’ of the common law mooted by Mahomed DP in Du Plessis. Carmichele was a major step in the direction of the unitary theory of the South African legal system, the previously referenced doctrine that ‘all law, including the common

218 See, for example, Khumalo (note 74 above) paras 41 & 45 (proceeding on the assumption that the challenger must establish the inconsistency).
219 Wagener v Pharmcare Ltd; Cuttings v Pharmcare Ltd 2003 (7) BCLR 710 (SCA) para 30 (challenger must show patent inadequacy of common law remedies).
222 Carmichele-CC (note 45 above). The Court analysed the case under s 39(2), although the events involved occurred when interim Constitution s 35(3) was in effect. See ibid paras 29 & 37.
223 Du Plessis (note 11 above) para 86.
law, derives its force from the Constitution and is subject to constitutional control.' The joint judgment links the development clauses to the principle of constitutional supremacy and establishes a parallel between development pursuant to s 39(2) and the s 7(2) obligation of the state to respect, promote, and fulfil the rights contained in the Bill of Rights.

The joint judgment attached specific meanings to the general mandate of s 39(2) to promote the spirit, purport and objects of the Bill of Rights. Thus:

- The courts must awake from their complacency concerning s 39(2). ‘[C]ourts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights’.226
- The duty of judges to develop the common law arises whether or not the parties in a particular case request the court to do so.227
- The responsibility of courts to develop the common law conformably to s 39(2) objectives is not optional or discretionary, it is an obligation.228

Although the Court did not address the point, it would seem to follow that common law judges must nurture a basic intellectual reflex to enquire whether constitutional concerns lurk within any case touched by private law, and they must hone their capacity to address that question. Also by implication, the teaching of common law subjects in South African law faculties must adjust substantially to provide future lawyers with the skills and capabilities s 39(2) demands.

The joint judgment said plainly that the power to develop the common law accorded by s 39(2), read with s 173, is not discretionary. ‘[W]here the common law as it stands is deficient in promoting the section 39(2) objectives,

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224 See text accompanying note 102 above.
225 Carmichele-CC (note 45 above) para 33. Whether courts are components of ‘the state’ within s 7(2) is unresolved. By virtue of s 239, courts and judicial officers are not ‘organs of state’; however the Constitution does not define the term ‘state’. In any event, s 39(2) requires the courts to promote the objects of the Bill of Rights, which includes s 7(2), and under s 8(1), all law that courts make, administer, and apply is controlled by the Bill of Rights.
226 Ibid para 36.
227 Ibid.
228 Ibid para 39. It is settled that regard to s 39(2) objectives is also mandatory when courts interpret legislation. See, for example, First National Bank of SA Limited v Commissioner for the South African Revenue Services 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) para 31 (‘[i]n the Carmichele case this Court held that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary but that the courts are under a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the section 39(2) objectives. There is a like obligation on the courts, when interpreting any legislation ... to promote those objectives’) (footnote omitted).
the courts are under a general obligation to develop it appropriately". But Ackermann and Goldstone JJ retreated in the very next sentence: 'We say a “general obligation” because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2)'. The word ‘independent’ seems out of place if all law, presumably including any application of the common law, is subject to constitutional control. That aside, it is difficult to see how the mandate of s 39(2) can be peremptory where that obligation is not extended to each case where a rule of common law is invoked. In many cases, the enquiry as to constitutionality will take but a few minutes in that the rule is manifestly compatible with the Constitution or, at least, the judge can perceive no deviation. Absent such examination, how are s 39(2)’s important purposes to be achieved? While it may not be common cause that s 39(2) was intended to launch a compulsory constitutional interrogation of every aspect of the common law, how, unless it enquires, is a court to determine whether the common law rule before it is or is not ‘deficient in promoting the section 39(2) objectives’? The authors of the joint judgment tell us that ‘it was implicit in the applicant’s case that the common law had to be developed beyond existing precedent’. Evidently the courts below missed that implication entirely. Perhaps such a deficiency in the common law would strike with greater force in future cases were judges to incorporate the s 39(2) enquiry into their normal work routine, or at least were they to fine-tune their s 39(2) radar.

At its most dramatic, Carmichele took flight into the realm of legal philosophy:

In South Africa, the IC brought into operation, in one fell swoop, a completely new and different set of legal norms ...
Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system .... The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.  

Standing at the brink of this jurisprudential watershed, most readers would expect some substantive description of the content of the objective normative value system and how the new Grundnorm might affect common-law development. Indeed, it was a great moment and an opportunity for Ackermann and Goldstone JJ to begin sketching out a vision of the kind of society toward which the Constitution aims and to reflect on the implications of the new value system for legal method. But there the joint-judgment ran out. The content of the value system was never specified. Other than that it exists and bathes all law in its light, we are told almost nothing about it. The joint judgment referred to the rights of life and bodily integrity, to the state’s obligation to act affirmatively to protect people, and to the commitment to gender equality, but little was said beyond what already appears in the constitutional text. The Carmichele Court deserves immense credit for one message it sent clearly – that a free society does not, and South Africa should not tolerate violence against women or the subordination of women by pervasive, background threats of violence. Apart from this, the Court missed a golden opportunity to begin to develop a substantive ethos to guide future law-making.

The Court added to the mystery by dropping a little bomb on the teaching that common law must be developed within the matrix of the objective normative value system; namely, it said that this must be accomplished ‘in a way most appropriate for the development of the common law within its own paradigm’.  

The meaning of this dictum is obscure. The statement is helpful insofar as it equates ‘development’ within s 39(2) with the ordinary evolution of the common law. But the own-paradigm dictum probably encouraged complacency. Echoing Zuma, Ackermann and Goldstone JJ gave new life to the pristine view of the common law, particularly the notion that the common law has its own unique, built-in logic. It is one thing to say that courts engaged with s 39(2) ought to accord due respect to common law wisdom and traditions. It is quite another to suggest that common law development in light of the objective normative values system must accommodate to or reconcile with an idealised version of a pre-constitutional common law paradigm.

The joint-judgment was also tentative, speculative, and vague on the question of how the objective normative values system translates into consequences for the case at hand. Ackermann and Goldstone JJ candidly observed that ‘it is by no means clear how these constitutional obligations on the State translate into private law duties towards individuals’. Then they floated sev-

233 Ibid para 54.
234 Ibid para 55 (italics added).
235 Zuma (note 173 above).
236 Carmichele-CC (note 45 above) para 57.
eral possible approaches, including: pouring constitutional values into general common law concepts (such as ‘the moral convictions of the community’, where relevant); or, accentuating the objective nature of the unlawfulness element of delictual liability; or defining unlawfulness broadly, and then looking to the element of fault and the remoteness-of-damage doctrine to put limits on liability. The Court notes that the High Court’s and the SCA’s common law expertise will helpfully contribute toward finding solutions in cases of this kind, an odd vote of confidence given that both courts below missed the boat in Carmichele. With nothing more concrete, the Court arrived at these oblique, less than enthusiastic conclusions: ‘[t]here seems to be no reason in principle why [on the facts of this case] a prosecutor … should not be held liable for the consequences of a negligent failure to bring such information to the attention of the Court’; and ‘the case for [Carmichele] has sufficient merit to require careful consideration to be given to the complex legal issues that it raises’. The matter was sent back to the High Court for the trial to be continued.

Perhaps the Court was determined not to prejudge anything about the case, but as an inevitable consequence of this approach, it provided little guidance for the future. It remains obscure how the Constitution influenced the Court’s decision (as distinct from its rhetoric) or how the Constitution steered the lower courts to decide in Carmichele’s favour on the remand. So far as appears, courts could have reached the same outcomes in Carmichele and other big cases like K v Minister without invoking s 39(2) but instead working creatively with boni mores, unlawfulness, and other pre-constitutional common law doctrines inviting regard to considerations of policy or community sentiment. Even during apartheid, judges sometimes reached progressive results in this way. If so, are we to conclude that the Constitution adds little more than a signal that the moral convictions of the South African people have evolved? And what of the fact that despite the capacity of the common law to evolve, the lower courts in Carmichele and K v Minister were unable to reason their way to results consonant with the spirit of the new dispensation. Perhaps the Constitutional Court brought s 39(2) into the mix in Carmichele in order to give the lower courts a jolt so that they will get with the programme. In any event, the Carmichele Court forfeited a golden opportunity by not initiating a conversation about what a transformative constitution means for legal method.

Yet for all its disappointments, Carmichele unambiguously holds that s 39(2) demands a constitutionally inspired common law. It follows, and the

237 See ibid paras 56–7.
238 Ibid para 74.
239 Ibid para 81.
240 O’Regan J provided an indication of how courts should approach their obligations under s 39(2) in Khumalo (note 74 above) (examining whether the defence of reasonable publication in a defamation action can balance the competing values of privacy, dignity, and freedom of expression).
241 Ms Carmichele ultimately won the case but did not receive compensation until September 2008, 13 years after the attack. ‘Litigation: Carmichele Wins Compensation of Just R1m’ LegalBrief Today 2150 (9 September 2008).
242 See, for example, Ewels (note 85 above) (relying on evolving moral sentiments of the community).
Court intimated if it did not say in haec verba, that the inquiry whether the common law status quo adequately respects and promotes the spirit, purport, and objects of the Bill of Rights must become a routine step of analysis in every common law case.

(c) Beyond Carmichele: one step backward, two steps forward

Carmichele had a great impact in cases concerning state protective duties, now a burgeoning field of law. The Court put all levels of government on notice that people have a constitutional right in the new South Africa to protection not just from the state itself but also from third parties. State actors must affirmatively ‘promote and fulfil’ the right of personal protection. Carmichele instructed the courts to give protective rights and obligations close attention and generous scope. The Court itself has rendered several subsequent judgments concerning positive state-obligations to protect against violence and other forms of rights-deprivation. This line of judgments brings honour to the Court for its concern about the urgent social problem of violence against women and children.

Without minimising this laudable contribution, Carmichele’s impact on other areas of law and on subsequent development-clause jurisprudence has been mixed. Many lower courts are content to continue with common law business as usual, except in cases involving state protective duties. Perhaps advocates have been slow to assist or challenge the courts with creative use of s 39(2) outside the protective-duty context. The ‘traditional approach’ to common law is alive and well, as seen in a line of cases to be discussed next. Thereafter, we examine the most promising and far-sighted post-Carmichele judgments, in which the Constitutional Court, and occasionally the SCA and some High Courts have laid down foundations for a transformative approach to common law development. However, even these most inventive decisions fall back at points on an instinctual traditionalism. This does not necessarily alter case outcomes but does inhibit the conceptual development of the law.

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243 See, for example, Minister of Safety & Security v Van Duivenboden, [2002] 3 All SA 741 (SCA), 2002 (6) SA 431 (SCA) (a cause-of-action lies when police omitted to take available legal steps to revoke a weapons-license of an individual who shot a woman, although the shooter was known by police to be unfit to possess firearms; relying on Carmichele’s ‘objective value system’ to give content to ‘legal convictions of the community’); Van Eeden v Minister of Safety & Security [2002] 4 All SA 346 (SCA), 2003 (1) SA 389 (SCA) (relying in part on Van Duivenboden in finding duty of police to take reasonable measures to prevent the escape from custody of known dangerous criminal and rapist). Some courts have reached similar results to Carmichele-CC without significant reliance upon that case or the Constitution. See, for example, Minister of Safety & Security v Hamilton 2001 (3) SA 50 (SCA) (police obliged to take reasonable steps to insure fitness of weapons-license applicant to possess firearms).

244 See particularly s 12(1)(c).

245 See Constitution s 7(2).

246 See, for example, K v Minister (note 47 above); Metrorail-CC (note 47 above).

247 Modderklip-CC (note 31 above).

248 How effective Carmichele-CC and its progeny have been in actually reducing violence against women and children is an empirical question beyond our competence to answer.
(d) The dark side

A well-known line of SCA judgments defending freedom of contract from the spectre of constitutional revision – *Brisley*, *Afrox*, *Wagener*, and *Barkhuizen* (the ‘freedom-of-contract cases’) – illustrates the extraordinary staying power of traditional common law thinking and its potential to inhibit transformation. The freedom-of-contract cases originated as low-visibility controversies about access to consumer goods and services in the marketplace. They concern mundane background rules that structure South Africa’s moral economy. At least on the surface, these cases do not appear to implicate the history of apartheid and racial domination. Courts have willingly contemplated legal change when an apartheid narrative lurks behind a case. When courts cannot see a connection to apartheid, they are comfortable with a traditional, pristine vision of the common law. These judgments share a reluctance to interrogate common law verities in light of Bill of Rights values, a minimalist attitude toward social transformation, a surprising readiness to place a neo-liberal gloss on the Constitution, and an uncritical acceptance of traditional legal methodology. The comparative twist is that US courts have generally reached the opposite, more pro-consumer outcomes in comparable cases although the legal landscape in the US has no constitutional commitment to transformation and allows almost no scope for horizontal application of constitutional values.

The freedom-of-contract judgments generated a large and generally critical academic literature. We agree with most of the criticisms appearing in this literature and do not intend to retrace that ground. We briefly review the

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250 *Afrox* (note 220 above).

251 *Wagener* (note 219 above). *Wagener* is thematically linked to the other cases although it sounded in delict rather than contract.

252 *Barkhuizen-SCA* (note 99 above).

253 It bears emphasis that the SCA has shown itself abundantly capable of engaging with the need for legal transformation in areas that fall outside its pristine vision of Roman-Dutch common law. See, for example, *Modderklip-SCA* (note 47 above); *Richtersveld Community v Alexkor Ltd 2003 (6) SA 104 (SCA); 2003 (6) BCLR 583 (SCA); and, *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuta 2001 (4) SA 1184 (SCA); 2001 (10) BCLR 1039 (SCA).*

cases, drawing on the commentary and adding a few comments and caveats of our own, in order to highlight points relevant to our argument and to indicate the US comparisons.255

- In *Brisley*, a residential tenant who paid rent late in violation of a written lease defended against eviction on the ground that the parties had orally modified the lease to permit late payment. The landlord responded that the lease contained a ‘*Shifren* non-variation clause’ providing that the written contract could not be modified by oral agreement.256 The tenant replied that the Constitution prevents strict enforcement of the non-variation clause in the circumstances of her case. She contended that the s 26(3) right of protection against unjust evictions bars courts from ordering an eviction from a home without first ‘considering all the relevant circumstances’, including the equity of eviction in light of the tenant’s personal situation and the availability of alternative accommodations, balanced against any considerations favouring the landlord. The SCA rebuffed the tenant’s challenge, stating that ‘a court cannot hide in the shadow of the Constitution to attack and thus reject principles of the common law’.257 The majority concluded that neither constitutional rights, nor the development clauses, nor broad common law principles (such as bona fides) grant courts a general jurisdiction to review the fairness of written contracts subscribed to by the parties.258 To indulge such thinking would destroy


255 Our comparisons are necessarily drawn in broad strokes. Primary competence to develop the common law in the US resides in the 50 states, with additional enclaves of federal common law. The law in states colonised by Spain or France retains the influence of the continental, civil code tradition. In short, there is no, single ‘US rule’ on these types of issues. Where possible, we indicate a prevailing rule or direction of the law.

256 See SA Sentrale Ko-op Graamnaatskappy Bpk v *Shifren* 1964 (4) SA 760 (A) (upholding the enforceability of non-variation clauses).

257 *Brisley* (note 249 above) para 24.

