

# Developing the Common Law Progressively—Horizontality, The Human Rights Act, and the South African Experience

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*The authors reflect on the relevance of recent South African constitutional law decisions and experience to ongoing debate concerning the effect of the HRA 1998 on private legal relations and so on the evolving content of UK common law. When one is dealing with development of the common law (in the light of the Act and the European Convention on Human Rights) rather than interpretation and direct application of the Act as a statute, it is both unsound and undesirable that judges feel the need to abandon the familiar methods of common law reasoning for some constitutional law-type “rights balancing” exercise. Progressive development of the common law can make it a vital vehicle in ensuring that private legal relations do not remain untouched by democratic initiatives to define an objective value system for society. Some process of reasoned balancing may be required in any dispute, but the legitimacy of the common law and its courts might be undermined if too facile a use of balancing technique is adopted.*

## Introduction

In 2002 the Constitutional Court of South Africa, in the defamation case of *Khumalo v Holomisa*,<sup>1</sup> explained the degree to which rights and freedoms in Ch.III of the Constitution of South Africa 1996<sup>2</sup> have any “horizontal” application in disputes between private (non-state) parties.

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<sup>1</sup> *Khumalo v Holomisa* (2002) (5) S.A. 401, CC (hereinafter *Holomisa*).

<sup>2</sup> The Constitution of the Republic of South Africa, Act 108 of 1996. South Africa’s previous system of parliamentary sovereignty was of course replaced, in 1994, by a system of constitutional supremacy (cf. *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158; [2002] 3 W.L.R. 344 at [69]–[70], per Laws L.J.). Integral to this system is a justiciable Bill of Rights, contained in Ch.III of the 1996 Constitution, s.2 of which states that “[the] Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled” (emphasis added). The Interim

In this article we discuss *Holomisa* and subsequent cases against the background of ongoing debate in the United Kingdom over the extent of horizontal operation of the Human Rights Act (HRA) 1998. That debate is partly concerned with the extent to which substantive rules of the common law must be transformed by UK courts so as to meet standards sourced in the European Convention. In other words, the extent to which the courts are obliged to develop a body of law to protect individuals from all violations of Convention rights *from whatever source*, so that the Act reaches the exercise of private (not only public) power: “the ‘cascade’ effect”.<sup>3</sup>

Beyond outlining the position as we see it, we do not attempt to traverse the UK horizontality debate. Given the number of years that the Act has been in operation, greater certainty now exists about the accepted possible degree of horizontality, even if a “definite appraisal” of case law on the matter is still some years off.<sup>4</sup>

Our purpose is the relatively narrow one of sounding a cautionary note. Whatever the degree and form of any horizontal application of the Act, its existence will inevitably affect the development and content of UK common law, and our aim is to offer some observations from the South African experience, in particular as to the *manner* of Act-inspired judicial development of the common law.

The underlying reason that we advance for caution is as follows. The common law’s position is affirmed, not undermined, by the Act. The common law can be a vital, supple vehicle for ensuring that private legal relations do not remain untouched by democratic initiatives (such as the Act) to define an objective value system for ordering society. The legitimacy, and thus the capacity of the common law and its courts for this role, is partly determined by the persuasiveness of the reasoning justifying particular outcomes and newly defined rules. One of the criticisms of rights instruments (and the courts that must apply them) has been the technique adopted in balancing inconsistent rights and interests.<sup>5</sup> Already, Richard Edwards has called for a more principled, persuasive judicial method of application and interpretation of the HRA in its familiar “vertical” operation (that is, in its operation as a *constitutional law* instrument).<sup>6</sup> Our concern is instead with techniques of development of the *common law*: although the Convention does not apply directly to private conduct, judges might feel compelled, because they act under its indirect influence, to abandon common law reasoning and methods. If some degree of “constitutional colonisation” of the common law is occurring, we say that there are sound reasons why this should consciously be

Constitution of 1994 governed South Africa during a phase of political transition in the early years of democracy and was replaced by the Final Constitution of 1996. We refer below to the Final 1996 Constitution as the Constitution and to the Interim Constitution of 1994 as the Interim Constitution.

<sup>3</sup> J. Griffith, “The Common Law and the Political Constitution” (2001) 117 L.Q.R. 42 at 62; Sir Stephen Sedley, *Freedom, Law and Justice* (Sweet & Maxwell, London, 1999), p.25.

<sup>4</sup> Bonner, Fenwick and Harris-Short, “Judicial Approaches to the Human Rights Act” (2003) 52 I.C.L.Q. 549, although the piece does not really address the effect of the Act on the development of the common law.

<sup>5</sup> See in particular T. Alexander Aleinikoff’s masterful piece, “Constitutional Law in the Age of Balancing” (1987) 96 *Yale Law Journal* 943, discussed below.

<sup>6</sup> R. Edwards, “Judicial Deference under the Human Rights Act” (2002) 65 M.L.R. 859; also Bonner *et al.*, n.4 above.

undertaken "in a way most appropriate for the development of the common law *within its own paradigm*".<sup>7</sup>

We also do not undertake here a general consideration of the comparative extent to which private actors in various jurisdictions can or should be able to invoke constitutional rights in "private common law"<sup>8</sup> litigation against one another.<sup>9</sup> Such questions are "authentically hard": conduct should not remain immune from scrutiny by reference to constitutional values simply because it is not a public actor's conduct, but there is a risk of endangering a valuable sphere of private autonomy.<sup>10</sup> It is enough to note that there will exist across different jurisdictions a spectrum or range<sup>11</sup> of possible scenarios between strictly vertical and unlimited horizontal applicability of constitutional norms. We examine the position reached in South Africa, before

<sup>7</sup> *Carmichele v Minister of Safety and Security* (2001) (4) S.A. 938, CC, at [55] (emphasis added).

<sup>8</sup> We borrow the phrase from Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999) 62 M.L.R. 824, n.2, as "a convenient shorthand for [the] common law governing . . . relationships between private individuals and organisations, including corporate bodies" (of course the common law itself does not make a firm division between public and private common law principles: see D. Oliver, *Common Values and the Public Private Divide* (Butterworths, 1999)).

<sup>9</sup> For a more comprehensive overview of the theoretical debate about the extent to which private legal actors are (or should be) subject to constitutional scrutiny by reference to fundamental rights, see S. Woolman (Ch.10) in Chaskalson *et al.*, *Constitutional Law of South Africa* (Juta, 1998). See also A. Clapham, *Human Rights in the Private Sphere* (Clarendon Press, Oxford, 1993), and D. Friedman and D. Barak-Erez, *Human Rights in Private Law* (Hart Publishing, Portland, 2001). See also M. Tushnet, "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law" (2003) 1:1 I.J.C.L. 79.

<sup>10</sup> A. Stone, "The Common Law and the Constitution: a Reply" [2002] 26 *Melbourne University Law Review* 646 at 665, discussing the Australian position on the extent to which the common law there must conform to the constitution (no bill of rights), and referring to general discussion in M. Seidman and M. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* (Oxford University Press, 1996) (the limited extent to which the US Supreme Court has supervision of common law development in the various states). Stone offers an Australian perspective in Campbell, Ewing and Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford University Press, 2001), Ch.21. On the relationship between the common law and the Constitution in Canada, see e.g. McLachlin C.J., "Bills of Rights in Common Law countries" (2002) 51 I.C.L.Q. 197 and also L. and E. Weinrib, "Constitutional Values and Private Law in Canada" in *Human Rights in Private Law*, n.9 above, p.43. On the effect of the enactment of a statutory Bill of Rights in New Zealand, see J. Allan in Campbell, Ewing and Tomkins, *op.cit.* Ch.20. While Germany is not a common law country, on the need for German private law to conform with the federal constitution, and the extent of "normative continuity", see *Luth* (1958) 7 BVerfGE 198; O. Gerstenberg, "Private Law, Constitutionalism, and the Limits of the Judicial Role" in C. Scott, ed., *Torture as Tort* (Hart Publishing, Oxford, 2001), Ch.26; and C. Starck, "Human Rights and Private Law in German Constitutional Development", R. Ellger, "The ECHR and German Private Law" in *Human Rights and Private Law*, n.9 above, pp.97 and 161 respectively. For a general and comparative overview of the connection between constitutional rights and private law, and the various models for the application or influence of the former on the latter, see A. Barak, "Constitutional Human Rights and Private Law" in *Human Rights and Private Law*, n.9 above, Ch.2 and J. Van der Walt, *The Future and Futurity of the Public-Private Distinction in the View of the Horizontal Application of Fundamental Rights* (Wolf Legal, 2002).

<sup>11</sup> M. Hunt, "The 'Horizontal Effect' of the Human Rights Act" [1998] P.L. 423 at 426; Phillipson, n.8 above, at 825.

comparing the position under the HRA. This will lead into our discussion of methodology.

### Background 1: Horizontality under South Africa's Final Constitution

In the early years of the new constitutional dispensation, a majority of the Constitutional Court of South Africa in *Du Plessis v De Klerk*,<sup>12</sup> confirmed that the South African Bill of Rights (under the Interim Constitution) was intended to be primarily vertical in application, so that its provisions could only be invoked directly against the State, and not by one private litigant against another: the right to freedom of expression could have no direct application in a defamation action to which the State was not a party.<sup>13</sup>

The position under the Final Constitution is different.<sup>14</sup> Section 8(2) expressly provides that constitutional imperatives *may apply directly* as between private actors:

- “(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

<sup>12</sup> (1996) (3) S.A. 850, CC.

<sup>13</sup> The Court held that under the “scope of application” clause (s.7), the Bill of Rights did not directly apply to the common law (despite the fact that s.7(2) provided that the Bill of Rights “shall apply to all law in force”: see Kriegler J.’s dissent n.12 above, at 914). However, the Court held that in view of s.35 of the Interim Constitution, principles of common law would nevertheless have to be applied and developed by the courts. S.35 provided: “In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and object” of the Bill of Rights chapter.

<sup>14</sup> For general opinion on the direct horizontal application of constitutional norms under South Africa’s Final Constitution see J. De Waal *et al.*, *The Bill of Rights Handbook* (4th ed., 2001), pp.45 *et seq.* See also K. Govender, “Horizontality Revisited in the Light of *du Plessis v de Klerk* and Clause 8 of the Republic of South Africa Bill 1996” (1996) 1.3 *Human Rights and Constitutional Law Journal of Southern Africa* 20; I. Wolhuter, “Horizontality in the Interim and Final Constitutions” (1996) 11 *South African Public Law* 512; A. Cockrell, “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontality’” (1996) *Bill of Rights Compendium* Issue 2 3A 15–16; S. Woolman and D. Davis, “The Last Laugh: *du Plessis v de Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions” (1996) 12 *South African Journal on Human Rights* 361; H. Cheadle and D. Davis, “The Application of the 1996 Constitution in the Private Sphere” (1997) 13 *South African Journal on Human Rights* 44; M. Wallis, “The Evolution of Private Law under the Constitution” (1997) 18 *Obiter* 206; A. Jeffrey, “The Dangers of Direct Horizontal Application: A Cautionary Comment on the 1996 Bill of Rights” (1997) 1.4 *Human Rights and Constitutional Law Journal of Southern Africa* 10; *cf.* C. Sprigman and M. Osborne, “*Du Plessis* is Not Dead: South Africa’s 1996 Constitution and the Application of the Bill of Rights to Private Disputes” (1999) 15 *South African Journal on Human Rights* 25; I. Rautenbach, “The Bill of Rights Applies to Private Law and Binds Private Persons” (2000) *Tydskrif vir die Suid-Afrikaanse Reg* 296; J. Van der Walt, “Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation Between Common Law and Constitutional Jurisprudence” (2001) 17 *South African Journal on Human Rights* 341.

