Legislators, Judges, and Professors

Edited by

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I. Introduction

As my title suggests, I have chosen to narrow the brief I was given by focusing on private-law scholarship in South African law today, and in particular on doctrinal scholarship. This is of course not to suggest that private-law

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academics in South Africa engage exclusively in doctrinal scholarship, or that it is uniquely valuable. However, the trajectory which South African doctrinal scholarship has followed over the course of the last hundred years is itself a subject worthy of study. In essence, while formerly it occupied a pre-eminent position, edging out virtually all other forms of inquiry, it now appears to be in retreat. This claim necessitates an immediate *caveat:* the decline of doctrinal private-law scholarship in the twenty-first century is clearly not a phenomenon confined to South Africa.[1] The reasons for it must accordingly be found at least partly in the wider context of legal systems worldwide. Nevertheless, certain features specific to the South African legal order appear to have given this trajectory a distinctive local shape. It is those features and that shape which constitute the focus of this chapter.

The term 'doctrine' is widely used throughout the English-speaking legal world, but it is seldom defined, at least by those who engage in doctrinal scholarship.[2] Thus I will begin with my own attempt at a definition, one which is at least partly specific to common-law – that is case-based – legal systems.[3] By 'doctrinal scholarship' I mean scholarship that adopts an internal point of view; that examines the case-law chiefly through critical engagement with the rules and principles of which that law is itself composed, although this does not of course preclude other yardsticks; and that proceeds from the starting point that case-law is authoritative by virtue of the fact that it obeys its own interior logic. It is rule-bound rather than result-driven; retrospective rather than prospective in its orientation. It must be distinguished from scholarship which takes an external point of view; which is empirical or socio-legal in its approach; and whose audience is typically the legislature or policy-maker.[4] It must be distinguished also from scholarship which is wholly theoretical; which addresses private-law subjects such as contract, tort or unjustified enrichment from a distance, ignoring the fine texture of specific

[1] See, e.g., *Andrew Burrows,* Challenges for Private Law in the 21st Century, paper presented at a conference entitled "Private Law in the 21st Century" held in Brisbane on 14–15 December 2015.

[2] Cf. *Burrows,* Challenges for Private Law (n. 1) 10, although Burrows himself provides a compelling account of the doctrinal method. However, there appears to be an increasing body of theoretical writing concerned with the question, what is doctrinal scholarship? See e.g. *Mátyás Bódig,* Legal Theory and Legal Doctrinal Scholarship, Canadian Journal of Law and Jurisprudence 23 (2010) 483–514; *idem,* Legal Doctrinal Scholarship and Interdisciplinary Engagement, Erasmus Law Review 8 (2015) 43–54.

[3] Cf. the sense in which the terms 'la doctrine' or 'la dottrina' are used in France and Italy respectively: see *Alexandra Braun,* Judges and Academics: Features of a Partnership, in: From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging, ed. by James Lee (Oxford 2011) 227–253, 228.

[4] Cf. *Aditi Bagchi,* On the Very Idea of Legal Methodology (in this book), section II.

legal rules.[5] Thus 'doctrinal scholarship' means engaging with the law in essentially the same way that judges do – that is, from the inside. Indeed, the relationship between doctrinal scholar and judge is that of partners in a joint enterprise.[6] The difference between them is to be found not in the content of their pronouncements or the method adopted, but rather in the goal pursued: whereas a judge seeks only to decide the case before her, the common-law scholar's focus is a much wider one; not the solving of a particular legal puzzle, but the explication of the body of rules of which an individual case is merely a part.