258 The court rejected some dicta from the High Court concerning the application of the principle of bona fides. By way of support, the judges cited an article by Professor Dale Hutchinson warning against an unfeathered form of bona fides. *Brisley* (note 249 above) para 22 (citing D Hutchinson ‘Non-variation Clauses in Contract: Any Escape from the *Shifren* Jacket?’ (2001) 118 SALJ 720). However, in a passage curiously omitted by the judges, Hutchinson argued that good faith ‘is a concept with a powerful creative, controlling and legitimating function but one which operates through other, more technical rules and doctrines, rather then directly …. On this approach, the courts are where necessary to develop the principles of the law of contract … to ensure that they conform to the requirements of good faith and thereby reflect the values underlying the Constitution …. [T]hat would entail [in some cases] limiting the *Shifren* principle, possibly by recognising exceptional circumstances where the principle would not apply, certainly by employing and developing concepts such as waiver, estoppel, and *pactum de petendo*. Hutchinson 744–5.
legal certainty.\textsuperscript{259} The court did not find it necessary to explore whether the advent of the new constitutional dispensation, which entrenches tenants’ rights, might call for a re-examination of an apartheid era common law principle.\textsuperscript{260}

Cameron JA, as he then was, concurred. He boldly stated that all law, including the common law of contracts, is now subject to constitutional control.\textsuperscript{261} The tenant’s challenge invited the court to reconsider \textit{Shifren}, and the court was ‘obliged to do so in light of the Constitution and of our “general obligation”, which is not purely discretionary, to develop the common law in the light of fundamental constitutional values’.\textsuperscript{262} However, citing ‘precedent and weighty considerations of commercial reliance and social certainty’, Judge Cameron concluded that the \textit{Shifren} doctrine remains sound and that the values of the new Constitution in no way detract from its validity.\textsuperscript{263} ‘On the contrary’, he wrote, ‘the Constitution’s values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons … is that contractual autonomy is part of freedom.’\textsuperscript{264} He continued: ‘Shorn of its obscene excesses, contractual autonomy informs also the constitutional

Sandra Liebenberg called our attention to the interesting, recent High Court judgment in \textit{Nyandeni Local Municipality v Hlazo} 2010 (4) SA 261. The court generally reaffirms the \textit{Brisley} approach. See ibid para 78 (‘fairness … is not an independent constitutional … principle in terms of which contracting parties may escape their obligations including obligations arising from the \textit{Shifren} principle’); and para 90 (‘[n]either the common law, nor the Constitution, requires that a contract operate fairly … [F]airness in itself is not a substantive imperative under the Constitution’). The High Court nevertheless determined that public policy, informed by the constitutional right to due process in terms of s 34, justified a departure from the \textit{Shifren} principle on the basis of the egregious and idiosyncratic facts of the case.

\textsuperscript{259} See \textit{Brisley} (note 249 above) particularly para 24.

\textsuperscript{260} The common law in most US jurisdictions looks with disfavour upon contract clauses barring oral modification. Numerous cases hold such clauses to be ineffective, although on close examination, most such cases involve detrimental reliance on the oral modification. See EA Farnsworth \textit{Contracts} 3 ed (2004) s 7.6; see also JD Calamari & JM Perillo \textit{The Law of Contracts} 3 ed (1987) 264–5. Some states provide by statute that a written contract containing a no-oral-modification clause (or, indeed, any contract) may only be modified in writing. See, for example, NY Gen Oblig L s 15–301 (enforcement of written no-oral-modification clauses). But when a party has reasonably relied, courts are generous in finding compliance with the writing requirement and have often invoked equitable considerations to avoid strict enforcement of the statute. Some jurisdictions have enacted targeted statutes providing for the enforcement of no-oral-modification clauses with respect to specific transaction types, although even statutes of this kind sometimes provide special protections for consumers or escape-hatches for parties that justifiably rely on an oral modification. See, for example, Uniform Commercial Code ss 2–209(2) (sales of goods; but separate signature required to bind non-merchant to no-oral-modification clause) & 2–209(4) & (5) (waiver and reliance). Targeted statutes enforcing no-oral-modification clauses in residential leases appear to be uncommon, and most courts decline to give effect to such clauses, at least in cases involving detrimental reliance. In some jurisdictions, it is a ‘general rule that a lease providing that any modification must be made in writing may nevertheless be modified orally’. EG Daber & H Chopp \textit{Landlord & Tenant Law} (2000) s 5:25 (Massachusetts).

\textsuperscript{261} \textit{Brisley} (note 249 above) para 88.

\textsuperscript{262} Ibid para 90 (citation to \textit{Carmichele} omitted).

\textsuperscript{263} Ibid.

\textsuperscript{264} Ibid para 94 (citation to \textit{Mort NO} (note 197 above) 475B–F (Davis J), in support of the proposition that ‘contractual autonomy is part of freedom’, omitted).
value of dignity . . . . The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom", and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity. The issues in the present appeal do not imperil that balance.265

Even assuming that constitutional freedom includes contractual autonomy, this general principle cannot decide concrete cases, as Judge Cameron acknowledged. That is because – as previously discussed – contractual autonomy reflects not one, but two, conflicting values. Freedom-of-contract is informed equally by the values of autonomy and private ordering and by the need for government to restrict autonomy in order to secure legitimate business expectations. Every contract judgment strikes a balance between the conflicting contractual values of autonomy and constraint.266 What Cameron JA identifies as a constitutional requirement is in fact an ordinary routine of common law contract decision-making. The key point is that, after 1996, this balance must be drawn with an eye toward promoting the spirit, purport and objects of the Bill of Rights.

So Judge Cameron correctly identified the question to be addressed in Brisley, namely, how should the balance between freedom and constraint be drawn in this particular case, in light of the circumstances, the relationship of the parties, and the social context? But here his judgment disappoints. He concluded that current doctrine gets the balance right in a brisk, circular paragraph based on the entirely speculative claim that, over the long-run, non-variation clauses equally serve the interests of landlords and tenants, the strong and the weak, and on 'weighty' but unspecified considerations of commercial reliance and social certainty. Judge Cameron takes for granted that, even if uniform enforcement of non-variation clauses against tenants produces adverse welfare consequences for them, it is socially optimal in aggregate. That might be true, but we cannot be certain a priori. The chaos caused in tenants' lives and the abrogation of their reliance interests might cause welfare losses that outweigh the gains from commercial certainty occasioned by the enforcement of non-variation clauses. Indeed, an approach based on principles of good faith and estoppel might better protect reliance and social certainty

265 Ibid para 94. Cameron JA attached to the phrase 'obscene excesses' a citation to the notorious and long discredited US case of Lochner v New York 198 US 45 (1905), presumably meaning to indicate, as is the standard view, that Lochner condoned obscene excesses of contractual freedom. Ironically, Cameron JA's insistence that contractual autonomy is included in the freedoms protected by the Constitution replicates one of the holdings of Lochner.

266 See text accompanying notes 133 to 135 & 145 to 151 above.
than one based on enforcing contracts according to their strict, written terms.\textsuperscript{267} 

- In \textit{Afrox}, a patient sued a private hospital for damages caused by post-operative complications allegedly resulting from a nurse's negligent care in dressing the wound. The action was for breach by the hospital of its implicit contractual obligation to utilise reasonable care in treating patients. The hospital defended on the basis of an exemption clause in its standard admissions form that indemnified it against any claims by a patient or dependent for any loss whatever flowing from negligent malpractice or any other cause whatever save the hospital’s ‘wilful default’. The plaintiff contended that the clause was contrary to good faith and the public interest, and that the admissions clerk had at least a duty to draw the clause to his attention (something that had not occurred). Putting constitutional weight behind these claims, the plaintiff contended that enforcement of the exemption clause would violate s 27(1)(a) providing that ‘[e]veryone has the right to have access to … health care services’, particularly in view of the unequal position in which the parties typically find themselves at the moment in time when hospital admission forms are signed and of the necessity for patients to place themselves in a position of trust in hospitals and other health-care facilities.

A unanimous court held for the hospital.\textsuperscript{268} In a tenacious illustration of reasoning abstracted from context, Brand JA suggested that there was no evidence that a surgical patient is a weaker bargaining party vis-à-vis a hospital.\textsuperscript{269} But even were there such evidence, simply because a clause favours the stronger contracting party does not justify interference with the bargain struck save in cases of extreme imbalance. What sort of bargain-

\textsuperscript{267} The Realists argued that the formulation of legal principles in terms of general standards such as ‘reasonableness’ and ‘good faith’ often produces greater certainty and predictability than resort to rigid rules. See, for example, Llewellyn Case Law System (note 128 above) 58 (italics in original, notes omitted):

[T]he average layman does not conform his actions to legal norms but rather to social norms .... For him ... the ... important type of legal certainty consists in knowing that some dealing of his would be treated — if matters ever came to litigation — in a manner that a reasonable man (i.e., a reasonable layman in the circumstances) might have anticipated, had he thought about the then-unforeseen dispute at the start.

See also AL Corbin \textit{Corbin On Contracts — One Volume Edition} (1952) 609:

Courts refusing to decree rescission for unilateral mistake often say that to do so would tend greatly to destroy stability and certainty in the making of contracts. In some degree, this may be true; but certainty in the law is largely an illusion at best, and altogether too high a price may be paid in the effort to attain it. Inflexible and mechanical rules lead to their own avoidance by fiction and camouflage.

See generally Kennedy (note 42 above).

\textsuperscript{268} Hawthorne (note 254 above) 299 characterises \textit{Afrox} in unusually blunt terms as ‘without a doubt ... the zenith of condonation of aggressive capitalistic entrepreneurship’, and observes that the judgment ‘causes one to pose the question whether the modern day South African supervisory jurisdiction is based on capitalistic business principles rather than morality?’ Ibid 300.

US courts have had no difficulty in finding a hospital’s attempt to disclaim liability for negligent care to be void as against public policy. For a leading example, see \textit{Tunkl v Regents of the University of California} 60 Cal 2d 92, 32 Cal Rptr 33, 383 P 2d 441 (California Supreme Court, in bank, 1963) (citing among other considerations patient’s inferior bargaining position).

\textsuperscript{269} See \textit{Afrox} (note 220 above) para 12.
ing imbalance may be regarded as extreme was not disclosed.\textsuperscript{270} As for the Constitution, the court stated that it calls for a balance between the right of access to health care against the equally important constitutional value of contractual autonomy.

Citing Cameron JA’s concurring judgment in \textit{Brisley} as authority for the constitutional status of contractual autonomy, the court ruled that ‘[t]he constitutional value of freedom of contract is encapsulated in the principle that is explained by and contained in the maxim \textit{pacta sunt servanda}’.\textsuperscript{271} Much was said about the importance of stare decisis, but we are left in the dark as to why the constitutional value of freedom of contract, let alone the common law value of freedom of contract, reduces to this ancient maxim. We are not told why pacta (as opposed to some richer and more nuanced concept of contractual autonomy) embodies values sufficiently central to the transformative project as to trump the constitutional values of equality, human dignity, and access to health-care services (or the public’s interest in holding hospitals accountable for negligent acts that adversely affect patients).\textsuperscript{272}

The court’s approach required three huge – and dubious – conceptual leaps. First, it boiled down the constitutional value of contractual autonomy, if there is one, to ‘freedom of contract’, a historically specific instantiation of the ideal of contractual autonomy associated with the industrial capitalist era. Second, in an echo of common law fundamentalism, the court equated freedom of contract with extant common law contracts doctrine. Rather than appreciating the common law as a reflection of the complicated and varied social contexts and conflicts within which it has unfolded, the common law is imagined to be a free-standing embodiment of progress toward freedom based on its own, intrinsic logic.

Finally, the court reduced contracts doctrine to pacta sunt servanda. Pacta is not the whole of contracts, but only an aspect. Pacta privileges enforcement and the protection of secured expectations (sometimes at the expense of reasonable but technically unprotected reliance). But contracts doctrine also develops along another axis pointing toward escape from

\textsuperscript{270} Bhana & Pieterse remark that ‘if contracts such as that entered into in \textit{Afox} are not viewed as so unequal as to warrant close scrutiny for adherence to public policy, it may seriously be doubted whether any contract would ever qualify as such’. Bhana & Pieterse (note 254 above) 886 (footnote omitted).

\textsuperscript{271} Ibid para 23. The Latin maxim is often translated as ‘agreements must be kept’.

\textsuperscript{272} \textit{Afox} did additional damage to the transformative project. It held that stare decisis binds the High Courts to follow SCA decisions, including pre-1994 decisions. Why stare decisis trumps the constitutional obligation of ‘every court’ to promote the spirit, purport and objects of the Bill of Rights was not explained. \textit{Afox} (note 220 above) para 29. See Woolman (note 61 above) 31–96. Additionally, \textit{Afox} dealt a devastating blow to a progressive trend that had been unfolding for some time in South African contract law in which courts endowed general terms such as good faith with expansive and modernised content. Brand JA held that good faith, reasonableness, and other general terms ‘underlie our law of contract’ but are not independent grounds for invalidating contract terms, and ‘they are not legal rules themselves’. \textit{Afox} (note 220 above) para 32 (translated from the Afrikaans by and discussed in Brand ‘Courts’ (note 249 above) 200–1). See also Woolman & Brand (note 202 above).
obligation under a formidable array of doctrines of contractual invalidity, excuse for breach, and restrictions on recovery. Sometimes escape is permitted for reasons grounded in the idea of promise, for example, when a defendant is excused for failure of a condition precedent to plaintiff's recovery. Sometimes social policy comes in to limit remedies at the expense of party-expectation, such as when reasonable foreseeability caps expectation damages. Numerous doctrines permitting relief from contractual obligation — such as duress, fraud, good faith, unconscionability, undue influence, and voidness as against public policy — are designed to protect the weak and vulnerable from overreaching.

As an historical matter, the ideology of freedom of contract privileged the powerful over the weak, the status quo over reform. For this reason, the Realists were at pains to demonstrate that freedom of contract is in fact a system for the exercise of economic pressure. But this tilt in contract reflected how it played out historically, not a force intrinsic to contract or to conceptions of contractual autonomy. Albeit an undertone, contract has always contained values and doctrines entrenching social solidarity and mutual concern. Standing by itself, contract law is an internally contradictory discourse calling for a balance of conflicting values in every interesting case. This is lost in the freedom-of-contract judgments, which reify contract doctrine and present it as though it were a stable, coherent, easily consultable and self-defining table of principles.

- In Wagener, surgical patients suffered serious injury resulting from anaesthetic injections that, they alleged, were defectively manufactured by the defendant. Invoking the mandate of s 39(2) and the constitutional right to bodily and psychological integrity found in s 12(2), they urged the court to develop the law of delict so as to impose strict liability on the manufacturer notwithstanding the absence of contractual privity between the parties.

The court unanimously rejected the plaintiffs' approach, expressing great confidence in the capacity of the common law to evolve and come to the assistance of persons injured by defective products in appropriate cases. It was suggested, for example, that courts might take a generous view of res ipsa loquitur or experiment with reverse onuses. Why it is better to reform the law by resort to fictions and technicalities rather than transparent and principled choices was not explained.

