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# Remnants of Apartheid Common Law Justice: The Primacy of the Spirit, Purport and Objects of the Bills of Rights for Developing the Common Law and Bringing Horizontal Rights to Fruition

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*REMNANTS OF APARTHEID COMMON LAW JUSTICE: THE PRIMACY OF THE SPIRIT,  
PURPORT AND OBJECTS OF THE BILLS OF RIGHTS FOR DEVELOPING THE  
COMMON LAW AND BRINGING HORIZONTAL RIGHTS TO FRUITION*

*The Constitutional Court in Carmichele was correct to hold that '[where] the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.' Professor Anton Fagan's argument that this is false is flawed because he misquotes, misrepresents and misunderstands the Court's argument. Further, Fagan's argument that the spirit, purport and objects of the Bill of Rights is merely a secondary reason for developing the common law that can be trumped by the individual moral views of judges, is also flawed. It is based on a mischaracterization of the Hart-Fuller debate that is both unconvincing and inappropriate. Both he and Professor Stewart Woolman are incorrect to elevate rights over the spirit, purport and objects of the Bill of Rights. The s 39(2) approach to developing the common law does not make the Bill of Rights vanish; rather, it provides a mechanism for bringing horizontal rights to fruition. Finally, s 39(2) is not merely a mechanism for achieving coherence, it is a mechanism for achieving a coherent and just legal system that is superior to Fagan's preferred mechanism of leaving justice up to the individual moral convictions of judges.*

## I INTRODUCTION

The Constitutional Court in *Carmichele* held that:

'[Where] the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.'<sup>1</sup>

Professor Fagan in his article, 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' makes the bold yet misguided claim that "[n]otwithstanding its endorsement by the Constitutional Court, [the proposition] is false."<sup>2</sup> Fagan claims that the proposition is false because he believes that the Constitution only provides three possible reasons for developing the Common Law, namely, rights in the Bill of Rights, justice, and common law rights.<sup>3</sup> He further argues, as the title of his article suggests, that the spirit, purport and objects of the Bill of Rights cannot be a primary reason for

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<sup>1</sup> *Carmichele v. Minister of Safety and Security & another (Center for applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at 954A.

<sup>2</sup> Anton Fagan 'The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development' (2010) 127 *SALJ* 611.

<sup>3</sup> *Ibid.*

developing the common law, but that they play a secondary role as a tie breaker when these other reasons are indeterminate.<sup>4</sup> Professor Woolman, in his article ‘The Amazing, Vanishing Bill of Rights’, similarly views the section 39(2) mechanism of developing the common law so as to promote the spirit, purport and objects of the Bill of Rights as a poor second to the more direct mechanism of developing the common law based on the rights in the Bill of Rights.<sup>5</sup> Contrary to Woolman’s view, however, the Bill of Rights is not somehow amazingly vanishing as a result of the courts’ resort to the spirit, purport and objects of the Bill of Rights. In order for the rights in the Bill of Rights to vanish, they would first need to appear, and although the Bill of Rights contains the seeds of a number of horizontally applicable rights, few are actually fully developed rights.<sup>6</sup> As will be demonstrated below, those rights have a better chance of coming to fruition through the s 39(2) process of developing the common law through the spirit, purport and objects of the Bill of Rights than through the s 8(2)-(3) processes of trying to determine if given rights in the Bill of Rights are applicable to natural or juristic persons. This article refutes Fagan’s arguments,<sup>7</sup> and in the process, refutes Professor Woolman’s position.

Although Fagan makes a valiant and sometimes logically sound argument for his assertion, he is wrong in a number of respects and his argument suffers from several fatal flaws. Fagan’s article contains a number of misquotes and misrepresentations. There are approximately ten serious flaws in his argument, among numerous other flaws:

- 1) Fagan, incorrectly asserts that the Constitutional Court’s proposition is false as a simple matter of Constitutional authority;

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<sup>4</sup>Ibid at 611-612.

<sup>5</sup> Stewart Woolman ‘The Amazing, Vanishing Bill of Rights’ (2007) 124 *SALJ* 762-794.

<sup>6</sup> The original working title of this article was ‘Looking for Rights in All the Wrong Places: Why the Bill of Rights is not Vanishing and Why the Spirit, Purport and Objects of the Bill of Rights are both a Primary Reason for Developing the Common Law and the Standard that must be Followed by Every Court, Tribunal and Forum When Developing the Common Law’.

<sup>7</sup> There have been two other refutations of Fagan’s work on this issue that should be mentioned, one reply by Dennis Davis (Dennis M Davis ‘How many positivist legal philosophers can be made to dance on the head of a pin? A reply to Professor Fagan’ (2012) *SALJ* 59 (Reply)) and an article by Drucilla Cornell and Nick Freidman, in the *Malawi Law Journal* (Drucilla Cornell & Nick Friedman ‘In Defense of the Constitutional Court: Human Rights and the South African Common Law’ (2001-2012) 5 *Malawi LJ* 1). Both of these pieces are excellent, but Davis’s is a more narrowly focused refutation of Fagan’s positivist approach and Cornell and Freidman’s article spends most of its ink refuting Fagan’s argument in his article, ‘The Confusions of K’ (2009) 126 *SALJ* 154. Neither of these works address the misquotes and misrepresentations addressed in this article that were made by Professor Fagan in his article. Fagan has written a rejoinder to Davis’s article Anton Fagan ‘A Straw Man, Three Red Herrings, and a Closet Rule-Worshipper – A Rejoinder to Davis JP’ (2012) *SALJ* 788 (Rejoinder). Nothing in his rejoinder, however, corrects the errors in his original argument. Fagan does charge Davis with a failure to feel constrained by the ordinary meaning of the text. Ibid at 789. Professor Fagan could have benefited from a bit more fidelity to the text himself in his article. Davis has replied again in ‘The Importance of Reading – A Rebutter to the Jurisprudence of Anton Fagan’ (2013) *SALJ* 52 (Rebutter).

- 2) He misquotes, misunderstands, and misrepresents the Constitutional Court's argument for the duty it has imposed on the judiciary;
- 3) He mischaracterizes the famous Hart-Fuller debate regarding 'no vehicles in the park' and the issue of 'penumbral' and 'core meanings' by misrepresenting the hypothetical example used in that debate to better suit his rhetorical purposes;
- 4) The use of this example from the Hart-Fuller debate not only fails to convince, it is off-point and misleading as it involved the discretion of park officials in 'developing' enacted law as opposed to judges developing the common law;
- 5) His further examples of fireworks in the park and doctors providing emergency medical assistance are unsuccessful because they are not 'clearly' outside of the penumbral meaning of the respective provisions;
- 6) His argument that the Constitution limits the power of the courts to develop the common law to developments that are based on the three mentioned reasons is based on an implausible and strained reading of the text of the Constitution;
- 7) Although for different reasons, both Professor Fagan and Professor Woolman are wrong to privilege 'rights' in the Bill of Rights over the spirit, purport and objects of the Bill of Rights;
- 8) Fagan's argument that the spirit, purport and objects of the Bill of Rights cannot be both a primary reason for the development of the common law and an obligation for how it is to be developed is not logically sound;
- 9) His view that 'justice' is a better, or more appropriate, reason for developing the common law than the spirit, purport and objects of the Bill of Rights is worrying given his views of 'justice' and his views regarding the appropriate mechanisms for delivering 'justice.'
- 10) He misunderstands, and grossly underestimates, the value of coherence in the South African constitutional scheme, in particular the type of coherence that is the objective of s 39(2), and he underestimates the value of justice that may be provided by reference to s 39(2);

In the end, he is incorrect in his assertion that the Constitution imposes no duty on the judiciary to develop the common law when it is out of step with the spirit, purport and objects of the Bill of Rights, because he misreads the Constitution as a set of wooden provisions written onto parchment rather than as a document that was created to fulfill a number of objectives, not the least of which, were the transformation and harmonization of South

African law with the spirit, purport and objects of the Bill of Rights. The document was designed to function in the real world and not merely in the world of logic. The duty imposed by the Court in *Carmichele* was not merely a duty implied by the letter of the law, but by its spirit, purport and objects. The duty was not imposed in the abstract, but based on the fact that much of the judiciary had been avoiding its duties under the Constitution up until the date of the Court's decision.

The danger of Fagan's approach is that it attempts to legitimize the continued avoidance of the Constitution's mandate by elevating common law rights and the idiosyncratic moral views of individual judges over the normative value system enshrined in the Constitution. Although his argument appears to be value neutral and based on the text, logic and giving effect to the constitution-makers' judgments, this is not the case. His arguments are not value neutral, and are not supported by the text, logic, nor the constitution-makers' judgments.

## II CONSTITUTIONAL AUTHORITY

Fagan is incorrect to assert that the Constitutional Court's proposition that '[Where] the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation' is false. This bold and bald statement both overstates his claim to know what the Constitution 'truly' requires and denigrates the role of the Constitutional Court a merely 'endorsing' various proposition about what the Constitution requires. Section 167(3) of the Constitution gives the Constitutional Court the last say, both on what is a Constitutional matter and how such constitutional matters are to be resolved.<sup>8</sup> Thus, given that it decided that this is a constitutional matter and that it decided that courts are obliged, under the Constitution, to remove deviations between the common law and the spirit, purport and objects of the Bill of Rights, then courts do in fact have that obligation. Thus, it is odd, for Professor Fagan to claim that the statement is false.

What he might have intended to say is that a better interpretation of the Constitution would not entail a duty to develop the common law merely because it deviated from the spirit, purport and objects of the Bill of Rights. As is demonstrated below, this more reasonable proposition is also incorrect.

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<sup>8</sup> Article 167(3) states:

The Constitutional Court

- a. is the highest court in all constitutional matters;
- b. may decide only constitutional matters, and issues connected with decisions on constitutional matters;  
and
- c. makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

### III MISQUOTING, MISUNDERSTANDING, AND MISREPRESENTING THE CONSTITUTIONAL COURT'S ARGUMENT

Fagan's argument against the Constitutional Court's reasoning on this issue is based on a truncated and distorted version of the Court's argument. He misrepresents the Court's argument by quoting the short summary version from paragraph 39 of the judgment, rather than the fuller explanation of the duty set out in paragraph 33. Further, he distorts the meaning of the short version by editing out key words and replacing them with his own. Finally, he misunderstands the Court's argument because he does not appreciate the factual context in which the decision was made.

#### (a) *The short version misquoted*

The short version in paragraph 39 of *Charmichele* reads:

'[I]t is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in *promoting the section 39(2) objectives*, the courts are under a general obligation to develop it appropriately.' (emphasis added).

