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The Common Law in South Africa: Pro Apartheid or Pro Democracy?

BY JEREMY SARKIN*

I. Introduction

The role of the common law in South Africa has been controversial. Some argue that during the apartheid era the common law could have protected rights and freedoms, but that it was overruled by security legislation passed by the parliament. Opponents of this view argue that South Africa's common law, with its roots in Roman-Dutch and English law, is a problematic colonial inheritance that has done little to protect justice and equality. Some have even proposed that the common law should be codified and South Africanized and that African customary law, previously derided or ignored, should be taken into account.1

This article examines several apartheid-era cases in which the common law protection of individual rights was at stake, to determine the extent to which the common law was human rights friendly and the extent to which the common law is compatible with South Africa's constitutional dispensation. It then moves on to consider what effect, if any, the new constitution and bill of rights have had on the common law. It examines to what extent South Africa's constitutional dispensation applies horizontally.2 Lastly, it considers which areas

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traditionally excluded from the ambit of a constitution and bill of rights (the common law and private law) will be affected by the values and protections afforded by this constitutional dispensation.

II. South Africa's Common Law During the Colonial Period

South Africa has a hybrid common law base made up mainly of Roman-Dutch and English law. The question as to whether the South African common law is Roman-Dutch or English has been the subject of much debate. Much of South Africa's private law comes from Roman-Dutch law, whereas English law has had a dramatic impact on public, procedural and commercial law.

Roman-Dutch law has its origins in the Roman Empire. After the Empire collapsed, the effect of Roman law waned, only to be revived in Europe in the twelfth century. By the sixteenth century it was well incorporated into the law of the Netherlands. The Dutch transported this blend to the Cape in the seventeenth century when they set up a refreshment station there. In 1795, the English occupied the Cape to forestall a French occupation. They handed it back to the Dutch in 1803 but retook it in 1806.

Initially, the English did not make any changes to the Roman-Dutch law that existed at the Cape of Good Hope. This policy changed in the 1820s as more British settlers arrived in the colony. However, several areas of the law remained largely Roman-Dutch. For example, the law of persons has not received a great deal from English law. One change that English law did bring about was the 1833 English decree that from the end of 1834 slavery would no longer be legal at the Cape.

Although the law of property remained largely Roman-Dutch, the law of succession and contract was heavily influenced by English law. Similarly, the definitions of various crimes and aspects of delict (tort law), which contain concepts such as “the reasonable man” and “the

3. African customary law, also applied in the country, has been treated by the legal system over the years with much derision, and many believe that it has been treated unfairly and not accorded the deference that it deserves.


5. The law imported was that of the province of Holland, as that was where the majority of directors of the Dutch East India Company came from who set up the refreshment station at the Cape of Good Hope.
duty of care," were taken from English law.

**III. Common Law During the Apartheid Era**

Many in the legal profession maintained during the apartheid years that South Africa's Roman-Dutch law was grounded in principles of fairness and equality, and that when apartheid legislation was repealed, these principles would once again be the guiding spirit of the law. The apartheid government passed laws that overrode the common law, rather than rewriting the common law itself. It can, however, be argued that the weakness of the common law with respect to equality was one of the factors that enabled the apartheid government to pass repressive legislation.

It is true that South African law acquired from both Roman-Dutch and English law a strong sense of justice. Both systems incorporate equality before the law and the advancement of personal freedom by the means of the perpetuation of fundamental freedoms and rights. In addition, English law incorporates natural justice and impartiality.

The common law creates a duty to uphold equal treatment of all and invalidates any practice that results in disparate treatment, unless that practice is authorized by statute or Act of Parliament. In *Mpanza v. Minister of Native Affairs*, the court declared that the right of personal liberty "is always guarded by court of law as one of the most cherished possessions of our society." This right, like all other common law rights, is residual, which means that it exists only insofar as it has not been denied by an Act of Parliament. Also, where such a statute or Act is ambiguous, a court may interpret it in favor of individual liberty.

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10. 1946 W.L.D. 225, 229.
Thus, it can be said that the South African common law recognizes that all people have a right to any and all freedoms not statutorily denied, and as such, the judiciary must interpret any statute encroaching on personal liberty “in favorem libertatis.”

Indeed, Roman-Dutch law perceives and acknowledges that all persons are equal under the law, that all are entitled to personal freedom, that no one person is above the law, and thus, that all persons are bound by it. Traditionally, in both Roman-Dutch and English common law, civil liberties are entitled to judicial protection. English law allows an individual who has been arbitrarily deprived of his liberty to invoke a writ of “habeus corpus.” The Roman-Dutch equivalent is the “interdictum de homine libero exhibendo.” These court-evolved remedies are designed to protect individuals from arbitrary governmental invasion of personal freedom.

In a 1916 case, Principal Immigration Officer v. Narayansamy, the court declared that all persons within the Union enjoyed the inherent right to bring an action of habeus corpus pursuant to British and Roman-Dutch law.

A 1975 case, Wood v. Ondangwa Tribal Authority, held that habeus corpus proceedings could be brought by any person on behalf of an imprisoned person. Furthermore, the court asserted that habeus corpus laws “should always be constructed in favour of the liberty of the citizen.”

Despite these decisions, this aspect of South African common law was pre-empted by statute. During the apartheid era, Parliament passed a series of laws that denied individuals the remedy of habeus corpus proceedings as a means to check arbitrary deprivation of personal liberty. Some of these laws were emergency measures, while others became ordinary law, despite their origins as emergency-type legislation.

During this period, the courts were in the main not allies of the common law principles of natural justice. In fact, they often interpreted security laws in favor of the government and used ambiguous statutory language to infer restrictions on personal liberty.