- (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)."<sup>15</sup>

Even if there is no direct applicability through this provision, s.39(2) of the Constitution provides:

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

The 1996 Constitution therefore gives a clear indication of two possible forms of horizontal constitutional normative effect on the common law and the conduct of non-state actors: *direct* application of constitutional provisions, and their *indirect* normative effect.<sup>16</sup>

#### *Direct application*

In *Holomisa*,<sup>17</sup> a decision under the Final Constitution, the Constitutional Court confirmed that the effect of s.8(2) is that there can be direct application of constitutional rights to private common law disputes. The *Holomisa* appellants represented a newspaper sued for defamation by a politician. The appellants had argued that the plaintiff politician’s claim failed to disclose a cause of action, as there was no assertion of the falsity of the suggestions made in the newspaper (that the politician was under police investigation). The appellants’ claim was that to the extent that existing common law rules of defamation did not require a plaintiff to plead falsity of an allegedly defamatory statement,<sup>18</sup> the common law unjustifiably privileged the plaintiff’s reputation over a media defendant’s freedom of expression, recognised in s.16 of the Bill of Rights. The appellants’ primary argument was that the freedom of expression provision was directly applicable (under s.8(2)), despite the fact that the litigation involved no organ of state, given that the Bill of Rights is to apply to “all law” and to the judiciary (s.8(1)).<sup>19</sup> Even if there was no direct application, it was argued that *indirect* effect should nevertheless be given to s.16, by developing the common law pleading rule in the manner contemplated by s.39(2) of the Constitution. Section 8(1) and (2) of the Constitution clearly distinguishes between two categories of entities possibly bound by the Bill of Rights: the legislature, executive, judiciary and all organs of state, on the one hand, and natural and juristic persons, on the other. While

<sup>15</sup> s.36 is the “limitations clause”. A prima facie infringement of a right will not be unconstitutional if it takes place for a reason that is recognised as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom.

<sup>16</sup> For a clear, authoritative description, see Justice Kate O’Regan, “The Best of Both Worlds? Some Reflections on the interaction between the Common Law and the Bill of Rights in our new Constitution”, (1999) 1 *Potchefstroom Electronic Law Journal* 3 at 9 (available at [www.puk.ac.za/lawper](http://www.puk.ac.za/lawper)).

<sup>17</sup> n.1 above.

<sup>18</sup> *National Media Ltd v Bogoshi* (1998) (4) S.A. 1196, SCA, at 1218 *per* Hefer J.A.

<sup>19</sup> *Holomisa*, n.1 above, at [4], [30].

observing that provisions of the Bill of Rights automatically bind the former class, the Court rejected the appellants' broad proposition that common law rules and conduct are in all circumstances automatically susceptible to the direct application of the Constitution, as this would leave s.8(3) no apparent purpose in the scheme.<sup>20</sup> The Court considered the interests that the common law of defamation has sought to accommodate over centuries. In this context it then accepted, by reference to the *nature* ("intensity") of the freedom of expression right, that s.16 was nonetheless of direct horizontal application in the particular case:

"Given the intensity of the constitutional right in question and the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case, as contemplated by section 8(2) of the Constitution."<sup>21</sup>

The Court held that in view of this direct applicability, the common law pleading rule needed to "strike an appropriate balance" between the constitutional interest in freedom of expression, and the protection of a person's dignity, but that as the common law rules of defamation already did so, the common law did not require development in the manner contemplated by s.8(3)(a) of the Constitution.<sup>22</sup>

Admittedly, s.8(2) is a rather awkward provision. Apart from confirming that direct applicability to non-state actors is not automatic and the need for a case-by-case analysis, no guidance was really given in *Holomisa* on the method of analysis of a right's "suitability" or "nature". The general nature of a constitutional protection can perhaps be described independently of any case where it is sought to apply it,<sup>23</sup> but an appreciation of its suitability will require examination of the particular rules of common law sought to be enforced by one party against the other. The receiving context may give the constitutional right a particular "intensity" in some sorts of private law cases that it might not display in others. So, for instance, the right to assemble peacefully and unarmed<sup>24</sup> may have direct horizontal application in a dispute between an employer and employees, but not assist in a trespass action involving private dwelling premises.<sup>25</sup> The *Holomisa* Court was dealing with a matter involving a politician and the mass media, in defamation, a field somewhat more generally amenable to direct constitutional scrutiny than other areas of private law (for example, unilateral legal acts such as the act of testation).<sup>26</sup>

<sup>20</sup> *ibid.* at [31].

<sup>21</sup> *ibid.* at [33].

<sup>22</sup> *ibid.* at [21]–[45].

<sup>23</sup> Of course it is arguable that one cannot talk sensibly of the content of rights outside any one situation where it is sought to apply them: see *e.g.* M. Tushnet, "An Essay on Rights" (1984) 62 *Texas Law Review* 1363.

<sup>24</sup> Protected under s.17 of the Bill of Rights.

<sup>25</sup> This is an example provided by J. De Waal *et al.*, n.14 above, p.55.

<sup>26</sup> The issue of possible horizontal application in both South Africa and under the HRA unsurprisingly arises most often (if not perhaps most starkly) in matters concerning privacy, defamation, and freedom of expression: see the remarks of Lord Goldsmith Q.C., "Human Rights v Civil Liberties" (address to the Liberty Annual Conference, June 8, 2002); Phillipson, n.8 above, at 825. The leading case on horizontality under the Interim Constitution in South Africa was also a defamation case (*Du Plessis*, nn.12 and 13 above).

*Indirect application*

In the background to any direct application is the radiating influence<sup>27</sup> that a rights instrument (and the values the rights embody) will inevitably have on the content of the private common law, even when no constitutional right is said to be directly applicable.<sup>28</sup> That is, a Bill of Rights may have a form of indirect horizontal effect,<sup>29</sup> so that while constitutional rights cannot be invoked directly by private litigants and do not create of themselves new private law causes of action, they can be relied upon indirectly to influence the interpretation, development or application of existing law.<sup>30</sup> In South Africa, even where there is no direct horizontal applicability of constitutional norms,<sup>31</sup> all superior courts are mandated by s.39(2) to privilege an interpretation of the common law that is consistent with the Bill of Rights, in the sense that they are obliged actively to develop the common law in the light of the Constitution.

Any indirect application situation in South Africa takes place in the context of a number of clear affirmations of the common law in the text of the Constitution, in addition to s.39(2) and the express role of the common law in s.8 applications. As Judge Deon Van Zyl has noted:

“It was to be expected that the introduction of a new constitution containing a bill of rights would have a radical effect on existing law. It was not, however, intended that it should supplant such law. On the contrary, its continued existence is deliberately and unequivocally recognised in a number of sections of the Constitution.”<sup>32</sup>

Thus s.39(3) provides that the Bill of Rights “does not deny the existence of any other rights or freedoms that are recognised or conferred by common law . . . to the extent that they are consistent with the Bill”. A telling example of explicit affirmation is the power under s.8(3)(b) to develop common law rules so as to *restrict or limit* a constitutional right. Section 173 of the Constitution provides:

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

<sup>27</sup> See the seminal 1958 German constitutional case *Luth* (that the Basic Law establishes an “objective order of values” affecting all spheres of law, including the private law) n.10 above, at 207 describing the *ausstrahlungswirkung* (radiating effect).

<sup>28</sup> Before 1996 Mohamed D.P. had already identified in the Interim Constitution’s predecessor to s.39(2), in relation to the intermediate and appellate divisions of superior common law courts in South Africa, “a clear and creative role in the active evolution of our constitutional jurisprudence by examining, and in suitable circumstances expanding, the traditional frontiers of the common law by infusing it with the spirit of [the Bill of Rights] and its purport and objects”. *Du Plessis*, n.12 above, at [87]; Interim Constitution, s.35, n.13 above.

<sup>29</sup> What the Germans call *mittelbare [drittwirkung]*; see also O’Regan, n.16 above; and K. Lewan, “The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany” (1968) 17 I.C.L.Q. 571. See also Phillipson, n.8 above, at 826, n.17.

<sup>30</sup> Phillipson, n.8 above, at 826.

<sup>31</sup> Quite a number of direct challenges have been brought to common law rules, beginning with *Shabalala v AG, Transvaal* (1996) (1) S.A. 725, CC; see O’Regan, n.16 above, at 13.

<sup>32</sup> Judge D. Van Zyl, “Constitutional Development of the Common Law”, *Seminar Reports, Konrad Adenauer Stiftung, South Africa* ([www.kas.org.za/publications/SeminarReports/Constitution&LawIV/vanzyl.pdf](http://www.kas.org.za/publications/SeminarReports/Constitution&LawIV/vanzyl.pdf)), p.169.

As the Constitutional Court noted in *Amod v Multilateral MVA Fund*,<sup>33</sup> there has always been an inherent jurisdiction to develop the common law to meet the needs of a changing society. It is simply that this must now, pursuant to s.39(2), be exercised in accordance with the “spirit, purport and objects” of the Bill of Rights.

The Constitutional Court has also reinforced the position of the common law and its courts in the overall Constitutional scheme. In *Carmichele v Minister of Safety and Security*<sup>34</sup> the Minister was sued on an alleged breach of duty of care, consisting in the State negligently releasing, with knowledge of his violent behavioural patterns, an individual who thereupon inflicted a vicious sexual assault upon Ms Carmichele. Both the High Court and the Supreme Court of Appeal dismissed her claim, since the common law did not recognise a general legal duty to act positively in order to prevent harm to another. She was successful on appeal to the Constitutional Court. While no constitutional right had direct application, the Court accepted Ms Carmichele’s argument as involving an implicit request for “indirect horizontal application” of at least the values of the Bill of Rights. It took her to be seeking development of the content of the duty of care “beyond existing precedent” to reflect the constitutional norms dealing with equality, life, dignity, privacy, and freedom and security of the person.<sup>35</sup> Where the common law is “deficient”, the Court held, all superior courts have an obligation—not a discretion—to ensure that the common law is developed so that it properly reflects constitutional values. This does not mean that a court must in each and every common law case embark on an independent exercise of whether the common law needs development.<sup>36</sup> The Court concluded that the common law test for delictual wrongfulness (whether a legal duty of care exists) is itself consistent with the Bill of Rights, but that the exercise of determining the content of the duty “must now be carried out in accordance with the ‘spirit, purport and objects of the Bill of Rights’ and the relevant factors must be weighed in the context of a constitutional State founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values”.<sup>37</sup>

<sup>33</sup> *Amod v Multilateral Motor Vehicle Accidents Fund* (1998) (10) B.C.L.R. 1207, CC, at [22]. It is clear that a “constitutional matter” for the purposes of s.167 of the Constitution (the jurisdiction of the Constitutional Court) includes both a direct application situation and one which calls only for the development of the common law: *ibid.* at [33], although it is not exactly clear whether a “constitutional matter” arises only where a court below fails to develop the common law. The question of what decisions may be appealed to Constitutional Court is governed by s.167(6); the decision must be on a “constitutional matter” and it must be “in the interests of justice” for the Constitutional Court to hear the appeal: *Holomisa*, n.1 above, at [7] *et seq.* S.167(3) provides *inter alia* that the Court may decide only constitutional matters, and “issues connected with” such, but has the final decision on what is a constitutional matter, defined in s.167(7) as including “any issue involving the interpretation, protection or enforcement of the Constitution”.