In his article, Fagan took out the phrase '*section 39(2) objectives*' and replaced it with '*objects of the Bill of Rights*', which he put in brackets. His version reads:

'[I]t is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the [*objects of the Bill of Rights*], the courts are under a general obligation to develop it appropriately.' (emphasis added).<sup>9</sup>

Thus, according to him, the Constitutional Court's argument is that because the courts have the power to develop the common law under s 173 and that under s 39(2) they must promote the objects of the Bill of Rights when doing so, it follows that they have the duty to develop the common law whenever it is inconsistent with those objects.<sup>10</sup>

He is correct that this result does not logically follow from the two provisions and he has a number of clever and entertaining examples to illustrate the point.<sup>11</sup> He is, however, incorrect to assert that this was the Court's argument.<sup>12</sup> It is peculiar that Fagan would replace the phrase '*section 39(2) objectives*' with '*objects of the Bill of Rights*.' The objectives of s 39(2) are to have the common law and statutory law come into harmony with the spirit, purport and objects of the Bill of Rights. The point is to have harmony and coherence

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<sup>9</sup> Fagan op cit note 2 at 618 misquoting *Charmichele* at 955G-H.

<sup>10</sup> Fagan op cit note 2 at 618.

<sup>11</sup> Fagan op cit note 2 at 619.

<sup>12</sup> Although Dennis M Davis writes a very sharp and concise criticism of Professor Fagan's article, he does not appear to have realized that Professor Fagan seriously misrepresented the Court's argument in support of the duty it imposed. Davis 'Reply' op cit note 7. Fagan, in his rejoinder to Davis's note, repeats the same misconstrued argument. Fagan 'Rejoinder' op cit note 7 at 789.

throughout the law within South Africa's objective, normative value system, which is embodied in the Constitution.<sup>13</sup> As the Court stated in *Carmichele*:

Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court:

“The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and judiciary.”<sup>14</sup>

The same is true of our Constitution.<sup>15</sup> The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.’<sup>16</sup>

These objectives of s 39(2) are not the same as the ‘objects of the Bill of Rights’. The spirit, purport and objects of the Bill of Rights include a whole host of values like: social justice and the advancement of human rights and freedoms (with an emphasis on human dignity, substantive equality, and non-discrimination), constitutionalism (including the supremacy of the Constitution), the rule of law, democracy and accountability, separation of powers and checks and balances, co-operative government and devolution of power, transformation, Ubuntu, and cosmopolitanism.<sup>17</sup>

The Court did not argue that inconsistency between the common law and these objects of the Bill of Rights creates the duty, but rather that inconsistency with the objectives of s 39(2) and s 173 creates the duty. There is nothing illogical about claiming that there is an implied duty to develop the common law so as to promote the spirit, purport and objects of the Bill of Rights when one both has the power to do so and when the failure to do so undermines the objectives of a constitutional provision, namely the objective of s 39(2) to harmonize the common law with the spirit, purport and objects of the Bill of Rights.

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<sup>13</sup> See *Carmichele* op cit note 1 at paras 54- 55. The first indication that the South African Constitution embodied an ‘objective normative value system’ was in the concurring opinion of Mahomed JP in *Du Plessis v DeKlerk* 1996 (3) SA 850 (CC). Dennis Davis and Karl Klare argue that “‘Development of the common law’ pursuant to s 39 is not about tinkering or consistency – it connotes a long-term project of fashioning common law foundations for a just and egalitarian society.’ Dennis M. Davis & Karl Klare, ‘Transformative Constitutionalism and the Common and Customary Law’ (2010) 26 *SAJHR* 403, 411.

<sup>14</sup> Citing BVerfGE 39, 1at 41 and *Du Plessis* op cit note 13 at para 94.

<sup>15</sup> Drawing attention to the remarks of Mahomed AJ in *S v Acheson* 1991 (2) SA 805 (NmHC) at 813B.

<sup>16</sup> *Carmichele* op cit note 1 at para 54.

<sup>17</sup> For a defense of this list which is not claimed to be exhaustive see Christopher J. Roederer, ‘Working the Common Law Pure: Developing the Law of Delict (Torts) in Light of the Spirit, Purport and Objects of South Africa’s Bill of Rights’ (2009) 26 *Ariz. J. Int’l & Comp. L.* 427, 484-493 (2009).

(b) *Factual context ignored*

This truncated and distorted version of the Constitutional Court's argument may appear weak, in part, because Fagan has left out the factual context in which the decision was made. Davis in his reply to Fagan criticized him for taking a decontextualized approach to the letter of the Constitution.<sup>18</sup> Fagan, in his rejoinder to Davis, points out that he did make a contextual argument for his interpretation of s 39 by referring to the context of the provision, namely other words in the provision.<sup>19</sup> He then criticizes Davis for not specifying the appropriate context from which to read the term and at the same time dismisses the relevance of the historical background of the Constitution and socio-economic context in which the Constitution operates.<sup>20</sup> He thinks that neither can create the duty articulated in *Carmichele*.<sup>21</sup>

However, if the Constitution was designed to operate in the real world and to deliver on its objects and purposes, then the historical background and the factual context in which the Constitution operates can in fact generate the need for the duty. The common law in 2001, when *Carmichele* was decided, was in fact deficient in promoting the objectives of s 39(2) because, up to that point, lawyers and judges were, by and large, ignoring the Constitution when working with the common law.<sup>22</sup> They were not only avoiding s 39 developments but were also avoiding applying the Bill of Rights to individuals when those rights were applicable under s 8 of the Constitution.<sup>23</sup> While lawyers and judges may have been acting within the letter of law by 'not developing' the common law (and thus avoiding the duty to develop the common law in this way), they were violating the spirit of the law, and undermining the purpose and objectives of section 39(2).<sup>24</sup> One way of staying within the

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<sup>18</sup> Davis 'Reply' op cit note 7 at 71.

<sup>19</sup> Fagan 'Rejoinder' op cit note 7 at 790-91.

<sup>20</sup> Ibid at 791.

<sup>21</sup> Ibid.

<sup>22</sup> As stated by Roederer, 'before *Carmichele*, the lower courts and the Supreme Court of Appeal acted as if the evaluation/re-evaluation of the common law in light of the Constitution was optional, at best.' Christopher Roederer, 'The Transformation of South African Private Law after 10 Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy in South Africa' (2006) 37 *Colum. Hum. Rts. L. Rev.* 447, 550 (2006). Davis and Klare note that the initial reaction of the courts to the mandate of the development clause 'was anemic outside the rarified field of defamation.' Davis & Klare of cit note 13 at 413.

<sup>23</sup> Authors such as Dennis Davis and Stewart Woolman lament the fact that the Courts are still avoiding direct application under section 8 of the Constitution. See Davis 'Reply' op cit note 7 at 66. See Woolman op cit note 5 at 762-794. Woolman argues that the Constitutional Court's persistent refusal to directly apply the Bill of Rights under s 8, and its insistence on taking the s 39(2) approach, has resulted in the Court sitting effectively as a court of equity applying flacid, rather than rigorous analysis, thereby undermining the Bill of Rights, rather than giving its provisions clear content. Ibid at 763. One virtue of the Court's decision in *Carmichele* is that while they may be able to continue to avoid engaging the Bill of Rights directly under section 8, they can no longer legitimately avoid engagement with the Bill of Rights through section 39.

<sup>24</sup> Davis and Klare argue as of 2010 that '[b]elow the apex level (CC and SCA), most courts have yet to absorb the message that the development clauses [section 8(3) and 39(2)] cast the judicial role in a new light.' Davis & Klare op cit note 13 at 415. See also Frank Michelman 'The Rule of Law, Legality and the Supremacy of the



letter of the law of ‘not developing’ the law is to develop the law and claim that one is not developing the law.<sup>25</sup> Further, at some point, turning a blind eye to the need to develop the law so as to avoid the duty to develop the common law in accordance with s 39(2) cannot be justified. Willful ignorance violates the duty of the courts to respect, promote and fulfill the rights in the Bill of Rights under sections 7 and 8 of the Constitution.

(c) *The full version with its textual context ignored*

Fagan is correct that normally a power does not imply a duty and thus having the power to develop the common law does not, alone, imply the duty to do so.<sup>26</sup> If this was the Court’s argument, it would in fact be flawed and deficient. Contrary to Fagan’s representations, the Constitutional Court’s actual argument for the duty is not based on s 39(2) and s 173 alone. The relevant constitutional context for interpreting s 39 is not confined to s 39 (Fagan’s stated contextual approach) but includes the document as a whole. The full argument in para 33 of the Court’s judgment includes the s 7 duty of the state to respect, promote and fulfil the rights in the Bill of Rights and the fact that the judiciary is bound by the Bill of Rights in s 8(1).<sup>27</sup> Given that there is a duty on the judiciary to respect, promote and fulfil the rights in the Bill of Rights, that those rights can be promoted and fulfilled through sections 8(2)-(3) and 39(2), it is reasonable to argue that this requires the judiciary to engage with the Constitution and for judges to not close their eyes to cases where the common law is out of step with the Constitution, including the rights in the Bill of Rights and the spirit, purport and objects of

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Constitution’ in Stuart Woolman et al eds *Constitutional Law of South Africa* 2d ed (2005) 11-16 --11-23 (detailing the turf wars between the Supreme Court of Appeal and the Constitutional Court, and between approaching the development of the common law in terms of the Constitution or merely the common law).

<sup>25</sup> Drucilla Cornell and Nick Friedman convincingly refute Fagan’s argument that a court does not ‘develop’ the common law whenever it applies an existing common-law rule to a set of facts regarding which it is indeterminate. Cornell & Friedman op cit note 7at 19-21 (They argue that Fagan even gets Raz wrong on this issue. Ibid at 21).

<sup>26</sup> Davis & Klare argue that the term ‘when’ in section 39(2) is meant to refer to anytime judges are engaged with the common law process as opposed to referring to specific occasions in which they are engaged in the specific activity of developing the common law. Davis & Klare op cit note 13 at 423-425. They further argue that there is no difference between ‘application’ and ‘development’ of the common law. Ibid at 425-428. I doubt that their argument would be convincing to someone like Professor Fagan who believes that one can apply rules without interpreting them. I am not completely convinced that the ‘ordinary’ reading of ‘when’ in section 39(2) is the one championed by Davis and Klare. It is, however, one plausible interpretation that is consistent with the Court’s decision in *Carmichele*. Note that the ‘ordinary’ reading is also based on an interpretation of the provision. Drucilla Cornell and Nick Friedman convincingly refute Fagan’s argument that a court does not ‘develop’ the common law whenever it applies an existing common-law rule to a set of facts regarding which it is indeterminate. Cornell & Friedman op cit note 7at 19-21 (They argue that Fagan even gets Raz wrong on this issue. Ibid at 21).

<sup>27</sup> Again, there is no mention of these further provisions, or this fuller argument in his rejoinder. Fagan ‘Rejoinder’ op cit note 7.

the Bill of Rights. The argument for the duty articulated in *Carmichele* is bolstered by the judiciary's avoidance of sections 8(2)-(3) and section 39(2) up to that point.