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11. See Dugard, Using the Law, supra note 7, at 38.
12. See id. at 109.
13. 1916 T.P.D. 274.
15. Id. at 311.
16. See DUGARD, SOUTH AFRICAN LEGAL ORDER, supra note 7, at 109.
The most infamous case of this period was *Rossouw v. Sachs*.\(^{17}\) In this case, the court was faced with the question of whether a detained lawyer was entitled to reading and writing materials in prison. The court departed from traditional modes of common law interpretation and upheld legislation forbidding the lawyer these materials. The importance of this case is further shown by the fact that its rule was extensively applied in other cases.

Thus, in *Goldberg v. Minister of Prisons*,\(^{18}\) the Appellate Division upheld broad discretion for the Commissioner of Prisons to determine convicted political prisoners' access to reading matter. The decision was particularly noteworthy because it demonstrated the court's unwillingness to interfere with the administrative body's discretion. Here, Acting Chief Justice Wessels cited the reasoning of the Appellate Division in *Rossouw v. Sachs*, in which the court had held that detainees were entitled only to necessities and not to comforts such as writing materials. Proceeding from the assumption that prisoners have no enforceable legal right to receive news, he reached the conclusion that the Commissioner's decision could not be questioned by a court of law.

Judge Corbett, later Chief Justice, dissented, arguing that a convicted and sentenced prisoner retains all the basic rights and liberties of an ordinary citizen except those taken away from him by law. The judge had no difficulty distinguishing *Rossouw v. Sachs* on the grounds that it concerned non-convicted detainees.

In *Sobukwe v. Minister of Justice*,\(^{19}\) Robert Sobukwe had been denied permission to leave the country. He argued that the common law acknowledged his fundamental right to leave the country, unless this right was revoked by due process of law. The court rejected this reasoning and found first, that the common law right was subject to restrictions, and second, that there was no difference between restrictions resulting from a sentence by a court of law and administrative restrictions as found in the Suppression of Communism Act.

Another natural law principle, the "*audi alteram partem* rule," mandates that before a person is deprived of his or her liberty, that person has a right to be heard by an administrative body. In *Sachs v. Minister of Justice*,\(^{20}\) Sachs argued that his being banned under the

17. 1964 (2) SA 551 (A).
18. 1979 (1) SA 14 (A).
19. 1972 (1) SA 693 (A).
20. 1934 A.D. 11.
Riotous Assemblies Act and the Criminal Law Act was unlawful and thus invalid since he had been denied the right to be heard in his own defense before the banning order was issued. The court found that the common law right to be heard had been explicitly excluded. It also found that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will.21

In Regina v. Ngwevela,22 the audi alteram partem rule was contested again. In this case, the court held that the fact that other sections of the act included the right to be heard should not mean that it was implicitly excluded where other sections were silent. However, the government quickly remedied this by amending the act so that there was a right to ask for reasons for the banning order only after it had been issued. The audi alteram partem rule was thus excluded.

In 1956, in Saliwa v. Minister of Native Affairs,23 the court again upheld an individual's right to be heard, only to have Parliament amend the legislation (in this case the Bantu Administration Act) to exclude the audi alteram partem rule.

In 1986, in Momoniat & Naidoo v. Minister of Law & Order,24 the court held that the right to be heard was something that Parliament could not have contemplated ousting. The court nevertheless rejected the proposition that detainees should be granted a hearing before being detained. Critics have argued that this was an inconsistent judgment because the audi alteram partem rule represents a fundamental right that the court should have excluded only if Parliament had shown a clear intention to do so.25

The role of the legislature and the courts during the apartheid years needs to be examined to determine whether the supposed libertarian strands were upheld or whether it was the common law that permitted the apartheid system to trample on the rights of the majority.

The conduct of the judiciary prior to the beginning of the 1980s26 has

21. See id. at 36-37.
22. 1954 (1) SA 123 (A).
23. 1956 (2) S.A. 310 (A).
24. 1986 (2) SALR 264 W.L.D (Goldstone, J).
25. See, e.g., MATHEWS, FREEDOM, supra note 4, at 197.
26. John Dugard has analyzed such conduct. See John Dugard, The Judiciary and National Security, S. Afr. L.J. 655, 656 (1982). In a study of appointments to sit at various political trials in the Transvaal, it was found that from 1978 to 1982 there were 25 political trials. These trials were presided over by 12 of the 45 judges of the province. Analysis revealed that 13 of these cases were heard by only 4 judges. The only common
been the theme of a number of major studies. It is possible to discern a shift in judicial attitudes from the late 1970s. Some judges developed an increasing awareness of the predicament they confronted. They realized that the legal system lacked credibility and legitimacy in the eyes of the majority because it was perceived as part of the machinery of oppression.

In the early 1980s, some courts, including the Appellate Division, showed a willingness on occasion to come to the rescue of the individual. However, the political turmoil that began in 1985, followed by the 1986 state of emergency, put an end to this new attitude. This new liberal consciousness was particularly prevalent in the province of Natal and can be seen in a number of cases. Pivotal to this increased liberalism was the appointment to the position of Judge President of the Natal Provincial Division (NPD) of Mr. Justice A.J. Milne. In a 1983 address to Lawyers for Human Rights, he said:

Judges must bring certain presumptions to bear in... interpreting

denominator, Dugard observed, was that each of these judges was a member of the more conservative Pretoria Bar before his elevation to the bench. The fact that so many judges were Afrikaans may reflect on their conscious or unconscious leanings towards the Africaner-dominated executive. It is, however, difficult to totally equate language group affiliation with a pro-executive or pro-individualist leaning. Nevertheless, it is possible to see why South African judges were in the main conservative and restrained by their backgrounds in general from playing a more activist position in alleviating some of the hardships imposed by the repressive legislation.
the legislature's intention. They look at precedent and what can only be called the general inherited spirit of our laws. It is here that I find the Universal Declaration of Human Rights particularly interesting reading. A great many of the fundamental presumptions that guide our interpretation of what the legislature intended are contained in the Declaration.\footnote{32}

The state, realizing that the courts were not always going to follow its dictates, thus saw a need for greater statutory intervention in the area of security laws. As a result, the Internal Security Act\footnote{33} was enacted following the Rabie\footnote{34} Commission of Inquiry.\footnote{35} This legislation consolidated most security laws into a single act. The consequence was to conserve the enormous powers of the executive at the expense of many of the common law individual rights and liberties. Among other features, the act enabled the detention of individuals to occur under separate categories, for different purposes, and for different periods.

During the state of emergency in the 1980s, the courts again had to determine the relevance of the common law rights of detainees. In the case of \textit{Buthelezi v. Attorney General},\footnote{36} it was contended that the rules

\footnotesize{\begin{itemize}
\item 1983 (3) SA 595 (A); In re Duma, 1983 (4) 469 (N). This presumption has also been interpreted to be in accord with the notion that the legislature is presumed not to have resolved to dispossess or encroach on individual vested rights, whether they originate from a statutory or common law source. \textit{See Cockram} 114; Fredericks v. Stellenbosch Divisional Council, 1977 (3) SA 113 (C); Komani v. Bantu Affairs Admin. Bd., 1980 (4) SA 448, 471-72 (A). The presumption has been interpreted as well to signify that penal statutes will be strictly interpreted to favor an individual whose freedom is in jeopardy. This was seen in the seminal case of \textit{R. v. Sachs}, 1953 (1) SA 392 (A). A second presumption was that where the statute was silent, the principles of natural law were included. This was seen in \textit{Kruse Johnson} [1898] 2 Q.B. 91, followed by later South African cases such as \textit{R. v. Ngwevela}, 1954 (1) SA 123 (A). A third presumption was that the law makers intended to modify the existing law no more than necessary. \textit{See Cockram} 139. This has been seen to mean that the statutes must be interpreted in accord with the common law and with common law provisions in mind. The statute may, however, intentionally exclude or alter the common law. \textit{See Dhanabakium v. Subramanian}, 1943 A.D. 160, 167. This was seen in \textit{R. v. Maphumulo}, 1960 (3) SA 793, 799 (N), a case arising during the state of emergency of 1960. A fourth presumption is the one against the interpretation of a statute that would restrict or remove the jurisdiction of the Supreme Court. This has been seen in many cases, the most important of these being \textit{Hurley v. Minister of Law & Order}, 1985 (4) SA 709 (D), 1986 (3) SA 568 (A).
\item 33. Internal Security Act 74 (1982).
\item 34. Chief Justice of South Africa.
\item 36. 1986 (4) SA 377 (D).
\end{itemize}
of natural justice had not been complied with because the person on whom the detention order was imposed had not been heard and therefore the notice denying bail was invalid. The decision of *S. v. Baleka*\(^3\) as to the expendability of the rule of *audi alteram partem* was not followed.

Judge Kumleben saw that serious inroads into the rights of the individual had been made, and therefore the rules of natural justice, as held in *R. v. Ngwevela*,\(^3\) should apply. Parliament has the right to exclude the rules of natural justice but where this is not done, either expressly or impliedly, the courts must enforce the rules of natural justice as demanded by the common law.\(^3\) Although this did not seem to be a large gain, the imposition of this obligation prior to the issuance of the detention order ensured that at least some intensive thought would go into the decision to make use of this provision. The decision, however, essentially has the effect of restricting the application of the rules of natural justice. This can be seen in Judge Kumleben's statement:

> It is generally acknowledged that in certain circumstances the rule is perforce to be restrictively applied, for instance where it would be contrary to the interests of the state for certain information to be disclosed . . . . When all is said and done, the application of the rule in any particular case involves balancing the interests of the individual against the interests of the state.\(^4\)

Thus, the *Buthelezi* decision has the effect of restricting the application of the rules of natural justice. This decision also has a significant effect on the usage of the maxim *expresio unius, exclusio alterius*,\(^4\) as it restricts the use of the maxim to cases where the result does not impede the protection of the rights of the individual. The decision ensures that statutes that infringe on the rights of citizens and violate conceptions of the protection of human rights are construed restrictively.

This case adds to the jurisprudence in this area by stating that although the rules of natural justice are adaptable in their use, there are

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37. 1986 (1) SA 361 (T).
38. 1954 (1) SA 123, 127 (A).
40. Buthelezi, 1986 (4) SA at 380.
41. A statute that expresses one of several things thereby implicitly excludes those that are not mentioned. See Keeley v. Minister of Defence, 1980 (4) SA 695 (T) (declining to apply the maxim).
limitations to the usage of these rules. The decision indicates that the rules can impose varying criteria in different situations\(^{42}\) and can be adapted to protect fundamental rights.

In a state of emergency case, *Omar v. Minister of Law & Order*,\(^{43}\) the court, in a split decision, rejected the argument that it was not the intention of Parliament to exclude the maxim of *audi alteram partem*.\(^{44}\) The court elected, rather, to utilize a restrained approach.\(^{45}\) Judge Vivier adjudged that the Public Safety Act implicitly gives the State President the power to exclude the maxim. The court declined to give a constricted reading to the word "hearing," so that it would encompass oral representations exclusively.\(^{46}\) This would have been the more permissive interpretation, as the other types of representations could then have been procured.