273 See discussion accompanying notes 148–151 above.
274 Despite some recent retrenchment, strict liability for product-defects running down the marketing chain from manufacturer to consumer has been well established in the US for decades.
275 Res ipsa loquitur is a fiction. Seen in its best light, res ipsa reflects a hunch that unless the defendant did something wrong, the accident would not have happened. It is fundamental that the burden of uncertainty — the risk that the evidence will not reveal what caused the harm — falls on the plaintiff. After all the evidence is in, if the cause of the harm remains unknown, the plaintiff is supposed to lose. Res ipsa circumvents this principle by authorising a fact-finder to draw an inference of negligence despite the plaintiff's inability to adduce any evidence thereof except fishy circumstances. It may be ethically appropriate and good social policy in certain circumstances to switch the burden of uncertainty to the defendant, but this is a choice a court should be obliged to acknowledge and explain. It is fiction to say that "the thing speaks for itself" or that the rule of res ipsa replaces uncertainty with knowledge.
from within the traditional mindset, the court treated the case as posing an issue of corrective justice between party A and party B. It studiously avoided the broader question posed, namely, what is the socially and morally appropriate allocation of the costs of inevitable accidents caused by risky but valuable products and activities? Should accident costs be left to burden unlucky victims who do not manage to finesse res ipsa? Or should all consumers who participate in or benefit from the product or activity be called upon to share in the injuries visited upon the unlucky few by embedding the costs of those harms into the activity’s price?\textsuperscript{276} The court said simply that the challengers had failed their supposed burden to show the ‘patent inadequacy’ of existing common law remedy,\textsuperscript{277} despite that 

\textit{Carmichele} had squarely placed a duty on the court to assure itself that extant rules promote the spirit, purport, and objects of the Bill of Rights. The \textit{Wagener} court also stressed separation-of-powers concerns and extolled the virtues of moderate, incremental development of the common law as opposed to ‘radical departure[s] from accepted law’.\textsuperscript{278} The SCA read the s 8(3)(a) power of courts to develop the common law where legislation gives insufficient effect to a constitutional right as a potentially dangerous and an unjustifiable encroachment on legislative prerogative.\textsuperscript{279} The judgment significantly reduced the scope for constitutional renovation of the common law.

- \textit{Barkhuizen} concerned a time-bar clause in an automobile insurance policy that required the insured to issue summons within 90 days of the insurer’s repudiation of a claim. The policyholder challenged the time-bar as a violation of the constitutional right of access to courts guaranteed by s 34.

\textit{Wagener} calls to mind a famous California case decided nearly 70 years ago. In \textit{Escola v Coca Cola Bottling Co of Fresno} 24 Cal 2d 453, 150 P.2d 436 (California Supreme Court 1944), a carbonated soft-drink bottle broke in a waitress’ hand, injuring her. She had handled the bottle with care. She had no evidence that the defendant was negligent in selecting a defective bottle or in filling it with the cola drink. Indeed, the defendant’s expert testified that its product-testing methods were nearly infallible. Nevertheless, Escola prevailed by invoking res ipsa loquitur to establish her prima facie case, a result upheld on appeal. In a renowned opinion, Traynor J concurred in the result but on the distinct rationale that strict liability should be imposed for injuries caused by defective products. Years later, Traynor J wrote the judgment for the same court when it eventually imposed strict products liability for the first time. \textit{Greenman v Yuba Power Products, Inc.} 59 Cal 2d 57, 377 P.2d 897, 27 Cal Rptr 697 (California Supreme Court 1963).

\textsuperscript{276} The theory of strict liability is that the defendant manufacturer will embed accident costs reflected in damages assessed against it (or the cost of insurance against such liability) into the price of the product. This forces all consumers of the product or service to purchase insurance against the accidents that will inevitably occur to the unlucky few without identifiable or provable fault of the manufacturer. If the manufacturer is unable to pass its accident costs on to the consumer – for example, because it releases more than the normal volume of defective products or because its product is unduly risky relative to its benefits – market pressures will, and should, squeeze that product-line out of business. See generally G Calabresi \textit{The Costs of Accidents: A Legal & Economic Analysis} (1970).

\textsuperscript{277} \textit{Wagener} (note 219 above) paras 25, 30.

\textsuperscript{278} Ibid para 37. See generally paras 26–37.

\textsuperscript{279} Strict products liability in the US largely originated in judge-made law.
Writing for a unanimous court, Cameron JA rejected the insured’s argument and upheld the time-bar clause.\(^{280}\)

Judge Cameron distanced himself from uncritical support of freedom-of-contract, and his judgment contains much that is helpful. He read *Aurox* to affirm the principle ‘that inequality of bargaining power could be a factor in striking down a contract on public policy and constitutional grounds’.\(^{281}\) Moreover, he affirmed the doctrine of horizontal application. He cited *Brisley* and *Aurox* for the propositions that ‘contractual terms are subject to constitutional rights’ and that ‘the common law of contract is subject to the Constitution’.\(^{282}\)

This does not mean, however, that the ‘Constitution and its value system confer on judges a general jurisdiction to declare contracts invalid because of what they perceive as unjust … or on the basis of imprecise notions of good faith’.\(^{283}\) ‘[T]he fact that a term is unfair or may operate harshly [does not] by itself lead to the conclusion that it offends against constitutional principle’.\(^{284}\) Thus, a court faced with a constitutional challenge to a contract clause or doctrine must seek a balance between the ‘unacceptable excesses of “freedom of contract”, while seeking to permit individuals the dignity and autonomy of regulating their own lives’.\(^{285}\) For ‘the Constitution prizes dignity and autonomy, and in appropriate circumstances these standards find expression in the liberty to regulate one’s life by freely engaged contractual arrangements’.\(^{286}\)

So the constitutional validity of a contract clause – and, one might add, the clause’s validity under common law principles, such as the public policy doctrine\(^{287}\) – boil down to an assessment of how the provision operates in social context: under the circumstances, would enforcement of the clause enhance or derogate from human dignity and autonomy? What, then, are appropriate circumstances for enforcement of contractual clauses despite that they operate

280 We have not located a parallel US case to *Barkhuizen*. Comparison is difficult because automobile insurance in the US is heavily regulated by State statute, with considerable variation between the 50 jurisdictions. Absent a State statute to the contrary, US courts will generally uphold reasonable, contractual time-limitations on the insured’s entitlement to commence suit. In at least some instances, a time-limit as short as 60 days has been upheld. *JA & J Appleman’s Insurance Law & Practice* (1 ed 1973; now an on-line Lexis publication) § 11602. However, US courts have long been concerned that insurance policies, particularly motorists’ policies, are often contracts of adhesion. See RE Keeton & AI Widiss *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, & Commercial Practices* (1988) 1096 (referring to ‘the increasingly widespread judicial recognition of the proposition that insurance policy terms in coverages acquired by most consumers do not result from a negotiated transaction and rarely, if ever, represent the intent of such purchasers’). US courts sometimes refuse to enforce contractually imposed time-limitations, particularly when the time-period specified is unreasonably short, citing doctrines of waiver, estoppel, public policy, unconscionability, and/or lack of prejudice to the insurer. See generally Keeton & Widiss 749–75, 1093–96; RH Jerry *Understanding Insurance Law* 3 ed (2002) 650–3.

281 *Barkhuizen* [CJ (note 99 above) para 8).


283 Ibid para 7 (citation omitted).

284 Ibid para 12.


286 Ibid (italics added).

287 See, for example, *Safin (Psy) Ltd v Beukes* 1989 (1) SA 1 (A), holding that a court should not enforce a contract if to do so would be contrary to public policy.
harshly? Addressing this question is the first step in creating a transformative contracts jurisprudence, and Judge Cameron deserves credit for posing it precisely. But he provided almost no guidance as to how to begin answer it. It is easy to see how a racist or sexist contract clause might violate the Constitution, he wrote, but then he candidly acknowledged that it is "[l]ess immediately obvious ... how the values of human dignity, the achievement of equality, and the advancement of human rights and freedoms may affect particular contractual outcomes". He was unwilling to go very far in the case at hand because the record was so limited. The matter had been submitted on a very short statement of agreed facts and contained no substantive evidentiary record. The court found the evidence "so scant that we can only speculate on the plaintiff's bargaining position in relation to the insurer", which it was unwilling to do. Two dissenting judgments on appeal to the Constitutional Court argued that the record was sufficient to permit the court to address the substantive issues, but it must be conceded that a fuller record should and could easily have been developed for litigation of issues of this importance.

_Barkhuizen_ is the only one of the contractual-freedom cases to reach the Constitutional Court. The Court unequivocally affirmed that common law contract doctrines, such as pacta sunt servanda, are subject to constitutional control. However the Constitutional Court was reluctant to address whether the terms of any particular private contract must answer directly to the Bill of Rights via horizontal application. Instead, Ngcobo J, as he then was, held that the proper approach to constitutional attacks on contractual provisions was to examine whether the impugned provision was contrary to public policy. Public policy, in turn, must be seen through the lens of Bill of Rights values. Later he added that "[p]ublic policy is informed by the concept of ubuntu." A 'term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable'.

Turning to the merits, Justice Ngcobo accepted that a time limitation clause could be so unreasonable as to be unfair and therefore contrary to public policy. However he found nothing in the record to suggest that the contract was not freely concluded between parties with relatively equal bargaining power or that the clause was not drawn to the insured's attention. In upholding the time-limitation clause in _Barkhuizen_, Ngcobo J stated: 'public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim _pacta sunt servanda_ which ... "

289 Ibid para 15.
290 See _Barkhuizen-CC_ (note 99 above) paras 92ff (Mosenekne DCJ, joined by Mokgoro J) & paras 121ff (Sachs J).
291 _Barkhuizen-CC_ (note 99 above).
292 Ibid para 30.
293 Ibid para 51.
294 Ibid para 29.
295 Ibid para 66.
gives effect to the central constitutional values of freedom and dignity.\textsuperscript{296} Here Ngcobo J repeated the error of Afrox. Even assuming that contractual autonomy is a component of the constitutional values of freedom and dignity, it is highly doubtful that contractual autonomy was understood by the drafters in the exceedingly narrow and one-sided perspective expressed in the pacta maxim.\textsuperscript{297} In addition to shrinking contractual autonomy to one facet of contracts doctrine, he reduced the broad concept of contractual fairness to the problematic and ultimately circular concept of ‘voluntariness’.\textsuperscript{298}

In their minority judgments, Mosenke DCJ (joined by Mokgoro J) and Sachs J frame the public policy inquiry differently than did the majority and the SCA. Instead of determining the fairness of the time-bar clause ‘subjectively’, by reference to the particular circumstances of the individual contracting parties, they would focus on the likely impact or “tendency” of the provision at issue and the extent to which, in the context of the contract as a whole, it vitiated standards of reasonableness and fair dealing that the legal convictions of the community would regard as intrinsic to appropriate business firm/consumer relationships in contemporary society.\textsuperscript{299} The pertinent question is ‘whether, objectively speaking … enforcement of the time-bar would be consistent with public policy in our new dispensation’\textsuperscript{300} or ‘whether the stipulation clashes with public norms and whether the contractual term is so unreasonable as to offend public policy’.\textsuperscript{301} Justice Mosenke reminded his colleagues that although ‘our constitutional values allow individuals the dignity and freedom to regulate their own affairs, they also require that bargains, even if freely struck, may not steer a course inimical to public notions of equity and fairness, which are now sourced from constitutional values’.\textsuperscript{302}

In Justice Sachs’ judgment we find a discerning appreciation of contemporary contracts theory and its implications for common-law development, one that is miles ahead of that found in the majority judgment. His careful discussion of contracts of adhesion recognises their potential efficiency advantages, but also illuminates the danger that judicial enforcement of adhesion contracts can ‘induce automatism’ rather than ‘promoting autonomy’.\textsuperscript{303} Sachs J observed that the virtues of the sanctity of contract and pacta sunt servanda are not self-evident and that their reach has been severely restricted.

\textsuperscript{296} Ibid para 57.
\textsuperscript{297} Ngcobo J himself hints in dicta at a more complex view of contract and of the constitutional conception of contractual autonomy. He states, for example, as though the point were uncontroversial rather than a central issue of contention in the entire line of cases: ‘while public policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties … [T]he hands of justice can never be tied under our constitutional order’. Ibid para 73.
\textsuperscript{298} See text accompanying and notes 145 to 147 above.
\textsuperscript{299} Barkhuizen-CC (note 99 above) para 146 (Sachs J).
\textsuperscript{300} Ibid para 122 (Sachs J).
\textsuperscript{301} Ibid para 96 (Mosenke DCJ).
\textsuperscript{302} Ibid para 104.
\textsuperscript{303} Ibid para 155. Sachs J’s treatment of adhesion contracts reprises points made by the Legal Realists more than a half-century ago. For a classic statement, see F Kessler ‘Contracts of Adhesion – Some Thoughts About Freedom of Contract’ 43 Columbia LR (1943) 629.
in open and democratic societies. 304 ‘Freedom of contract has been said to lie at the heart of constitutionally prized values of dignity and autonomy … [y]et the evolution of contract law suggests that the notion of sanctity of contract has been used to undermine rather than reinforce true volition’. He concluded that the Constitution requires ‘that received notions of sanctity of contract be revisited’. 305 He would hold that public policy in the new dispensation compels ‘courts to refuse to give legal effect to an imposed, onerous and one-sided ancillary term buried in a standard form contract that unilaterally and without corresponding advantage, limits the enjoyment of an important constitutionally protected right, namely, that of access to court’. 306 On the merits, he concluded that the record was adequate to decide that ‘considerations of public policy animated by the Constitution dictate that the time-bar clause in question … should not be enforced’. 307

To summarise the central difficulties of the freedom-of-contract judgments:

1. The constitutional values of freedom, personal autonomy, and dignity are reduced to contractual autonomy, which is then equated with the principle of freedom of contract. In turn, freedom of contract, if it is a constitutional value, is reduced to the law and doctrine of contracts as we know it. Finally, contracts doctrine is reduced to a neat, homogenous portion of the chaotic whole, the principle pacta sunt servanda. Some critics decry the courts' emphasis on freedom of contract at the expense of other, purportedly extra-contractual values, such as equality or access to basic social needs like medical care. We agree with the thrust of this criticism, but this way of formulating it unwittingly repeats the error of the freedom-of-contract judgments. Equality, fairness to consumers, and protection of the weaker contractual party are questions that can and should arise within contract law. The problem is not how to strike a balance between ‘contract’ and ‘equality’. The conflict between settled expectation and equality permeates contract law itself (in just the same way as equality discourse is a terrain of conflict between formal and substantive conceptions of equality). A Constitution committed to equality and social rights should be understood to lend its weight to transformative development within contracts thinking by expanding the pockets of egalitarianism and social solidarity already in residence there.