For example, the Supreme Court of Appeal in *Mostert v Cape Town City Council* was not living up to its duties under s 7 when it acknowledged that constitutional arguments might be relevant to deciding the case but also noted that they had not been made by counsel and thus the decision would have to be made in accordance with the common law.<sup>28</sup> Likewise, Justice Swart in *Van Eeden v Minister of Safety and Security* was not living up to his s 7 duties when he responded to an attempt by counsel to raise a constitutional argument in that case with the remark, 'The law of delict is to be found in the law of delict'.<sup>29</sup> Was the Supreme Court of Appeal in *Brisley v Drotzky*, living up to its duties when it held that 'the court cannot seek shelter in the shadow of the constitution from which vantage point it can attack and alter principles of the common law'?<sup>30</sup>

Given that the objectives of s 39(2) were to bring about harmonization of the common law, customary law and statutory law with the spirit, purport and objects of the Bill of Rights, would the drafters prefer Fagan's reading, which allows for decisions like *Mostert*, *Van Eeden*, and *Brisley*, or one that imposes a duty on judges to be vigilant in both identifying the disharmony and in correcting it? Would there be a purpose for s 39(2) if the drafters did not believe that the common law was in need of development in line with the s 39(2) objectives?<sup>31</sup>

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<sup>28</sup> *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA) at 117 (case involving the question of the duty of the municipality to prevent damage to property from a broken water main).

<sup>29</sup> *Van Eeden v Minister of Safety and Security* 2001 (4) SA 646 (TPD) at 658 (overturned in *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389) (The case involved a suit against the Minister of Safety and Security based on the fact that the plaintiff had been sexually assaulted, raped and robbed by a known dangerous criminal and serial rapist who had escaped from police custody. The issue was whether the police owed the plaintiff a legal duty (it was conceded that they acted negligently in allowing the assailant to escape custody)).

<sup>30</sup> 2002 (4) SA 1 (SCA) at para 24 (as translated by Dennis M. Davis in 'Transformation: The Constitutional Promise and Reality' (2010) 26 *SAJHR* 85, 90). As Davis describes the case, the defendant attempted to defend his eviction based on s 26(3). One may note that section 26(3) is one of the constitutional provisions that sets out a relatively clear standard for the courts, namely 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.' Davis's article goes on to critique both the Supreme Court of Appeal and the Constitutional Court for its treatment of contract law. As he states:

'In summary, the Constitution sought to promote a social democratic framework for the new South African democracy. By contrast, the traditional laissez faire norm of a minimalist state, which safeguards the interest of free, autonomous individuals remains the basis of the law of contract'. Ibid at 93.

<sup>31</sup> For a treatment of the drafting history of sections 8(2)-(3) and 39(2) see Davis & e op cit note 13 at 415-423. As Drucilla Cornell and Nick Friedman state, 'the decision by the Constitutional Assembly to include the judiciary in section 8(1) of the final Constitution can only be understood as a reaction to the fear ... that the Constitution would leave relations between individuals largely untouched by its transformative values, thus allowing apartheid to live on in the 'private' sphere. Cornell & Friedman op cit note 7 at 18.

#### IV CORE AND PENUMBRA AT DUSK OR DAWN: THE MISCHARACTERIZATION OF THE HART-FULLER DEBATE

Fagan begins his article, and his argument for why the object of the Bill of Rights are secondary, by trying to distinguish between ‘reasons’ and ‘tie breaker reasons’, as well as between rights and justice on the one hand, and the spirit, purport and objects of those rights, on the other. While one can make a distinction between these concepts, they are distinctions that do not make much of a difference in most cases. The distinction between the first two concepts (reasons and tie-breaker reasons) gives out in part, even on Fagan’s view, as soon as the rights in the bill of rights, justice and/or the rules of the common law are indeterminate.<sup>32</sup> For Fagan, in such cases, the ‘tie breaker’ (the spirit, purport and objects of the Bill of Rights) comes into play. In trying to answer most any legal question of import, each of these three sources, taken on its own, is indeterminate. If all three sets of reasons can be brought to bear on a given legal question, the possibilities for indeterminacy grow exponentially.<sup>33</sup> ‘The common law’ may pull in one direction, while ‘rights’ pull in another and ‘justice’ pulls in yet another direction. These terms are in quotes because the meaning and scope of any given common law rule or any given right or set of relevant rights, or of what justice is and demands, is contested and controversial. They are contested and controversial, not merely because literary critics can imagine all sorts of meanings for these things, but because these are complex concepts whose meanings have serious consequences for those whose lives they impact. Based on Fagan’s own argument, his approach should only apply in rare, simple and uninteresting cases where all three sets of primary reasons for the developing the common law are determinate. When this is not the case, the so called secondary tie breaker reason is actually the deciding factor. The problem with this approach is that ‘determinacy’ like ‘plain meaning’ is often in the eyes of the beholder. As will be argued below, contrary to Fagan’s view, the ‘tie breaker’ reason is not ‘a’ secondary reason, but ‘the’ standard for any and all developments of the common law.

One risk associated with Fagan’s approach is that it attempts to legitimate further avoidance of the Constitution’s mandate. Before, many judges avoided the mandate to

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<sup>32</sup> Fagan op cit note 2 at 611-612.

<sup>33</sup> It is possible to argue that the confluence of the common law, the rights in the bill of rights and ‘justice’ make a given choice more determinate, but such a proposition would rely on controversial interpretations of the common law, the meaning of, and or balance of relevant rights in the bill of rights, and controversial views of what justice entails. Of course, one very plausible reading of the Constitution is that these concepts should be brought into harmony-- in other words, justice, the common law, and the rights in the Bill of Rights should all be brought into harmony so as to promote the spirit, purport and objects of the Bill of Rights. Note that this is not consistent with Professor Fagan’s view of justice. See section IX below.

develop the common law so as to promote the spirit, purport and objects of the Bill of Rights by claiming that they were not developing the common law. Now, if a judge accepts Fagan's arguments, she or he may avoid the same mandate by claiming that either common law rights, the rights in the Bill of Rights, or the judge's own moral judgement is determinate.<sup>34</sup> In other words, Fagan has presented an argument that allows for even more rationalizations for avoiding the Constitution's mandate.<sup>35</sup>

Part of Fagan's argument relies on the folksy idea that there is a clear and important distinction between the core meaning of a legal rule and the penumbra of a rule.<sup>36</sup> He refers to the classic debate between Hart and Fuller on this issue, noting that according to Hart, one need only resort to such things as objects and/or purports (the purpose behind a rule) to justify a decision when a situation falls outside of the core meaning of a rule and into the penumbra of the rule.<sup>37</sup> The penumbra is the periphery or the shadow of the rule. Fagan uses John Finnis to argue that the former type of justification is deduction, while the latter is determinatio.<sup>38</sup> In other words, when situations fall within the core meaning, they follow logically by deduction from that core meaning, while in cases where they are in the penumbra of that meaning, one must resort to objects and purposes to determine the result.

What counts as core, penumbra and outside the penumbra is often contested and controversial, even in well settled and stable legal systems with relatively simple rules like 'no vehicles in the park'.<sup>39</sup> The problem with societies in transition, particularly multicultural societies, and societies in which there are vast discrepancies in wealth, social status, access to basic services and justice, is that what one person interprets as within the core meaning of

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<sup>34</sup> Fagan op cit note 2 at 622,625. Fagan states that justice is a primary and independent reason for developing the common law on page 622 and argues on 623 that when independent reasons are determinate that the objects of the Bill of rights play no role. On page 625 he argues that it is legitimate for judges to develop the common law in accordance with their own moral convictions because it is one way for the common law to be just.

<sup>35</sup> In Fagan's rejoinder he asserts that his 'mode of thinking' may be a bigger step forward than Davis's because it '... would force the court's to start grappling with something that Davis's preferred 'mode' (by his own admission) has enabled them to avoid, namely the important questions raised by s 8(2) and s 8(3): which constitutional rights are binding on natural and juristic persons and how does the common law have to be developed in order to give effect to them? Fagan 'Rejoinder' op cit note 7 at 795. This is wishful thinking. It in no way follows that foreclosing section 39 will encourage the use of section 8, particularly when one has opened the door for arguments that a judge can determine the answer via their own moral convictions or through common law rights. As noted in the introduction, although Fagan's rhetorical approach in this article is to appear value neutral, his argument is not value neutral. As Cornell and Friedman argue, 'Fagan's argument is not merely a 'plain' reading of section 39(2). Instead, his argument is better cast as a normative argument against the influence of the Constitution on the common law...' Cornell & Friedman op cit note 7at 4.

<sup>36</sup> Fagan op cit note 2 at 614-616

<sup>37</sup> Ibid at 614 citing HLA Hart 'Positivism and the Separation of Morals' (1958) 71 *Harv LR* 593, 607-8. Just because one does not need to resort to the purpose of rule in what appears to be clear cases does not mean that the purpose of the rule is not there doing any work. Often the purpose of the rule helps make one or more interpretations clear or easy cases.

<sup>38</sup> Ibid at 615 citing John Finnis, *Natural Law and Natural Rights* (1980) 281-90.

<sup>39</sup> The Hart-Fuller debate centered around this hypothetical rule.

something is often another's penumbra or even outside the realm of possibilities altogether. During both the twilight of one era and the dawn of another, the clear demarcations of night and day, often give way to long, soft, overlapping shadows – the black and white become gray penumbra.<sup>40</sup> Take, for example, the vastly different views of South Africans over the meaning of dignity and freedom of expression in light of the Spear painting and the Zapiro cartoons.<sup>41</sup> Are these within the core of freedom of expression or in the penumbra? Are they in the core of offending the dignity of the president (or the office of the president), or in the penumbra? Might one or the other fall completely outside the penumbra? Can anyone plausibly claim that the forces that have created the fault lines on this issue are rooted in the plain or ordinary meaning of the relevant constitutional provisions?

Fagan concedes that deduction and determinatio both equally justify a decision, that the bulk of the rights in the Bill of Rights are abstract rights, and that most common law developments justified by those rights would be penumbra cases, thus calling for determinatio justifications.<sup>42</sup> Thus, he acknowledges that the tie breaker reasons will come into play in most cases where one is attempting to interpret rights.

Nonetheless, he wants to make sure that one does not 'infer from the fact that a rule may justify a decision by determinatio and the fact that determinatio of a rule may rely on the rule's purpose, that there is no difference between, on the one hand, the justification provided by a rule, and the justification provided by the purpose of the rule.'<sup>43</sup> Fagan argues that Roederer makes this error of inference.<sup>44</sup> Of course, Roederer was talking about rights and the spirit, purport and objects of the Bill of Rights, and not simply about any given rule and its purpose. More importantly, however, Roederer did not argue that there was no difference between justifying a development in the common law on the basis of a right and justifying the same development on the basis of the spirit, objects and purposes of the Bill of Rights.<sup>45</sup> Rather, he

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<sup>40</sup> The job of the court, to use the words of Sixto Rodriguez is to, '...con convince your mirror --As you've always done before-- Giving substance to shadows -- Giving substance ever more.' Sixto Rodriguez, 'Crucify your Mind' *Cold Fact* (1970).

<sup>41</sup> See for example the *Mail & Guardian* colloquium 'Talking about freedom of expression' partially transcribed available at <http://www.zapiro.com/Sponsored-by/Mail-Guardian-Talking-about-Freedom-of-expression-versus-rights-of-individuals/>, accessed on 27/12/2012; See also Jackie May & Andrea Nagel 'Ban The Spear, stone its maker' *Times Live* 22 May 2012 available at <http://www.timeslive.co.za/politics/2012/05/22/ban-the-spear-stone-its-maker>, accessed on 27/12/2012.