Judge Friedman perceived that no matter how considerable the powers of the State President were, nothing in the act empowered him to override the fundamental procedural rule of fairness and of natural justice.\(^{47}\) Accordingly, he found that the outing of this maxim was unlawful. Friedman also concluded that the regulation could be set aside because the State President did not properly consider the problem when he issued the regulation.\(^{48}\) Judge Friedman stated:

> It appears ... that the State President was of the opinion that there may be circumstances where there may be adequate reasons for ordering the continued detention of a person without giving him a hearing. It is necessarily implicit in this reasoning that this consideration cannot apply to all persons who have been detained. To make a regulation which deprives all detainees of the right to be heard before the Minister makes an order for their further detention, when such a procedure may be necessary in the case of only certain detainees is, to my mind, indicative of the fact that the State President has not correctly applied his mind to the question of whether *audi alteram partem* should, in all, and not merely in exceptional cases, be

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\(^{43}\) 1986 (3) SA 306 (C).

\(^{44}\) *Id.* at 315.

\(^{45}\) See *id.* at 311.

\(^{46}\) See *id.* at 309.

\(^{47}\) See *id.* at 329.

\(^{48}\) See *id.* at 329.
abolished.\textsuperscript{49}

Friedman went on to state:

The exercise of an administrative power is assailable in a Court of law where the person vested with a discretion fails to apply his mind to the matter. Where he fails to direct his thoughts to the relevant data or principles or relies on irrelevant considerations, that constitutes a failure to apply his mind.\textsuperscript{50}

Such statements from the minority opinion show that some judges were then more willing to interpret the common law in favour of the rights of the individual.

In \textit{Omar v. Minister of Law \& Order}, \textit{Fani v. Minister of Law \& Order}, and \textit{State President v. Cameron},\textsuperscript{51} a number of decisions came on appeal to the Appellate Division for resolution. This judgment represented a major setback for the human rights cause. This was the first opportunity that the Appellate Division had to react to the new security regulations and their infringement of fundamental common law rights.\textsuperscript{52} The Appellate Division responded abysmally. All the victories in the courts of the provincial divisions were nullified by this one nonchalant decision. The court, without regard to statutory presumptions or rules of interpretation, accepted the argument that fundamental common law rights were excluded in the absence of an indication by the statute that they be retained. A minority decision stressed that the \textit{audi alteram partem} is presumed to be present unless there is an unmistakable intention to eliminate it.\textsuperscript{53}

To conclude, in the majority of cases during the apartheid era, Parliament rode roughshod over the common law rights to individual liberty.\textsuperscript{54} The courts generally served as a rubber stamp for the legislature as they upheld and sanctioned government encroachment on personal freedom.

Therefore, while it is obvious that the common law had strands that were compatible with human rights, the statutory laws of apartheid in South Africa overwhelmed the common law. Consequently, the

\textsuperscript{49} \textit{Id.} at 329.

\textsuperscript{50} \textit{Id.} at 330.

\textsuperscript{51} 1987 (3) SA 859 (A).


\textsuperscript{53} 1987 (3) SA at 906.

residual common law rights were of minimal effect.

IV. The Common Law in the Constitutional Era

South Africa, in its democratic era, has had two constitutions: an interim and a final constitution. The interim justiciable constitution entered into force on April 27, 1994, while the final constitution became law in February of 1997.

A. The Interim Constitution

The interim constitution contained a chapter on fundamental rights. As a result of compromise, the chapter contained only those fundamental rights that negotiators could agree warranted protection during the transitional period before a final constitution was adopted.

Constitutional supremacy, rather than parliamentary supremacy, was established by section 4:

This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.

The Constitutional Court was the final forum for all matters relating to the constitution and all other laws. Parliament did not have free reign to make laws as was previously the case.

Other sections further entrenched the supremacy of rights enumerated in the constitution over other law and administrative actions. Thus, section 7(2) stated that “[t]his Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.”

Similarly, section 33(2) stated that “[n]o law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this chapter.”

Thus all law, including legislation and the common law, was covered by this provision. However, there was debate about whether the chapter had horizontal effect and, thus, whether it governed

56. S. AFR. CONST. of 1994 § 98(2).
58. Bills of rights are usually vertical in that they operate against the state. Thus, a citizen can bring an action against the state where the state has transgressed his or her rights. Usually this amounts to a challenge to a law or administrative act by the
private law relationships.\textsuperscript{59} While the bill was clearly vertical in ambit, there were arguments for its horizontal application. A number of sections (for example, section 7(2) quoted above) could have been interpreted to include all law, including private law, in the operation of the Bill of Rights.

However, a section indicating the possible non-horizontal application of the bill was section 7(1), which stated that “[t]his Chapter shall bind all legislative and executive organs of state at all levels of government.” The argument was that because section 7(1) was silent on the judiciary, the law emanating from this branch of government was not subject to the operation of the chapter.\textsuperscript{60} If this was the case, then private law was considered to be outside the constitutional arena.\textsuperscript{61}

There were two major reasons why the issue of the extent to which the constitution would operate horizontally was left open in the interim constitution. The first was that the negotiators of the interim constitution could not agree whether that constitution should apply horizontally. The second was that some negotiators wanted the interim constitution to be a minimalist document, arguing that only elected politicians drawing up the final constitution should determine what rights ought to be protected. Ultimately, the constitution’s ambivalence on the issue of general horizontal application left it up to the courts to decide which of the provisions of the Bill of Rights should be applied horizontally.