2. The freedom-of-contract judgments deliver too much pacta and not enough ubuntu. The vision of liberty and human freedom informing the contractual-freedom judgments is a thinly updated version of ideas rooted in classical liberal philosophy. The ethos is individualist and libertarian. It

304 Barkhuizen-CC (note 99 above) para 141.
305 Ibid para 150 (citation to Brisley (note 249 above) omitted).
306 Ibid para 123.
307 Ibid para 185.
prefers limited government and a negative conception of liberty.\textsuperscript{308} It narrows ‘autonomy’ to freedom from governmental compulsion and elides the problem of socio-economic domination. It seems highly implausible that the Constitution is founded on this bleak social vision. Although the contours of ‘the democratic values of human dignity, equality and freedom’\textsuperscript{309} remain to be charted, the ethos of the new constitutional order is well down the path toward some conception of social democracy.\textsuperscript{310}

3. The contractual-freedom judgments exhibit a curious lack of attention to social context. Perhaps this is because routine contracts cases appear unrelated to apartheid. When the legacy of apartheid is involved, the Constitutional Court and SCA have no difficulty weaving social context into legal analysis. The contracts cases take account neither of the grotesquely unequal distribution of economic resources in South Africa in general, nor of the particular problems of bargaining inequality raised by the cases themselves. For at least a century, it has been well understood by sophisticated jurists and legal scholars that whether contractual freedom increases or diminishes human autonomy is ultimately a sociological question that cannot be answered simply by consulting the entitlements, empowerments, and bargaining freedoms formally entrenched in the law. As Max Weber famously observed: ‘[t]he exact extent to which the total amount of “freedom” within a given legal community is actually increased [by legal rules reflecting the principle of freedom of contract] depends entirely upon the concrete economic order and especially upon the property distribution. In no case can it be simply deduced from the content of the law’.\textsuperscript{311}

4. This lack of attention to context is seen particularly in the analytics of bargaining power, which the freedom-of-contracts cases reduce to the apparently self-defining, isomorphic distinctions between ‘normal’ and ‘excessive’ amounts of bargaining pressure, and between ‘freely chosen’ and ‘coerced’ bargains. Very few contracts concerning the distribution of welfare in modern societies – wage bargains, rental housing leases, waivers of liability – are either ‘free’ or ‘coerced’ in anything like a pure sense. Such contracts almost always reflect aspects of choice and aspects of coercion in complicated and varied combinations. Likewise, infinite gra-

\textsuperscript{308} The ethos of the contractual-freedom cases is rooted in the same sources that provided the intellectual provenance for Lochner, despite that Justice Cameron tells us that Lochner is outmoded and led to unfortunate excesses even in its time. Justice Ackermann’s well-known judgment in Ferreira also interpreted the constitutional value of freedom through the lens of classical liberal theory, although he, too, explicitly renounced Lochner. See Ferreira v Levin NO 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) paras 65–6. See generally D Davis ‘The Underlying Theory That Informs the Wording of Our Bill of Rights’ (1996) 113 SALJ 385, 389–94.

\textsuperscript{309} Constitution s 7(1).

\textsuperscript{310} Bhana & Pieterse demonstrate that, even if contractual autonomy is a constitutional value in its own right or as included within the values of freedom and/or dignity, it is exceedingly doubtful that the classical, individualist conception of contractual autonomy and economic freedom was embraced by the drafters. See Bhana & Pieterse (note 254 above) 876–83. See generally Woolman & Davis (note 35 above).

utations lie between ‘normal’ and ‘excessive’ bargaining power. Drawing lines between ‘normal’ and ‘excessive’ economic pressure, or between ‘freely chosen’ and ‘coerced’ arrangements, gains us little analytical purchase; it merely restates a range of questions to be addressed. But the discursive effect of these distinctions is to marginalise the cases calling for judicial intervention by portraying them as rare and uncommon. The normal/excessive distinction legitimises and apparently removes from constitutional scrutiny the ordinary pressures of economic circumstances, not because of a judgment that they are socially acceptable, but because of a perception that they are normal. But we are pointed to nothing in the Constitution that limits its concern with power and contractual fairness to aberrational, outlying cases and excludes ‘normal’ exercises of power. Quite the opposite, the mission of a transformative constitution that celebrates equality, human dignity, and human self-realisation, must be to challenge our ideas of the social and economic ‘normal’.

5. The freedom-of-contract judgments stifle promising trends that had unfolded within pre-Constitution contract law. 312 We referred previously to the Sasfin principle that a clause in a contract should be struck down when found to be contrary to public policy, a determination to be based on the likely effect of the impugned clause (as opposed to being dependent on the relative personal situations of the contracting parties). 313 Similarly, leading scholars such as Gerhard Lubbe and Christina Murray had called for the progressive development of exceptio doli, a Roman law doctrine authorising a court to refuse enforcement of a contractual provision that would work manifest unfairness. 314 True, the Appellate Division cut that promise short by holding that exceptio doli was no longer to be a part of South African law, 315 but one might hope for its resurrection now that a transformative constitution is in place. 316 Indeed, as Bhana and Pieterse argue, ‘South African courts ... appear well-equipped to ensure the infusion of ... constitutional values through engagement with the open-ended standards that had previously served as a vehicle for similar value-based development.’ 317

313 Sasfin (note 287 above), A classic US judgment invoking the doctrine of voidness as against public policy in a consumer-protection context is Hennington v Bloomfield Motors, Inc. 161 A.2d 69, 32 NJ 358 (Supreme Court of New Jersey 1960). See ibid 87 (‘gross inequality of bargaining position occupied by the consumer in the automobile industry’).
315 Bank of Lisbon & SA Ltd v De Ornelas 1988 (3) SA 580 (A).
316 In Crown Restaurant (note 231 above), the Constitutional Court declined to consider whether exceptio doli generalis should be reintroduced into South African law because the question had not been timeously raised below. Observing that ‘it is a pity that a point of law in such urgent need of constitutional resolution fell through the cracks’, Barnard-Naudé argues that the Court’s approach was inconsistent with the teaching of Carmichele that courts must be vigilant in fulfilling their duty to develop the common law, whether or not invited to do so by the parties. J Barnard-Naudé (note 249 above) 190–3.
317 Bhana & Pieterse (note 254 above) 872.
(e) Pushing the boundaries

By way of contrast to the disappointing freedom-of-contract judgments, we conclude with a discussion of the very best in constitutionally inspired common law development, exemplified by a remarkable series of decisions rendered in an 18-month period in the mid-2000s. The sequence on which we focus begins with the SCA’s judgment in Modderklip,318 and concludes with the Constitutional Court’s decision in Fourie.319 The intervening judgments include Port Elizabeth Municipality (PEM),320 Jaftha,321 Zondi,322 Bhe,323 Metrorail,324 the SCA judgment in Fourie,325 Modderklip-CC,326 Laugh It Off Promotions,327 and K v Minister.328 Only a few of these cases involved common law development under s 39(2) as such. The courts now regularly invoke the statutory interpretation clause of s 39(2), but as yet there are few common law development cases from which to choose. Nevertheless, the cases in our series form an appropriate and illuminating object of discussion here because they all directly or indirectly address basic conceptual building blocks of the common law such as the notions of duty, contract, private property, and family.

These judgments pushed the outer boundaries of South African legal thought (hence, we call them the ‘boundary judgments’ or refer to the ‘boundary cases’). An obvious, but it should be said heroic, achievement of the boundary cases is to interrogate and challenge the racist, sexist, patriarchal, and homophobic values and structures entrenched in the common law during the colonial and apartheid eras. The boundary decisions move boldly to cleanse the common law of its overt support for illegitimate oppression, hierarchy, and exclusion. In addition, these cases began in earnest the project of interrogating and denaturalising the background private law concepts and rules that structure social and economic life, and they reformulate some of these concepts and rules with an eye toward generating more egalitarian outcomes and entrenching the values, rights, and obligations appropriate to a caring and communitarian society. In this process, the courts — notably the Constitutional Court — have offered us visionary reimaginings of private-law fundamentals such as private property, contractual ordering of economic relationships, and the public/private distinction. Glimmers appear in these cases of a new moral economy to guide common law development in light of the Constitution’s transformative aspirations. The boundary judgments also experiment with post-formalist legal reasoning techniques. Any court in the world could justifiably take pride in such an astonishing burst of creative energy and jurisprudential pyrotechnics. We recognise

319 Fourie-CC (note above 49 above) decision issued 1 December 2005.
320 PEM (note 39 above) decision issued 1 October 2004.
323 Bhe (note 49 above) decision issued 15 October 2004.
324 Metrorail-CC (note 47 above) decision issued 26 November 2004.
325 Fourie-SCA (note 49 above) decision issued 30 November 2004.
326 Modderklip-CC (note 31 above) decision issued 13 May 2005.
327 Laugh It Off Promotions (LIOP) (note 104 above) decision issued 27 May 2005.
328 K v Minister (note 47 above) decision issued 13 June 2005.
and celebrate that achievement. But we also call attention to limitations of the boundary cases that sought to concern those committed to realising the Constitution’s transformative potential. Occasionally the left hand takes back what the right hand gives. Cutting-edge legal methodology may be promptly followed in the same judgment by a retreat to formalist catechism. Daring conceptual innovation appears alongside uncritical recitation of common law orthodoxy. The courts are most confident and persuasive when a case is about undoing the legacies of apartheid. When they bring ‘social context’ into legal analysis, the courts generally mean the consequences of apartheid policies. The courts are often less convincing when it comes to analysing South African common law prior to 1913 or common law in other jurisdictions. They have proved more successful in undoing apartheid injustice than in sketching out the institutions and social practices toward which transformation should aim.

It in no way detracts from the courts’ accomplishments to say that the boundary judgments cluster in certain areas which made them relatively ‘safe’ or ‘easy’ to address on the scale of problems facing legal transformation in South Africa. Many of the heroic judgments concern residual effects of apartheid land policy, ‘influx control’, and ‘spatial planning’ (*Bhe, Jaftha, Metrorail, Modderklip, PEM, and Zondi*). The consequences of apartheid land policy were so devastating and remain so salient in South Africa today that the courts stand on relatively secure political ground in this field. Similarly, the courts have promoted the inclusion of excluded and subordinated identity groups (*Bhe, Fourie, and K v Minister*). The Constitutional Court has accomplished dramatic inclusionary steps primarily by invoking a dignitarian conception of equality.\(^{329}\) By contrast, the courts have been less eager

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\(^{329}\)Hinging the equality inquiry to the concept of dignity is not without problems. Susannah Cowen argues that dignity as a value is ‘well placed to guide and serve the Court’s equality jurisprudence’. S Cowen ‘Can Dignity Guide South Africa’s Equality Jurisprudence?’ (2001) 17 *SAJHR* 34, 58. Even so, she acknowledges that the Constitutional Court has ... been slow and restrained in giving content to the concept of dignity and in explaining what it means when it says dignity has been impaired’, and she concedes ‘that the concept alone does not go very far towards explaining the vision of the transformed society in any detail, nor the means by which such a society ought to be achieved’. Ibid 54–5. Nothing in the concept of human dignity *inherently* tilts towards individualism or prevents its application to questions of economic distribution. Hints of a redistributive approach do appear in some cases, notably *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) (progress toward substantive equality may constitutionally include cross-subsidisation measures). In practice, however, the dignitarian approach to equality reflects the Constitutional Court’s reluctance to carry its equality jurisprudence into questions of economic redistribution. See C Albertyn ‘Equality in Cheddle et al (note 69 above) 64 (Constitutional Court reluctant to engage with the concept of redistributive justice). Moreover, the Constitutional Court’s equality and dignity cases are marked by a strain of social conservatism. See, for example, *Jordan v S* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) (Ngcobo J) (denigrating attitudes toward sex workers; traditional conceptions of gender); *Voils NO* (note 140 above) (Skweyiya J) (traditional conception of marriage). See also *President of the RSA v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC). Although the majority recognised that the socially imposed division of labour ‘is one of the root causes of women’s inequality in our society’, ibid para 38, Krieger J’s separate judgment exposed limitations in the Court’s ability to think transformatively about traditional gender roles. See C Albertyn ‘Substantive Equality & Transformation in South Africa’ (2007) 23 *SAJHR* 253, 261–3; C Albertyn & B Goldblatt ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 *SAJHR* 248, 264–6. But these are topics for another day.
to address problems of class domination and or to enquire into the role of
the common law in sustaining class hierarchy and wealth inequality. They
avoid addressing how background common law rules affect the distribution
of income and wealth and how private law rules must be adjusted so as to
coax South Africa toward an economic distribution more reflective of the just
society to which the Constitution aspires. Although courageous in bringing
outsiders into the mainstream, the courts hesitate to interrogate conventional
institutions and practices (as distinct from purging the remnants of apartheid).
Someday the South African masses will be lifted out of poverty and have the
opportunity to lead better-resourced lives. As miraculous as that will be, is the
end point toward which the transformative project aims simply to bring the
poor into conventional, middle-class life as we know it?

Finally, the boundary cases were amenable to ‘resource-lite solutions’, that
is, to outcomes and remedies that do not involve or do not appear to involve
oceanic monetary outlays. To be sure, cases like Metrorail (and Carmichele)
that impose heightened protective duties on the state imply a commitment
of resources to increase deployment and upgrade training of public-safety
personnel. But such costs pale in comparison to the sums needed to realise the
rights to food, health care, housing, and social security.

(i) Toward a new moral economy

The boundary cases unmistakably demonstrate the ability of the courts, par-
ticularly the apex courts, to engage the project of transforming fundamental,
background concepts of private law. A good example is Bhe, in which African
women challenged the customary law principle of male primogeniture (which
barred women from inheriting) and the statutory scheme that imposed this
rule of succession on their cases – a combination of the Intestate Succession
Act (ISA), the Black Administration Act (BAA), and subordinate regu-
lations. Langa DCJ (as he then was) wrote with passion that the BAA was
totally racist in purpose and impact, and the Court struck down the BAA
and the pertinent ISA provisions. In the posture of the case, settlement of the
decedents’ estates defaulted to customary law. Langa DCJ then found that the
operative principle of male primogeniture served a deeply patriarchal system
and was therefore repugnant to the Constitution (to the extent that it excludes
or curtails women and extra-marital children from inheriting property).

Bhe vividly illustrates the method of spotlighting and revising back-
ground rules that structure social practices and institutions. Of course, the
pre-existing rules of intestate succession, and the racism and sexism they
reflected, were not ‘backgrounded’ in the sense of being obscured from
popular consciousness; quite the opposite. Moreover, the racist core of the

331 38 of 1927.
332 Bhe (note 49 above) paras 59–74.
333 Ibid paras 77–9.
334 Ibid paras 93–7.
challenged rules was a product of modern statute and regulation, not common or customary law. Even as to the customary law rule of male primogeniture, the Court, and particularly Ngcobo J (as he then was) in an impressive concurrence, cautioned that we must carefully distinguish authentic, ‘living’ customary law from its fossilised incarnation in the colonial and apartheid eras. That said, the portions of Bhe concerning primogeniture focused on a ‘taken-for-granted,’ naturalised rule that profoundly affected the structure of relationships in the so-called ‘private’ domains of home, marriage, and family. The distributive consequences of male primogeniture empowered men and disempowered women. The rule legitimated and enhanced male power – although in the account of Ngcobo J, the rule also validated the social and moral responsibilities of the successor (the indlalifa), who was not simply an ‘heir’ to property but also acquired a position of responsibility for the well-being of the family unit. As the Court’s careful discussion makes clear, there was nothing ‘natural’ or ‘eternal’ about primogeniture – it was a product of human agency, culturally shaped, historically evolved, and enforced by law.

It remains to be seen how successful the Court’s intervention and follow-up legislation will be in undermining gender-hierarchy and creating greater space for women’s economic and social advancement. That project will span generations and require cultural and political, as well as purely legal change. We do not imagine that a single case outcome can usually be anything more than a step in the right direction. On the other hand, Bhe dismantled a key buttress of patriarchy and began a process of building a more egalitarian, non-sexist, non-racist legal infrastructure. That is the aspiration of transformative constitutionalism in private law development – to lay new foundations that will install ‘structural solidarity’ into society’s legal infrastructure.

Port Elizabeth Municipality, Jaftha, Laugh It Off Promotions, and the Modderklip judgments carried the project forward by critically re-examining the concepts of private property and contract. As these judgments explain, ‘private property’ has no self-revealing or trans-historical content. The incidents of private-property ownership are determined by myriads of micro-focused decisions – in the well-known metaphor, property rights consist of a ‘bundle of sticks’. Whether a particular legal stick is in the bundle in any particular historical and cultural setting – say, whether a land owner in the new South Africa may call on the public authorities to evict a trespasser – cannot be determined in the abstract from the ‘nature’ of property or from some built-in logic of the common law. The answer always involves, whether consciously or not, a judgment of social policy involving a balancing of conflicting legal and social considerations.