That much is general. However, it seems that there are subtle variations in the form of doctrinal scholarship across the common-law world broadly defined: its South African incarnation is significantly different from that which prevails elsewhere, e.g. in England and Wales, as well as obviously different from that found in the civilian world. I will begin by setting out the characteristic features of South African doctrinal scholarship as it has existed over the course of the last century, identifying also its distinctive failings. Next, I will set out why I believe that doctrinal scholarship still has an important contribution to make to the contemporary South African legal order, despite (or even because of) the profound changes brought about as a result of the democratic transition in 1994. However, I will describe also what I believe to be the greatest threat to doctrinal scholarship in South African today, namely a crisis in the authority of the common-law rules on which doctrinal reasoning depends. I will conclude that the traditional partnership between doctrinal scholars and judges endures, but in a new form: to the extent that judges neglect consistency and coherence, the distinctive values of doctrinal scholarship, scholars can fill the void.

II. The South African Law Professor

1. "With us the position is different": South Africa's mitigated doctrine of precedent

As is well known, South Africa's common law has its roots in the uncodified civil law, specifically the *ius commune* expounded by the jurists of the Republic of the United Netherlands and in particular the province of Holland in

[5] Although "there is indisputably a very difficult question for every doctrinal lawyer as to how deep a theory one needs to have in order to make sense of the law while remaining intelligible to those who have to decide and argue about particular facts." See *Burrows,* Challenges for Private Law (n. 1) 9.

[6] See *Peter Birks,* The Academic and the Practitioner, Legal Studies 18 (1998) 397–414; *Braun,* Judges and Academics (n. 3).

the seventeenth and eighteenth centuries.[7] Superimposed on to that civilian substrate, however, is a substantial layer of English law, both substantive and, especially, procedural. In fact, the most significant and lasting legacy of English colonial rule for the common law of South Africa is the adoption of the doctrine of precedent or *stare decisis*.[8] Thus the principal source of common-law rules in modern South Africa is judicial decisions, subject always to the overriding authority of the Constitution of 1996.[9] On the other hand, although they are rarely invoked, even today the old authorities of Roman-Dutch law remain technically authoritative in themselves.[10] This means that the South African common law is 'mixed' not only in terms of the substance of its legal rules but also in terms of the formal sources of its law.

The differences between the South African doctrine and its English parent are elusive. On the one hand, there are certain technical distinctions: the decisions of divisions of the High Court do not bind other divisions, although they are persuasive; nor has the Supreme Court of Appeal (formerly the Appellate Division) ever been bound by its own prior decisions.[11] On the other hand, in *Fellner v. Minister of the Interior*[12] Centlivres CJ said,

> "The rule stare decisis has been applied with great rigidity in England, the reason probably being that English common law has been built up largely on decided cases: hence the reverence for judicial decisions. But with us the position is different: our common law rests on principles enunciated by the old writers on Roman Dutch law. Consequently there is no reason why we should apply the rule with the same rigidity as it is applied in England."

This sense that judicial decisions rest on a bedrock of principle has had an important effect on the nature of adjudication in South Africa. As the passage

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[7] See, e.g., the overview by *Reinhard Zimmermann,* Roman Law in a Mixed Legal System, in: The Civil Law Tradition in Scotland, ed. by Robin Evans-Jones (Edinburgh 1995) 41–78, 45 ff. On the precise scope of 'Roman-Dutch law' see *D. P. Visser/D. B. Hutchison,* Legislation from the Elysian Fields: The Roman-Dutch Authorities Settle an Old Dispute, SALJ 105 (1988) 619–636.

[8] *Zimmermann,* Mixed Legal System (n. 7) 47 ff.

[9] Thus in *S v. Thebus and another* 2003 (6) SA 505 (CC), it was held by the Constitutional Court that, "[s]ince the advent of constitutional democracy, all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity. Thus, any law which precedes the coming into force of the Constitution remains binding and valid only to the extent of its constitutional consistency" (para. 24, footnotes omitted). See also *Pharmaceutical Manufacturers Association of South Africa and another: In Re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) at para. 44.

[10] For a recent example, see the judgment of Madlanga J in *Paulsen and Another v. Slip Knot Investments777 (PTY) Ltd* 2015 (3) SA 479 (CC) at paras. 47 ff.