Nevertheless, the interim constitution stated that the aims and general thrust of the Bill of Rights were to be incorporated into all branches of the law. Section 35(3) directed that when performing 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 objects of this Chapter.”\textsuperscript{62} Thus, even though there


\textsuperscript{60} See L. M. Du Plessis & H. Corder, Understanding South Africa’s Transitional Bill of Rights 112 (1994).


\textsuperscript{62} S. Afr. Const. of 1994 § 35(3).
was debate about whether there was direct horizontal application, section 35(3) ensured the indirect application of the chapter to private law. An interesting question is what the result would be if the legislature simply repealed certain statutes without replacing them. Would the common law revive? In such a situation, section 12(2) of the Interpretation Act would play a part. Section 12(2) provides, "Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not ... (a) revive anything not in force or existing at the time at which the repeal takes effect."

Thus, the intention of the legislature is decisive in determining whether or not a previous law revives. However, whether this section includes the non-revival of the common law depends on the meaning given to the word "anything." Steyn is of the opinion that the common law might revive if a statute is repealed. Steyn cites Tiffin v. Cilliers in this regard, where the court held that the word "anything" was "wide enough to include a rule of the Common Law" but expressed some "doubt however as to the correctness of that view."

Elucidating Steyn's view, Devenish points out that section 12(2)(a) applies only where one law repeals another. However, this does not take the matter further as the repeal of a law would occur either when a later law on the same subject overrode it by implication or Parliament passed a law that explicitly repealed it. Thus, if Parliament simply repealed an act, nothing would exist.

As far as the striking down of a law is concerned, the matter is unclear. In Du Plessis v. De Klerk, the court held as follows:

The operation of a declaration of invalidity of a law ("wet") is dealt with in subsection (6), but section 98 nowhere provides for a declaration that a rule of common law is invalid. Such a declaration would be highly unusual, and would give rise to much difficulty. If a
statute, including one embodying a private law rule, is struck down, the previous common law (or earlier statute law) is presumably restored. But what would result from holding a rule of the common law to be unconstitutional? What would follow is that the relevant common law would require to be reformulated.\footnote{71}

It does, however, seem that the Constitutional Court and even other courts would be reluctant to strike down the common law. In this regard, Justice Kentridge stated:

For present purposes the point is that these are not choices which this court can or ought to make. They are choices which require consideration perhaps on a case by case basis by the common law courts. The common law, it is often said, is developed on an incremental basis. Certainly it has not been developed by the process of "striking down."\footnote{72}

In \textit{Gardener v. Whitaker},\footnote{Id.} the Constitutional Court held that while the Bill of Rights was aimed at vertical application, it was not exclusively so. The court also held that the constitution should not be limited to the sphere of public law because the foundation of society is to be found in the Bill of Rights, which would be undermined if ignored in private law relationships. The court further held that the highest norms of the constitution should penetrate every aspect of private law relationships and therefore the horizontal/vertical application should lose its traditional significance. The court reiterated that the constitution is concerned with transforming South African society by way of providing a legal system that is concerned with openness, accountability, human rights, democracy and reconstruction and reconciliation and therefore, in some cases, this Bill of Rights must operate in the private law sphere. The court furthermore pointed out that it was not possible to provide an answer to the question of the extent to which horizontal application applies because the question can only be answered with the concrete situation of each individual case. The court also stated that indirect application of the Bill of Rights should be performed by the other courts so that "a court which has regard to the dictates of § 35(3)IC does not merely develop common law in abstracto: it must apply the laws found to the case before it."\footnote{74} The court maintained, however, that it

\footnote{71. Id.}
\footnote{72. Id.}
\footnote{73. 1996 (4) SA 337 (CC); 1996 (6) BCLR 775 (CC).}
\footnote{74. Id.}
retained an oversight role.\textsuperscript{75}

In \textit{Shabalala v. Attorney General of the Transvaal},\textsuperscript{76} the prosecutor’s docket privilege in the common law was found to be unconstitutional. This case indicates the power of the courts to reshape the common law. Here, Justice Mahomed explained that the interim constitution “retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of apartheid and racism to a constitutionally protected culture of openness and democracy.”\textsuperscript{77}

The critical case determining the applicability of horizontality to the interim constitution was \textit{Du Plessis v. De Klerk}.\textsuperscript{78} In that case, the Constitutional Court had to determine whether the Bill of Rights of the interim constitution was applicable to legal relationships between private parties. The case raised the issue of whether one private party could enforce the free speech guarantees of the constitution against another private party. In \textit{Du Plessis}, individuals sued the Pretoria News and its publisher, editor, and a reporter for defamation in connection with a series of articles accusing certain private citizens of financing the UNITA forces in the Angolan civil war. The defendants argued that they were protected by the free speech provision of the Bill of Rights. The court declined to apply the protections of the Bill of Rights to wholly private delicts such as defamation.

The majority of the court held that the Bill of Rights is only indirectly horizontal. The court made this determination in regard to the entire Bill of Rights, rather than to any specific provision. It adopted an all-or-nothing approach, holding that “Chapter 3 does not have a general horizontal application.” The court stated:

Traditionally bills of rights have sought to strike a balance between governmental power and individual liberty and to constitute a protection against state tyranny. Conventionally fundamental rights and freedoms are protected against State Action only. Where horizontal protection occurs, it is invariably provided in express terms. Nowhere does the constitution contain an explicit provision that the fundamental rights provisions have horizontal effect between private citizens. The terms in which § 7(1) and §

\begin{tabular}{ll}
\textsuperscript{75} & \textit{See id.} \\
\textsuperscript{76} & 1996 (1) SALR 725 (CC); 1995 (12) BCLR 1593 (CC). \\
\textsuperscript{77} & 1996 (1) SALR at 740. \\
\textsuperscript{78} & 1996 (6) BCLR 752 (CC). \\
\end{tabular}
4(2) are framed indicate the contrary. Furthermore § 33(4) would be unnecessary if Chapter 3 had horizontal effect. It is also inconceivable that the framers intended the whole body of Private Law to become unsettled - as would be the consequence of horizontal application.79