<sup>42</sup> Fagan op cit note 2 at 616

<sup>43</sup> *Ibid* at 615.

<sup>44</sup> *Ibid* at 615. He claims that the error is made in Christopher J. Roederer, 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) *SAJHR* 57, 70, 75. *Ibid*.

<sup>45</sup> In his 'Post-Matrix' article in note 75 on page 71 Professor Roederer recognizes that the section 8(3) approach is superior from the point of view of guidance to the courts as it calls attention to the possibility that while promoting one right or set of rights, other rights may be infringed or limited. The section 8(3) approach directs the courts to ensure that any such limitation passes the section 36 requirement that any infringement or

argued that although there is a clear distinction between these approaches to developing the common law (one appearing much more rule like than the other), that if one really thinks through each approach (especially given how s 39 tells us to interpret and develop the law), it will be rare that one would end up in a different place, just because one took the different route.<sup>46</sup> This is because these two paths, while distinct, overlap considerably in their substance.<sup>47</sup>

Fagan attempts to illustrate and explain the difference between a justification provided by a right in the Bill of Rights and one provided by the objects of the Bill of Rights by turning to what he claims is an example used by Hart in the Hart-Fuller debate on the separation of law and morals.<sup>48</sup> As he states, ‘The example is that of a rule forbidding one to drive a vehicle in a park.’<sup>49</sup> The actual example from the Hart-Fuller debate does not mention driving but merely states: ‘no vehicles in the park.’<sup>50</sup>

Fagan argues that the purpose behind the rule, namely, preventing noisy and dangerous activities, could not justify banning fireworks, even by determination.<sup>51</sup> For this to be true using Fagan’s approach, it is not enough that fireworks are out of the core meaning of ‘vehicles in the park’, they must be out of the penumbra of that meaning as well. They must be a clear case of something outside the rule. As he states, ‘fireworks are not vehicles.’<sup>52</sup>

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limitation of another right be ‘reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.’ He points out that a similar analysis should take place in any evaluation of the appropriateness of the development of the common law under section 39 if that development limits other rights. Roederer Post-Matrix op cit note 44 at 71 n.75.

<sup>46</sup> Ibid at 75-81.

<sup>47</sup> Iain Currie & Johan De Waal note that ‘In common law disputes between private parties, a direct application of the Bill of Rights will seldom offer significant advantages for a litigant over an indirect application. In most cases, a litigant will motivate for a change in the common law and it matters little whether a court is persuaded to do so with reference to an argument based on direct or indirect application.’ Iain Currie & Johan De Waal *The Bill of Rights Handbook* (2005) at 50. See also Andre van der Walt, ‘Transformative Constitutionalism and the Development of South African Property Law’ (2005) 4 *TSAR* 655, 666-667. Note that Stuart Woolman, who is a strong critic of the Court’s use of section 39(2) over the use of section 8 concedes that a muscular approach to s 39(2) could hypothetically provide rules of the type that Woolman believes a s 8 analysis is more likely to provide. Woolman *Amazing Vanishing* op cit note 5 at 766 note 6.

<sup>48</sup> H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard LR* 593, 606-15. Lon L. Fuller, ‘Positivism and Fidelity to Law --A Reply to Professor Hart’ (1958) 71 *Harvard LR* 630, 661-69 .

<sup>49</sup> Fagan op cit note 2 at 614 citing to 71 *Harvard LR* 593. Later he repeats this, putting ‘driving a vehicle in the park’ in quotes and citing to 607. There is no such language in H.L.A. Hart’s article. The words ‘drive’ and ‘driving’ are nowhere mentioned in Hart’s article.

<sup>50</sup> While Fagan’s distortion of the example makes his point somewhat easier to make, it raises a whole host of other similar problems to those raised in the actual Hart-Fuller debate. See below.

<sup>51</sup> Fagan op cit note 2 at 615-616

<sup>52</sup> Fagan op cit note 2 at 616. Dennis Davis points out the example of a firework with a parachute in his reply to Fagan, noting that Fagan is not concerned with these interpretive difficulties. Davis ‘Reply’ op cit note 7 at 61. Note that Davis did not pick up on the fact that Fagan distorted the hypothetical used in the original debate.

## V THE FAILURE AND INAPPROPRIATENESS OF THE HART-FULLER EXAMPLE

I will make two points with regards to this example, the first being less important than the second. The first point is that this is a bad example and fails on its own. Secondly, the context of the example is off point and misleading as a rhetorical device. It is an inappropriate example.

*(a) Fagan's example of fireworks fails as a device to illustrate the difference between penumbral meanings and meanings that fall outside the penumbra*

First, while the written rule on the sign, along with its purpose may not provide a ground for banning all fireworks, an officer in the park could very reasonably interpret the rule on the sign to ban various flying and exploding devices because they are noisy and dangerous 'vehicles.'<sup>53</sup> In other words, it is not senseless to say that some fireworks are vehicles. While Fagan can argue that fireworks do not fall within the core meaning of vehicles, the little rockets that carry explosives up into the air are as much vehicles as are wheelchairs, skateboards, bikes, ambulances, WWII Jeep monuments, books, paintings and various other things that at least fall into the penumbra of 'vehicles.'<sup>54</sup> Vehicles carry things and many fireworks, especially the dangerous and noisy kind, carry things; they do not just sit there and explode.

However, Fagan added the word 'driving', and thus, arguably, the rule would not work to ban fireworks, because one does not 'drive' them. Would this mean that one could not ban flying airplanes in the park? Is one allowed to ride or race motorbikes and horses? If one is driving in these cases, are they not also driving the firework that they direct up into the sky and light? Are they really outside of the penumbra? Can we determine if they are in the core, the penumbra, or outside the penumbra without any reference to the purpose for the rule? The purpose, or potential purposes for rules not only justify the rules, but they help determine what should or could follow under 'the rules'; they in fact help define them.<sup>55</sup> 'The rule'

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<sup>53</sup> Although Fagan often uses the example of 'no driving vehicles in the park', he argues that fireworks are outside the ambit of the rule because they are not vehicles rather than because no one is driving them.

<sup>54</sup> There is a vast literature on this, but books and paintings are arguably vehicles for delivering ideas, knowledge, etc. the WWII Jeep memorial is an inoperable vehicle, etc. See, e.g. Symposium in The New York University School Law Review dedicated to the debate 'Symposium: The Hart-Fuller Debate at Fifty' (2008) 83 *NYU LR*. See especially, David Dyzenhaus, 'The Grudge Informer Revisited' (2008) 83 *NYU LR* 1000 -1034; Frederick Schauer, 'A Critical Guide to Vehicles in the Park' (2008) 83 *NYU LR* 1109; Nicola Lacey, 'Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate' (2008) 83 *NYU LR* 1059, 1060-63.

<sup>55</sup> For instance, it is common to talk about driving nails into boards. We generally use hammers as the vehicle for driving nails into boards. Are hammers allowed in the park? We also use books as vehicles for driving points

which we attempt to capture in words is not fixed or static, merely because it is reduced to words. Our rules have many layers of purposes that go into them, and that shape their meaning and our understanding of them. Legal rules make sense because they are part of a complete legal apparatus. They are inherently purposeful. Rules without purposes fall rather rapidly into disuse.

We tend to like the certainty that they bring, but we also like for our rules to have some flexibility so that they do not lead to absurd or unjust consequences. Is the park official acting inappropriately if she stops a person from flying into the park on a small aircraft, be it an airplane or a helicopter (since they are not driving it)?<sup>56</sup> Is the park official acting arbitrarily if she or he allows a person in a wheelchair in? Are wheelchairs in the penumbra because of their meaning (or are they in the core?) or because we do not think the purpose behind the rule is served by banning them? Although wheelchairs would appear to be vehicles that should fall squarely under the ‘core’ meaning of the rule, since they are neither noisy nor dangerous, there is no purpose served by enforcing the rule in such a case. Applying the ordinary meaning of the rule in such a case would be absurd, unjust, and most likely unconstitutional.<sup>57</sup>

It sounds good rhetorically to claim that a given rule follows by mere deduction from the core, plain meaning of a term while someone else’s interpretation requires more interpretive work, and follows only by determinatio. It sounds even better to argue that someone else’s interpretation is so far out, that they are not even using the existing rule to justify their decision any more, but merely the spirit of the rule. It is trite that the text used to capture a rule does not interpret itself. We interpret it. You can say that the text has a core meaning and that you are simply deciding the case as a matter of deduction from that core meaning, but all this does is beg the question – core meaning for who, when and why? Rules and reasons can be engrained and appear to have something like a ‘natural’ meaning, but all this means is that the rule and its purposes are well settled and accepted by those who find the meaning plain and natural. Plain, core meanings are in most cases merely unexamined or unchallenged

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home. Do they fall within the penumbra of the rule’s meaning? Does the plain meaning of the words give us the answer or does the rules purpose?

<sup>56</sup> What if one rode into the park on a lion (a personal child-hood fantasy of mine) or came in on horseback? Would it be okay for 20 people to ride in on horseback, but not okay for the single horse and buggy?

<sup>57</sup> Of course notions of equality, remedying past discrimination and justice would also make applying the rule to a person in a wheel chair not only absurd but unjust. The mandate in section 39(2) that statutes be interpreted so as to promote the spirit, purport and objects of the Bill of Rights would also argue against an interpretation banning those in wheelchairs. Of course, the equality provisions may make banning people in wheelchairs unconstitutional.



meanings. Cases often arise because someone is chaffing against someone else's core or penumbra.

Nonetheless, one may concede that there may be cases where banning something could only be justified by the purpose for the rule and no plausible interpretation of the rule. In such cases, one may concede that it would be improper for a park official to fashion another rule to cover the case on the spot. Note, that it is also improper for an official to apply the plain or literal meaning of a rule when such an application cannot be justified by reference to any legitimate purpose for the rule, for example banning the person in the wheelchair from the park. We have common law presumption to stop such things.<sup>58</sup> Thus, one may concede that there are cases where the rule and its purposes come apart in what decisions they could justify.

(b) *The example is inappropriate and misleading*

This leads to the second, and more fundamental, problem with the example. The force of the example is largely derived from the fact that it is a park official who is creating new legal rules based on the purpose behind some other rule enacted by the local authority. This activity is ultra vires. Park officials are bound to apply the enacted rules as they exist. They are not supposed to be adding things and activities to the list of banned things and activities on the sign at the park gate. Most would agree that it would be better for democratically elected bodies (the local authority) to be adding fireworks, horses, dogs, helicopters, etcetera, to the list of things that are banned from the park than for the park official to be doing so.

Does it follow that it would be equally inappropriate for a judge to fashion a new common law rule based on the spirit, purport and objects of the Bill of Rights? Given Fagan's argument, the example of a park official creating new rules based on the purpose of a given rule is only an appropriate example (in point) if park officials somehow fall within the core or penumbra of the s 39(2) provision, which is directed to 'every court, tribunal or forum'.<sup>59</sup>

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<sup>58</sup> If a strict literal interpretation would result in absurd results, then the court may deviate from the literal meaning to avoid such an absurdity. See *Venter v R* 1907 TS 910 914. '[I]n construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some *absurdity, inconsistency, hardship or anomaly* which from a consideration of the enactment as a whole a court of law is satisfied the legislature could not have intended.' (Per Stratford JA in *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129). (Emphasis supplied, quoted with approval in *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 3 SA 582 (SCA) para 10). See also *The Bill of Rights Compendium* '2C18 Statute law is not unjust, inequitable and unreasonable':

The (sub-)presumption that legislation was not meant to be absurd or anomalous... it is submitted, is an articulation of the expectation that legislation will be reasonable. The presumption is related to the golden rule that also makes for the avoidance of absurdities. However, the focus of the presumption is the avoidance of absurdities that are also unjust and inequitable' (internal references deleted).