335 The judgment of Ngcobo J substitutes the term ‘indigenous law’.
336 We owe the phrase to Duncan Kennedy.
337 For a high-formalist statement of the view that ‘property’ has self-defining content, see RA Epstein ‘A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation’ (1983) 92 Yale LJ 1357, 1389 (footnote omitted) (“the absolute power to exclude … is the hallmark of any system of private property”).
This insight is sometimes expressed as follows: under the 1996 Constitution, the 'protection of property as an individual right [is] not absolute but subject to societal considerations'. Private property entitlements under the common law were always bounded by 'societal considerations'; that is nothing new. The statement gains force because the pertinent 'societal considerations' now impose ubuntu-inspired obligations on ownership. For example, owners' and possessors' interests must now be balanced against the competing claims of poor people in need of accommodation in light of the new constitutional principles of a right of access to adequate housing and protection from arbitrary residential eviction. At least in principle, the eviction of a home occupier is subject to constitutional scrutiny in the US. But in South Africa, the Constitution (along with legislation giving effect to s 26 rights) has dramatically altered the normative framework and brought residential evictions under recurring, high-profile constitutional scrutiny.

Gradually the Constitutional Court and other courts have begun to sketch a new conception of property that embraces greater responsibilities of owners toward neighbours, tenants, and strangers than contemplated at common law. Traditional 'private property' is very slowly but perceptibly morphing into 'socially-engaged property'. Laugh It Off Promotions, a first effort to stake out a socially-engaged approach to intangible property, exemplifies the trend. Although LIOP arose under a statute that prohibits the infringement or dilution of trademarks, the Court's judgment delves deeply into the nature of the property interest congealed in a trademark. According to Moseneke DCJ, the extent and scope of property in trademarks must take account of competing constitutional considerations, here the s 16 right to freedom of expression. Proportionality thinking replaces the absolutist mindset in demarcating the dimensions of property interests. Invoking the statutory interpretation language of s 39(2), the Court held that the protection of trademarks must be 'curtailed to the least intrusive means necessary' to achieve its purposes and must be restricted to the scope 'least destructive of' and 'most compatible with' free expression. This is not mere 'balancing'. The least-destructive-means test is meant to put a thumb on the scales on the side of free expression.

Bold interrogation of the traditional mindset and intriguing glimpses of a socially-engaged conception of property and contract are found in the Constitutional Court judgments in Jaftha and Modderklip and the remarkable judgment of Harms JA in Modderklip-SCA. Jaftha-CC proceeds from a view of property, contract, and market consistent with the Realist tradition. Mokgoro J's judgment denaturalised the background rules of market transactions. It

338 PEM (note 39 above) para 16.
339 See ibid (citing AJ van der Walt). For example, the ancient maxim sic utere tuo ut alienum non laedas taught that one must so use one's own property as not to injure the property of another. On the incorporation of obligations of mutuality and interdependence in the law of property, see generally J Singer 'The Reliance Interest in Property' (1987) 40 Stanford LR 611.
340 PEM (note 39 above) paras 23 & 33.
341 See note 28 above.
342 LIOP (note 104 above) para 48.
paid attention to the coercive side of contract as well as the liberty-enhancing side and understood that contract enforcement puts the power of the state at the disposal of private parties to control and sometimes to inflict devastating losses upon other private parties.

The applicants in *Jaftha* were poor women who lived in homes acquired with the assistance of a governmental housing subsidy. They defaulted on trifling debts. The loan creditors obtained judgments against them, attached their homes, and then had them sold in execution to satisfy the judgments pursuant to collection procedures specified in the Magistrates’ Court Act. The execution sales proceeded despite that the applicants would have no suitable, alternative accommodations once evicted, and despite that an owner evicted from a state-subsidised home sold in execution is permanently barred from obtaining any further housing subsidies. The applicants asked the Court to find that the sale of their homes under these circumstances violated their constitutional right of access to adequate housing under s 26(1). The Court concluded that governmental action that permits a person to be deprived of his/her existing access to adequate housing limits the rights protected by s 26(1) and is therefore unconstitutional unless justified under s 36.

In resolving the s 36 question of justification, the Court ruled that the forced sale of a poor person’s home to satisfy a small debt may be unreasonable and therefore unconstitutional, although this will not always be the case: ‘a consideration of the legitimacy of a sale-in-execution must be seen as a balancing process.’ After detailed discussion of the factors to be weighed, the Court concluded that the collection procedure authorised by the Magistrate’s Court Act is ‘overbroad and constitutes a violation of section 26(1) of the Constitution to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure .... [I]t is not justifiable and cannot be saved to the extent that it allows for such executions where no countervailing considerations in favour of the creditor justify the sales in execution’ and where appropriate judicial oversight at the point of sale is lacking.

Without too much of a stretch, *Jaftha-CC* can be given a reading that radically challenges foundational common law understandings. On a robust interpretation, *Jaftha-CC* stands for the proposition that whether it is constitutional for a judgment-creditor to execute on the home of an indigent debtor – in other words, whether the legal process will permit contractual arrangements to run their ordinary course – is determined by a balancing test a central ingredient of which is the link between access to housing, security

343 32 of 1944.
344 The applicants relied on s 26(1), not the s 26(3) right of protection against arbitrary evictions. In rendering judgment, the Court read s 26 as a whole and referenced s 26(3) in passing. *Jaftha-CC* (note 48 above) para 28. The Court emphasised ‘that any claim based on socio-economic rights claims must necessarily engage the right to dignity’ under s 10. Ibid para 21.
345 *Jaftha-CC* (note 48 above) para 39.
346 Ibid para 42.
347 Ibid paras 52 & 61.
of tenure, and human dignity. A gross disproportionality of the burden on the debtor as compared to the burden on the creditor will render the execution sale on an indigent person’s home unconstitutional. The legal process may be invoked to collect on contractual debts, but only up to a point. If collection would be inhumane, a line is crossed, and the law will no longer come to the creditor’s aid.

Understood this way, the judgment contributes the following building blocks to the foundation of a new moral economy for South Africa:

- **A transaction entered by a poor person to secure a basic necessity of life that reflects gross economic inequality is legally unenforceable. The normal workings of the market are constitutionally circumscribed by a ‘humaneness’ limitation.**

The decision embodies a kernel of an idea that interpersonal duties of solidarity sometimes take priority over market-outcomes. Redistributive consequences may flow from this approach. The creditor was left holding the bag in *Jaftha-CC*. The Constitution’s underlying commitment to minimum social and economic rights apparently runs so deep that in the circumstances of the case, one South African was asked to bear a loss because another South African was too poor to fulfil her contractual obligations.

Read generously, *Jaftha-CC* is a watershed in the transformation of private law. There is, of course, a narrower and perhaps culturally more plausible reading of *Jaftha-CC*, in which the judgment seeks to temper the worst excesses of free contract with a dose of humanity but does not purport to inquire generally into the fairness of the market. That is, one can read *Jaftha-CC* as working within the framework propounded by Cameron IA in the freedom-of-contract cases that draws a bright line between the normal pressures and hardships of the market (constitutional) and extreme, outlying cases (constitutionally suspect). On this view, *Jaftha-CC* concerns a rare exception to the ‘free market’, somewhat akin to a market failure. In the market for small loans to extremely poor people, borrowers are typically unaware of or under-informed about their legal options. Because of the grossly unequal bargaining power typically found in that market, we cannot assume that the contracts arising from it truly reflect the parties’ intentions and desires. The legal substructure of that market must therefore be adjusted in light of the Constitution to produce arrangements and outcomes that mimic what the parties would probably choose if the power-imbalance were not present.

Concededly, Mokgoro J was ambivalent about how far she wanted to go in pushing boundaries. Her judgment wavers on whether it is announcing a general rule of law or dealing only with a narrow range of marginal cases.\(^{348}\) She

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348 *Jaftha* has had an impact on legal practice in the general residential housing market. *Standard Bank of SA Ltd v Sanderson* 2006 (2) SA 264 (SCA); 2006 (9) BCLR 1022 (SCA) concerned the enforcement of ordinary mortgage bonds. The SCA accepted for purposes of the case, but without deciding, that in some circumstances the right of access to adequate housing enshrined in s 26(1) might be compromised by a creditor’s execution sale of a residence where the debt arose from an ordinary mortgage bond, although the court speculated that ‘such cases are likely to be rare’. Ibid
carefully cautioned that the principles of the case should not lightly be extended to other situations, lest poor people be priced out of the market for credit or rendered unable to begin accumulating wealth by pledging their homes. The Court expressly declined to find a blanket, low-income homestead exemption from debt-collection. On this more subdued interpretation, Jaftha-CC takes the fairness and constitutionality of ordinary market transactions for granted. The judgment tantalises the reader with a hint of interrogating the market-structuring role of traditional private law principles, but then abruptly takes that inquiry and the question of economic redistribution off the table by the device of restricting it to aberrant cases.

The Modderkloof judgments will be remembered as visionary contributions to legal transformation in South Africa. Some 400 informal settlers who had been evicted from public property by a municipality moved to and built about 50 shacks on a nearby strip of land. Soon 40,000 people lived in the settlement. Streets were laid out, stores established, and public space set aside, but the settlement still had only one water tap and no toilets. The original occupiers believed in good faith but erroneously that the land they had entered was unused, municipal property. The land, it turned out, was privately owned. Ironically, legal transgression in the form of trespass was an indispensable element in precipitating these distinguished judgments. For all their fear of anarchy, the judgments treat the trespassing occupiers with respect and look upon them with humanity and compassion. Contrary to the government’s arguments, the SCA and Constitutional Court concluded that the occupiers were not attempting to ‘jump the queue’ to obtain priority listing for a government housing programme. They simply had nowhere else to go – their homelessness was a legacy of apartheid ‘urban planning’, not individual unworthiness.

The owner laid charges of criminal trespass, and some arrests occurred; those convicted were released with a warning and immediately returned to the settlement. The official in charge of the local jail asked the owner and police to stop processing these cases, as insufficient space was available in the prison

para 19. Nevertheless, the court observed that ‘[b]earing in mind that in most cases where an order for execution is sought the defendant has no defence to the claim for payment, and is thus unlikely to seek or obtain legal advice, it seems to us desirable that the defaulting debtor should be informed, in the process of initiating action, that s 26(1) may affect the bond-holder’s claim to execution’. Ibid para 25. Accordingly, the SCA laid down a rule of practice ‘requiring a summons in which an order for execution against immovable property is sought to inform the defendant that his or her right of access to adequate housing might be implicated by such an order’. Ibid. As a result, the standard summonses banks issue now include a Sanderson warning.

349 Jaftha-CC (note 48 above) paras 50–1. The statutory collection scheme immunised from seizure any of debtors’ goods that are ‘necessities’. The applicants argued that the statute was unconstitutional unless it read the necessities exemption to accord immunity to poor people’s homes valued below a certain sum. The Court rejected this challenge on the assumption that a blanket prohibition of seizure might lead to a poverty trap by ‘preventing many poor people from improving their station in life because of an incapacity to generate capital’ by pledging their homes. Ibid para 51; see also para 58. The homestead exemption is a familiar feature of US law. For an illuminating discussion of its significance in US political culture, see W Simon ‘Social-Republican Property’ (1991) 38 Univ of California-Los Angeles LR 1335, 1356–9.

350 Modderkloof-CC (note 31 above) paras 35 & 36.
should custodial sentences be imposed. The owner then sought an order of eviction which the High Court granted along with a writ of execution. The sheriff balked at carrying out the eviction, demanding a deposit of R1,800,000 (then approximately US$220,000) to pay the costs of a security firm to carry out the order. This figure exceeded the value of the land. The owner's applications to high levels of government to have the eviction carried out were unsuccessful, so it brought suit claiming that unless the government carried out the eviction or otherwise removed the unlawful occupiers, it would be sanctioning an unconstitutional breach of the owner's property rights under s 25(1).

The surprising lesson of Modderklip-SCA was that an owner in possession of a concededly valid court order protecting its property from unlawful invasion does not have a constitutional right to have the order carried out: 'the state does not serve as an insurer of litigants[,] and if an order is unenforceable because of practical considerations the loss is usually that of the litigant'. However, the SCA concluded that the government breached the occupiers' constitutional right of access to housing by failing to fulfil its Grootboom obligation to cater to those in 'desperate need' and by failing to find an alternative location to which the occupiers could be relocated. Under the circumstances, eviction could not be effected humanely and was therefore unconstitutional. As a consequence of these defaults, the state in turn breached its duty under s 7(2) to protect Modderklip's property rights guaranteed by s 25(1). In effect, the state violated the owner's constitutional rights by allowing the burden of societal problem to fall exclusively on a private party's shoulders.

Decisively rejecting the bright-line, act/no-act distinction, the SCA held (and was sustained in this respect by the Constitutional Court) that the Constitution can be violated by inaction as well as action, and that the government's failure to act in this case was 'conduct' that must measure up to the Bill of Rights. The SCA's solution was to declare that the occupiers had an interim right to remain and to order the government to pay the owner the fair rental value of the property as constitutional damages for the duration of the unlawful occupation.

The Constitutional Court agreed with much in the SCA's assessment of the case, but veered off on a different tangent in one crucial respect. The Court declined to reach a decision as to whether the owner's s 25 property rights or the occupiers' housing rights under s 26 had been violated. Motivated by a fear of 'anarchy' and 'social upheaval', Langa CJ shifted the focus of analysis to

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351 Modderklip-SCA (note 47 above) para 30.
352 Ibid paras 22 & 26 (relying on Grootboom (note 99 above) para 88).
354 See Constitution ss 2 ('the obligations imposed by [the Constitution] must be fulfilled'); and 7(2) ('The state must respect, protect, promote and fulfil the rights in the Bill of Rights') (italics added).
355 Modderklip-CC (note 31 above) paras 45–6. This fear of social disruption is a steady undercurrent in the Court's work. See, for example, Zondi (note 48 above) para 63 (Constitution 'requires that potentially divisive social conflicts ... be resolved by courts, or other independent and impartial tribunals') & paras 76–7 (constitutional infirmity of legal scheme for impounding cattle that 'remove[s] from the court's scrutiny one of the sharpest and most divisive conflicts of our society'); and City Council of Pretoria v Walker (note 329 above) paras 92–3 (Langa DP):
the 'rule of law' principle enshrined in s 1(c) and the owner's right of access to courts under s 34. His judgment holds that the 'rule of law' obliges the state to provide adequate dispute-resolution mechanisms, including not only courts but an infrastructure capable of effective enforcement of court orders. The state must 'take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law'. Because the government had neither expropriated the land nor found relocation space for the occupiers, it could not at present carry out the eviction in Modderklip without risking horrendous consequences in social disruption and misery. In this it violated Modderklip's constitutional right of access to courts under s 34 read with s 1(c). In essence, the Court held that peaceful and humane execution of court orders is a 'public good' and therefore an obligation that government may not fairly or constitutionally thrust onto an individual party. The Court largely upheld the remedy ordered by the SCA.