The decision in Du Plessis contrasted with the decisions from lower courts, which held that some of the provisions of the Bill of Rights were capable of horizontal application.80 In making its decision, the Constitutional Court surveyed foreign case law and concluded that there was no universal answer to the problem of vertical and horizontal application of a bill of rights. After analyzing case law from the United States, Canada and Germany, the court expressed its comparative approval of the German model of indirect horizontal application. The court’s endorsement of the German model resulted from the fact that both Germany’s and South Africa’s constitutions divide constitutional jurisdiction between different appellate courts depending on the issue presented for review. The court determined that the applicability of constitutional values to private conduct ought to be determined incrementally by the common law.

The majority of the court found that the Bill of Rights could not be applied directly to the common law in actions between private parties, but left open the question of whether there were particular provisions of the Chapter that could be so applied. In terms of section 35(3), courts were obliged, in the application and development of the common law, to show due regard for the spirit, purpose and objects of Chapter 3. The majority held that it was the task of the Supreme Court, including the Appellate Division, to apply and develop the common law in the manner required by section 35(3).

Justices Madala and Kriegler dissented. They argued that the horizontal question hinged upon whether disadvantaged groups could demand equal treatment in both public and private spheres.

Thus, the interim constitution applied vertically only. The courts were bound to apply the spirit, purport and objects of the Bill of Rights in their interpretation of the common law.

B. The Final Constitution

The Bill of Rights contained in the final constitution also has a

79. Id.
section that requires the courts, when developing the common law, to promote the spirit, purpose and objects of the Bill of Rights. The Bill of Rights also improves on the interim Bill of Rights in some respects.

Significantly, the final constitution and Bill of Rights not only bind the state (vertical application) but, to the extent that the nature of the right at issue permits, they also bind private and juristic persons. The relevant provision is section 8(2) of the final constitution, which states: "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."

The Bill of Rights now binds the legislature, the executive, the judiciary and all organs of state. Under the interim constitution the term "judiciary" was left out. Thus all laws and the acts of private individuals are now included within the ambit of the constitution and Bill of Rights. These provisions made the Du Plessis decision lose most of its force, but kept intact the Du Plessis analysis of the indirect horizontal application.

Which rights are to be included in the scope of horizontality have yet to be determined. However, certain sections contain provisions that make them likely to fall within this scope. For instance, section 9(4) states that no person may discriminate directly or indirectly against anyone on one or more grounds listed in section 9(3). It thus seems that the right not to be unfairly discriminated against will always apply to private conduct. In addition, section 12(1)(c) states that the right to freedom and security of the person includes the right "to be free from all forms of violence from either public or private sources."

The uncertainty on the precise scope of rights is of some concern. At a minimum, however, the clause will effectively ensure that the common law is developed in line with the Bill of Rights, which is vital for the development of a democracy based on human rights. As Justice Mohamed noted in Du Plessis v. de Klerk:

The common law is not to be trapped within the limitations of its past. It needs not to be interpreted in conditions of social and constitutional ossification. It needs to be revisited and revitalized with the spirit of

81. S. Afr. Const. of 1997 § 39(2) ("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 constitutional values defined in Chapter 3 of the Constitution and with full regard to the purport and objects of that Chapter.83

Similar sentiments were expressed in *S. v. Makwanyane*,84 *S. v. Mhlungu*,85 and *Shabalala v. Attorney-General of the Transvaal*.86

The question of the scope of rights would arise, for example, if the courts examined whether corporal punishment is permissible in the home.87 At present, the imposing of corporal punishment in homes is governed by the common law.88 The state can, however, bring the infliction of this type of punishment within the direct protection of the rights contained in the Bill of Rights if it enacts legislation on the issue. This was done for corporal punishment in schools, both state and independent, which was prohibited by the National Education Policy Act and the South African Schools Act. These acts were passed by Parliament in 1995 and 1996, respectively.89 More recently, Parliament passed the Abolition of Corporal Punishment Act. This act removed those legal provisions sanctioning judicial corporal punishment by courts, including traditional courts.

The extent to which the constitution and Bill of Rights will transform the common law has yet to be determined. Generally speaking, most South African private law is common law as there has not been a great deal of statutory intervention in these areas of the law.

One area that has seen development since 1994 is the law relating to defamation. There have been, however, conflicting approaches to defamation by the courts since the constitution came into force. These conflicts were resolved in *National Media v. Bogoshi*,90 when the court examined the issues of strict liability and media or political privilege. In

83. 1996 (3) SALR 850 (CC).
84. 1995 (3) SALR 391 (CC).
85. 1995 (3) SALR 867 (CC).
86. 1996 (1) SALR 725 (CC); 1995 (12) BCLR 1593 (CC).
88. The South African common law dealing with the power of chastisement is relevant. According to the common law, disciplinary competence is not confined to parents, but vests also in teachers and others *in loco parentis*. Those *in loco parentis* are those who have custody and control of children. However, it is not clear whether authorities in a children’s home have an original power of chastisement or derive their power from their position *in loco parentis*.
89. These laws are being contested in the courts at present by a group of religious schools.
90. 1998 (4) SALR 1196 (SA).
that decision, the court abolished strict liability of the press, reasoning that such liability was incorrect, rather than that such liability conflicted with the constitution. Again, as with other decisions, the court ignored the effect of the constitution on the common law. The reason for this is that a perception exists that the constitution (and its reach) is a public law matter. This can be seen in various cases. For example, in *National Media Ltd. v. Jooste*, the Appellate Division examined the right to privacy and the invasion thereof in the delictual context, no reference was made at all to the constitution.