[11] See, e.g., *François du Bois,* Sources of law: common law and precedent in: Wille's Principles of South African Law[9], ed. by François du Bois (Cape Town 2007) 64–99, at 76–77 and 86 ff.

[12] 1954 (4) SA 523 (A) 529.

quoted above suggests, the existence of a source of common-law rules apart from case-law affords an external perspective on such case-law which itself weakens the doctrine of precedent. It encourages the view that judicial decisions are authoritative only insofar as they reflect the higher rationality of the law. In this way, South Africa's 'mitigated' doctrine of *stare decisis*[13] evokes that which prevailed in England until the early 19th century, rather than the stricter form of precedent now recognised there.[14] This is reflected in the style in which judgments are written. With the important exception of the decisions of the Constitutional Court, South African judgments are frequently shorter and more axiomatic than their English counterparts. Indeed, there is a tendency for South Africa courts to treat *rationes decidendi* as abstract legal rules, equivalent to statute, and to reason deductively from those *dicta*. This is obviously quite distinct from the analogical reasoning characteristic of the English common law.

The flexible approach to precedent which characterises South African legal culture affects not only judicial reasoning but also the character of academic legal writing. Of course, South African law professors do not now and have never enjoyed the exalted status of their nineteenth-century German counterparts. At the same time, the role of the law professor during the twentieth century in South Africa has been markedly active rather than reactive, especially when compared to English scholars during the same period.[15] Examples of such opinion makers are many, whereas one struggles to identify an English scholar prior to Peter Birks who enjoyed comparable influence on the courts during his lifetime.

2. The formative period: De Villiers, Maasdorp, Wessels and Wille

The last quarter of the nineteenth century and first quarter of the twentieth was undoubtedly the formative period in the development of the modern South African common law, dominated by several hugely influential judges: (John) Henry de Villiers (later Baron de Villiers), John (later Sir John) Kotzé and James Rose Innes are obvious examples.[16] Innes was educated in South Africa, and was deeply learned in the Roman-Dutch law, although self-

[13] *Zimmermann,* Mixed Legal System (n. 7) 52.

[14] See, e.g., *J. H. Baker,* An Introduction to English Legal History[4] (London 2002) 196–204.

[15] See, e.g., *Reinhard Zimmermann/Daniel Visser,* South African Law as a Mixed Legal System, in: Southern Cross: Civil Law and Common Law in South Africa, ed. by Reinhard Zimmermann/Daniel Visser (Cape Town 1996) 1–30, at 11–12.

[16] See generally *Stephen D. Girvin,* The Architects of the Mixed Legal System, in: Southern Cross (n. 15) 95–139, especially at 119–133. Regarding the contribution of John Kotzé in particular, see *Reinhard Zimmermann/Philip Sutherland,* "…a true science and not a feigned one": J.G. Kotzé (1849–1940), Chief Justice der Südafrikanischen Republik (Transvaal), Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 116 (1999) 147–194.

taught; De Villiers, on the other hand, learnt his law at the Middle Temple in London. A careful study of his judgments on contractual mistake during the final decades of the nineteenth century led me to conclude that they were largely founded on the leading English contract textbooks of the time: Stephen Leake's *Elements of the Law of Contracts* (first published in 1867)[17] and Frederick Pollock's *Principles of Contract* (first published in 1876).[18] Indeed, this period is associated with the profound Anglicisation of the Roman-Dutch sources, an egregious example being De Villiers CJ's flirtation with the doctrine of consideration during the last decades of the 19th century.[19] Speaking more generally, however, this was the period in which South African private law formed its distinctive character at the hands of certainly highly creative and influential judicial officers. One factor which accounts for the tremendous intellectual self-confidence displayed by these judges must be the effective absence of any scholarly legal tradition in South Africa at this time.