<sup>59</sup> I doubt that Professor Fagan would argue that park officials fell into the penumbra of 39(2) much less the core. Resort to the spirit, objects and purport of s 39(2) likewise do not provide much support for bringing the

There are three important differences between Fagan's example and the practice that he is critiquing through the aid of the example: 1) judges do not have the same role vis-à-vis developing the law that park officials do; 2) developing common law rules is different from creating new unwritten statutory rules or regulations; and 3) using the Bill of Rights and its spirit, purport and objects to develop the law is different from using the purpose of a statutory rule to develop new rules.

*(i) judges do not have the same role vis-à-vis developing the law that park officials do*

While it is not generally considered legitimate for either park officials or judges to create new statutory rules, unlike park officials, common law judges have been legitimately developing the common law based on public policy consideration for hundreds of years.<sup>60</sup> They are not confined to developing common law rules that can only be justified by either deduction from, or determination of, an existing rule.<sup>61</sup> They can, and have, developed new rules based on public policy, or what may be termed the legal convictions of the community.<sup>62</sup> Further, s 39 of the Constitution states that 'when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' Thus, there is nothing illegitimate about developing a common law rule in this fashion.

*(ii) developing common law rules is different from creating new unwritten statutory rules or regulations*

When the park official creates new rules based on what she or he thinks is best for the park, or what she or he thinks are the purposes behind the rules created by the municipal council or the legislature, she or he is engaged in a very different enterprise than the judge who is looking to the spirit, purport and objects of the Bill of Rights to develop the common law. Most decisions by park officials and police officers as to the meaning of park rules/ordinances are unwritten, very few are publically justified and most go uncontested. When one is given a citation or asked to leave a park one does not get the equivalent of a written

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park official under s 39(2). Park officials are not courts, tribunals or forums. Strictly speaking, the park official would need to fall under the mandate as articulated by the Constitutional Court in the *Carmichele* case. There is no indication in that judgment that park officials would be included.

<sup>60</sup> Fagan acknowledges that there is nothing countermajoritarian about courts developing the common law based on their own moral convictions. 625.

<sup>61</sup> See MM Corbett 'Aspects of the Role of Policy in the Evolution of the Common Law' (1987) 104 *SALJ* 52.

<sup>62</sup> *Ibid.* It is not uncommon for people to argue that the Constitution now embodies the legal convictions of the Community. See for example Davis 'Reply' op cit note 7 at 72; James Grant 'Defences under the Protection of State Information Bill: Unlawfulness and the demands of certainty' (2012) 28 *SAJHR* \_\_\_ (forthcoming); see also *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) paras 38-9.

judicial decision that justifies the officials ‘development’/ ‘interpretation’ of the law. By contrast, the judge is required to openly justify her or his decision in an opinion that is accessible to the public. Litigants can often appeal such decisions, and should the legislature not agree with the way the courts have developed the common law, it is free to trump the decisions by the courts, as long as it does so in a way that is consistent with the Constitutional Court’s understanding of the underlying rights and duties imposed by the Constitution.

So, why does Fagan argue that s 39 reasons can only be tie breaker reasons when deciding whether to develop the common law, when they are ‘clearly’ primary reasons for developing them in one manner or another? Fagan argues at one point that:

‘In the same way that the no-vehicles rule represented a judgment by the local authority as to how certain ends were to be pursued, so every right in the Bill of Rights represents a judgments by the constitution-makers as to how certain fundamental values are to be achieved.’<sup>63</sup>

He further argues that in cases of determinatio, the park keeper can appeal to the local authority’s judgment to justify the decision as can the judge appeal to the constitution-maker’s judgment when she or he develops the common law by determinatio of a right.<sup>64</sup> He argues, however, that ‘[t]here is no possibility of a similar appeal to the constitution-maker’s judgment when a judge develops the common law so as to promote the objects of the Bill of Rights.’<sup>65</sup> He argues that the judge in this case has exceeded the law-makers judgment without giving effect to it in the same way as the park keeper exceeded the judgment of the local authority without giving effect to it.<sup>66</sup>

*(iii) Using the Bill of Rights and its spirit, purport and objects to develop the law are different from using the purpose of a statutory rule to develop new rules.*

Fagan not only confuses the role of the park keeper with that of judge but he also confuses local authority ordinances (rules and regulations) with constitutional rights. Fagan may be correct that when a park official is making up new rules based only on what she or he thinks are the purposes behind other park rules, the park official is going beyond the judgment of the law-maker and is not giving effect to the law-maker’s judgment. However, the text and history of the Constitution do not support the same conclusion in cases where judges develop the common law based on the spirit, purport and objects of the Bill of Rights. For one, s 39 not only allows, but requires that courts, tribunals and forums do just that when developing the common law. It is hard to imagine that following the text of s 39 when

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<sup>63</sup> Fagan op cit note 2 at 625.

<sup>64</sup> Ibid at 625.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid at 625.

developing the common law somehow results in failing to give effect to the constitution-maker's judgment.

While it is true, in one sense, that the specific provisions in the Bill of Rights represent judgments about how certain fundamental values are to be achieved, most of the rights in the Bill of Rights are open ended, and many simply state the right with no guidance as to how it is to be interpreted so as to achieve the values it represents. Very few rights in the Bill of Rights are articulated as 'rules'.<sup>67</sup> In other words, in many cases there is no strong distinction between the right as articulated in the text and the values it was meant to promote. The judgment of the constitution-maker was, arguably, to leave the decision as to how the values themselves should be achieved to future legislators and to the courts.<sup>68</sup> This is particularly true in cases involving application of the Bill of Rights to natural and juristic persons. The constitution-makers left the judgment as to what rights in the Bill of Rights are 'applicable' to such person under s 8 largely up to the courts.

Fagan argues that the distinction between determinatio justified developments of the law and what he calls 'tie breaker justifications' matters, because the tie breaker justifications, namely, purposes behind rules justify more than rules do.<sup>69</sup> In other words, he argues that the objects of the Bill of Rights, justify more common law developments than do the rights in the Bill of Rights.<sup>70</sup>

This is not clearly true. While it may be true that the spirit, purport and or object of any given rule may justify more than the particular rule, it does not follow that the spirit, purport and objects of a whole set of rules like the Bill of Rights, justify more than the rights found within/ or articulated within, the Bill of Rights. The spirit, purport and objects of the Bill of Rights may in fact have a narrowing effect upon the range of interpretations of any given right in the Bill of Rights. Any given rule in the Bill of Rights may have a number of possible purposes and interpretations. Section 39 narrows that range of interpretations by stating that

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<sup>67</sup> What is the rule articulate in section 10. Human dignity which states, 'Everyone has inherent dignity and the right to have their dignity respected and protected.' What rule is articulated in section 11. Life which states, 'Everyone has the right to life.' How did the constitution-makers exercise their judgment in section 18 Freedom of Association which merely states, 'Everyone has the right to freedom of association'. 'What about the section 14 Right to Privacy which gives an open ended list of things that it includes, but gives no guidance as to where the right may end, it states:

Everyone has the right to privacy, which includes the right not to have

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.

<sup>68</sup> The classic example of this was the question of the constitutionality of the death penalty which the constitution-makers left to the courts. *S v Makwanyane and Another* 1995 (3) SA 391.

<sup>69</sup> Fagan op cit note 2 at 617

<sup>70</sup> Ibid.

they must be interpreted in light of the spirit, purport and objects of the Bill of Rights itself. In other words, when interpreting any given provision it is insufficient to merely rely on the plain meaning of the words. Further, it is insufficient to ask what the purpose or purposes of the rights, or provisions are. The plain meaning of the provision might be quite broad, as may be the potential list of purposes.<sup>71</sup> But of all the plausible meanings and purposes that a provision may have, those interpretations that do not jibe with, or comport with the spirit, purport and objects of the Bill of Rights as a whole, are not legitimate candidates.

Even if it were true that the spirit, purport and objects of the Bill of Rights justified more than the rights found within its provisions, this would not, in itself, be an argument against using it to develop new common law rules.

(iv) *'Giving substance to shadows -- Giving substance ever more: '72 bringing rights to fruition: the example of NM & Others v Smith & Others'*<sup>73</sup>

As noted above, Fagan argues that a development of the common law that is based directly on a rights or set of rights in the Bill of Rights would be giving effect to the judgment of the constitution-makers whereas a development of the common law based on the spirit, purport and objects of the Bill of Rights would not. The case of *NM & Others* nicely illustrates why it is incorrect to suppose that one follows the judgment of the constitution-makers to any larger degree in the former case of directly applying a right than in the latter case of using the spirit, purport and objects of the Bill of Rights. In either case, courts are likely to have recourse to the textual provisions and the spirit, purport and objects of the Bill of Rights when developing the common law. Not surprisingly, perhaps, the s 39(2) approach is a more congenial way for courts to actually fulfill the objects of s 39(2), namely bringing harmony/coherence between the common and the Constitution's value system than the s 8 direct approach. It is also a better way for rights in the Bill of Rights to come to fruition in the horizontal context, that is, as applied to natural and juristic persons.

As noted above, Woolman is also critical of the courts for developing the common law so as to promote the spirit, purport and objects of the Bill of Rights, rather than applying the rights directly to natural and juristic persons under s 8(2). For, example, Woolman criticizes

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<sup>71</sup> For example s 11 Life, which states, 'Everyone has the right to life' can be read very broadly given the plain meaning of the text. Was the Constitutional Court incorrect to limit its meaning in *Sobramoney v Minister of Health* (Kwazulu-Natal) 1998 (1) SA 765 (CC)?

<sup>72</sup> Rodriguez op cit note 40.

<sup>73</sup> 2007 (5) SA 250 (CC). Would Fagan disagree with the Court's purposive approach which gave the provision a 'a narrower or specific meaning' rather than its literal or plain meaning? Ibid at para 17.

the Constitutional Court for doing this in the case of *NM & Others*, a case that involved the intentional and nonconsensual publishing of the applicant names and H.I.V. statuses in a biography.<sup>74</sup> Rather than applying the rights to dignity and privacy from the Bill of Rights directly, the Court chose to ask whether the common law action of invasion of privacy comported with the spirit, purport, and objects of the Bill of Rights. The Court addressed the rights to dignity and privacy as articulated in the law of delict, particularly under the *actio iniuriarum*, in light of the constitutional values of dignity and privacy.<sup>75</sup>

Why didn't the Court simply apply the rights directly? The Court quoted the language of the Bill of Rights provisions with regards to privacy,<sup>76</sup> but those provisions offered very little guidance for creating rules to cover the situation. Section 10, The Right to Human Dignity, reads: 'Everyone has inherent dignity and the right to have their dignity respected and protected.' Section 14, The Right to Privacy reads:

'Everyone has the right to privacy, which includes the right not to have:

- a. their person or home searched;
- b. their property searched;
- c. their possessions seized; or
- d. the privacy of their communications infringed.'