<sup>34</sup> *Carmichele v Minister of Safety and Security* (2001) (4) S.A. 938, CC (n.7 above).

<sup>35</sup> *ibid.* at [39]–[40].

<sup>36</sup> *ibid.* at [30], [34], [39], although the Court may be obliged to raise this of its own initiative and invite argument from the parties. The Court warned that “in exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary”: at [36]. Again, no real guidance was given for the process by which a court should attempt to determine the sufficiency or deficiency of the common law *vis-à-vis* the Bill of Rights.

<sup>37</sup> *ibid.* at [43].

What is of particular interest to our methodological argument below, is that the Constitutional Court in *Carmichele* did not itself pursue the identified necessary common law rule development. While the Court reflected on the possible avenues of development,<sup>38</sup> it stated that due to their specific common law expertise the High Courts and the Supreme Court of Appeal ought to carry out the exercise of eventual development.<sup>39</sup> According to the Court, "[n]ot only must the common law be developed in a way which meets the section 39(2) objectives, but it must be done *in a way most appropriate for the development of the common law within its own paradigm*".<sup>40</sup> The Court has stated that it views ordinary development of a common law rule as an anterior step to be undertaken, in private common law contexts, so that there may be no need for any s.8(2) direct application analysis and accompanying s.8(3) development.<sup>41</sup> Recent jurisprudence of the Constitutional Court thus displays an effort to harmonise the common law with the Constitution, but in a manner that best fits with the common law as a continuing, vital system of law.

### Background 2: Horizontality and the HRA

The issue of horizontal applicability under the HRA is a very different one to that sketched above in relation to South Africa.

Of course, we must bear in mind that below a level of broad approach (such as informs our ultimate purpose here), the South African and UK positions are not directly comparable. This is not simply because of the caution always to be adopted against simply importing ideas drawn from national jurisdictions with very different constitutional systems.<sup>42</sup> Unlike the South African setting, the HRA is not strictly speaking constitutional.<sup>43</sup> On the other hand, as many observers have stressed, the Act is no

<sup>38</sup> The Court stated that "it is by no means clear how these constitutional obligations on the State translate into private law duties towards individuals": *ibid.* [57].

<sup>39</sup> *ibid.* at [41] and [50]–[60]. See also the authorities cited at [51]–[53]. The Supreme Court of Appeal (formerly the Appellate Division of the Supreme Court) is the final court of appeal in South Africa on non-constitutional matters: s.168(3) of the Constitution. As Mark Tushnet observes, n.23 above, at 86, the way in which a constitutional court achieves indirect horizontal effect is itself usually indirect, as it directs ordinary common law courts how to take constitutional issues into account as these courts develop the law.

<sup>40</sup> *ibid.* at [55], emphasis added.

<sup>41</sup> *Amod*, n.33 above, at [26]. See also O'Regan, n.16 above, at 13. It is not clear whether and in what circumstances there is an independent constitutional cause of action where the common law appears to provide adequate protection: see O'Regan, at 15 *et seq.* and the cases cited therein.

<sup>42</sup> In *Douglas v Hello! Ltd* [2001] Q.B. 967, CA, at [76], Brooke L.J. noted that, now that the Act is in force, British courts should be cautious "when seeking to derive assistance from judgments in other jurisdictions founded on some different rights-based charter".

<sup>43</sup> In *Pharmaceutical Manufacturers Association in re President of South Africa* (2000) (2) S.A. 674, CC (albeit dealing with public common law, compare n.8 above), the Court could not 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, each dealing with the same subject matter . . . there is only one system of law . . . 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". We note this only because the same cannot be said about the HRA relative to the common law.

ordinary statute (it is, “to use the well-worn cliché . . . not [simply] a tax statute”<sup>44</sup>). It is a “constitutional measure”<sup>45</sup> or even a “constitutional instrument”.<sup>46</sup> It has been described judicially as placing the United Kingdom at an “intermediate” stage of evolution to constitutional, rather than parliamentary, supremacy.<sup>47</sup> Nevertheless, the degree of “constitutional” change intended and effected by the Act is not of quite the same level or profundity as that which has occurred in South Africa. In relation to the future of the common law in the United Kingdom, we argue, it is of some significance that even in a system of such relatively express constitutional supremacy as South Africa’s, there is a clear indication of the mandate for development of the common law through its own paradigm.

It has become tolerably clear in the United Kingdom what the scope of effect of the Act might be on the common law, although the precise influence of the Act within that scope remains somewhat uncertain. After the United Kingdom’s accession to the Convention, but prior to the Act, it was generally accepted that the Convention might properly be used to guide shaping of the common law.<sup>48</sup> After 1998 but prior to the Act coming into force, there was a great deal of debate on the extent to which “whole areas of settled private law might have to be re-opened”.<sup>49</sup> The most supportable suggestions

<sup>44</sup> Conor Gearty, “What are Judges For?” in F. Butler, *Human Rights Protection: Methods and Effectiveness* (Kluwer, The Hague, 2002).

<sup>45</sup> A. Lester and D. Pannick, “The Impact of the Human Rights Act on Private Law: the Knight’s Move” (2000) 116 L.Q.R. 380 at 381.

<sup>46</sup> Lord Steyn, “Democracy through Law” [2002] E.H.R.L.R. 723 at 731. In *Thoburn v Sunderland City Council* [2002] EWHC 195; [2002] 3 WLR 247 at 280–281, Laws L.J. (observing that it is possible to recognise a certain hierarchy of Acts of Parliament and distinguish these by application of principle), said that the Act was, by the force of the common law, a “constitutional” statute, as opposed to an “ordinary” one, one effect of the difference in status being that the former may not be impliedly repealed. In *Matadeen v Pointu* [1999] 1 A.C. 98 at 110, Lord Hoffmann described the Act as having created, in effect, a modified form of constitutional review which operates, in practice and aside from remedy, substantially as if the Act were an entrenched instrument. Edwards, n.6 above, at 866, describes the Act as having caused a “paradigm shift in the foundations of British constitutional law”; cf. T. Campbell, “Incorporation through Interpretation” in Campbell, Ewing and Tomkins, n.10 above, pp.79, 81: that although politically difficult to roll back the Act, Parliament retains sovereignty and the Convention is not directly part of UK law. Even if one were to emphasise the HRA’s statutory (rather than quasi-constitutional) nature, and aside from the pervasive infusing or radiating effect of such an Act, it is not clear that statute law in general should continue to be considered irrelevant to the development of the common law. This is perhaps particularly so of a statute of this special nature: see generally J. Beatson, “The Role of Statute in the Development of Common Law Doctrine” (2001) 117 L.Q.R. 247.

<sup>47</sup> *International Transport Roth v Secretary of State for the Home Department*, n.2 above, at [71]. Bonner *et al.*, n.4 above, at 551, argue that “despite such rhetoric” about the Act, it has not moved very far along this continuum: see text to n.36 below.

<sup>48</sup> See generally Bonner *et al.*, n.4 above, at 550.

<sup>49</sup> Phillipson, n.8 above, at 825, relating how La Forest J. put the issue in the main Canadian case on the matter (*Retail Wholesale Dept Store 7 v Dolphin Delivery Ltd* (1985) 33 D.L.R. (4) 174 at 262–263). On the debate in the UK at this time see generally the various references cited at n.1 of Phillipson’s article, in particular M. Hunt, n.11 above; also, Grosz, Beatson and Duffy, *Human Rights: the 1998 Act and the Convention* (Sweet & Maxwell, 2000), paras 4–45 to 4–53; A. Lester and D. Pannick, *Human Rights Law and Practice* (Butterworths, 1999); Buxton L.J., “The Human Rights Act and Private Law” (2000) 116 L.Q.R. 48 (the Act cannot have horizontal effect); H.R.W Wade, “Horizons of Horizontality” (2000) 116 L.Q.R. 217 (the Act has horizontal effect, “full operation in the sphere of private rights”), cf. Lester and Pannick, n.45 above; N. Bamforth, “The True

were that the Act did not accommodate direct horizontal effect, but that some form, strength or degree of indirect horizontal effect would exist.<sup>50</sup> Attention to the terms and overall scheme of the Act would have indicated the remoteness of any possibility of a direct *Holomisa*-type application of Convention rights to private disputes. Phillipson noted at the time that in addition to clear statements by the Lord Chancellor during the passage of the relevant Bill (that it was not intended that private individuals could be taken to have contravened a Convention right), ss.6(1), 7 and 8 indicate that the only relevant Convention breaches would be those of public authorities. There is nothing in the Act analogous to possible applicability to the conduct of "natural persons" (as in s.8(2) of the South African Constitution), and indeed no reference at all to the common law.<sup>51</sup> Arguments, such as those of Sir William Wade,<sup>52</sup> that the Act would result in automatic and complete horizontal application, and create new private causes of action, ignored the careful distinctions made by ss.6, 7 and 8 in the scheme of the Act between "public law wrongdoing in breach of Convention rights" and "other cases in which the Convention rights may be relevant".<sup>53</sup> These "other cases", it was foreseen,<sup>54</sup> are those based on an existing common law action, where Convention rights may be relevant even where no public actors are involved because the state (acting through its courts) is obliged to protect individuals against breaches of their rights: courts were included (s.6(3)(a)) within the "public authorities" bound by s.6(1) of the Act not to act in a way which is incompatible with a Convention right.

Within the accepted scope for some such effect, Phillipson described two possible versions of indirect horizontality: "strong" and "weak".<sup>55</sup> "Strong indirect horizontality", he wrote, would place an absolute duty upon courts to ensure compatibility of all existing law with the Convention (rather than requiring courts merely to have regard to it), and that compatibility analysis is one directed towards the rights themselves, rather than the values which these represent. "Weak indirect horizontality" is by contrast the form in which courts in Germany and Canada (and South Africa under the Interim Constitution<sup>56</sup>) may and ought to attempt to develop the common law in the light of, and in a way that is consistent with, constitutional rights and values. As seen above, the position in South Africa under the Final Constitution is that constitutional rights may in particular cases be held to apply directly to private law litigation, although they do not of themselves create new private law causes of action.