The Modderklip judgments, read with Port Elizabeth Municipality, reflect and contributed to a revolution within landlord-tenant law that has occurred over the past decade. On a broad interpretation, these decisions added additional foundations to the new moral economy guiding legal transformation in South Africa:

- Absent exceptional circumstances, no one in South Africa – not even a conceded trespasser – may be evicted from his or her home unless the eviction can be executed humanely, which ordinarily means that provision must be made for alternative shelter.
- The Constitution's property clause (s 25) does not guarantee the protection or implementation of property rights under inhumane circumstances.
- Whether one may insist that the authorities enforce a court order in a private law matter dealing with property depends on a balancing test involving an assessment of all relevant circumstances and competing interests, including the nature of the underlying right sought to be enforced by the order, the impact of enforcement on those against whom it would run, and the risk of social upheaval.

Much has been said about a culture of non-payment by residents of townships. It is a feature of the past ... It has no place in a constitutional state in which the rights of all persons are guaranteed and all have access to the courts to protect their rights ...

... [R]esort to self-help by withholding payment for services rendered ... carries with it the potential for chaos and anarchy and can therefore not be appropriate. The kind of society envisaged in the Constitution implies also the exercise of responsibility towards the systems and structures of society.

356 Modderklip-CC (note 31 above) para 41.
357 Ibid para 43.
358 Ibid para 45.
359 Legislation, of course, also played a central role, notably the PIE Act (note 209 above). For a comprehensive account of these developments, see S Liebenberg 'A New Paradigm for Evictions Law' in Socio-Economic Rights (note 98 above) 268–316.
These are potentially paradigm-shattering holdings. To be sure, like Jafitha, the Modderklip decisions can be read more sparingly. Consider the portion of the remedy ordered by the SCA and substantially confirmed by the Constitutional Court requiring the government to pay Modderklip constitutional damages calibrated to the rental value of the land. The apex courts thereby forced the state to shoulder the economic costs of the transition toward a socially acceptable resolution of the problem. (Such ‘transition costs’ are in addition to whatever sums government will be obliged to pay to resolve the problem, such as the cost of providing alternative housing or an alternative location for the settlement.) In other words, peaceful, law-guided dispute resolution and the processes of transition toward a just society are public goods, so all South Africans may be taxed to purchase them. Where the enforcement of rights between private parties threatens social conflict — by extension, where the enforcement of rights between private parties touches on major flashpoints of social and economic inequality — the matter may not be left to the parties working in a private law framework. The costs of the interim resolution of major social conflicts must be internalised to the state’s budget. Constitutional damages accomplish this by shifting the economic costs of rights-conflicts from the parties to the national community as a whole.

The logic of the Constitutional Court’s position is that the Constitution socialises the costs of transition to a just society. From one point of view, this approach is a giant step-forward. All South Africans are enlisted in the transformative project, even if indirectly. From a different angle, however, this formulation represents a retreat from the dangerous territory of redistribution to the safer, but probably illusory ground that transformation can be achieved without asking those at the top of the economic and social ladder to make special sacrifices. In this sense Modderklip is inconsistent with Jafitha, which implies that the state will not pay for everything. Rather, Jafitha unambiguously conveys that losses might be imposed on the ‘haves’ in order to lift (or at least provide a life-raft for) the ‘have-nots’.

Ambivalence may also be detected in the way the SCA and Constitutional Court side-lined the issues of horizontal application and channelled the case into a ‘vertical’ solution. Harms JA commented in Modderklip-SCA that the right of property operates horizontally, although technically this point might be dictum as no relief was sought against the squatters. The SCA also remarked, clearly as dictum but intriguingly nevertheless, that ‘[c]ircumstances can ... be envisaged where the right [of access to adequate housing] would be enforceable horizontally but the present is not such a case’.

That is, cases may be conceived in which, at least in principle, homeless people would be constitutionally entitled to enforce the right of access to housing against private property owners. While this might be a question for a distant future, the SCA judgment indicates that it is not science fiction. The SCA placed on the table the proposition that a moral and legal community committed to equality
and social justice such as envisioned by the Constitution should consider the virtues (and potential disadvantages) of entrenching interpersonal duties of solidarity with respect to the provision of life’s basic needs. At the end of the day, however, the SCA judgment defaults to a ‘public good’ rationale centred on the duties of the state.\footnote{361}

Chief Justice Langa’s decision in \textit{Modderklip} cut off the interrogation of property and entirely deflected the horizontality inquiry, focusing instead on the more tepid and presumably less controversial right of access to courts. This switched the analytical ground to the (vertical) duties of the state and pushed interpersonal duties of solidarity to the side. A conceptual weakness of this approach is that it postpones inquiry into whether the common law of property had anything to do with why South Africa now finds itself with millions who do not enjoy access to adequate housing. The critical insight that the common law of property partially constitutes the socio-economic order is once again backgrounded. There is a certain unexamined circularity in the Court’s argument that the state must protect property rights, when property rights exist only because of governmental action.\footnote{362}

The access-to-courts rationale for the outcome in \textit{Modderklip} involved an interesting irony that has received little attention in the literature. In the mid-1990s debates about whether justiciable social and economic rights should be entrenched in the final Constitution, the argument was often made that ‘first generation rights’ (voting, fair trial, freedom of expression, and so on) impose little or no demands on the public fiscus, whereas social and economic rights imply massive claims on national resources and government spending and are therefore singularly inappropriate areas for judicial meddling. Against this background, Langa CJ’s shift of focus from housing to court-access put the Constitutional Court’s resolution of \textit{Modderklip} in a more politically palatable and less intrusive light. The problem is that the Court gave the s 34 right of access to courts a vigorous, substantive, not merely formal, content. The Court held that the right of access does not mean merely that South Africans have the right to approach the courts to settle their disputes. The constitutional entitlement is broader than that – the state is obliged to provide a substantively adequate institutional infrastructure so that orders of courts can peacefully and effectively be executed.\footnote{363} Courts were surely available to the owner in \textit{Modderklip} to resolve the dispute; what was lacking was an institutional infrastructure that would enable the authorities to carry out court orders. Providing such an infrastructure will surely command substantial resources, to which must be added transition costs incurred along the way. In \textit{Modderklip}, the government was obliged either to expropriate the parcel or to rent it until it could provide the occupiers with some form of at least temporary, alternative housing. The judgment of Langa CJ blurs almost to invisibility the supposed distinction between first generation rights and social-economic rights as

\footnote{361}{See Van der Walt ‘Thoughts on the \textit{Modderklip} Case’ (note 97 above) 54–5.}\footnote{362}{See note 131 above and accompanying text.}\footnote{363}{\textit{Modderklip-CC} (note 31 above) paras 41–6.}
regards fiscal implications. The Court casually passed over this important separation-of-powers issue without comment.

(ii) **Legal method: post-formalism and neo-formalism**

The boundary cases are rich in post-formalist techniques of legal analysis absent from the *Brisley to Barkhuizen* line.

(a) **Contextual legal reasoning**

Sachs J wrote in *Port Elizabeth Municipality* that a court is obliged in deciding a matter of that kind (involving squatters) to go beyond technical considerations, 'to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment'.

The phrase 'extraneous factors' is an inadvertent concession to traditionalism. Justice Sachs' point is that moral and contextual factors are not extraneous but central to legal decision-making. Legal analysis must have regard to them in order to reason to a satisfactory conclusion, and the analyst must be both self-aware and candid with the public about the role of moral considerations in legal reasoning.

As Sachs J explained in *Fourie-CC*, '[i]gnooring the context, once convenient, is no longer permissible in our current constitutional democracy which deals with the real lives as lived by real people today'. Similarly, in addressing a seemingly technical question about trademark dilution, Moseneke J observed in *LIOP* that 'Courts must be astute not to convert the anti-dilution safeguard of renowned trade marks usually controlled by powerful financial interests into a monopoly adverse to other claims of expressive conduct of at least equal cogency and worth in our broader society'.

In *Metrorail*, O'Regan J faced the question whether semi-public commuter railroads engaged in transporting black workers from Cape Town's surrounding townships owe a duty of reasonable care to protect riders from third-party criminal violence. She located the solution to this question squarely in the context of apartheid 'spatial planning' under which public transportation was designed to cater for labour-demand under a system of race-based residential segregation.

The apex courts have been most sensitive to social and historical context in cases involving land and housing. They have repeatedly found that legal issues before them in such cases could only be understood in the context of the apartheid history of forced disposessions, removals, unjust evictions, 'influx control', 'spatial planning', and race-based residential segregation, and their resulting legacies of poverty, homelessness, and economic inequality.

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364 *PEM* (note 39 above) paras 35–6 & 33 (referring with approval to an SCA decision).
365 *Fourie-CC* (note 49 above) para 151.
366 *LIOP* (note 104 above) para 48.
367 *Metrorail-CC* (note 47 above) paras 8, 65 & 82. The SCA had virtually ignored this context, imagining that the legal question could be resolved by parsing the words of the railroad's enabling statutes.
Under the Constitutional Court’s leadership, social and historical context are not merely recited as background; context is coming to be understood as a source of legal knowledge. Sachs J wrote in PEM: ‘complex socio-economic problems … lie at the heart of the unlawful occupation of land in … urban areas’; and, under apartheid, ‘dispossession was nine-tenths of the law’. He concluded that the common and Roman-Dutch law of property, apparently neutral on its face, was manifestly racist in practice. The rights of illegitimate owners installed by state-action routinely trumped the rights of occupiers.

Zondi is perhaps the finest example of resort to social context as a fountainhead of legal knowledge and reasoning. Zondi concerned a constitutional challenge to the Pound Ordinance (KwaZulu-Natal) 1947 providing for self-help impoundment of trespassing animals. Although some provisions of the particular impoundment ordinance involved in Zondi might pass constitutional muster standing alone, Ngcobo J, as he then was, determined that the scheme as a whole did not. Particularly offensive to the constitutional right of access to the courts were provisions in the ordinance for determination of liability and the quantum of damages for trespass without notice, and for the sale of impounded animals without notice. As Ngcobo J wrote: ‘The effect of the scheme … is to remove from the court’s scrutiny one of the sharpest and most divisive conflicts of our society. The problem of cattle trespassing on farmland must be seen in the context I have outlined above. It is not merely the ordinary agrarian irritation it must be in many societies. It is a constant and bitter reminder of the process of colonial dispossession and exclusion.’

Ngcobo J described the context in intimate and painstaking detail referencing the social, cultural, and economic importance of cattle to rural black South Africans, the inextricable connection between apartheid land policy and practices concerning impounding livestock, the history of forced removals and dispossession of black South Africans from their land, and the resulting, widespread poverty and deprivation.

The courts’ increasing willingness to invoke social context is promising, but it is not without its difficulties. As previously noted, ‘social context’ often means, and only means, the legacy of apartheid. The factor of class has barely made an appearance, although class considerations indelibly marked legal development everywhere in the common law world including South Africa before, during, and after apartheid. Moreover, the courts do not enquire what features of the historic common law made it so vulnerable to the apartheid infection. What does it say about the historic common law of property that, under apartheid, dispossession could become nine-tenths of the law? It defies belief that all traces of racism, sexism, patriarchy, and homophobia in the common law were apartheid innovations.

368 PEM (note 39 above) paras 56 & 9 (italics added).
369 Ibid para 10.
370 32 of 1947.
371 Zondi (note 48 above) para 76.
Few decisions invoking social context are as concrete and persuasive as Zondi. Description and excoriation of apartheid era policies and injustices often jump to doctrinal abstractions without much connective tissue. One easily sees how the apartheid history provides moral force for legal development, but often the judgments do not make clear what legal-analytical content the historical context adds. Consider Jaftha, in which Mokgoro J movingly evoked the history of forced evictions and deprivation and correctly argued that the social problem underlying the case was poverty.\textsuperscript{373} To regard poverty as a factor of central relevance to legal analysis places South African constitutional discourse light-years ahead of that in the US. However, after carefully describing the context and rightly insisting that legal analysis should draw upon contextual knowledge, the judgment reverts to abstract concepts and values, such as dignity, creditors’ interests, and people’s obligation to pay their debts. Perhaps these are relevant considerations but, so phrased, they are lifeless and divorced from the relevant social context. Once at the purely conceptual level, the Jaftha Court added into the balance the desirability of encouraging the poor to take on the financial responsibility of home-ownership and of ensuring poor people opportunities to escape poverty traps and generate capital by collateralising their real property.\textsuperscript{374} The opportunity to generate capital by mortgaging multi-million rand homes might be a legitimate consideration for analysis, but it seems a flight into fantasy to give it weight in a balance against housing-access rights for poor people in a South Africa, where millions are either homeless or live in shacks cobbled together from scraps.

As the new approach has been used so far, resort to ‘social context’ often consists of identifying unjust, apartheid practices; observing that these practices cannot be squared with the new constitutional values of dignity, equality, and accountability; and then concluding that the case at bar must be governed by a new norm or test that takes account of the new constitutional values. This can be a persuasive template for legal analysis if, but only if, the decision maker explains what she hopes the reformulated norm will accomplish in relationship to the social problems that gave rise to the need for legal development, and how she believes the reformulated legal norm will impact on the lived experience of the affected constituencies. If those steps are missing or glossed over – if ‘social context’ merely invokes past injustice without providing legal-analytic content – legal reasoning based on social context can easily slide into a new kind of formalistic discourse, purporting to derive concrete solutions from highly abstract legal concepts. ‘Dignity’ and ‘equality’ are no more self-defining than ‘private ownership’, ‘reasonable person’ or ‘good faith’.

\textsuperscript{373} Jaftha-CC (note 48 above) para 30.
\textsuperscript{374} Ibid paras 50–8.
(bb) Balancing and proportionality

A second innovation in legal method is the rapid emergence of balancing and proportionality tests, often in tandem with contextualised legal reasoning. 'Balancing', of which 'proportionality inquiry' is a subcategory, is a method of addressing legal problems by weighing up the conflicting considerations of policy, morality, right, welfare-maximisation, legal form, and institutional competence pertinent to a decision. Balancing is potentially superior as an analytical approach to deduction from abstract norms and authorities. The modern emergence of balancing represents progress in legal thought. In principle, balancing encourages the decision maker to surface a wider range of relevant concerns, to consider them in a more fine-grained detail, and to be more candid with the public about the motivations behind a decision than do traditional abstract, deductive methods. In principle, balancing reduces the probability of formalist error. However, balancing is not inherently superior to other legal methods. Intrinsically, it is neither good nor bad, neither progressive nor conservative. Everything depends on how the tool of balancing is deployed — that is, with what level of attention to context, what level of self-awareness and candour, what scope of vision, what sense of values, and what policy orientation. While the diffusion of balancing inquiries in South African constitutional jurisprudence is a promising development that may open a door to transformative jurisprudence, that outcome cannot be taken for granted.

Balancing is no stranger to South Africa, but the grip of the traditional legal culture meant that South Africa had some catching up to do after the transition in 1994. South African jurists now increasingly use balancing techniques, and there is a growing tendency to weigh in social and economic factors as well as legal and institutional considerations. South African jurists resort to balancing to resolve constitutional questions of the utmost importance and political salience. The 1996 text itself in s 8(2) refers to the question of the scope of horizontal application of the Constitution to a case-by-case balancing of considerations. Equality jurisprudence has acquired a baroque doctrinal structure, but in the end, equality cases are decided by a form of balancing.  

The PIE Act, read in light of the Constitution, permits the eviction of squatters only when this is 'just and equitable', a standard that devolves into a weighing of moral and policy considerations in light of all the relevant circumstances. Whether a sale in execution of a judgment-debtor's home is unreasonable and unjustifiable, and therefore unconstitutional, is determined by a 'balancing process'.  