Section 10, The Right to Human Dignity, provides little to no guidance for fashioning a rule, and the s 14 provisions, which largely address searches and seizures, appear to be written primarily with the state in mind. It is unclear how they might apply to persons in this case, or how the common law rules could be developed to vindicate the constitutional right in this case. They do not really address the common law right to privacy, which is much broader than this right (at least as written in the provision). The right to human dignity easily applies to persons, and it already does under the common law action for insult to dignity and to some extent in the action for invasion of privacy.<sup>77</sup> One can also look to other provisions in the Bill

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<sup>74</sup> Woolman *Amazing Vanishing* op cit note 5 at 781. For a critique of Woolman's critique see Roederer 'Working' op cit note 17 at 470-481.

<sup>75</sup> The Court also looked to the value of freedom of expression both to determine how far it would develop the action and to determining the amount of damages in the case. Note that Professor Woolman does not mention the Court's treatment of freedom of expression in paragraphs 31 and 43. The Court also addressed dignity, equality, and freedom at paragraph 49 and in paragraphs 66-69. It also addressed the issue of the chilling effect on freedom of expression of large damage awards in paragraph 73. In other words, its section 39 analysis was not a free floating venture into the spirit of the Bill of Rights. It was grounded in Bill of Rights provisions as well.

<sup>76</sup> *NM* (5) SA at paragraph 27 and in note. 9.

<sup>77</sup> The right to privacy is an independent action under the concept of *dignitas* in the law of Delict. Neethling, Potgieter & Visser *Law of Delict* (6<sup>th</sup> ed 2010) 346-350. There are two forms of the action, one relating to intrusion and the other relating to disclosure of private facts. *Ibid* at 347-348.

of Rights, for instance the provision on safety and security of the person in s 12, which includes a right to bodily and psychological integrity. These provisions and rights could be cobbled together and balanced against the right to freedom of expression in s 16, which includes the ‘freedom to receive or impart information or ideas.’ These provisions do not, however, provide better guidance in developing a common law rule than the values of the Constitution. In fact, it is not likely possible to interpret and balance these provisions in a way that justifies the creation of a particular rule without recourse to constitutional values. What sense does it make to suggest, as Fagan would, that the Court would have been giving effect to the judgments of those who made the Constitution if it followed the s 8(2) approach but that it failed to do so in this case because the Court had recourse to the spirit, purport and objects of the Bill of Rights?

While the Court may not have done the best job using the spirit, purport and objects of the Bill of Rights when analyzing the common law in this case, it is dubious to suggest that it could have done a better, or more legitimate job had it used the s 8(2) direct approach.<sup>78</sup> As Roederer argues:

‘It is significantly more difficult to try to vindicate these constitutional rights, which were not written with horizontal application in mind, than it is to start where the rights have already been developed to a point with horizontal application in mind. In other words, to the extent that these rights already exist in the private common law, it will often be much easier to develop them in light of the values of the Constitution than to try to develop rules to vindicate constitutional rights that were drafted to apply to the state.’<sup>79</sup>

Although the rights in the Bill of Rights were drafted using an extensive list of recognized international human rights, very few of those rights were drafted with horizontal application in mind.<sup>80</sup> In other words, most of the rights in the Bill of Rights are rights that have traditionally applied to the state and not to natural or juristic persons.<sup>81</sup> For Fagan, this may

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<sup>78</sup> Although Professor Woolman criticizes the Court for its failure to engage in a s 8 analysis, he nowhere attempts such an analysis himself.

<sup>79</sup> Roederer ‘Working’ op cit note 17 at 480-81.

<sup>80</sup> See for example Penelope E. Andrews ‘*Incorporating International Human Rights Law in National Constitutions: The South African Experience*’ in *Progress in International Law* 835 (Russell A. Miller & Rebecca M. Bratspies eds., 2008). Although Andrews notes the wide range of international human rights that informed the drafting of the Constitution's Bill of Rights, she nowhere addresses the horizontal application of any of these rights.

<sup>81</sup> The provisions containing the rights to dignity and privacy are practically the same in the Interim Constitution, which did not contain a horizontal application provision. In other words, there was no equivalent provision to s 8(2) although there was an equivalent provision to s 39(2). Section 10 of the Interim Constitution, Human Dignity, provided that, ‘[e]very person shall have the right to respect for and protection of his or her dignity’ while section 13, Privacy, provided that, ‘[e]very person shall have the right to his or her personal

imply that these rights should not be applied to natural or juristic persons. The constitution-makers simply said that they did apply if they are ‘applicable given the nature of the right and the duty imposed by the right.’ One risk of adopting the Fagan approach is that judges may look at the rights in the Bill of Rights and not be able to determine if they could or should apply directly to natural or juristic persons. This may in fact appear too daunting and so a given judge or court may simply decide that the right is not applicable. Thus, contrary to Woolman’s wish that the courts rigorously engage with rights so as to develop clear rules,<sup>82</sup> they may continue the trend of constitutional avoidance. In these cases, it is not that the Bill of Rights ‘amazingly vanish’, but rather that they are never brought to fruition in the horizontal context at all. In the words of section 7, they might never be ‘promoted’ or ‘fulfilled’ in this way. It should be noted that the blame for this should not be laid solely or even primarily at the feet of judges, many of whom were educated long before the Bill of Rights came into existence. The fact is that very few lawyers are making s 8 arguments before the courts. Neither the parties in *NM & Others*, nor the courts below attempted a s 8 analysis.

The section 39 approach also has rule of law benefits, since it contemplates the development of the law in light of these values instead of a whole new set of potential claims and rules that are based solely in the provisions of the Bill of Rights. Again, it is much easier for judges and lawyers alike to address the familiar common law analogues of the rights in the Bill of Rights and to bring those into line with the spirit, purport and objects of the Bill of Rights than to try to fashion a common law rule out of rights in the Bill of Rights that are not clearly designed with horizontal application in mind. Because of this, this approach has more prospects for success at bringing the rights in the Bill of Rights to fruition in the horizontal context. It is a more congenial mechanism for courts to use to live up to their section 7 duty to ‘respect, promote and fulfill the right in the Bill of Rights’. They both have a better chance at ‘amazingly’ appearing, and doing so in a way that that connects with the existing common law.

They are also less disruptive to the legitimate expectations of those who are governed by the law. Given the open texture of the right to dignity and somewhat sideways potential for

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privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications’.

<sup>82</sup> Woolman argues that the s 39(2) approach, has resulted in the Court engaging in flaccid, rather than rigorous analysis; that by moving to a vague value analysis under s 39, the Court is effectively sitting as a court of equity, rather than a court of law; that it is undermining the Bill of Rights, rather than giving its provisions clear content; and that it is undermining the rule of law rather than supporting it through the development of clear rules that provide some level of certainty for future cases. Woolman *Amazing op cit* note 5 at 763.



the right to privacy to apply, it is hard to guess what kind of free standing claims could be made, entertained and/or won in a direct application claim. I would suggest that it is easier for those who are regulated by the law to start with the common law status quo and ask whether the existing law may shift in one way or another in light of the spirit, purport and objects of the Bill of Rights than to guess how a direct application might arise or turn out.

#### VI ANOTHER UNCONVINCING EXAMPLE THAT IS AT LEAST MORE ON POINT: THE EXAMPLE OF THE S 27(3) RIGHT TO EMERGENCY MEDICAL SERVICES

Given that Fagan's 'no driving vehicles in the park' example does not take his argument very far forward, we can look to another of his examples which may be more on point. Fagan posits the following hypothetical example: say that the Constitutional Court decides that the right to emergency medical services, in s 27(3) is a right that only applies against the state and not against private persons.<sup>83</sup> Given this decision, he argues, the Supreme Court of Appeal could not use the right to justify a decision to develop the common law so as to impose delictual liability on doctors who fail to stop at motor vehicle accidents to help victims.<sup>84</sup> According to Fagan, the right could not support the decision by either deduction or determinatio.<sup>85</sup> He argues that while the spirit, objects and purposes of the Bill of Rights might justify that decision, the right itself could not.<sup>86</sup>

The hypothetical is based on a very broad ruling with very little to no factual context. It is doubtful that the Court would make such a broad ruling, if it would make such a ruling at all. Nonetheless, the Supreme Court of Appeal could, depending on the facts of the case, distinguish its case from the Constitutional case, and hold that a doctor is liable because in a given case, the doctor is, or was not acting as a 'private person'. Fagan does not tell us if the original case involved a doctor. If it did not and the facts are different enough, a Supreme Court of Appeal decision could be justified by determinatio, and might even be upheld by the Constitutional Court if it went up on appeal.

Further, the Supreme Court of Appeal could justify such a decision based on the right as defined by the Constitutional Court itself, by taking either a narrow view of what counts as a 'private person' or an expansive interpretation of the word 'state.' Fagan does not tell us anything about the factual context of the Constitutional Court's decision. What that decision

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<sup>83</sup> Fagan op cit note 2 at 617

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

involved a tourist from the U.K. who failed to stop and give any emergency medical assistance to a person who had been robbed and shot late at night outside of the bed and breakfast that the tourist was staying at. What if the case in front of the Supreme Court of Appeal involved a person who, under the circumstances, was not so clearly ‘private.’ What if in this case it is a doctor who is licensed by the state, works at a state hospital, and who after leaving work drives by an accident, slows down and then just ignores the screams and pleas for help by a family trapped in a car? The doctor neither calls for help nor provides direct help her or himself. One parent and two children die and the surviving parent and children have considerably more severe injuries because of the two hour delay between the time that doctor crossed their path and when a doctor who stopped to help crossed their path. But for the second doctor stopping, no family members would have survived. Is the doctor in this case within the ‘core’ meaning of a ‘private person’? Is she not at least in the penumbra, or even arguably outside the meaning of the term ‘private person’?

Can one argue that the off duty doctor is a state actor?<sup>87</sup> The Constitution, in s 239, defines an organ of state in part as ‘...someone exercising a public power or performing a public function in terms of ... the Constitution or a provincial constitution ...[or] in terms of any legislation.’ Could an off duty doctor fall under this definition? Do doctors at state hospitals serve public functions or are these merely private functions? Wouldn’t it be reasonable for the Supreme Court of Appeal to decide that the doctor fell into the penumbra between ‘private persons’ and ‘state actors’? Would it not also be reasonable for the Constitutional Court to agree that the doctor represented a penumbral case? Wouldn’t both need to have recourse to the spirit, purport and objects of the Bill of Rights in order to determine whether and how to develop the common law in such a case?