'Horizontal Effect' of the Human Rights Act 1998" (2001) 117 L.Q.R. 34 (discussing the debate between Buxton L.J. and Sir William Wade, suggesting that "both authors overstate their case"); see also *Douglas v Hello! Ltd*, n.42 above, M. Elliott, "Privacy, Confidentiality and Horizontality: the Case of the Celebrity Wedding Photographs" [2001] C.L.J. 231.

<sup>50</sup> We thus agree with the views then taken of Hunt and Phillipson, n.11, at 439 and n.8, at 827 esp n.22 respectively, above. See also H. Fenwick, *Civil Liberties and Human Rights* (3rd ed., Cavendish, London, 2002), p.161.

<sup>51</sup> As Phillipson observed, n.8 above, at 825, "the Act compounds its silence on horizontal effect by a complete absence of any reference to the common law".

<sup>52</sup> See n.49 above. In the same way, rejection of automatic horizontality in *Holomisa*, n.20 above, centred upon each separate provision of s.8 of the South African Constitution bearing its own utility and significance in the scheme.

<sup>53</sup> Lester and Pannick, n.45 above, at 382–383.

<sup>54</sup> See esp. Phillipson, Hunt, and Lester and Pannick (nn.8, 11 and 45, above).

<sup>55</sup> Phillipson, n.8 above, at 830–831; the "strong" version taken from Hunt, n.11 above, at 434.

<sup>56</sup> See nn.12 and 13 above.

Direct s.8 application aside, a form of “strong indirect horizontality” might be seen to exist in South Africa in the s.39 duty to develop the common law. However, the duty is only a “general obligation” (the court need not embark on the process of inquiry into common law consistency in every case), the court must first decide whether the common law is in any case “deficient”, and the duty is not to ensure compatibility with rights provisions themselves, but only consistency with the values, the spirit, purport and objects, of the Bill of Rights.<sup>57</sup> This is somewhat weaker, perhaps, than Phillipson’s notional strong indirect effect.

The Act came fully into effect in October 2000. While no clear authority exists on the matter, no scope for *Holomisa*-style direct horizontal effect can be discerned in the Act, as Phillipson predicted,<sup>58</sup> but Convention rights will have at least a “weak indirect” effect as values and principles influencing development of the existing common law, even if courts are not obliged as such (in a *Carmichele* sense) to do so.<sup>59</sup> Commencing with *Douglas v Hello! Ltd*,<sup>60</sup> and mainly by developing the existing common law remedy of breach of confidence “with inspiration from Article 8 of the Convention”, the courts have been “engineering a quiet revolution”, at least in the area of protection of privacy.<sup>61</sup> While acceptance of the Convention’s “weak indirect effect” has led to these developments, the fallout from the various judgments in *Douglas v Hello! Ltd* and later cases is that the question is unresolved of whether the indirect effect is “strong” in that the courts have (by reason of s.6) a *duty* to take Convention rights into account or act compatibly with them.<sup>62</sup> It is partly this subsisting uncertainty over the proper effect of Convention rights that may have affected the quality of judicial reasoning in cases where the Convention is said to be implicated.<sup>63</sup>

### Constitutional rights and the content of the common law

Given the degree of indirect horizontal application the Act, it is useful to reflect on South African experience as to the influence generally of constitutional rights on the content of the private common law. This, along with the issue it raises of democratic limits to judicial law-making, must necessarily inform our methodology discussion in the final section.

<sup>57</sup> *cf.* Phillipson’s discussion of the hierarchy of rules *vis-à-vis* principles and the weight to be accorded to values as opposed to rights themselves: n.8 above, at 831–833.

<sup>58</sup> Phillipson, n.8 above, at 834 *et seq.*, including perhaps the development of new *common law* causes of action by reference to Convention rights.

<sup>59</sup> See H. Beale and N. Pittam, “The Impact of the Human Rights Act 1998 on English Tort and Contract Law” in *Human Rights and Private Law*, n.9 above, pp.131, 137, section I of which also includes a useful summary of the debates noted in n.49 above as to the possible extent of horizontality; on the assumption of at least this form of horizontality, the balance of their chapter outlines some possible impacts of the Act on substantive private law (tort and contract). For further “stocktaking” of the impact of the Act—not all related to effect on the common law—see the references cited by Bonner *et al.*, n.4 above, fn.1; see in agreement C. Gearty, “Tort Law and the Human Rights Act” in *Sceptical Essays*, n.10 above, pp.243, 247–248.

<sup>60</sup> n.42 above, and *Douglas v Hello! Ltd (No.6)* [2003] EWHC 786 (Ch); [2003] 3 All E.R. 996, Ch.

<sup>61</sup> G. Phillipson, “Transforming Breach of Confidence? Towards a Common Law Rights of Privacy under the Human Rights Act” (2003) 66 M.L.R. 726 and the cases discussed therein.

<sup>62</sup> *ibid.* at 730.

<sup>63</sup> *ibid.* at 728. See the final section of argument, below.

The common law is of course no stranger to development by reference to, and in accommodation of, new influences. That is its essential nature, and, within democratic limits, its value. As Judge Van Zyl has noted in the South African context:

“No legal system can afford to stagnate: it must keep up with the needs of the time, as eloquently put by Innes CJ in *Blower v Van Noorden* [1919 TS 890 at 905]:

‘There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature’.

In similar vein is the graphic description . . . by Lord Tomlin in *Pearl Assurance Co v Union Government* [1934 AD 560 at 563]:

[The common law] is a virile, living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.’<sup>64</sup>

It is not difficult to acknowledge that there are many public law values common to the private law<sup>65</sup> and that many common law rules may be consistent with the requirements of a justiciable Bill of Rights (even were its provisions to apply directly). Some common law rights may have a direct analogy in a formal rights instrument. And the common law has always in some fashion been “tempered by its innate general considerations of justice and reasonableness”.<sup>66</sup> In *London Regional Transport v Mayor of London* Sedley L.J. remarked:

“In the present case, as one would hope in most cases, the human rights highway leads to exactly the same outcome as the older road of equity and common law. But it may be said that it is in some respects better signposted, and it is therefore helpful that it has played a central role in that argument.”<sup>67</sup>

However, there are obvious limits to any generalised analogy between the two rights systems. The South African Constitutional Court has said that the Bill of Rights embodies an “objective normative value system” and it is “within the matrix of this . . .

<sup>64</sup> Van Zyl, n.32 above, at 170–171.

<sup>65</sup> See generally Clapham, n.9 above and Oliver, n.8 above (and more recently D. Oliver, “Developing Human Rights in Private Law: the English Experience”, at 5 *et seq.*, paper to International Association of Constitutional Law World Congress, October 2003, available at [www.iaclworldcongress.org](http://www.iaclworldcongress.org)).

<sup>66</sup> Van Zyl, n.32 above, at 170.

<sup>67</sup> *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491; [2003] E.M.L.R. 4 at [62]. Before the HRA it had been recognised that in a system with an unwritten constitution, some basic rights rank as “constitutional rights”: *R. v Secretary of State for the Home Department Ex p Leech* [1994] Q.B. 198, although this may have a limited meaning: *R. v Lord Chancellor Ex p Witham* [1998] Q.B. 575; *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39; [2003] 1 W.L.R. 1763.

that the common law must be developed".<sup>68</sup> Even if the effect of the instrument is weak and indirect, the common law will be affected by the formal explicit nature of rights.<sup>69</sup> An instrument such as the Act creates some rights unknown as such to the common law (such as an express right to "equality"), it makes some existing rights more explicit, and may give priority to certain rights. It may bring in values to which the private law has hitherto attributed little weight.<sup>70</sup> Keith Ewing has said that the effect of the Act is to create a new hierarchy of rights in British constitutional law.<sup>71</sup> Remarks such as those of Sedley L.J.'s are often attacked as representing, really, a reluctance or ambivalence about the new order.<sup>72</sup> Ewing, for instance, has noted a "worrying perception that there is no difference between Convention rights and values and common law rights and values and that the Convention reflects the common law".<sup>73</sup> It has to be accepted that while there may be some overlap, the common law is plainly not the same sort of protective creature as an entrenched human rights instrument.<sup>74</sup> Even if it might be said that the common law is ideologically neutral, or "ethically aimless", a Bill of Rights is unashamedly explicit.<sup>75</sup> And of course, the common law has *not* been ideologically neutral. The common law is not, as Oliver Wendell Holmes famously observed, a pre-political "brooding omnipresence", but a product of judicial construction and development, involving value choices.<sup>76</sup> Many common law rules were developed by reference primarily to the demands of, say, consistency in commerce and industry. The common law's ideology "has always been manifestly rooted in respect for property rights and for the need to ensure enforceability of contracts"<sup>77</sup> and reveals a commitment to

<sup>68</sup> *Carmichele*, n.34 above, at [56]. See also *Luth* (1958), nn.10 and 27 above.

<sup>69</sup> Of course it is not as if the content of formal rights is certain, and all that is uncertain is how the content of the common law might change.

<sup>70</sup> Friedmann and Barak-Erez, n.9 above, at 3.

<sup>71</sup> K. Ewing, "The Unbalanced Constitution" in *Sceptical Essays*, n.10 above, pp.103, 104. See and compare the "hierarchy of rights" discussed by Laws L.J. in *International Transport Roth GmbH v Secretary of State for the Home Department*: under a system of "pure" parliamentary sovereignty, there was by contrast "no general hierarchy of rights, no distinction between 'constitutional' and other rights" so that while courts "evolved rules of interpretation which favoured the protection of certain basic freedoms", these were often presumptions or interpretive rules rather than fundamental rights limiting the ambit of Parliament's legislation: n.2 above, at [71], and see *Thoburn v Sunderland City Council*, n.46 above, at [62] *per* Laws L.J.; *cf.* Lord Hoffmann, "Human Rights and the House of Lords" (1999) 62 M.L.R. 159 at 164–165.

<sup>72</sup> See generally Bonner *et al.*, n.4 above.

<sup>73</sup> Ewing, n.71 above, p.104. This is also the point of the criticisms made by Bonner *et al.*, n.4 above.

<sup>74</sup> On the issue of the extent to which the South African common law displayed human rights or natural justice elements prior to 1994, see D. Davis, *Democracy and Deliberation* (Juta, 1999); compare D. Dyzenhaus, *Hard Cases in Wicked Legal Systems* (Oxford University Press, 1991).

<sup>75</sup> Putting aside, but recognising, the realists' argument that no meaningful content can be given to abstract rights outside of any particular application context.

<sup>76</sup> See discussion of Holmes' statement in A. Stone, n.10 above, at 657–658 and notes. See n.157 below.