However, the position was already changing. It is significant that the *Cape Law Journal,* now the *South African Law Journal,* was founded in 1884.[20] Roman-Dutch law began to be taught at the South African College, now the University of Cape Town, in 1859, when JH Brand was appointed the first professor of law.[21] These dates are thrown into relief by a comparison with academic culture in England at the time. The *Law Quarterly Review* was founded only in 1885, and it was not until the second half of the nineteenth century that Oxford and Cambridge began offering degrees in English law.[22] Nor has South Africa ever known any functional equivalent to the Inns of Court which dominated legal education in England for so long, although the original Charter of Justice of 1827 required judges to be British barristers, and reserved eligibility to practise at the Bar to those who had been admitted as barristers in England or to the degree of Doctor of Laws at Oxford, Cambridge or Dublin.[23] From early in the twentieth century South Africa began to produce legal writers whose substantive influence approached that of the old

[17] *Stephen Martin Leake,* The Elements of the Law of Contracts (London 1867).

[18] *Frederick Pollock,* Principles of Contract at Law and in Equity (London 1876). For details, see *Helen Scott,* Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer (Oxford 2013) 46–51.

[19] See, e.g., *Dale Hutchison,* Contract Formation, in: Southern Cross (n. 15) 165–194, at 166–173.

[20] *Zimmermann,* Mixed Legal System (n. 7) 50.

[21] Ibid.

[22] See, e.g., *Baker,* English Legal History (n. 14) 170–172.

[23] The Charter was amended in 1858 so as to authorise the Supreme Court to admit to practice persons who had obtained a "Certificate of the Higher Class in Law and Jurisprudence". See *Denis V. Cowen,* The History of the Faculty of Law in the University of Cape Town, 1859–1959: A chapter in the story of the survival and growth of the Roman Dutch law in South Africa, Acta Juridica 1959, 1–19, at 6 and 8–9.

authorities.[24] Melius de Villiers' *The Roman and Roman-Dutch Law of Injuries*[25] was treated as hardly less authoritative than a citation of Voet, on whose treatment of *iniuria* it was directly based. Indeed, a crude search reveals close to two hundred citations of that work in the South African Law Reports to date. Broadly the same can be said of Maasdorp's *Institutes of Cape Law,*[26] Sir John Wessels' *The Law of Contract in South Africa,*[27] and George Wille's *Principles of South African Law*.[28]

3. Twentieth century: the age of the scholar

This tendency was not confined to the quasi-institutional writers of the late nineteenth and early twentieth centuries. Any list of mid-twentieth-century South African law professors must begin with JC de Wet, in particular his work on contract and criminal law.[29] In the sphere of delict in particular, the scholarship of Robin McKerron, Tom Price, Paul Boberg, Johannes van der Walt, Nico van der Merwe and Pierre Olivier has exercised huge influence on the courts. One example must serve to illustrate this important point.

In *Maisel v. Van Naeren*[30] it was held at first instance, largely on the strength of academic writing by Melius de Villiers and Tom Price, that *animus iniuriandi* constituted an essential element of liability in defamation, and that it should be understood to comprise not only an intention to produce the consequences of the act complained of but also an accompanying wrongful state of mind, or consciousness of wrongfulness.[31] This rule was understood

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[24] Nor does South Africa appear ever to have recognised the convention against the citation of living authors as authorities in court. For the position in England, see *Alexandra Braun,* Burying the Living?, The Creation of Legal Writings in English Courts, American Journal of Comparative Law 58 (2010) 27–52.

[25] *Melius de Villiers,* The Roman and Roman-Dutch law of injuries: a translation of Book 47, Title 10, of Voet's Commentary on the Pandects, with annotations (Cape Town 1899).

[26] *A. F. S Maasdorp,* The institutes of Cape law: being a compendium of the common law, decided cases and statute law of the Colony of the Cape of Good Hope, in four volumes (Cape Town 1903).

[27] *J. W. Wessels,* The Law of Contract in South Africa, in two volumes, ed. by A.A. Roberts (Durban 1937).

[28] Published at Cape Town in 1937.