The Supreme Court of Appeal's finding in the 1998 case of *S. v. Jackson* is also relevant to a discussion of the role of the constitution in the reform of the common law. It is a critical case relating to gender equality and the common law. The case dealt with an appeal from a conviction of rape. A key question before the court was the applicability of the cautionary rule in sexual assault cases. The holding of the court, according to Judge Olivier writing for the majority, was that the rule “in sexual assault cases is based on irrational and out dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable.” The court held that the rule should not be applied in sexual cases only but that “the evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.”

This holding by the Supreme Court of Appeal overturned a rule of the common law that was imposed regularly by courts. While the court held the rule no longer applicable, it did not specifically mention the common law or even that the rule had been regularly applied for years. Surprisingly, no mention was even made of the constitution or its effect on the judgement. In addition, no reference was made to gender equality.

This case is pertinent to the transformation of the judiciary, however. Particularly relevant is Judge Oliver's background. Previously, he had been criticized in an interview for a seat on the Constitutional Court, and in the media, for sexist comments he had made in a rape case. This almost certainly affected his judgment in *S. v. Jackson*, and may have influenced either his selection or his request to write the opinion in the case. Where courts have discussed the

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91. 1996 (3) SALR 262 (A).
92. 1998 (1) SACR 470 (A).
93. *Id.* at 476.
94. *Id.*
constitution in relation to the common law, they have mostly found that
the common law reflects the values contained in the constitution.

This reluctance to drastically transform the common law by using
the constitution can also be seen in decisions of the Constitutional
Court. For example, in *Fose v. Minister of Safety and Security*, the
Court noted that "[t]he radical adaptation of our common law is not
called for by the provisions of the Constitution [and] ... in many cases
the common law requires no more than a slight modification to create
the degree of harmony required between itself and the Constitution."95

Thus, the courts have been reluctant to bring constitutional values
into decision making in the private law sphere. This is true even of the
Constitutional Court. In *Du Plessis*, Justice Ackerman stated:

Direct application of the Chapter 3 rights ... will cast onto the
Constitutional Court the formidable task of reforming the private
common law of this country, a consequence which could not have
been intended by the drafters. It turns the Constitution, contrary to
the historical evolution of constitutional individual rights protection,
also into a code of obligations for private individuals, with no
indication in the Constitution as to how clashes between the rights
and duties are to be resolved, or how clashing rights are to be
balanced; section 33(1)IC was clearly not designed and is quite
inappropriate for this purpose. It would also be undesirable in a
broader constitutional sense, pre-empting in many cases Parliament's
role of reforming the common law by ordinary legislation.96

In the same case, Justice Sachs stated:

A major advantage of following the indirect approach and allowing
the Appellate Division to develop the common law in keeping with
the soul of the Constitution, is that the decisions of that court would
not have the entrenched permanence automatically resulting from our
judgments. Parliament could, following normal procedures, opt for
amending or even abrogating Appellate Division decisions, provided
that it legislated within the range of possibilities permitted by Chapter
31C. Such alterations, however, would be severely limited in relation
to determinations by our Court, where only a constitutional
amendment, or at most, cautious navigation by Parliament around the
prescriptive rocks of our judgments, could produce the change.97

Justice Ackerman similarly noted:

95. 1996 (2) BCLR 232 (CC).
96. 1996 (3) SALR 850 (CC).
97. *Id.*
The common law of this country has, in the past, proved to be flexible and adaptable, and I am confident that it can also meet this new constitutional mandate.  

C. How Will the Common Law Be Reformed in Reality?

Although the courts will probably make slight modifications to the common law in the light of the constitution, it is unlikely that they will play a major role. This is because they perceive the constitution as a public law matter. In addition, the courts are currently severely overburdened. It seems more probable that the transformation of South Africa's private law will occur through parliamentary enactment rather than by way of the courts. Accordingly, lacunae, problems, and the like will be remedied by statute rather than by judicial involvement. Thus, while the courts must reconsider common law rules in light of the Constitution, it seems likely that the development of the common law is more likely to occur by way of legislative involvement.

If Parliament alone is to reform the common law, the Constitutional Court needs to play a crucial role in ensuring that reforms are consistent with constitutional rights. How vigorously the court will examine state legislation and action remains, however, a debatable point. The court has stated that its role is not to "second guess" the executive or legislative branches of government or interfere with affairs that are properly their concern. We have also made it clear that we will not look at the Constitution narrowly. Our task is to give meaning to the Constitution and, where possible, to do so in ways which are consistent with its underlying purposes and are not detrimental to effective government.  

In the 1997 case Soobramoney v. Minister of Health of Kwazulu-Natal, the Constitutional Court showed judicial restraint in this regard. Mr Soobramoney was a diabetic who also suffered from heart disease and kidney failure. He wished to be admitted to the dialysis program at a public hospital in Kwazulu-Natal but was told that he did not meet the

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98. Id.
99. See Rivett-Carnac v. Wiggins, 1997 (4) BCLR 562 (C); Hix Networking Technologies v. System Publishers Ltd., 1997 (1) SALR 391 (A) ("That it is this Court's duty to develop the common law, in the manner laid down in the Constitution, is clear . . . .").
100. Western Cape Executive Council v. President of the Republic of S. Afr., 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).
101. 1997 (12) BCLR 1696 (CC).
entry requirements. He was told that state hospitals suffer from a shortage of dialysis machines and staff and that only those patients who could be cured in a short period or those who were eligible for a transplant would be admitted. Soobramoney sought relief in court on the basis that section 27(3) of the constitution provides that no one may be refused emergency medical treatment and that section 11 protects the right to life.