<sup>77</sup> Gearty, n.44 above, saying that the "extension of the Act to private law through section 6(3)(a) may over time prove to be the most important legislative intervention in the ethical base of the common law since the latter's emergence in medieval times". See also M. Hunt, "The Human Rights Act and Legal Culture: the Judiciary and the Legal Profession" (1999) 26 J.L.S. 86. On this point see *Mohammed v Trinidad and Tobago* [1999] 2 A.C. 111, PC, at 123F-H: "... it is a matter of fundamental importance that a right has been considered important enough ... to be enshrined in [a written] Constitution. The stamp of constitutionality on a citizen's rights is not

economic liberty at the expense of other principles.<sup>78</sup> The inevitability of change to the common law (even without direct horizontality) results from the fact that provisions of a human rights instrument are usually expressly tied to somewhat different ideals, expressed in fairly absolute terms. In South Africa it is therefore true to say that the milk has been spilt and there has been a degree of constitutional colonisation of the common law,<sup>79</sup> even though the Constitution expressly affirms the position of the common law. It is inevitable too that some degree of Convention-sourced change will of necessity be worked upon the content of the private common law in the United Kingdom, as one more influence in its long history, if for no other reason than the imperative for consistency in the development of the total body of law in force.

It is possible to indicate at least one area where this sort of constitutional influence will operate.<sup>80</sup> This is where traditional private common law formulations or liability tests account for public policy considerations or require courts to discern “the legal convictions of the community”.<sup>81</sup> The effect of the instrument’s objective value system will be to indicate more clearly to the courts what they should deduce public policy content to be. We have described an example of this “weak indirect” examination of the content of a common law duty of care in the *Carmichele* case. Likewise, the Constitutional Court in *Holomisa* stated<sup>82</sup>:

“It should be emphasised that the court’s perception of the legal convictions of the community as a test for determining wrongfulness in delict might well have to be reconsidered in the context of our new constitutional order.”

The same point had been more eloquently made by Van Dijkhorst J. in the High Court case of *De Klerk v Du Plessis*:

“[The Constitution] is intended to permeate our judicial approach to . . . the development of the common law with the fragrance of the values in which the Constitution is anchored. The means that whenever there is room for interpretation or development of our virile system of law that is to be the point of

meaningless: it is clear testimony that an added value [relative to common law rights] is attached to the protection of the right.” See also *Darmalingum v Mauritius* [2000] 1 WLR 2303 at 2308A–B.

<sup>78</sup> Ewing, n.71 above, p.106. For Fredman, the Diceyan notion that basic rights are protected by the common law is “simply untrue”: S. Fredman, “Scepticism under Scrutiny” in *Sceptical Essays*, n.10 above, pp.197, 202.

<sup>79</sup> cf. D. van der Merwe, “Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity” *Tydskrif vir die Suid-Afrikaanse Reg* (2000) 12–32, 13, referred to in Van Zyl, n.32 above. See also P. Visser, “A Successful Constitutional Invasion of Private Law” (1995) 58 *Journal of Contemporary Roman Dutch Law* 745, and early (1995) judicial remarks on the “constitutional invasion of private law”: *Potgeiter v Kilian* (1995) (11) B.C.L.R. 1498 (N); also, Gerstenberg, n.10 above, at 690–691. See further, n.55 below.

<sup>80</sup> For a discussion of the possible effect of the Act on substantive rules of English tort and contract law, see Beale and Pittam, n.59 above.

<sup>81</sup> In South Africa, it may be that the existence of a public policy element in a common law test will, in some cases, signify that the common law receiving context deals with an area of human activity which is of such a nature that fundamental constitutional norms may take on sufficient “intensity” as to be directly applicable.

<sup>82</sup> *Holomisa*, n.1 above, at [18], n.16.

departure. When in future the unruly horse of public policy is saddled, its rein and crop will be that value system.”<sup>83</sup>

So, even where a provision of the Bill of Rights is not found to be directly horizontally applicable, it may affect the outcome of a case where its existence is relied upon by the court—in its common law jurisdiction—in determining the content of public policy considerations relevant to delictual (tortious) liability, or the enforceability of a contractual clause in restraint of trade,<sup>84</sup> or the validity of a will said to discriminate on grounds proscribed in the Bill of Rights.<sup>85</sup>

Perhaps the best illustration of the indirect effect of a rights instrument on the distillation and formulation of public policy is the Supreme Court of Appeal decision in *Brisley v Drotzky*.<sup>86</sup> The appellant argued that a non-variation clause in a contract ought not to be enforced against her because it would in the circumstances be unfair, unreasonable, and in conflict with the principle of bona fides. She invited the Court to develop the common law in the light of fundamental constitutional values (in particular, equality) on the grounds that the *Shifren* rule<sup>87</sup> (parties may include a written provision that only written alterations to their contract are valid) necessarily protects those with bargaining power at the expense of those who lack it. The Court explained that the common law rule needed no development—the balance of interests struck in the common law rule 40 years before remained sound.<sup>88</sup> On the question of the influence of the Bill of Rights, Cameron J.A. said:

<sup>83</sup> *De Klerk v Du Plessis* (1995) (2) S.A. 40 (T) 127 (the precursor to the Constitutional Court’s decision, n.12 above).

<sup>84</sup> In *Knox D’Arcy Ltd v Shaw* (1996) (2) S.A. 651 (W), for example, a party seeking to escape a restraint of trade earlier agreed to invoke the right to engage freely in economic activity in s.26(1) of the Interim Constitution. Such restraint provisions are enforceable unless the restraint is “unreasonable” in the circumstances and so contrary to public policy: *Magna Alloys (SA) (Pty) Ltd v Ellis* (1984) (4) S.A. 874 (A). The Court in *Knox D’Arcy Ltd* observed that whether a particular provision is contrary to public policy was now to be decided in the light of the Bill of Rights, but that “[t]he Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions . . . ”. (The Interim Constitution which did not include a provision similar to s.8(2) of the Final Constitution.)

<sup>85</sup> It is difficult to conceive of a branch of law more obviously belonging in the “private autonomy” sphere than the law of succession. As such it provides a useful basis for drawing analogies of the possible conduct-limiting effect of constitutional norms in other areas of traditionally “private” law. This is to say no more than that if it (the far-reaching effect of constitutional norms on private law) can happen here (in this branch of law), it can happen anywhere. See in relation to the constitutional application of public law norms in the private law realm of succession law in South Africa: M.J. de Waal, “The Law of Succession and the Bill of Rights” in *Bill of Rights Compendium* 1996 Issue 2 3G 13. In a similar fashion, in succession law the notion of *boni mores* is likely to play an important role in the constitutionally-influenced or mandated limitation of testamentary freedom. Under South African common law a court will not give effect to testamentary dispositions or conditions contained in these, which are illegal, *contra bonos mores*, or vague. See in this regard F. Du Toit, “The Constitutionally Bound Dead Hand?” (2001) 2 *Stellenbosch Law Review* 222, esp. 244–257.

<sup>86</sup> (2002) (4) S.A. 1, SCA.

<sup>87</sup> *SA Sentrale Ko-Op Graanmaatskappy Bpk v Shifren end Andere* (1964) (4) S.A. 760 (A).

<sup>88</sup> *Brisley*, n.86 above, at [90], the paradox being that such provisions limit contractual freedom but are the result or manifestation of the parties’ freedom to contract in that way.

“Public policy in any event nullifies agreements offensive in themselves—a doctrine of very considerable antiquity. In its modern guise, ‘public policy’ is now rooted in our Constitution and the fundamental values it enshrines. These include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.”<sup>89</sup>

From these select South African cases it will be clear that one of the likely effects of the Act in the United Kingdom is that the content of public policy in any case will be informed by or infused in the light of Convention rights and values.<sup>90</sup> The South African courts have, however, made it clear that in such a weak indirect effect situation, the court is involved in a task familiar to a common law court, rather than a constitutional law exercise (and short of a legislative one). It still applies the tested techniques and methods of the common law using existing tools. This brings us, after the following two observations, to the final section of our article.

First, it is worth noting as an aside that the court may be required to fashion a remedy where it has embarked on modifying the common law, without any direct application but by reference to the Constitution. Justice O’Regan has observed that the question is still open as to what precise remedial powers a court will have where it gives indirect effect to constitutional norms through development of the common law.<sup>91</sup> Logically, an existing *common law* remedy would be adapted to give effect to the common law rule, as now developed.<sup>92</sup>

Secondly, it is necessary to comment briefly on concerns about the democratic legitimacy of judicial development of the common law. In *Brisley*, Cameron J.A., having noted that the public policy limits on contractual freedom contained in the common law would receive “enhanced force and clarity in the light of . . . the values embodied

<sup>89</sup> *ibid.* at [91].

<sup>90</sup> Aharon Barak, President of the Supreme Court of Israel, advocating a “strengthened indirect application model”, sees the tools for implementing this model as already existing within the private law, in concepts such as “good faith” and “public policy”, which are “particularly sensitive to constitutional considerations”, and that change is carried out within the framework of the private law: Barak, n.10 above, 14 *et seq.* Justice Barak concedes (at 42) that while a “clear constitutional stand” must be taken to resolve ambiguity about horizontality, it must be taken by the legislature.

<sup>91</sup> The Constitutional Court chose in *Amod*, n.33 above, at [30], to leave open the issue of the precise scope of the inherent power to develop the common law in s.173. It was also not necessary there to consider whether that power is more extensive than the analogous power under the Interim Constitution recognised in *Du Plessis* (n.12 above) and *Gardner v Whitaker* (1996) (4) S.A. 337, CC, although the factors referred to by Kentridge A.J. in *Du Plessis* (at [50], [57–60]) would be relevant to the way the common law is developed under s.39(2) of the Constitution. Where on the other hand a direct application (as contemplated by s.8) has resulted, it is clear that ss.172 and 173 of the Constitution give the court wide remedial powers: O’Regan, n.16 above, at 14.