[29] See, e.g., *Reinhard Zimmermann/Charl Hugo,* South African Legal Scholarship in the 20th Century: The Contribution of JC de Wet (1912–1990), in: A Man of Principle: The Life and Legacy of JC de Wet, ed. by Jacques du Plessis/Gerhard Lubbe (Cape Town 2013) 3–22, at 4–7.

[30] 1960 (4) SA 836 (C)

[31] See e.g. the extensive discussion of academic literature by De Villiers AJ at 842 ff. The articles cited there include *T. W. Price,* Animus Injuriandi in Defamation, SALJ 66 (1949) 4–30 and *Melius de Villiers,* Animus Injuriandi: An Essential Element in Defamation, SALJ 48 (1931) 308–311.

to co-exist with the stereotyped defences of justification, fair comment and privilege, inherited from English law. Thus proof of a genuine mistake on the part of the defendant as to the existence of a privileged occasion was held to be sufficient to defeat the plaintiff's claim, on account of the absence of *animus iniuriandi*. The position was more fully theorised in *Wentzel v. SA Yster en Staalbedryfsvereniging:*[32] here it was held on the strength of writing by Boberg, van der Merwe and Olivier amongst others that the 'stereotyped' defences of English law referred to wrongfulness rather than *animus iniuriandi*.[33] As in the *Maisel* case, the result was to duplicate the established defences of English law in a series of 'putative defences' to *animus iniuriandi:* mistake as to privilege, mistake as to truth etc. That these decisions were manifestly inconsistent with pre-existing case-law, in terms of which the stereotyped defences had been understood to rebut the presumption of *animus iniuriandi,* did not prevent their correctness from being subsequently assumed by the Appellate Division.[34]

This seismic shift in the pre-existing common law was justified in part by these writers' claim to be re-establishing the original Roman-Dutch position, at least insofar as their understanding of *animus iniuriandi* was concerned.[35] Indeed, it seems that this was an instance of the so-called 'purist' movement's drive to reassert the Roman-Dutch law in the face of pervasive English influence.[36] The project of returning the common law to its Roman-Dutch roots was of necessity driven by scholars rather than judges, given that it required sustained and detailed inquiry into historical sources written in Latin and Dutch. That is undoubtedly part of the explanation for the enthusiasm with which the South African courts embraced academic learning during this period. However, it would be a mistake to attribute this phenomenon exclusively to the influence of the purist movement. Even today, in the Constitutional era, there is a tendency on the part of the courts to cite textbooks, such as the modern editions of *Wille's Principles,* as if they constituted binding authority. The LAWSA series, a continually updated digest of South African law organised alphabetically, is treated similarly. This tendency is encouraged by the form that many South African textbooks take: rather than the

[32] 1967 (3) SA 91 (T)

[33] *Anton Fagan,* The Gist of Defamation in South African Law in: Iniuria and the Common Law, ed. by Eric Descheemaeker/Helen Scott (Oxford 2013) 169–195, 177–178, 179–180.

[34] *Fagan,* Gist of Defamation (n. 33) 178–179.

[35] Cf. Fagan, who points out that in their conceptualisation of stereotyped defences such as privilege as defences to unlawfulness rather than fault, these writers were consciously deviating from Roman-Dutch law. See *Fagan,* The Gist of Defamation (n. 33) 182–183.

[36] See, e.g., *Eduard Fagan,* Roman-Dutch Law in its South African Historical Context in: Southern Cross (n. 15) 33–64, 60–64.

narrative style typically adopted by common-law textbooks,[37] South African delict textbooks such as Neething, Potgieter and Visser's *Law of Delict* typically take the form of a series of abstract, quasi-legislative propositions. Discussion of cases is generally confined to voluminous footnotes.[38]