The scope of a semi-public railroad's positive obligation to protect passengers from violent crime is measured by the standard of reasonableness, which boils down to a balancing of conflicting considerations concerning both the social problem itself (in this case, violent crime on commuter trains in the

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375 See, for example, MEC for Education: KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC); City Council of Pretoria v Walker (note 329 above).

376 See, for example, PEM (note 39 above) paras 25, 31 & 35–6.

377 Joftha-CC (note 48 above) para 42.
Western Cape) and separation-of-powers.\textsuperscript{378} In his \textit{Bhe} concurrence, Ncgobo J, as he then was, would have held – pending comprehensive new legislation – that where the parties themselves cannot agree, whether customary law (without male primogeniture) or the Intestate Succession Act\textsuperscript{379} governs intestate succession should be determined by a ‘balancing exercise’ conducted by a magistrate to determine what is fair, just and equitable in light of respect for cultural pluralism and the need to protect vulnerable family-members.\textsuperscript{380}

A salutary consequence of the new openness to balancing is a greater scepticism toward ‘either/or’, bright-line tests (‘binaries’). A classic instance of sharp binaries in legal thought is the act/no-act distinction upon which was founded the historical reluctance of the common law to assess liability for omissions. \textit{Fourie-CC} provides an outstanding example of a modernist insight – namely, that ‘inaction’ of government is a communal choice that should be subject to constitutional scrutiny in the same manner as is governmental action.\textsuperscript{381} There it was held that the Marriage Act\textsuperscript{382} might be found unconstitutional for failing to make provision for same-sex couples, even if it does not affirmatively prohibit same-sex marriage.\textsuperscript{383} Under certain circumstances, state inaction violates the constitution: ‘exclusion by silence and omission is as effective in law and practice as if effected by express language’.\textsuperscript{384}

The act/no-act distinction appeared in its most wooden form in an argument placed before the Constitutional Court in \textit{Jaftha} by the respondent Minister for Justice and Constitutional Development. The Minister attempted to save the constitutionality of the statutory debt-collection procedure being reviewed by pointing out that the scheme contains provisions of assistance to debtors, such as the right to approach a court to set aside a warrant of execution and the right to seek an order allowing instalment-payment of the judgment debts.\textsuperscript{385} The Minister acknowledged that, as a practical matter, poor debtors might not be able to make use of these protective safeguards because ‘many people similarly situated to the appellants might not have the wherewithal’ to do so. Shockingly, the Minister nevertheless argued that ‘practical difficulties that accompany the use of the legislative scheme cannot render that scheme unconstitutional’.\textsuperscript{386} In substance, the Minister argued that government cannot be faulted if it merely ‘stands by’ and ‘does nothing’ with respect to a person’s inability, due to their poverty, to realise their constitutional rights. The Court swiftly and correctly dismissed this pre-modern argument, holding that ‘it the fact that a permissive measure which must be invoked by the debtor exists does not change the potentially unjustified executions that may occur ....

\textsuperscript{378} \textit{Metrorail-CC} (note 47 above) paras 84–8.
\textsuperscript{379} 81 of 1987.
\textsuperscript{380} \textit{Bhe} (note 49 above) paras 238–40 (Ncgobo J concurring).
\textsuperscript{381} In this regard, see also the discussion of \textit{Modderkip} accompanying note 354 above.
\textsuperscript{382} 25 of 1961.
\textsuperscript{383} \textit{Fourie-CC} (note 49 above) paras 77 & 118.
\textsuperscript{384} Ibid para 81.
\textsuperscript{385} \textit{Jaftha-CC} (note 48 above) paras 19 & 46–8.
\textsuperscript{386} Ibid para 48.
So long as the possibility exists within the legislative scheme for sales in execution to occur in circumstances where debtors’ rights have been unjustifiably violated, the scheme is [unconstitutionally] overbroad.\(^{387}\)

While the emergence of balancing techniques is a sign of maturity in South African jurisprudence, there remain some disappointing aspects in the way this trend has unfolded.

Balancing suggests the nature of the exercise required, but tells us almost nothing about how to conduct it. Merely concluding that a balancing test is appropriate with respect to a legal problem leaves us in the dark regarding how to identify, weigh, and prioritise the conflicting considerations. For balancing techniques to evolve, let alone for them to contribute positively to legal transformation, jurists must begin to establish and disclose the scale of values informing their work. That is, they must develop political theories of the Constitution by which they can assess the relative importance of considerations that enter the balancing exercise. To put it simply, they must explain what they are doing when they balance and why, and they must begin to discipline the exercise so that some consistency in use of the technique may be sought from one case to the next. To date, the courts’ balancing jurisprudence has been ad hoc, loosely explained, and inconsistent.\(^{388}\) Unless it becomes more disciplined and more deeply rooted in a transformative theory of the Constitution, contextual legal reasoning and balancing can easily become a new species of formalism.\(^{389}\)

(c) Separation-of-powers and legal method

South African courts have recently pushed the analytic frontier by embracing contemporary approaches such as balancing and context-sensitive legal reasoning. This is a considerable accomplishment. But the courts often seem in denial about the destabilising potential of ‘advanced’ legal methods. As experimentation with new legal methods has increased, a gap has opened

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387 Ibid. This holding is another example of how South African constitutional theory is miles ahead of its US counterpart. See the discussion of Harris v McCrae (note 119 above) (holding that government fulfills its obligations with respect to the enjoyment of constitutional rights if it makes such enjoyment available on paper, even where it is clear that poor people cannot actually avail themselves of their rights because of their poverty).

388 We are aware of two major studies that have looked closely at what the apex courts do when they say they are doing balancing or proportionality exercises or when they are engaging in the related exercise of ‘reasonableness review’. Both studies find that the case law exhibits substantial inconsistencies. See Liebenberg Socio-Economic Rights (note 98 above), particularly ch 4 (medley of approaches deployed by the Constitutional Court in socio-economic rights cases under the heading of ‘reasonableness review’); Brand ‘Courts’ (note 249 above) (observing that the Constitutional Court’s ‘reasonableness review’ judgments in socio-economic rights cases exhibit no consistent test of ‘reasonableness’).

389 In the mid-20th century, a mutual assimilation occurred between American Legal Realism and its classical predecessors, resulting in a new, hybrid style of legal reasoning – ‘social conceptualism’ – that was more self-conscious and more attentive to social and political context than classical legal thought, but that, by its insistence on a radical disjunction between law and politics, carried forward into a modern idiom the inclination of classical legal thought to formalist error. See K Klare ‘Judicial Deradicalization of the Wagner Act & the Origins of Modern Legal Consciousness, 1937–1941’ (1978) 62 Minnesota LR 265, 279–80, 309–11, 327–6.
between what the courts actually do and how they understand and present what they are doing. This is particularly noticeable in judicial treatment of separation-of-powers.390

In the textbook version of separation-of-powers, judges are neither authorised nor competent to make choices that are legislative in nature. A core tenet of judges’ professional self-discipline is that they must refrain from trenching upon legislative prerogative. The Constitutional Court has on numerous occasions contemplated, but declined to take an advocated course of action on account of its professed commitment to the ethos of judicial self-restraint. But as a decision procedure, context-sensitive, socially-aware balancing looks very much like legislation. It is difficult to regard balancing as neutral, apolitical, and/or judicially constraining. Balancing tends to blur, if not collapse, the distinctions between adjudication and legislation, and between legal and political discourses. This approach to legal analysis ultimately turns on choices or ‘judgment calls’ as to which moral and social policy considerations outweigh others.

The legislative character of resort to social policy and balancing tests have been known and acknowledged for well over a century.391 Jurists and legal philosophers propose theories that explain why judicial legislation is not, after all, a serious threat to the separation-of-powers if judges will only restrict themselves to legislating within ‘gaps’ in the law or so as to fill ‘open spaces’ in the law392 or when only ‘incremental’ development of the law is contemplated.393 The problem, of course, is that one lawyer’s incremental development is another’s sea change, and no one has yet devised a neutral metric to calibrate the scope of a proposed course of action.

A challenge of 21st century constitutionalism is to invent and refine new technologies of judicial review, that is, to develop more complex standards and procedures for judicial consideration of public policy that will bring constitutional and other apex courts into a more dialogic and less hierarchical relationship with legislatures. The threadbare fiction that courts in consti-

390 For convenience, we use the heading ‘separation-of-powers’ to refer both to questions of the democratic accountability and allocation of functions between different branches of government and to questions of the relative competence or capacity of various institutions of government to take decisions of a specified kind.
391 See, for example, Holmes (note 123 above). Discussing the common law defence of ‘privilege’ in economic torts, Holmes remarked ‘whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds .... [But,] decisions for or against the privilege ... really can stand only upon such grounds’[.] Ibid 3.
If you ask how [a judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it .... Here, indeed, is the point of contact between the legislator’s work and his. The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law ...
393 See, for example, Du Plessis v Road Accident Fund 2004 (1) SA 359; 2003 (11) BCLR 1220 (SCA) para 37 (suit for wrongful death of same-sex partner seeking loss-of-support damages) (appropriate for judiciary to develop the common law because this would result only in incremental change).
tutional democracies only 'declare', but do not 'make' law is ill-suited to a transformative constitutional dispensation that entrenches justiciable social and economic rights. The apex courts have grappled mighty with the implications of a transformative constitution for separation-of-powers theory, and they have made several contributions to the emergent international discussion of judicial enforcement of social and economic rights. That said, much of the new jurisprudence in this field is ad hoc and poorly justified. One is frequently jarred by an odd contrast between the vast scope of a substantive judgment and the constricted choice of remedy and narrow explanation of the order. Two obvious examples are the judgments abolishing male primogeniture (Bhe) and upholding same-sex marriage (Fourie). As everybody knows, these were momentous decisions. They cannot plausibly be described as merely 'incremental' changes. These judgments brought about legal changes with obvious political and cultural overtones on controversial matters of social policy. That is, the courts took decisions in these cases of a kind supposedly within the exclusive province of Parliament. However, in explaining their actions and fashioning the remedy, the courts often fell back on a bright-line distinction between legislation and adjudication and ritual incantation of the modest role of the judge.

The Constitutional Court in Bhe and Fourie and the SCA in Fourie had no difficulty explaining their respective judgments in substantive terms. These judgments combine formidable intellectual work and a passion for justice with majestic prose. The judgments also contain promising starting points for a theoretical justification of vigorous judicial action in light of the fundamental importance of the human rights at stake and the political, legal, and cultural marginalisation and exclusion suffered by women, extra-marital children, and gay and lesbian South Africans. All the ingredients were present for the Constitutional Court to launch a conversation on the modernising implications of transformative constitutionalism for separation-of-powers theory. But the judgments showed little intellectual daring and were unpersuasive when it came to explaining why they were appropriate in separation-of-powers terms. Given that these were such courageous and far-sighted decisions, it may seem churlish to register complaints regarding tangential jurisprudential questions. We do so to show the residual imprint of traditional legal culture on even the most inspired work-product.

Much of the separation-of-powers talk came as an afterthought related to remedies, and much of it consisted of tired clichés. For example, the applicants in Bhe urged the Constitutional Court to develop customary law pursuant to s 39(2). Langa DCJ, as he then was, confirmed that the Court had the power to do so and, speaking generally, urged courts to be imaginative, not shy, in crafting remedies. In an impressive concurrence, Ngcobo J, as he then was, argued that the case was an appropriate vehicle for developing customary law and that the Court's obligation to develop the law is 'especially important

394 Bhe (note 49 above) para 102.
in the context of indigenous law.\textsuperscript{395} Nevertheless, the majority declined to exercise the Court’s power and, one might think, its responsibility, to develop the law.\textsuperscript{396}

Langa DCJ’s reasoning was based on the counterintuitive proposition that development of customary law would usurp the legislative prerogative. He was surely correct in holding that legislative attention was urgently needed and that the problem called for a wide-ranging and multi-faceted package of statutory reforms. It does not follow that development of customary law was inappropriate. As O’Regan J stated in another context: ‘The fact that Parliament faces choices does not … seem to me to be sufficient for this Court to refuse to develop the common law.’\textsuperscript{397} Customary law is originally non-legislative, and Parliament must always act against a backdrop of common and customary law. Why not install a backdrop that is more, rather than less, faithful to the ethos of the new dispensation? The Court’s expressed caution about developing customary law was singularly unconvincing given the ambit of the order actually made, which had unmistakably legislative overtones and laid down fairly complicated and nuanced guidelines for future legislation to ‘cleans[e] … the statute book’.\textsuperscript{398} Developing customary law in this case would not seem to involve a hugely greater incursion on legislative domain than that implied by the Constitutional Court’s actual order. True, the Court’s order was only temporary. It assumed an alert legislature would pick up and run with the ball. But if the legislature is alert, any harm a court does in developing the law (‘harm’, in the sense that the legislature, acting within the Constitution, prefers a different resolution) can be promptly remedied. If the legislature is not alert or is otherwise incapable of responding in a competent and democratic manner, better a court should at least entrench constitutionally adequate background rules. Recall that under some circumstances, courts are constitutionally obligated in terms of s 8(3)(a) to develop the common law in the face of legislative foot-dragging.

A disappointing aspect of \textit{Bhe} is the Court’s explanation of why due regard for separation-of-powers compelled it to refrain from developing customary law. Langa DCJ focused primarily on questions of the relative institutional competence of courts and legislatures. He provided a textbook recitation of the limitations of case-law decision-making, including the inconvenience of piecemeal and delayed evolution of the law, the risks of uncertainty, and the potential for lack of uniformity. Leave aside for purposes of discussion that Parliament, left to its own devices, does not always deliver greater speed, comprehensiveness, uniformity, or certainty than the judicial process or a judicially-prodded legislative process. Assume that Parliament possesses superior institutional capacity to address the reform of intestate succession law. Section 39(2) development might still have been appropriate. Langa DCJ

\textsuperscript{395} Ibid 215.
\textsuperscript{396} Ibid paras 105–13.
\textsuperscript{397} \textit{Fourie-CC} (note 49 above) para 169.
\textsuperscript{398} \textit{Bhe} (note 49 above) para 116.
made it an all-or-nothing proposition – either a comprehensive legislative solution or slow, piecemeal, case-by-case development. This is too narrow a view of the possibilities. That a court once develops the common or customary law on a key point does not mean that all future legal evolution on that topic becomes the sole province of adjudicators or that Parliament has been ousted from the field. In the context of a mutually respectful and transformation-oriented relationship between the two branches, it might be highly constructive for an apex court to develop the law dramatically precisely in the expectation that Parliament will thereby be induced in reasonably short order to lift the entire topic to a more comprehensive plateau. In sum, the Bhe Court passed on the opportunity to apply a transformative perspective to separation-of-powers.

In Fourie, the applicants sought development of the common law so that their union could be recognised and registered as a marriage and become binding in terms of the Marriage Act. Because the Marriage Act legislates against the common law background, the applicants apparently believed that revision of the extant common law definition of ‘marriage’ (restricting it to heterosexual couples) would be enough to entitle them to the relief they sought, which was to become legally married. Evidently they misjudged the situation and made an error in form by not directly challenging the constitutionality of the statute. The High Court dismissed their application on the ground that eligibility for the relief sought must await a direct challenge to the Marriage Act itself. The applicants unsuccessfully sought immediate access to the Constitutional Court. Moseneke J, as he then was, acknowledged the importance of the issue – and the importance of an early resolution of it – to the gay and lesbian community and to society at large. Nevertheless, he held, these considerations ‘should not oust the important need for the common law, read in the light of the applicable statutes, to develop coherently and harmoniously’. The case was ‘pre-eminently suited to be considered first by the SCA’.