<sup>92</sup> An excellent example of that happening is provided by the High Court’s decision in *Mineworkers Investment Co (Pty) Ltd v Mobidane* (2002) (6) S.A. 512 (W). The Witwatersrand High Court in a defamation claim was faced with the plaintiff’s request for a remedy in the form of a public apology, derived from the Roman Dutch Law remedy of *amende honourable*, which had partly fallen into disuse. The Court acceded noting that the Constitution “exhorts the Courts ‘to develop the common law’ taking account the interests of justice”, so that “[e]ven if the *amende honorable* had never existed, the imperatives of our times would have required its invention” (at [28]).

in the Bill of Rights" cautioned that (where the only question is one of indirect application of the Bill of Rights):

"[N]either the Constitution nor the value system it embodies gives the Court a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith."<sup>93</sup>

With the express, non-discretionary common law development mandate given to them, it is harder to consider South African judges developing the common law in the spirit of the Constitution as impermissibly legislating.<sup>94</sup> By comparison, with its general silence on the issue, the Act has given fresh impetus in the United Kingdom to the complex, long-standing debate about judicial legitimacy in common law development. The duty or power of UK judges to develop the common law (as fulfilling an acknowledged role in a democracy), remains unexpressed in any instrument, except to the extent that the court may have a duty under s.6(3) HRA not to make an order that effectively endorses what would be a breach of a Convention right if done by a public actor. Gearty comments that, in passing the Act, the legislature has "positively mandate[d] the judiciary to transform its function" and has transferred "a huge and open-ended portion of its legislative function to the judiciary", inviting it to exercise legislative power "in a far more general and pervasive nature than has ever hitherto been countenanced". British judges thus face a difficult task in "steering the Act away from judicial supremism" and giving respect to parliamentary supremacy, while applying the terms of the Act.<sup>95</sup> Griffith has likewise commented on the enhanced relative influence of the judiciary over the other arms of government.<sup>96</sup> Griffith attributes to Sir Stephen Sedley a desire to see the judicially-developed principles of the common law given greater prominence in limiting the power of the state but also in defining standards by which abuse of power by *any entity* might be judged. That is, the common law "has the capacity and the obligation to move in the next generation towards a principled constitutional order".<sup>97</sup> Griffith takes this, along with statements that the most important task for the courts in a twenty-first century democracy is the control of abuses of power whether in private or public hands,<sup>98</sup> to mean advocating

<sup>93</sup> *Brisley*, n.86 above, at [92]-[93]; the courts should show a "perceptive restraint" in declining to enforce contracts; at [94], see n.121 below. See also *Afrox Healthcare BPK v Strydom* (2002) (6) S.A. 21. Despite Cameron J.A.'s statement, some academics feel that these decisions show an unjustifiable judicial reluctance to embrace fully the new rights order and enable the transformation of the common law: e.g. D. Tladi, "One Step Forward, Two Steps Back for Constitutionalising the Common Law" (2002) 17(2) *SA Public Law* 473. The author's concern about democratisation of the common law ironically displays little concern for the role of the legislature, rather than the judiciary, in crafting substantial changes in the law in South Africa's new democracy.

<sup>94</sup> Van Zyl, n.32 above, at 171; see also O'Regan, n.16 above, at 3.

<sup>95</sup> Gearty, n.44 above. The effect of the Act is thus "the most significant formal redistribution of political power since 1911, and perhaps since 1688": K. Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 M.L.R. 79. See also Ewing, "The Unbalanced Constitution", n.71 above.

<sup>96</sup> n.3 above, at 42.

<sup>97</sup> Sir Stephen Sedley, "The Sound of Silence: Constitutional Law without a Constitution" (1994) 110 L.Q.R. 270 at 273.

<sup>98</sup> Lord Nolan and Sir Stephen Sedley, *The Making and Remaking of the English Constitution* (Blackstone, 1997), p.38.

the extension of the jurisdiction of the courts, in their development of the common law, to include "all abuses of power, as defined by the court, wherever it may be found and by whomsoever the power is exercised".<sup>99</sup> Of course, such statements need to be reconciled with the actual chosen terms of the Act. But the important point is that acting (even out of best motives) to develop the common law in excess of mandate and jurisdiction is as much a threat to the legitimacy of the common law as the methodological dangers that we now turn to.

### Towards a principled "constitutional colonisation" of the common law

The feature common to criticisms of judicial performance in relation to the HRA is the inadequacy of the reasoning employed in interpretation of the Act or in support of Act-inspired development.<sup>1</sup> For example, in Phillipson's recent catalogue of decisions on the development towards a (common law) right to privacy, he notes the "startling ease"<sup>2</sup> with which judges arrive at formulations, without recourse to sufficient analysis of either common law or Convention jurisprudence. Bonner *et al.* in a recent article show that such reasoning is "most conspicuous by its absence".<sup>3</sup> This may be a result of judicial uncertainty regarding the proper effect of Convention rights on the evolution of the common law.<sup>4</sup> Starting with an acknowledgment that the legislature appears to have deliberately chosen that the Act is not to be taken to affect the common law except in some indirect sense, we would express this caution: simply because a formal rights instrument now exists, and may affect the *content* of the private common law, it is not obvious that some change in judicial *technique* needs to occur. That is, the reason for inadequate judicial reasoning may be that judges feel lost between a common law world that is far from dead (but which is said to hide vast abuses of private power amenable to Convention reordering), and one that has not been born (the legislature has refrained from a clear mandate radically to transform the common law). Our argument is that traditional common law reasoning methods might be abandoned by judges in their bona fide attempt to show fidelity to the implicitly transformative ideals of the overall new rights order. This abandonment would be unnecessary (there may be no strong indirect horizontal effect; the common law was intended to continue in its own paradigm) and unfortunate (the common law's potential to infuse private spheres with human rights values will be undermined if any Act-inspired development is not supported by proper persuasive and contextualised common law reasoning).

In his 1987 article "Constitutional Law in an Age of Balancing", Aleinikoff expressed dismay at the threat to constitutional legitimacy in the United States posed by the easy resort to a facile "rights balancing" technique (the sort of reasoning that "gives answers, but . . . fails to persuade").<sup>5</sup> His purpose was not to offer an alternative technique, but only to question the implications of the dominant pattern of balancing. In the same way, we perceive a threat to the common law (and, ultimately, to the

<sup>99</sup> Griffith, n.3 above, at 62–63.

<sup>1</sup> See esp. Bonner *et al.*, n.4 above; Phillipson, n.61 above; Edwards, n.6 above.

<sup>2</sup> Phillipson, n.61 above, at 746.

<sup>3</sup> Bonner *et al.*, n.4 above, at 572. While these criticisms mostly relate to lack of reference to Convention jurisprudence on the issue, what might be more worrying is the converse: if the influence of the Convention leads to a lack of common law reasoning.

<sup>4</sup> Bonner *et al.* and Phillipson all make this point.

<sup>5</sup> Aleinikoff, n.5 above, at 1005.

legitimacy and effectiveness of the rights project of which it is a vital part) by any resort to constitutional rights-balancing methodologies where it is only the common law being developed (albeit with a new, obvious source of guidance). Like Aleinikoff, we do not purport to offer an alternative. We do not seek to define or describe "proper common law technique". But we know what it does not consist of. Also, even if we could not yet find any cases of inappropriate reasoning, the caution would still be valid.

Clearly, the common law retains its vitality and relevance in both the United Kingdom and South Africa. What we suggest is that this must be consciously taken, by the respective judiciaries, to include an affirmed role for common law method. In the South African context, at the same time as giving a clear constitutional basis for common law development, ss.8(3)(a) and 39(2) and other sections of the Constitution give recognition to the accepted and recognised *techniques and methods* of common law development, thus allowing such traditions to continue.<sup>6</sup> The *Carmichele* case, in particular, makes this clear. In the United Kingdom, too, the common law in general is "reasonably safe from obliteration" by the Act.<sup>7</sup> Indeed, the Act's complete silence on the common law can only be taken to mean that the culture and methodology of the common law is hardly in question.<sup>8</sup>

We have discussed the radiating effect of rights instruments on the common law, even in the absence of direct application provisions. Where one is dealing with indirect weak effect,<sup>9</sup> the court is involved in a familiar common law exercise. Fairly early in the horizontality debate,<sup>10</sup> Lester and Pannick (discussing how the Act and Convention rights would exert a powerful influence beyond their direct vertical effect and create "a strong magnetic field" across the entire body of UK law<sup>11</sup>) observed that what is important is the *manner* in which the influence is represented, and the *judicial technique* used in making the "best fit" between Convention rights and existing UK legal structures. The authors argued for a more subtle, sophisticated judicial method of giving effect to Convention rights in the private sphere, approaching rights "through" rather than "round" the existing law, so that by incremental adaptation of established principles of the common law (and equity), including the principle of legal certainty, rights would be domesticated and "woven into the fabric of the common law" in a way that would preserve the integrity of the legal order.<sup>12</sup>

<sup>6</sup> O'Regan, n.16 above, at 9–10. O'Regan gives a number of illustrations of post-1996 cases in the common law where, although no mention is made of the Constitution, the reasoning clearly echoes the equality or other concerns covered by the Constitution, so that one can witness techniques of the common law being used to develop the common law in its own right albeit within (and consistent with) the normative framework of the Constitution.

<sup>7</sup> Gearty, n.59 above, at 243, 245.

<sup>8</sup> This is supported by the terms of s.11(a) of the Act (affirming any other right or freedom conferred by or under any law having effect in any part of the UK), an observation made by Adrienne Stone, n.10 above, at 408.

<sup>9</sup> In South Africa, s.(2) development, although the same point applies in s.8(3)(a) development after a direct application of rights.

<sup>10</sup> See references at n.49, above.

<sup>11</sup> n.45 above, at 381–383, referring to the statement of the Lord Chancellor in the House of Lords in 1998 that Convention rights are magnetic north and UK law must point towards them (*Hansard*, HL Vol.585, col.840 (February 5, 1998)).

<sup>12</sup> n.45 above, at 383–384. To some extent, at least in relation to statutory interpretation, the higher courts in the UK were already familiar with the Convention and its influence before

In the same way, even though the advent of a rights instrument is no formal threat to the common law, some South African jurists have recently pointed out the threat to the “institutional integrity”<sup>13</sup> of the common law if its own traditions of incremental development are abandoned or corrupted by inappropriate techniques. This caution is of equal relevance in the United Kingdom. Judge Leon van Zyl has warned that, in supposedly developing the common law by reference to the Constitution, judges have already started to abandon proper legal historical method, and taken to what is a *constitutional law* exercise of balancing competing rights and interests, the result being “an eclectic, irrelevant academic exercise”.<sup>14</sup> Van Zyl warns that some cases reveal that:

“[O]nly lip service has been paid to the need to identify and develop the relevant common law. So powerful has been the apparent influence of the Constitution that common law development has become an exercise in weighing up interests with reference only to policy or public interest considerations.”<sup>15</sup>

Van der Merwe, concerned with the “colonisation” of the common law through a style of argument peculiar to constitutional law, argues that some South African judges employ “constitutional argument in drag”:

“[I]n their laudable enthusiasm to fully embrace the new constitutional jurisprudence, [they] seemingly have simply assumed that the direct application of Bill of Rights to private legal relationships gives them a certain license in the conduct of their judicial inquiry. They assume that an inquiry into the solution of private disputes is best conducted by means only or primarily of the determination of the content of competing fundamental rights, and their balancing and limitation in the regulation of social relationships.”<sup>16</sup>

Although they agree that it reached the correct finding, Judge van Zyl and Professor Van der Merwe criticise, for example, the method and reasoning employed in the Supreme Court of Appeal’s decision in *National Media Ltd v Bogoshi*.<sup>17</sup> Van Zyl opines that the court in that case, while expressly stating that it was dealing with the common law and not constitutional law, overturned the prevailing decision on the issue<sup>18</sup> by stating that it reflected a failure to effect an appropriate balancing of relevant competing rights. This, as Van der Merwe noted, is a constitutional argument “far removed from what one would expect of a judicial . . . development of the common

October 2000: Sir A. Hooper, “The Impact of the Human Rights Act on Judicial Decision-Making” [1998] E.H.R.L.R. 676 at 686.

<sup>13</sup> See n.79 above.

<sup>14</sup> Van Zyl, n.32 above, at 171.