4. A clash of legal cultures: the case of wrongfulness

It is not difficult to see the potential for conflict inherent in this attitude. What if the courts were to diverge from orthodoxy as propounded by the professor? An example of such divergence can be found in the debates surrounding the nature of wrongfulness in the South African law of delict over the course of the last fifty years. As we have already seen, prominent delict scholars of the mid-twentieth century advanced a certain conception of the law which rested on a number of key propositions: first, that fault and wrongfulness constitute distinct requirements for delictual liability; second, that whereas subjective considerations are confined to the fault inquiry, wrongfulness is determined wholly objectively, according to whether the defendant's conduct was *ex post facto* unreasonable; and third, that intention requires consciousness of wrongfulness. It was essentially these propositions that underlay the shift in the understanding of the *animus iniuriandi* requirement in defamation described above. As Anton Fagan has shown, these three ideas are clearly derived from German Pandectist scholarship.[39] However, to those propositions can be added two further, closely related claims: that the wrongfulness of conduct is determined exclusively with reference to its consequences and, finally, that fault presupposes wrongfulness. As Fagan has also shown, these two further propositions are of more uncertain origin. He argues that the idea that the wrongfulness of conduct is determined exclusively with reference to its consequences derives from the *Erfolgsunrechtslehre* which until the late 1950s was accepted as valid by the overwhelming majority of German delict scholars.[40] However, it has since fallen out of favour in its country of origin, due to serious conceptual difficulties.[41] Moreover, as Fagan has also shown, this consequentialist analysis did not fit the South African case law at the time at which it appeared. In fact, taken in the round, the case-law of the twentieth century clearly supports the proposition that negligent conduct is wrongful where the defendant is found to have been under a duty to act without negligence. The existence of such a duty is determined not

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[37] See, e.g., *E. Peel/J. Goudkamp,* Winfield & Jolowicz on Tort[19] (London 2014).

[38] *Johann Neethling/Johan Potgieter,* Neethling, Potgieter and Visser's Law of Delict[7] (Durban 2015).

[39] *Anton Fagan,* The German Origins of a South African Dogma about Delict, RabelsZ 76 (2012) 967–993, at 968–979.

[40] *Fagan,* RabelsZ 76 (2012) 967, 978–979.

[41] *Fagan,* RabelsZ 76 (2012) 967, 980–985.

according to the objective consequences of the defendant's conduct, but rather according to whether it is reasonable to impose liability in respect of such conduct.[42]

In an article published in the *South African Law Journal* in 2005, Anton Fagan presented these conclusions. Since the appearance of that article, and several others making broadly the same points,[43] they have become still further entrenched in South African law, having been unequivocally accepted in a series of Supreme Court of Appeal and Constitutional Court judgments.[44] Thus in *Le Roux and Others v. Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae),*[45] speaking in general terms about the concept of wrongfulness, Brand J said:

"In the more recent past our courts have come to recognise, however, that in the context of the law of delict: *(a)* the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and *(b)* that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct [which is part of the element of negligence], but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct."[46]

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[42] See the cases cited by *Fagan,* RabelsZ 76 (2012) 967, at 987–988. On the other hand, in cases of intentional harm-doing, wrongfulness is determined according to the *ex ante* reasonableness of the defendant's conduct. Thus the justification ground of self-defence will apply where a reasonable person in the defendant's position would have believed that the victim posed a danger and that the means of defence used were commensurate with that danger: *Fagan,* RabelsZ 76 (2012) 967, 989–990.

[43] *Anton Fagan,* Rethinking Wrongfulness in the Law of Delict, SALJ 122 (2005) 90–141. See also *Daniel Visser,* Compensation for pecuniary loss – the actio legis Aquiliae, in: Wille's Principles of South African Law[9] (Cape Town 2007) 1094–1160, at 1098; *François du Bois,* Getting Wrongfulness Right: A Ciceronian Attempt, in: Developing Delict: Essays in Honour of Robert Feenstra, ed. by T. J. Scott/Daniel Visser (Cape Town 2000) 1–48, at 28.