The Constitutional Court held unanimously that the right not to be refused emergency medical treatment applies when a person suffers a sudden catastrophe that calls for immediate medical attention. The court found that because Soobramoney had chronic renal failure and would require dialysis several times a week, his case was not an emergency.

The court (narrowly and wrongly, it is contended) did not examine whether the state had too few machines or whether the budget was being spent in the best possible manner. Rather, the court found that such policies were best left to those with specialized knowledge at a functional level. The court was hesitant to "interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."\(^{102}\)

Judge Sachs agreed with this view of the court's review function. "Courts are not the proper place to resolve the agonizing personal and medical problems that underlie these choices. Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious."\(^{103}\)

This stands in contrast to earlier comments of the court regarding socio-economic rights. In *Ex parte Chairperson of the Constitutional Assembly in re Certification of the Constitution of the Republic of South Africa*,\(^{104}\) the court had to certify the compliance of the final constitution with the constitutional principles contained in the interim constitution. Objections to certification were made by various groups and individuals. Defending the inclusion of socio-economic rights in the constitution the court noted:

The second objection was that the inclusion of these rights ... is inconsistent with the separation of powers ... because the judiciary would have to encroach upon the proper terrain of the Legislature.

102. *Id.*
103. *Id.*
104. 1996 (4) SA 744 (CC).
and Executive. In particular the objectors argued it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of State benefits to a class of people who formerly were not beneficiaries of such benefits. In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the Courts so different from that ordinarily conferred upon them by a bill of rights that it can result in a breach of the separation of powers.\textsuperscript{105}

Thus, while the court was willing to defend the inclusion of these rights in the constitution by the politicians and defend the possibility of the courts’ concerning themselves with budgetary issues when necessary, the court would not do so itself.

While the result in Soobramoney can, to some extent, be understood by the ramifications it might have had, the decision highlights the limited role the court sees for itself. The court indicates in this case, as it has in others, that as far as some questions are concerned it will play a hands-off role. This is highly problematic because a dynamic and robust court is necessary to find a balance in a country undergoing transition.

This case, and similar cases in the past, indicate that the Constitutional Court will not be robust in its determination of issues that it believes to be in the domain of the state.\textsuperscript{106} Thus, it seems that the court will give a great deal of latitude to Parliament.

V. Conclusion

The implication of the constitution’s having little or no real effect on the common law is enormous. This is because most of the relations between individuals remain within the realm of private law. If this branch of the law remains beyond the reach of the constitution, it will continue, for example, “to protect the right of private persons substantially to perpetuate such unfairness by entering into contracts or making dispositions subject to the condition that such land is not sold to

\textsuperscript{105} Id.

or occupied by Blacks."\(^{107}\) This is relevant because the cases handed down so far by the courts, including the Constitutional Court, have not grappled with the legacy of apartheid or the socio-economic deprivation that continues to plague the majority of South Africans. This is surprising given the government's rhetorical emphasis on socio-economic issues and the fierce debates about including socio-economic issues in the constitution.

It is also relevant that private law still provides protections for those who discriminate. Because private law remains beyond the protection afforded by the constitution, discrimination by one individual against another is still permissible. It is surprising that during the tenure of the first democratic government, no legislation was introduced to forbid discrimination in, for example, housing sales and rentals or use of amenities.

Only recently has anti-discrimination legislation been enacted. This legislation was finally enacted by Parliament in a rush to meet a constitutional deadline. In short, too little has been done by Parliament and the courts to affect the private lives of the majority of South Africa's citizens.

The Constitutional Court has not worked to ensure that more people are affected by the principles in the constitution. First, access to the court is complex and expensive. Very few cases reach the court and those that do deal with very narrow points of law. The role of the Constitutional Court, far from being robust and interventionist, has been very limited. It has often attempted to avoid dealing with issues of major importance by invoking procedural rules and approaches that have relevance only to a particular case or to a restricted area of law. While this approach can be understood in the context of the court's not wanting to tie itself to positions that might affect future decisions, this approach ensures that its decisions have a limited impact.

Second, while the court complains that the media inadequately reports on its judgments, the court does little to ensure that its decisions are understood. The court also refers to almost no writings of South African academics. Thus, no debate is engendered.

The Constitutional Court is also set on encouraging other courts to play an important role in determining constitutional issues that come before them. Although this ensures the inclusion of many courts in the

\(^{107}\) Du Plessis, 1996 (3) SALR 850 (Mohamed, J.). The recent enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 will, it is hoped, negate this to some degree.
constitutional process, it is unfortunate that the Constitutional Court is not playing a more dynamic role by providing guidance and establishing principles for application by other courts.

The Constitutional Court has also shown that it is unwilling to strike down legislation enacted by South Africa's post-apartheid Parliament. This is most visible in the recent bail decision of the Constitutional Court where the court again indicated its reluctance to interfere with legislation enacted by Parliament. In fact, the Constitutional Court in its first four years did not strike down a post-apartheid parliamentary enactment. In addition, the court has adopted a cautious approach in many of its decisions. This approach is visible, for example, in its task of certifying the final constitution, when it interpreted the matter narrowly and displayed its reluctance to interfere with or reopen carefully crafted political compromises.

108. The only exception to this is possibly the sending back of the final constitution to the Constitutional Assembly for limited reworking.

109. For more detail on the role of the court with regard to political matters and with regard to certification, see Jeremy Sarkin, The Political Role of the Constitutional Court, 114 S. Afr. L.J. 134 (1997).