<sup>15</sup> *ibid.* at 173. See also thoughtful discussion of this in Van der Walt, *Future and Futurity*, n.10 above.

<sup>16</sup> Van der Merwe, n.79 above, at 21. Of course there is no automatic direct applicability of constitutional norms in the private sphere, as s.8 and *Holomisa* have now made clear.

<sup>17</sup> *National Media Ltd v Bogoshi* (1998) (4) S.A. 1196, SCA, where the Supreme Court of Appeal, the highest common law court, referred to constitutional protections to freedom of expression in developing the common law so as to reject the existing principle of strict liability for negligent defamatory publication, fashioning a defence of the reasonableness of an act of publication.

<sup>18</sup> *Pakendorf v Flamingh* (1982) (3) S.A. 146 (A).

law",<sup>19</sup> and, on Van Zyl's terms, an inadequate development of the relevant common law—there being no discussion of relevant delictual principles and prior sources, "[n]or a whisper of centuries of development".<sup>20</sup>

For Van der Merwe, there is a failure to recognise that there are two distinct intellectual enterprises involved. Judges blur the distinction between the obligation to determine the constitutional compatibility of the common law, and the obligation accordingly to develop the common law, if necessary. If it is determined that the common law already gives, in effect, due recognition and protection to the values<sup>21</sup> embodied in a constitutional right, there is no need to embark on any further exercise. As we have described, having been asked in *Brisley v Drotzky*<sup>22</sup> to reconsider the legality of the rule supporting non-variation clauses in a contract by reference to certain constitutional values (including equality), the Supreme Court of Appeal found that the existing common law rule possessed a latent "constitutional" normativity and already reflected these values, and so needed no development. Cameron J.A. said:

"Constitutional considerations of equality do not detract from [the non-variation principle]. On the contrary, they seem to me to enhance it . . . [I]t is fallacious to suggest that insistence on only written alterations to a contractual regimen necessarily protects the strong at the expense of the weak. In many situations the reverse is likely to be true."<sup>23</sup>

Cameron J.A. said that courts should show "perceptive restraint" in striking down contracts, since "[s]horn of its obscene excesses", contractual autonomy is part of freedom and informs the constitutional value of dignity, by enabling the self-determination of persons within the sphere of their contracts and other legal structures.<sup>24</sup> It is thus not inevitable that the content of any particular private common law rule will require alteration simply because of the existence of explicit rights provisions dealing with the same subject-matter. Indeed, Cameron J.A.'s reasoning shows how constitutional values may, in appropriate cases, provide counter-intuitive reasons for *not* attempting a rewrite of the common law.

It is only if the common law does not adequately recognise a fundamental right, that the second enterprise identified by Van der Merwe (to develop the common law) becomes relevant:

"[T]he common law must be developed so that the right is incorporated into the fabric of the common law doctrine in a manner that allows for due recognition of the right in common law. The common law is, as it were, 'fleshed out' and

<sup>19</sup> Van der Merwe, n.79 above, at 20. Of course there are cases where, on the other hand, the Supreme Court of Appeal has developed the common law without, surprisingly, even a mention of the Constitution: see S. Jagwanth, "The South African Experience" in *Sceptical Essays*, n.10 above, p.313 (referring to *S v Jackson* (1998) (1) S.A.C.R. 470, SCA).

<sup>20</sup> Van Zyl, n.32 above, at 173.

<sup>21</sup> There is nothing, in an indirect application in South Africa, which directs attention to be had to particular provisions of the Bill of Rights.

<sup>22</sup> n.86 above.

<sup>23</sup> *ibid.* at [94].

<sup>24</sup> Cameron J.A., *ibid.* quoting H.L.A. Hart, *The Concept of Law* (Oxford University Press, 1961), pp.40–41.

reorganised by the addition of other considerations of fundamental importance."<sup>25</sup>

Ultimately, Van Zyl's fears are that the common law may develop itself right out of the system, where instead there is room for both common law and constitutional method.<sup>26</sup> Common law and constitutional argument are distinct, although we might not take this point as far as Van der Merwe, given that the foundation of the new South African legal order is the "supreme law" of the Constitution.<sup>27</sup> Nevertheless, relative autonomy within the new colony has been granted to the common law, and where it does not already—like in *Brisley*—admirably reflect the values of the rights instrument, it has been invited to flourish.

Adrienne Stone has expressed warnings of a somewhat similar sort, in relation to the HRA. Describing the process by which the High Court of Australia discerned an implied freedom of political communication in the Australian federal constitution, she observes how the Court showed a tendency of excessive and uncritical reliance on the US constitutional model and in so doing overlooked the role that the common law might play.<sup>28</sup> In tones that echo with Van der Merwe's,<sup>29</sup> she notes that:

"The Australian experience . . . suggests that it is likely that enthusiasm for new rights [in the United Kingdom] will obscure the possibility of common law solutions . . . and that courts should resist the temptation to ignore the common law . . . [C]ourts should at least consider whether the advantages of incremental, comparatively untheorised decision-making and predictability of result make the common law an appropriate alternative."<sup>30</sup>

While reference might increasingly be made to comparative law in giving content to rights in the Act for any related common law development, it is not self-evident that comparative rights jurisprudence is more significant than comparative common law.<sup>31</sup> It is not necessarily improper (for example) that a judgment of the Australian High

<sup>25</sup> n.79 above, at 21. His arguments, we believe, cannot simply be written off as nostalgic or defensive, when one understands that the Constitution intends the common law to be an institution of the new democratic, rights-based dispensation, and more than simply another policy-generating institution.

<sup>26</sup> Van Zyl, n.32 above, at 174. For Van Zyl, the proper approach is to develop the common law without recourse to an analysis of competing analogous human rights said to be implicated, and to then test the modified result to see whether it is consonant with the spirit, purport, objects and underlying values of the Constitution. This would be an exercise of the common law rather than simply a quasi-mathematical balancing of constitutional interests.

<sup>27</sup> s.2 of the Constitution. See n.43 above (*Pharmaceutical Manufacturer's* case). See also Gerstenberg, n.10 above, at 690, in the German debate, rejecting the approach that democracy requires the independence of the private law from—or a privileged pre-political position with regard to—the constitution.

<sup>28</sup> Stone, n.10 above, at 392 *et seq.* Of course these cases were constitutional cases where the common law was relevant, rather than vice versa.

<sup>29</sup> n.115 above.

<sup>30</sup> Stone, n.10 above, at 408.

<sup>31</sup> References to comparative jurisprudence must not be at the expense of properly reasoned judgments. See in this regard I. Ward, "The Limits of Comparativism: Lessons from the UK-EC Integration" (1995) 2 *Maastricht Journal of European and Comparative Law* 23 at 31. Ward worries about macro-comparativism and constitutionalism as an alternative to proper jurisprudence. The former, he argues, is "dangerous or useless—or both". See also C. Gearty, "Tort Law and the Human Rights Act", n.59 above, at 253—we might adapt his warning by saying that the

Court (in its common law jurisdiction) dealing with the common law's movement towards a tort remedy for breach of privacy should have "far more influence on the development [of] . . . a privacy remedy [in a UK court in its common law jurisdiction] than any principles derived from Article 8 of the Convention".<sup>32</sup>

It is not obvious that the appropriate discourse for common law development is a rights-based one. Why is it so wrong (where there may be no direct or strong indirect applicability), while there is a potential for the transformation of the tort of breach of confidence by reference to the values of the Convention privacy right, that "in many cases the actual decisions made are . . . firmly rooted *not* in such values, but in very traditional common law principles"?<sup>33</sup> Judges may not have given due weight to Art.8 in the breach of confidence/privacy cases, but is it really safe (where there may be no direct or strong indirect applicability) to criticise "lingering attachment to principles and values deriving not from [the Convention right to] privacy, but from orthodox [common law] notions of confidentiality"?<sup>34</sup> The question is one of common law development, after all. There is no scheme of direct horizontality. The Convention is a new source—albeit an explicit and authoritative one—in a familiar process, and the apparent frustration of *Bonner et al.* with judicial approaches to the Act<sup>35</sup> perhaps partly overlooks that the United Kingdom's "rights revolution", manifesting as it does in otherwise ordinary statutory form, was not intended to be so wholly new that traditional approaches were simply to be discarded. Where the Act is not directly applicable, fidelity to this incremental development tradition does not in and of itself represent unjustifiable judicial reticence or rights ambivalence, given that nothing in the Act suggests that the common law has in any way been structurally modified. We simply raise these issues (the effect of s.6(3) of the Act may be stronger), without purporting to offer a particular model of reasoning.<sup>36</sup>

To take this point further, there is not necessarily direct translatability between constitutional rights and private law norms. It would be odd to think of the private law action in defamation as "protecting the defendant's freedom of expression except where the plaintiff could demonstrably justify the need to protect reputation" (as a constitutional formula might put it), given that in the law of defamation the "organising concern" is reputation, and the freedom of expression value is merely an interest accounted for: there is in the private law system no necessary priority of one over the other.<sup>37</sup> It is not clear that the proper approach (where there may be no direct or strong indirect applicability) should be the extent to which principles deriving from the Convention right to privacy simply "substitute themselves for the traditional

approach in common law development might not be to ferret out a Convention decision and "triumphantly" apply it to an analogous common law situation.

<sup>32</sup> Phillipson, n.61 above, at 731, criticising recent judgments on this subject for insufficient attention to the Convention.

<sup>33</sup> *ibid.* at 748.

<sup>34</sup> *ibid.* at 758.

<sup>35</sup> "One can perceive . . . some desire to fit [the Act] within the traditionally British incremental approach as building on developments and trends in common law . . . rather than as something wholly new": *ibid.* at 585.

<sup>36</sup> *Bonner et al.*, n.4 above, at 553, suggest a model of sequential steps in deciding incompatibility of statutes with the Convention.

<sup>37</sup> We use the example given by Weinrib and Weinrib, n.10 above, at 56.

ingredients of the action in confidence".<sup>38</sup> Nor is it clear that the appropriate way to consider the development of the common law of tort is by "evaluating and juxtaposing principles of tort law and Convention jurisprudence",<sup>39</sup> where the analogies may be strained, or tort law's concern with "wrongs", as opposed to rights, might preclude simple juxtaposing. It might not properly describe the content, nuance and history of a common law norm to simply refer to a constitutional right said to protect the same interest. We should not assume that private law concepts such as "reasonableness" are "the expression of constitutional human rights themselves", nor is it obvious that what is involved in private law concepts "is really just human rights balancing".<sup>40</sup>

Not only is rights-balancing not self-evidently the preferable technique for common law development, its suitability as a technique of constitutional law has been questioned. Aleinikoff shows how the dominance of balancing technique led US Supreme Court jurisprudence to become "mechanical" and "generalised discussion . . . [I]nterests are identified and a winner is proclaimed or a rule announced . . . with little discussion of the valuation standards . . . it loses the ability to persuade." Aleinikoff explicitly ties the problem (as we would) to a wider concern about continuing legitimation and the validating function of fully reasoned decision-making in constitutional cases. That is, while the purpose of balancing was originally to get judges openly to connect constitutional law to the real world as a way out of formalism, it has itself become "rigid and formulaic".<sup>41</sup> Jurgen Habermas has argued that the balancing approach (in constitutional law) undermines the force of rights, downgrading them so that they lose their strict priority and "assume the character of policy arguments".<sup>42</sup> Gerstenberg notes that one concern about applying constitutional principles to private actors has been that the private law would "be drawn into the complex process of constitutional balancing" and the problem of the legitimacy of judicial balancing would be aggravated "by . . . conflict between the indeterminate and indefinite nature of judicial balancing and the interest of private actors in clear and calculable legal rules".<sup>43</sup>

<sup>38</sup> Phillipson, n.61 above, at 748.