Even if it is true in theory, that one could not justify such a development of the common law by deduction from, or determination of, the right, but could in theory justify it by the spirit, purport and objects of the Bill of Rights more generally, how often would this be the correct answer to the question of how one should develop the common law? How often will it be that one can persuasively argue that, in spite of the fact that neither the right itself, nor the right as interpreted in light of s 39, justify the development of the common law, that the common law is still deviating from the overall spirit, purport and objects of the Bill of Rights? Note that Fagan does not venture to provide such an argument. It is hard to imagine

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<sup>87</sup> Note that Fagan did not say that the Constitutional Court held that the right only applied to state actors, but merely that the right did not apply to ‘private persons.’ There may very well be a fertile middle ground between the two. Ibid.

an argument that would be persuasive based on s 39 that would not also be a persuasive argument based on s 27(3) and s 8(2)-(3).<sup>88</sup>

In our doctor/tourist scenario, if we really thought that the spirit, objects and purpose behind the Bill of Rights was inconsistent with the common law rule of no duty for doctors/tourists to provide emergency medical assistance, then wouldn't this make us question an interpretation of the right in s 27(3) that required that interpretation? After all, in order for the Constitutional Court to decide that the right did not apply to private persons, it would be required under s 8 to determine that the provision did not bind natural or juristic persons because it was not 'applicable' 'taking into account the nature of the right and the nature of any duty imposed by the right.' On first blush, the right appears perfectly applicable to a doctor. It may not be applicable to the same degree that it is applicable to a state hospital's emergency room, but s 8 allows the provision to apply to 'the extent that it is applicable given the nature of the right and the nature of the duty imposed by the right.' The right would not need to apply to all private persons. It would not be hard to fashion a rule that imposed a prima facie duty on doctors (and perhaps other health care professionals) to stop at accidents where a reasonable doctor would have reason to believe that someone at the accident was in need of emergency treatment that was not being provided. The rule could allow for a doctor to avoid the duty under certain circumstances, including the safety and wellbeing of herself, her family, or other patients (provided that the doctors calls in for appropriate help).

Could the Court nonetheless conclude that the right was not applicable to any natural or juristic persons, including doctors? It could, but in order to determine that the right was not applicable, it would need to interpret the right in light of s 39. Section 39 requires that a court, tribunal or forum to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' and to consider international law when

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<sup>88</sup> One may raise the example of *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007) where the Court held that although the then current definition of rape was not inconsistent with the Constitution in para 32, it went on to hold that the definition needed to be extended to include non-consensual anal penetration of a woman in para 45, and that this decision was 'in the interests of justice and will have, as its aim, the proper realisation by the public of the principles, ideals and values underlying the Constitution'. Ibid. Note, however, that this case could never have been analyzed under section 8(2), because there was no issue of applying the Bill of Rights to natural or juristic persons. This case involved the State. The Court in *Masiya* addressed this issue as an under-inclusive case. In other words, while it found that the statutory definition of rape was underinclusive in that it did not fully vindicate the rights in question, it did not think that the remedy was to strike it down. As it stated: 'Invalidating the definition because it is under-inclusive is to throw the baby out with the bath water. What is required then is for the definition to be extended instead of being eliminated so as to promote the spirit, purport and objects of the Bill of Rights.' The analogue in a section 8(2) case would have been to develop the common law under section 8(3) to give effect to the right.

determining the nature of a right. It allows, but does not require, that a court consider foreign law. The Constitution, namely Act no 108 of 1996, is legislation, and therefore, under s 39(2) any interpretation of that act requires that one promote the spirit, purport and objects of the Bill of Rights. This is, in part, redundant, because the values of a democratic society based on human dignity, equality and freedom are also foundational to the spirit, purport and objects of the Bill of Rights.

So, where is the gap in such a case between what the right itself would justify and what the spirit, purport and objects of the Bill of Rights would justify? Although there must be a gap logically and hypothetically, it is really hard to conceive of a persuasive argument that the right is not applicable and yet that a failure to hold doctors delictually responsible in these cases is inconsistent with the spirit, purport and objects of the Bill of Rights.

VII THE CONSTITUTIONAL TEXT DOES NOT LIMIT THE POWER OF THE COURTS TO DEVELOPING THE COMMON LAW BASED ONLY ON RIGHTS IN THE BILL OF RIGHTS, JUSTICE OR RIGHTS RECOGNIZED OR CONFERRED BY THE COMMON LAW<sup>89</sup>

According to Fagan, Courts can develop the common law based on three primary reasons, namely: rights in the Bill of Rights justice and common law rights.<sup>90</sup>

Although s 8(3) addresses this first situation, namely when rights in the Bill of Rights are applicable, nothing in s 8 limits the development of the common law to those situations. Similarly, nothing in s 173 limits the development of the common law to situations where ‘justice’ requires it. Section 173 of the Constitution, states:

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.

Further, contrary to the view of Fagan, section 173 does not limit the court’s inherent power to develop the common law to situations wherein ‘the development is required by justice’ as

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<sup>89</sup> Dennis Davis is rightfully skeptical of this last purported primary reason for developing the Common law. See Davis ‘Reply’ op cit note 7 at 69 note 25, where he points out that the Constitutional Court in *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA* 2000 (2) SA 674 (CC) ‘warned against a legal apartheid where two systems of law operated, being the Constitution and a common law which was incongruent with the norms of the Constitution.’ It should be noted that even on Fagan’s approach, the development that took place based on the primary reason of common law rights would still need to be carried out in a way that promoted the spirit, purport and objects of the Bill of Rights.

<sup>90</sup> Fagan op cit note 2 at 611, 622.

Fagan asserts.<sup>91</sup> If the justice clause was intended to limit the range of legitimate reasons for developing the common law, then how is it that the other two purported primary reasons are legitimate? If it was designed to be a limit, as Fagan suggests, then either these other primary reasons are illegitimate or ‘what is required by justice’ and what is required by rights, must be the same thing, or at least compatible with each other. The first interpretation is not really a viable interpretation of the constitution since it conflicts with any plausible interpretation of s 8 of the Constitution, which does impose a duty to develop the common law when so required by rights in the Bill of Rights and where the common law and legislation has not already given effect to the given right or rights.<sup>92</sup> The second approach is more attractive, but is not the view of justice endorsed by Fagan, who argues that it is legitimate for ‘judges to develop the common law in accordance with their own moral convictions ... because it is a possible route to a just common law.’<sup>93</sup>

I’m not sure that either of these interpretations are the most plausible. Nothing in the text of s 173 makes justice a primary reason for developing the common law vis-à-vis any other reason. It does not limit the court’s inherent power to develop the common law to situations wherein ‘the development is required by justice’. It is not stated as a precondition, but merely adds on that it (justice) should be taken into account. This could just as easily be interpreted as indicating a method for development or a consideration when developing, and not just a reason for development. That is, it could just as easily mean that ‘when’ courts exercise their inherent power to develop the common law, they take justice into account. In Fagan’s terms, it could just as easily be a ‘secondary reason.’ Contrary to his view, however, as a ‘secondary reason,’ it must be a secondary reason that is consistent with ‘the standard’ for developing the common law, namely it must be a conception of justice that is consistent with the spirit, purport and objects of the Bill of Rights. It cannot be a conception of justice that is based purely on the judge’s moral convictions, for if there is anything that s 39 is clear about, it is

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<sup>91</sup> Ibid at 622.

<sup>92</sup> Section 8. Application

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
  - 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>93</sup> Fagan op cit note 2 at 625.

that if a court is in fact developing the common law it ‘must promote the spirit, purport and objects of the Bill of Rights.’

Fagan argues that if one of his ‘primary reasons’ for developing the common law is determinate and conflicts with the spirit, purport and objects of the Bill of Rights, that his ‘primary reasons’ and the rule they determine, trump the spirit, purport and objects of the Bill of Rights. This is ‘plainly’ inconsistent with the ‘must promote’ language of s 39(2). There is no similar ‘must’ language in any of the other provisions that ground his purported ‘primary reasons.’ He argues, nonetheless, that if s 39(2) trumped these other ‘primary reasons,’ that this would negate the primary reasons for developing the common law, and there would be no justification for the development.<sup>94</sup> Although the text of the Constitution nowhere says so, for Fagan, these other reasons are somehow preconditions for any development of the common law.<sup>95</sup>

#### VIII HIS ARGUMENT THAT THE SPIRIT, PURPORT AND OBJECTS OF THE BILL OF RIGHTS CANNOT BE BOTH A PRIMARY REASON FOR THE DEVELOPMENT OF THE COMMON LAW AND AN OBLIGATION FOR HOW IT IS TO BE DEVELOPED, BECAUSE IT IS CIRCULAR, IS NOT LOGICALLY SOUND

His argument above only makes sense if his ‘primary reasons’ were somehow exclusive primary reasons. Nothing in the dispersed sections that ground these reasons lists them,<sup>96</sup> nor justifies them, as being primary and exclusive reasons. Nothing in the text indicates that they are preconditions.

He argues that it would be circular for the reason that triggered the obligation to promote the objects of the Bill of Rights to be the same obligation to promote the objects of the Bill of Rights.<sup>97</sup> From this, he argues that the reason that triggers the obligation, namely the reason that triggers the need to develop the common law must be an independent reason, namely one of his three ‘primary reasons’.<sup>98</sup> There is, however, nothing circular about having a reason for doing something that also imposes an obligation for how one is to do that something. In

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<sup>94</sup> Ibid at 623.

<sup>95</sup> Ibid.

<sup>96</sup> See sections 8(2), 39(3) and 173.

<sup>97</sup> Fagan op cit note 2 at 621

<sup>98</sup> Ibid at 621-22.

other words, reasons can both be justifications for imposing obligations and standards for how to carry out the obligation.<sup>99</sup>

This can be illustrated by returning to the meaning of s 173. The most plausible, and I suspect ‘natural’, reading of the justice provision in s 173 is that justice is a consideration, both in deciding whether to develop the common law, and a guide or standard for how best to do so. Nothing limits ‘taking into account the interests of justice’ to either of these ways. In fact, it would be odd for justice to only play a role in one of these ways but not the other.

Likewise, nothing in the Constitution limits promoting the spirit, purport and objects of the Bill of Rights to merely a secondary tie breaker role. Not only does the text make it mandatory when developing the common law, reason tells us that it would be odd for it not to be a primary reason for deciding to develop the common law. To argue that a court cannot look to the spirit, purport and objects of the Bill of Rights when deciding whether or not to develop the common law, but yet must consult that spirit, purport and objects as the deciding factor (‘the tie breaker’) when they have decided to develop the common law, borders on the absurd.<sup>100</sup> It is as absurd as thinking that justice can play a role in deciding if to develop the common law, but not provide a standard for how to develop the common law. Would it make sense to say that justice tells us that the common law as it stands is unjust and must be changed, but that we do not need to use justice as a standard for how it should be changed?

Fagan does not think that either justice, the rights in the Bill of Rights, or common law rights only play this primary role of triggering the duty, he actually argues that if they are somehow determinate, then they trump the duty to promote the spirit, purport and objects of the Bill of Rights.<sup>101</sup> In other words, for Fagan, they not only provide the reason for developing the common law, they provide the standard. Why is this not circular? Why on Fagan’s view shouldn’t the reason for the development give way to s 39(2)’s duty and standard for how to develop the common law?