[44] Regarding Aquilian liability see, e.g., *Trustees, Two Oceans Aquarium Trust v. Kantey & Templar* 2006 (3) SA 138; *Shabalala v. Metrorail* 2008 (3) SA 142 (SCA); *McIntosh v. Premier, Kwazulu-Natal* 2008 (6) SA 1 (SCA); *Loureiro and others v. iMvula Quality Protection* (Pty) Ltd 2014 (3) SA 394 (CC) at [51] ff.; *Country Cloud Trading CC v. MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) at [20] ff.; regarding self-defence see, e.g., *Mugwena v. Minister of Safety and Security* 2006 (4) SA 150 (SCA). See also *R. W. Nugent,* Yes, it is always a bad thing for the law: a reply to Professor Neethling, SALJ 123 (2006) 557–563.

[45] 2011 (3) SA 274 (CC) at para. 122.

[46] See also *Fritz Brand,* Reflections on wrongfulness in the law of delict, SALJ 124 (2007) 76–83, at 80–81; *Roux v. Hattingh* 2012 (6) SA 428 (SCA) at [33]. It is not clear,

It is difficult to imagine a more ringing endorsement of the proposition advanced by Fagan *et al.* Yet in their discussion of the *Le Roux* case in the 2011 volume of the *Annual Survey of South African Law,* Johann Neethling and Johan Potgieter commented as follows:

"[T]he assertion by Brand AJ that 'what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct' is incorrect."[47]

Although they do cite certain case-law in support of this view,[48] their argument is mainly axiomatic. For example, they simply say: "[t]he reasonableness of the defendant's conduct generally plays an important part in determining wrongfulness in our law."[49]

As Fagan himself notes,

"[E]ven though the scholars tell us...that their views are required by 'logic', that they are 'theoretically pure', that they are necessary to 'avoid confusion' (or so as not to 'obscure the distinction') between wrongfulness and negligence, and that their denial will 'undermine the legal-theoretical foundations of our law of delict' and create a 'conduit for legal uncertainty', they provide no argument to justify these assertions. It would seem, therefore, that the consequentialist analysis of wrongfulness has established itself as a dogma of modern South African delict scholarship. In other words, it is an analysis believed to be valid mainly because of the authority of those who initially proposed it […]"[50]

The result of this dogmatic approach is a troubling bifurcation between the work of the courts and that of doctrinal scholars. It seems that the latter sometimes regard themselves as formal as well as substantive authorities – not so much holders of the *ius respondendi* as licensees under the Law of Citations.[51] Indeed, it sometimes appears that there are two rival conceptions of the role of the law professor at work in South Africa today. On the one hand, the 'common-law' approach sees legal scholars offering different explanations for the available data, that is, the cases. Disagreement here is generally amicable, since it is assumed that there is likely to be more than one plausible account. Indeed, it sometimes takes on an almost ludic quality. On the other hand, the 'civilian' approach treats the professor as one who expounds the

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however, that this conception of wrongfulness applies to the law of defamation, the context of these remarks. See further the justified criticism of *Johann Neethling/Johan Potgieter,* The Law of Delict, Annual Survey of South African Law 2011, 747–845, at 808–809.

47 *Neethling/Potgieter,* Annual Survey 2011, 747, 809.

48 *Neethling/Potgieter,* Annual Survey 2011, 747, 809–810, as well as the fuller discussion *Neethling/Potgieter,* Delict (n. 38) at 80 ff.

49 They appear unwilling to accept Fagan's distinction between unintentional and intentional harm-doing.

50 *Fagan,* RabelsZ 76 (2012) 967, 992.

51 See, e.g., *H. F. Jolowicz/Barry Nicholas,* Historical Introduction to the Study of Roman Law[3] (Cambridge 1972) 374 ff., 452–453.

truth about the law. Although case-law of course forms part of the subject-matter of this analysis, as we have seen, its authority depends to a large extent on its continuity with the wider civilian tradition. Disagreement here has the potential to become acrimonious, since in questioning your account of the law I implicitly accuse you of being wrong-headed or ill-informed.