<sup>39</sup> J. Wright, *Tort Law and Human Rights* (Hart Publishing, 2001).

<sup>40</sup> Barak, n.10 above, at 33–34.

<sup>41</sup> n.5 above, at 998–1000. Moreover, he says, courts would offer no source for the weights assigned to interests, or adopted "scaled-down equations that do not take account of all the possible interests". We would argue that judges must avoid adopting easy balances that do not openly seek to address the issues. "If adjudication is to be a rational process", Justice Felix Frankfurter wrote, "we cannot escape a candid examination of the conflicting claims", which means avoiding rights analysis that amounts to nothing more than "a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict": *Dennis v United States* 341 U.S. 494 (1950), 519. Ironically, Tushnet identifies Justice Frankfurter's opinion in the case as "one of the great scandals of [overly-simplistic] balancing", saying that Frankfurter simply placed the threat of communism on one side of the scale, the other side of the scale consisting of "a hymn to the abstract values of free speech": M. Tushnet, n.23 above, at 1366.

<sup>42</sup> Like Aleinikoff, Habermas says that weighing takes place "either arbitrarily or unreflectively", and while the process may reach a result, it will have failed to justify that result: J. Habermas, "Reply" in M. Rosenfeld and A. Arato, eds, *Habermas on Law and Democracy* (UCP, Berkeley, 1998), 258–259, 430, cited in R. Alexy, "Constitutional Rights, Balancing and Rationality" (2003) 16:2 *Ratio Juris* 131 at 134.

<sup>43</sup> Gerstenberg, "Private Law and Constitutionalism", n.10 above, at 689–690, 697 referring to the work of K. Hesse (1998) and U. Diederichsen (1998) respectively.

It may be that a species of facile, reductive reasoning and balancing technique has not yet affected common law development in South Africa or the United Kingdom.<sup>44</sup> We only caution against the possibility that in any common law development UK judges (certain only that the Convention is somehow indirectly relevant) might, in their "laudable enthusiasm" to account for the Convention, adopt methods foreign to the system being developed. Our support for the development of the private common law in the spirit of the new rights dispensation (and its capacity to effectuate constitutional aims), is not inconsistent with caution that the manner of transformation be legitimate according to the culture of the system.

### Conclusion

The resolution of questions about horizontality in the United Kingdom is some years away, and the South African Constitutional Court has not given much detail on the question that might readily be offered to UK lawyers. *Holomisa* is not particularly helpful in setting out precisely what is entailed in deciding whether a right applies directly, only emphasising the case-by-case nature of the question.<sup>45</sup> Nor has the Court described at length guidelines for s.39(2) (indirect application) development of the common law. However, sufficient lessons for the United Kingdom consist in how the Court has given a clear indication that, even in a system of such express constitutional supremacy and applicability, a court must not depart from familiar common law method where the only issue is the indirect influence or application of the rights instrument.

It has frequently been stated that the HRA is no ordinary statute, or at least for its wider purpose to be achieved, it has to be "seen to be different" and treated thus by judges. This is so. The sort of danger that we are alluding to is that, in response to and in recognition of this (whether out of enthusiasm or ambivalence or fear), judges might eschew ordinary techniques of common law development in a rush for fashionable constitutional rights rhetoric. As we have argued, a doctrine that private law should (or even must) be developed in a manner consistent with a rights charter does not transform private law into constitutional law.<sup>46</sup>

First, our premise in speaking of "ordinary techniques of development" has been that in both the South African and the UK contexts, the place of the common law and its methods has been affirmed within the overall scheme intended. In South Africa, this has been done expressly. The South African Constitution can thus be seen as having an

<sup>44</sup> We do not argue that balancing is intrinsically irrational (Alexy, n.42 above, argues that constitutional balancing method overcomes Habermas' objections) and of course all legal decision-making involves a form of it, as Aleinikoff acknowledged. Barak has described private law as a system of balancing *par excellence*: n.10 above. But there are different depths or sophistications of balancing techniques.

<sup>45</sup> *e.g.* the notion of a rights "intensity" is undeveloped. Jagwanth illustrates that the Constitutional Court has not been consistent or predictable in cases involving the application of the Constitution to the private common law: n.19 above, at 301. Nor has the Canadian Supreme Court, after *Dolphin Delivery*, n.49 above, given anything more than "sparse guidance" on how the balancing process (of reconciling competing common law interests by reference to constitutional rights) is to be carried out, or even what it means: Weinrib and Weinrib, n.10 above, at 46.

<sup>46</sup> Weinrib and Weinrib, n.10 above, at 56.

intended dual protective and evolutionary functions in relation to the private common law, shielding it from erosion, but also providing it with “developmental impulses”.<sup>47</sup> In the United Kingdom, whatever the exact strength of indirect horizontality, Parliament has nowhere in the HRA questioned the place of common law traditions.

Secondly, our premise in speaking of “danger” has been that something of value is threatened. We are not motivated by nostalgia, common law apologetics, or some dark intention to frustrate the transformation of society towards the objectives sought by the Constitution and the HRA. Much of the total aggregate of power in society lies in the private sphere, regulated (if at all) by the private common law. In our view, the common law can be an important vehicle through which rights (or, the values which they attempt to embody) are brought home (and perhaps into the home). The common law courts can be seen as good candidates for this transformation.<sup>48</sup> However, their legitimacy and effectiveness in achieving this challenge may be undermined by an inappropriate methodological approach to development of the law.

Whether or not one thinks that constitutional rights instruments should not take such a “meddlesome interest”<sup>49</sup> in private legal affairs, when writers comment on the “colonisation of the common law” by constitutional instruments,<sup>50</sup> the term “colonisation” perhaps carries with it all the historical, pejorative, apocalyptic implications of pervasive imperial domination effecting drastic change to centuries-old cultures. From habits, perhaps of political correctness, we do not tend to think of the term “colonisation” as representing the coming of enlightenment or objective progress (as might be said of the constitutional colonisation of the common law). But this is also because we reasonably entertain concerns at what might be lost in the process. Although the benevolent colonialist may, as in South Africa and the United Kingdom, have expressly carved out an autonomous region for the older regime (within a wider obligation to transform and conform), it may be tempting for the representatives of the previous regime to feel some urgency to adopt not only the values and irreducible minimums but also the traditions, manners and customs of the colonial master, despite the fact that the master never intended, and regrets, a complete cultural colonisation.

Accepting this, we must however be careful, at least in South Africa,<sup>51</sup> of romanticising the common law as a noble savage, living in parallel with but separate from the new order. Gerstenberg remarks that viewing the impact of the (German) constitution on private law as one of invasion of other territory leads to a form of “split thinking” which perpetuates the notion that the constitution is concerned with the state and the private law with society, and which relieves private actors of their responsibility for the realisation of constitutional standards.<sup>52</sup> It is not necessary to state whether our starting point is that the private law represents a sphere of valuable autonomy worth preserving, or whether it is a last bastion of undemocratised private power that must be filtered through constitutional values. That is because in both South Africa and the United Kingdom a democratically-based choice has been made, expressly or by

<sup>47</sup> This is drawn from the two functions identified in the German context by K. Hesse, whose work is described by Gerstenberg, n.10 above, at 692—see n.43 above.

<sup>48</sup> cf. J. Fudge, “The Canadian Charter” in *Sceptical Essays*, n.10 above, at 335, 358.

<sup>49</sup> See n.84 above.

<sup>50</sup> See n.79 above, and Gerstenberg, n.10 above, at 690.

<sup>51</sup> See n.43 above: one system of law (*Pharmaceutical Manufacturers case*).

<sup>52</sup> Gerstenberg, n.10 above, at 690.

omission, such that the culture and techniques of the common law have a positive legitimacy that are to be guarded as dutifully as the application of constitutional rights themselves. Of course, this is not to argue that the common law must remain as if it is a “pre-political private law with static normative content”.<sup>53</sup> The hallmark of the common law, decisions based on full explicit reasoning (looking partly back, and partly to the future) is most appropriate to an evolving system of law with an important role to play in embedding a new culture of rights within an elaborate, rich and ancient culture.

It was clearly intended that the Act be interpreted in a broad, protective fashion, and this spirit should ideally inform the development of the common law where the Act itself is not being applied. However, in steering the common law towards the new quasi-constitutional “due north”, UK judges can and should use oars of the common law and judges who seek to develop faithfully the common law according to its customs should not necessarily feel that they are somehow obstructing the bowels of the new rights order. The desire to avoid being seen as overly legalistic, or not paying enough attention to the Act and Convention,<sup>54</sup> may in coming years lead to common law judges abandoning their proper and familiar function. In such a situation, and given the risks we have identified, the South African experience would suggest that in the United Kingdom (given the scheme of the Act and the democratic imperative against unjustifiable judicial creativity), an incremental,<sup>55</sup> value-conscious, persuasive approach should be adopted, framed in terms of principle and “according to the common law’s own paradigm”.<sup>56</sup>

<sup>53</sup> *ibid.* One hope is that judges will more explicitly accept the value-laden nature of their decisions. Gearty challenges judges to “expand on their reasons” and guide us “away from the kind of constipated legalism with which the adversarial system invariably seeks to swamp and destroy all novel laws”. Gearty, nn.44 and 59 above, at 253, 259. See n.41 above; Griffith, n.3 above, at 42; also S. Jagwanth, “The South African Experience” and J. Allen, “The Lesson from New Zealand” in *Sceptical Essays*, n.10 above, at 301–302, 313 and 388–389 respectively. See generally Justice M. McHugh, “Law-Making as a Function of the Judicial Process” (1988) 62 *Australian Law Journal* 15 and 116. Our cautionary message is not inconsistent with such calls.

<sup>54</sup> Others have warned that the desire of some members of the judiciary to avoid being perceived as party to excessive judicial activism might lead to them failing to give adequate protection to Convention rights: M. Edwards (2002) 65 M.L.R. 859 at 862, referring to Sir John Laws, “The Limitation of Human Rights” [1998] P.L. 234 at 259.

<sup>55</sup> Oliver, n.65 above, at 19; what Kentridge A.J. called development along “incremental lines” in *Du Plessis v De Klerk*, n.12 above, at [58] (a statement that has been approved); see also O’Regan, n.16 above; but cf. Jagwanth, n.19 above, at 313, n.74.

<sup>56</sup> See Carmichele, n.34 above.