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<sup>99</sup> For example, one’s love for her or his children can both be a reason for change and a guide for how best to change. If one’s children are unhappy, love may be a reason to change in order to bring about their happiness. But it also may be a guide for how best to make them happy, long term. Drucilla Cornell and Nick Friedman argue that: ‘In short, we cannot understand what constitutes a development of the common law without understanding why the Constitution requires the common law to be developed’. Cornell & Friedman op cit note 7 at 15.

<sup>100</sup> It is particularly absurd to suggest that logic dictates that the reasons for triggering a duty, trump the duty after the duty is created. See Fagan op cit note 2 at 622-23.

<sup>101</sup> Ibid at 623.

IX FAGAN'S VIEW OF 'JUSTICE' IS NOT A BETTER, OR MORE APPROPRIATE, REASON FOR DEVELOPING THE COMMON LAW THAN THE SPIRIT, PURPORT AND OBJECTS OF THE BILL OF RIGHTS

One may have a conception of justice (for instance a laissez faire/ classical liberal conception) that both fits and justifies the common law as it existed at the end of apartheid. From that point of view, justice would not require any development of the common law.<sup>102</sup> Whether or not one thinks that these convictions are consistent with the best conception of justice, is it plausible to suggest -- as Fagan does -- that they are consistent with the conception of justice referenced in s 173?<sup>103</sup> Is it plausible to think that the constitution-makers thought that justice would be better served by the individual moral convictions of judges (as Fagan argues) than by asking judges to pursue justice so as to promote the spirit, purport and objects of the Bill of Rights?<sup>104</sup>

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<sup>102</sup> As Professor Pieterse writes:

'South African legal culture with its pronounced preference for "political neutrality" in adjudication (which requires lawyers and judges to remain 'neutral' in their interpretation and application of legal texts by abstaining from interpretations or orders that have 'political' (or social and economic) significance or consequences) has ... rightly been accused of masking a strong preference for the political structures and rights discourses associated with classic liberalism ... and accordingly of condoning the inequalities occasioned, reinforced and sustained by the unfettered operation of classical liberal economic and social structures... Particularly, like all others rooted in the liberal tradition, South African legal culture frowns on the achievement of social or political projects through adjudication -- "[l]iberal legalism balks at the idea of transformative adjudication" (Moseneke (2002) 18 SAJHR 309 at 315...)' M Pieterse 'What Do We Mean When We Talk about Transformative Constitutionalism?' (2005) 20 *SAPL* 155, 164-165.

<sup>103</sup> As Professor Roederer argues:

'The conscientious academic, advocate, and judge is not justified in picking and choosing the values that she or he likes the most, feels most comfortable with, or which best support the conclusion that she or he wants. The Constitution directs otherwise. The Constitution challenges those whom it touches to harmonize the Constitution with all of South African law, including private law. ..., the conscientious jurist should attempt, as much as possible, to reconcile all of the values of the Bill of Rights and Constitution when interpreting and developing the law.

These values can be reconciled. They overwhelmingly support a caring, egalitarian, transformative conception of justice that has drawn from the very best of human rights traditions. ...Although rights and liberties can be put in jeopardy by the state, the history of Apartheid demonstrates that rights and liberties can also be put in jeopardy by individuals and corporations. The strict separation of private and public domains, as well as the conservative libertarian approaches to "private" law simply are not consistent with the values of the new constitutional order.' Roederer Working op cit note 17 at 502.

<sup>104</sup> Sanele Sibanda warns of the danger to any hope of a transformative constitutional project if that project relies on the interpretation of judges, as he states:

[I]t is my contention that within the context of South Africa's prevailing conservative legal culture, the extent to which the success of transformative constitutionalism as an enterprise depends on legal and judicial interpretation leaves the project in danger of remaining an incomplete project at best. At worst, it runs the risk of failing to deliver true transformation by promising that which many charged with delivering it are not committed to, owing to its potential to undo already entrenched elite or middle class interests. Sanele Sibanda 'Not Purpose Made!, Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) *Stellenbosch LR* 482, 493.



If one's conception of justice and one's mechanisms for developing the common law are rooted in apartheid or even in pre-apartheid practices, should they trump post-apartheid mechanisms rooted in the constitutional revolution and adopted by the Constitutional Court?<sup>105</sup> If one's conception of justice pulls in a direction that is at odds with the spirit, purport and objects of the Bill of Rights, it must give way to this new spirit under the supremacy of the Constitution.<sup>106</sup> Conceptions of justice that fit and justify a bygone era cannot be considered primary reasons for developing the common law, while relegating the spirit, purport and objects of the Bill of Rights to a secondary role.<sup>107</sup> If the common law is at variance with the spirit, purport and objects of the Bill of Rights then s 173 'justice' (justice that is congruent with the spirit, purport and objects of the bill of rights) both requires the development and the development must promote s 173 justice.

## X FAGAN MISUNDERSTANDS, AND GROSSLY UNDERESTIMATES, THE VALUE OF COHERENCE IN THE SOUTH AFRICAN CONSTITUTIONAL SCHEME

In the last few pages of his article he acknowledges that developing the common law so as to promote the spirit, purport and objects of the Bill of Rights may have 'the virtue' of providing coherence.<sup>108</sup> Nonetheless, he argues that the virtue of coherence does not have the same value as justice.<sup>109</sup> He argues that in fact, it has 'a lot less' than justice, and this, he argues, is why one should celebrate the fact that the spirit, purport and objects of the Bill of

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<sup>105</sup> As Professor Roederer argues:

'Unfortunately, under Apartheid, the law of delict primarily served a subset of South African society. It did not draw from the fount of justice in order to work its common law pure during this period. Apartheid delict did not generally consist of blatant racist or sexist decisions; it had a veneer of neutrality. However, that veneer not only masked the inequality beneath, but protected it. It further entrenched inequality through a conservative libertarian bias that assumed the freedom and equality of persons while the Apartheid apparatus ensured that the opposite was true. At best, the development of South African delict was arrested during the Apartheid era. The end of Apartheid not only provided for the transformation of South Africa's public law, it also provided ... for the transformation of South African private law ... [The] Constitution ... provid[es] a framework for South Africa to continue the process of working the common law pure via the fountain of justice. The fountain of justice ... is not a reference to divine natural law or even to abstract reasoning, but is a reference to the conception(s) of justice embodied in the ... Bill of Rights. [The] Constitution directs its jurists to that fountain in s 39(2).' Roederer Working op cit note 17 at 429. See also Roederer, Transformation op cit note 22 at 447-521.

<sup>106</sup> Frank Michelman argues that section 1(c) of the Constitution, 'Supremacy of the constitution and the rule of law,' along with the other values of section 1, means that "'the rule of law" signifies not just the rule of rules but the rule of justice, as the Final Constitution envisions justice. "Supremacy of the Constitution and the rule of law" signifies the unity of the legal system in the service of transformation by, under, and according to law.' Frank Michelman, 'The Rule of Law, Legality and the Supremacy of the Constitution' in Stuart Woolman et al eds *Constitutional Law of South Africa* 2d ed (2005)11-38.

<sup>107</sup> Professor Fagan's argument on page 626 that judges following their own moral lights give effect to the constitution-makers judgment while those who develop the common law so as to promote the object of the Bill of Rights do not is baffling.

<sup>108</sup> Fagan of cit note 2 at 626.

<sup>109</sup> Ibid.

Rights plays a secondary role in the common law's development.<sup>110</sup> He goes so far to argue that because justice matters more than coherence, that the spirit, purport and 'objects of the Bill of Rights matter a lot less to the common law's development than do rights in the Bill of Rights and the moral convictions of judges, past and present.'<sup>111</sup>

His argument only makes sense if in fact the coherence mandated by s 39 is inconsistent with justice and if somehow the rights in the Bill of Rights and the moral convictions of individual judges are superior at delivering justice. Fagan nowhere argues for any specific conception or standard for justice. He never comes out and says why he believes that the spirit, purport and objects of the Bill of Rights is unjust. He might think that the actual rights in the Bill of Rights are more just, merely because he thinks they justify less developments of the common law than the spirit, purport and objects of the Bill of Rights.<sup>112</sup> In other words, he might not think the rights in the Bill of Rights are particularly just, but they do less damage to 'justice' as embodied in the existing common law, than the spirit, purport and objects of the Bill of Rights.

His argument for why the moral convictions of judges provide justice is that it is 'one way to achieve justice.'<sup>113</sup> He takes on the possible criticism of this assertion by stating that 'it must be true. For it would be false only if judges were morally wrong more often than they were morally right – and that is implausible.'<sup>114</sup> This is a weak argument at best.<sup>115</sup> By the same argument, the spirit, purport and objects of the Bill of Rights must also be 'one way to achieve justice' because it 'would be false only if [promoting the spirit, purport and objects of the Bill of Rights] was morally wrong more often than [it was] morally right – and that is implausible.'<sup>116</sup>

Is having a coherent legal system that provides justice that is consistent with the spirit, purport and objects of the Bill of Rights of less value than the justice provided by the individual moral convictions of judges who are purportedly 'morally right more often than

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<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid at 625

<sup>114</sup> Ibid. I'm not sure if Fagan also thought this to be true of judges under apartheid. David Dyzenhaus brings such an assertion into question in David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth Reconciliation and the Apartheid Order* (1998). Davis in his Rebutter to Fagan's rejoinder states: "The Constitution itself, cognisant of the extraordinary damage that many members of the apartheid judiciary inflicted upon society when they developed or applied the law in terms of their own moral convictions, sought to insure that we have a progressive Constitution which looks forward and seeks, at least in part, to constrain a judge's choice of a residual normative framework." Davis 'Rebutter' op cit note 7 at 58.

<sup>115</sup> In Fagan's rejoinder to Davis's Reply, he takes on the claim of Davis that he had 'provided no answer "to what justifies . . . the exercise of the discretion of a judge"' by simply quoting the above language from his article, which remains inadequate. Fagan 'Rejoinder' op cit note 7 at 796.

<sup>116</sup> Fagan op cit note 2 at 625.

they are wrong'? Note that Fagan has nowhere argued, much less supported the view, that judges following their own moral convictions when developing the common law are morally right more often than judges who develop the common law so as to promote the spirit, purport and objects of the Bill of Rights.

## XI CONCLUSIONS

In the end, Fagan is wrong to assert that the Constitution imposes no such duty on judges to develop the common law when it is out of step with the spirit, purport and objects of the Bill of Rights because he chooses to selectively misread the Constitution as a set of wooden provisions rather than as a document created to fulfill a number of objectives, not the least of which, were the transformation and harmonization of South African law with the spirit, purport and objects of the Bill of Rights. The document was designed to function in the real world and not merely in the world of logic. The duty imposed by the Court in *Carmichele* was not merely a duty implied by the letter of the law, but by the point of the law, by its spirit, purport and objects. The duty was not imposed in the abstract, but based on the fact that much of the judiciary had been avoiding its duties under the Constitution up to that point. Perhaps they avoided this duty because their individual moral convictions told them that the common law as it stands is already just. Perhaps, this is Fagan's view as well. Perhaps they believed that they could keep the common law separate from the Constitution and avoid constitutional developments. Unfortunately, for those who hold such a view, the text, as well as its spirit, purport and objects, require something different.