When the case went to the SCA, Cameron JA, as he then was, delivered a remarkable judgment for the majority. He wrote:

What was unique about apartheid was not that it involved racial humiliation and disadvantage … but the fact that its iniquities were enshrined in law. More than anywhere else, apartheid enacted racism through minute elaboration in systematised legal regulation. As a consequence, the dogma of race infected not only our national life but the practice of law and our courts’ jurisprudence at every level.

... This paradox lies at the core of our national project – that we came from oppression by law, but resolved to seek our future, free from oppression, in regulation by law.

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399 The National Assembly is a ‘forum’ in terms of s 42(3) and therefore bound by the mandate of s 39(2).
400 25 of 1961.
401 Fourie v Minister of Home Affairs 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC) para 12.
402 Ibid. For this point, the Constitutional Court relied on its earlier judgment in Amod-CC (note 185 above) para 33 (appeals of constitutional matters involving development of the common law ought ordinarily to proceed first to the SCA).
Having themselves experienced the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans.\footnote{403} Cameron JA additionally penned a bold conception of the development clauses, perhaps the most fulsome judicial discussion of s 39(2) to date.\footnote{404} Constitutional development of the common law is meant to harvest the power of evolving insight and to reflect the deepening understanding of the South African people and their deepening commitment to each other across the lines of race, gender, religion, and sexual orientation.\footnote{405} The transformative project, he wrote, requires faith in the capacity of all South Africans to adapt, and faith that all South Africans are prepared to accept the evolving implications of the choices made in writing the Constitution.\footnote{406} In the result, the majority concluded that the common law definition of ‘marriage’ was unconstitutional, and that the common law must be developed to remove the defect.

All members of the SCA and of the Constitutional Court agreed in substance with Judge Cameron’s conclusion that the common law bar to same-sex marriage was unconstitutional. However, they differed on the nature of the appropriate relief. The salient issues were whether the development of the common law should take immediate effect, and whether the courts had the power to and should ‘read in’ constitutionally required changes in the Marriage Act or ‘read out’ objectionable features. (The techniques of ‘reading in’ and ‘reading out’ are examples of promising technologies of judicial review for the 21st century.) Both questions raised difficult separation-of-powers concerns. The fiction that judges only ‘discover’ the law implies the corollary that judicial action is retroactive – supposedly judges tell us what the law ‘always was’. Denying retroactivity to a common law decision or suspending its effective date amounts to acting ‘prospectively’, that is, ‘legislatively’. This suggests that, if the court concludes the common law is in need of development, it should so decree without qualification. The counter argument is that in a case involving issues on the order of primogeniture or same-sex marriage, the more ‘modest’, deferential judicial path is to identify the problem but allow Parliament time to address it. Both sides of the debate start from the same premise of the desirability of judicial restraint. In other words, a commitment to judicial deference cannot, by itself, tell a judge how to proceed in a case of this kind. A judgment call is required that is sensitive to all relevant contextual social and political concerns. It is formalist error to imagine that the proper order can be deductively derived from abstractions about the judicial role.

In deciding upon the order, Cameron JA fixated on seeing Fourie as only a common law case. This led him to hold that the court lacked the authority to adjust the statute by the techniques of ‘reading in’ or ‘reading out’, with the

\footnote{403} Fourie-SCA (note 49 above) paras 7–9.  
\footnote{404} Ibid paras 4–5 & 22–5.  
\footnote{405} Ibid para 23.  
\footnote{406} Ibid para 24.
awkward result that the applicants could not obtain the relief they sought.\textsuperscript{407} They were entitled, he held, to an immediately effective order that the common law definition of marriage barring legal recognition of their union was unconstitutional. However, they could get married only if the statute were amended or if the Minister revised the prescribed marriage formula for religious ceremonies (and the applicants were prepared to marry in such a ceremony).\textsuperscript{408}

Cameron JA offered some persuasive policy reasons why the order should not be suspended. We agree that the development of the common law should take immediate effect, which is why we think O’Regan J got it right when \textit{Fourie} went to the Constitutional Court.\textsuperscript{409} However, his \textit{explanation} of his order largely recites traditional verities about separation-of-powers. Judge Cameron surely knew that the judgment he was about to issue was a counter-majoritarian intervention on a ‘hot button’ political matter calling for an epochal change in South African social life; surely he knew that the judgment would be newsworthy the world over. Yet he felt obliged to write at length to reassure the public that the decision was nothing new in terms of the judicial role, just another marginal adjustment of the kind that common law judges make every day; in short, that the judge was just doing his job.

Thus, he insisted that the development of the common law decreed in \textit{Fourie-SCA} was simply an ‘incremental change’ perfectly consistent with the judicial function, and that it involved no intrusion into the legislative domain. For the most part, his arguments simply assert the conclusion sought to be drawn. For example:

... [D]evelopment of the common law entails a simultaneously creative and declaratory function in which the court perfects a process of incremental legal development that the Constitution has ordained. Once the court concludes that the Bill of Rights requires the common law to be developed, it is not engaging in a legislative process. Nor in fulfilling that function does the court intrude on the legislative domain.\textsuperscript{410}

Cameron JA posed as a true believer in the existence of a sharp, bright-line distinction between legislation and adjudication.\textsuperscript{411} The distinction between legislation and adjudication is that the judges are confined to incremental decisions, whereas legislators are not. Incrementality is the touchstone of judicial work, and by sticking to incremental decisions, a court assures

\textsuperscript{407} In a separate opinion, Farlam JA agreed that the common law stood in need of development and should be developed. Ibid paras 100–1 & 131 & 139. He was also prepared to round out the plaintiffs’ relief, permitting them to marry forthwith, by giving an ‘updated construction’ to the marriage formula in s 30(1) of the Marriage Act. Ibid paras 133–6. However, he would have suspended the effective date of the order so as not to intrude upon ‘policy questions’ within the legislative domain. Ibid paras 140–6. Cameron AJ roundly criticised Farlam AJ for blurring the line between ‘interpretive construction’ and ‘reading in’ as remedies concerning a constitutional defect in a statute. Ibid paras 28–33. His criticism seems overdone. Farlam AJ’s judgment contains some ambiguity but can be fairly read to propose a ‘reading in’ remedy consistent with his overall approach.

\textsuperscript{408} Ibid paras 37 & 48.

\textsuperscript{409} See \textit{Fourie-CC} (note 49 above) para 169 (separate judgment of O’Regan J) (would hold both that the common law rule should be immediately developed and that the Court had the power to and should cure the statutory defect by ‘reading in’).

\textsuperscript{410} \textit{Fourie-SCA} (note 49 above) para 39.

\textsuperscript{411} Ibid paras 38–40.
itself that it is not improperly invading legislative territory. But Cameron JA did not tell us how to spot the difference between an incremental and a non-incremental change in law. His approach is basically that he knows an incremental change when he sees one. An elaboration on that theme might be that properly trained judges, initiated into the mysteries of the judging craft, have an ineffable capacity to distinguish the incremental from the systemic. But most likely there are many perfectly respectable South African lawyers who consider development of the common law to legalise gay marriage more than an incremental development.

Cameron JA may have been entirely correct in classifying his ruling as ‘incremental’. The difficulty is that he presents that classification as self-evident. It is not. Incrementality is not self-defining, and we have no neutral decision procedure to tell us whether a proposed legal change falls on the incremental or systemic side of the line. To be sure, there are easy cases. Probably most lawyers would agree that a minor, technical adjustment of the tax codes is an incremental change, whereas repeal and replacement of the tax code with an entirely different process for raising revenue would be a systemic change. But many cases — and almost all of the interesting cases — fall closer to the line, and judges disagree profoundly about where the border is located. Judges cannot reason to a conclusion about where to draw the line without regard, consciously or unconsciously, to considerations that are fundamentally legislative in character. Put another way, in close cases, the contrasting designations ‘incremental’ and ‘systemic’ are not analytic tools; they are labels for the conclusion a judge reaches on other grounds. A disappointing aspect of Cameron JA’s otherwise noble judgment in Fourie-SCA is that it invokes the clichés of traditional legal culture to avoid the difficult task of explaining why the court’s action was democratic and consistent with the Constitution’s allocation of powers even though in form it might be seen as judicial usurpation of a classically legislative competency.

The Constitutional Court was unanimous in Fourie as to matters of substance. O’Regan J disagreed with the Court only as to an aspect of the order. With his characteristic eloquence, Sachs J described South Africa’s constitutional project as bringing into being ‘[a] democratic, universalistic, caring, and aspirationally egalitarian society [that] embraces everyone and accepts people for who they are’. He movingly concluded that same-sex couples are guaranteed not only protection from punishment and stigmatisation, but also the right to be acknowledged as equals and to be ‘embraced with dignity by the law’.

412 André van der Walt cogently argues that the Constitutional Court and other courts are wrong to conflate the traditional incrementalism of common law method with the separation-of-powers concern about judicial deference to the legislature. ‘Respect for democratic processes should not prevent the courts from rooting out remnants of tradition such as discrimination or inequality in conflict with the new constitutional dispensation; ... the courts need not shy away from larger development of the common law out of respect for the legislature’. Van der Walt (note 254 above) 120.

413 Fourie-CC (note 49 above) para 60.

414 Ibid para 78.
The Court's discussion with respect to the order was preoccupied with separation-of-powers concerns. The state had argued that the Court had no power to develop the common law except in an incremental fashion and that the change in the common law contemplated in *Fourie* would not be incremental, Cameron JA to the contrary notwithstanding. The Court declined to address the question whether s 39(2) is so restricted. Instead the Court said that it had the power and obligation to strike down an unconstitutional provision of the common law by virtue of s 172(1)(a) of the Constitution, a type of action different from 'development' of the common law in terms of s 39(2).\(^{415}\) Whatever limitations might apply to development under s 39(2), these are inapplicable when the Court proceeds under s 172(1)(a).

The Court then proceeded to strike down the discriminatory defect in the common law, but suspended the declaration of invalidity for one year. The South African Constitution contains a notable feature that looks toward a modernised conception of separation-of-powers; namely, it grants courts the power, when they have declared a law or conduct invalid due to inconsistency with the Constitution, to make 'any order that is just and equitable', including an order suspending the declaration of invalidity 'to allow the competent authority to correct the defect'.\(^{416}\) Sachs J concluded that the declaration of invalidity should be suspended, invoking standard separation-of-powers and institutional competence arguments.\(^{417}\) For example, legalisation of gay marriage would undoubtedly require substantial legislative adjustments within the prerogative of Parliament, and instability and uncertainty might result if the applicants and others were permitted to marry forthwith, a piecemeal solution, and then Parliament later adopted a different approach. But Sachs J gave another reason for suspending the declaration, that this would gain time for public acceptance of same-sex marriage, thereby enhancing the legitimacy of the final, parliamentary disposition.\(^{418}\) It appears that Sachs J crafted the order at least in part with an eye toward influencing public opinion. This political pragmatism would seem to be in tension with what classical separation-of-powers theory has to say about the judicial role.

The Court might have been wise to take this approach. Perhaps time was needed for South Africans to accept the Court's decision, and referring the matter to Parliament might very well have added democratic legitimacy to the resulting, seismic change in the law. At the same time, one may doubt whether Parliament would have done its constitutional duty with regard to gay and lesbian marriage in the short run were it not subject to the precisely time-limited order made in *Fourie-CC*, which surely reflected some judicial distrust about the capacity of Parliament to get its act together. An admirable feature of the judgment is Sachs J's insight that separation-of-powers is not an all-or-nothing proposition. There are numerous intermediate options between

\(^{415}\) Ibid para 121.
\(^{416}\) Constitution s 172(1)(b).
\(^{417}\) See *Fourie-CC* (note 49 above) para 139.
\(^{418}\) Ibid.
the extremes of simple deference and judicial usurpation of the legislative prerogative. From the point of view of transformative jurisprudence, we might say that the Court was cautiously feeling its way out of the old framework and taking a beginning step in the direction of a dialogic conception of separation-of-powers. One wishes Sachs J had pursued the discussion in that vein.

Justice O'Regan embraced Cameron JA's readiness to develop the common law forthwith, and she took a generous view of the Court's power to 'read in' changes to the underlying statute. She differed with the Constitutional Court majority and Farlam JA in that she would have granted immediate relief, both in declaring the common law unconstitutional and in making the statutory adjustments necessary to allow the applicants to marry. We agree with O'Regan J that immediate relief was fully appropriate in this case and would not have unduly trench upon Parliament's prerogatives. Our preference for O'Regan J's approach is, however, beside the point. Assume for purposes of discussion that the majority's decision to suspend the order was the wise and prudent path. O'Regan J's discussion of separation-of-powers was nevertheless far superior to any other in this series of judgments. She demolished most of the majority's stated arguments. The basic legal issue in the case was the definition of marriage at common law, which is judge-made law. Insofar as Parliament attended to the matter in the Marriage Act, it simply absorbed the common law definition. Consequently, O'Regan J insisted, in the traditional conception of separation-of-powers, the question was eminently suited for decision by courts. A court's proper role is to determine, declare, and then make an order enforcing the parties' rights and obligations. Having concluded that the common law stood in need of development, no reason of judicial deference suggested a course of action other than for the Constitutional Court to give immediate effect to its 'discovery' of the true principles of law. Of course, O'Regan J's own views on separation-of-powers are not limited to traditional platitudes. She was prepared to adjust the statute, with immediate effect, and in this sense she, like the majority, was searching for 21st century solutions to the dilemma in Fourie. What she unquestionably revealed is that the terms in which South African jurists customarily discuss separation-of-powers questions are no longer up-to-date with contemporary problems, and surely not with the frame of reference of a transformative constitution.

We accept that the general principle of legislative supremacy over the judiciary with respect to social policy questions reflects and enacts important democratic values. A freely elected and representative legislature should ordinarily set a nation's social policy, not judges, although there are certain well-known exceptions to this generalisation, and all democracies rely upon some forms of judicial law-making. But separation-of-powers theory is not a magic wand that can make difficult choices for judges disappear. The core concepts of separation-of-powers theory – what is 'legislative' and what is 'judicial'; what is 'large-scale' and what is 'incremental'; what is a 'policy question' and what is a 'juridical question' – are not self-defining. Applying these concepts involves choices with significant social and political consequences. Our plea is, first, for somewhat greater judicial candour and self-reflection
about this indeterminacy, and second, that South African lawyers begin to rethink and revise separation-of-powers doctrine in the same way and with the same imagination that the transformative project obliges them to rethink the common law.

VI CONCLUSION

If the transformative project is ever to be realised, the background rules of private law that structure daily life in commerce and society must be revisited and re-imagined. Is the South African legal system on that road? We think so, with caveats. Tangible steps have been taken guided by the boldness and originality of the constitutional text and by the intellectual courage and imagination of some jurists. More than a few heroic judgments have been rendered, showing the capability of the courts to transform the common law and providing us with glimpses of a more just, egalitarian, inclusive, and caring legal infrastructure.

But the courts have also swerved off the path. The greatest disappointments are the absence thus far of a coherent exploration of the Constitution's values and an explicit and sustained effort to develop new legal methodologies appropriate to transformative constitutionalism; the reluctance to interrogate the distributive consequences of private law rules in the routines of economic life; the emergence of a neo-liberal strand in constitutional application; and the lack of critical sharpness with respect to separation-of-powers issues. The inhibiting effect of mainstream legal culture is by no means responsible for all of these hesitations and shortcomings, but we believe that the concerns we expressed some years ago that the courts would be held back by the traditions of the legal culture were well taken.