To some degree, then, this is an intractable clash of legal cultures – a further consequence of South African private law's mixed heritage. Yet even accepting the point made earlier in this section, that South Africa's version of the doctrine of precedent is a somewhat mitigated one, the proper working of the partnership between courts and academia depends on consensus as to their respective roles. If there is to be genuine dialogue between the doctrinal scholar and the common-law judge, the former must recognise the formal authority of the latter. In other words, the civilian conception of the law professor's role is sustainable in modern South Africa only insofar as it accords due weight to the cases.

III. Private-Law Scholarship in the Twenty-First Century I: The Continuing Importance of Doctrine

1. Rationalising the uncodified ius commune

What, then, is the role of doctrinal scholarship in contemporary South Africa? In fact, there are two respects in particular in which the South African legal order appears to need doctrinal scholars more than ever.

On the one hand, as we have seen, South African private law has its roots in the uncodified civil law of early modern Europe. In fact there is still much work to be done in order to rationalise the ancient forms of action inherited ultimately from Roman law. Given the relative paucity of litigation, and thus the relatively small number of decided cases, especially in marginal subjects, imaginative doctrinal scholarship is vital; only through wide-angled scholarly analysis can the scattered fragments of which much South African private law consists be converted into a coherent and normatively defensible system of causes of action.[52] Of particular value in this respect is the appropriate use of comparative law, particularly models drawn from the civilian world. I have already given an example of the misuse of comparative law in doctrinal legal

[52] Indeed, it seems that marginal subjects (like unjustified enrichment) in small jurisdictions (like South Africa) are acutely in need of restatement, akin to the Restatements produced by the American Law Institute or the restatements of the English law of unjust enrichment and contract recently produced by Andrew Burrows: see *Andrew Burrows,* A Restatement of the English Law of Unjust Enrichment (Oxford 2012); A Restatement of the English Law of Contract (Oxford 2016). See also *idem,* Challenges for Private Law (n. 1) 12–16.

reasoning: namely, what appears to have been the wholesale adoption of the German *Erfolgsunrechtslehre* by South African delict lawyers in the mid-twentieth century. However, recent examples of the highly creative and constructive use of comparative sources in order to systematise the South African common law can be found in the two books on unjustified enrichment published recently by Danie Visser and Jacques du Plessis respectively.[53] Although their treatments differ in many respects, both have used the Wilberg/von Caemmerer taxonomy of the German law of unjustified enrichment in order to try to make sense of the disorderly and sometimes irrational South African common law. At a lower level of generality, both have drawn heavily on the individual enrichment claims of German law – the *Leistungskondiktion* and *Rückgriffskondiktion* in particular – in order to rationalise the complex rules regulating the restitution of enrichment by transfer and the restitutionary liability arising from the payment of another's debt.[54] I have argued, on the contrary, that the South African law of enrichment by transfer is best analysed in terms of reasons for restitution, 'unjust factors' such as mistake, compulsion and minority, as in the case of the English law of unjust enrichment.[55] That there is so much room for rational disagreement between academics about the best analytical framework to adopt shows just how undetermined the South African law of enrichment really is, and what an important role doctrinal lawyers have to play in systematising it.

2. "The normative influence of the Constitution must be felt throughout the common law"

It is, however, in the context of the Constitution of 1996 that South African doctrinal lawyers face their greatest challenge. The South African Bill of Rights applies to all law and binds not only the state[56] but also natural or juristic persons,[57] at least in certain circumstances.[58] As such, it imposes an obligation on the courts when applying a provision of the Bill of Rights to a

[53] *Daniel Visser,* Unjustified Enrichment (Cape Town 2008); *Jacques du Plessis,* The South African Law of Unjustified Enrichment (Cape Town 2012)

[54] For a summary of these innovations see *Helen Scott,* Rationalising the South African law of enrichment, Edin. L. Rev. 18 (2014) 433–451, at 435–440.

[55] See generally *Scott,* Unjust Enrichment (n. 18).

[56] Section 8(1).

[57] Section 8(2).

[58] On the direct horizontal application of the South African Bill of Rights see, e.g., *Iain Currie/Johan de Waal,* The Bill of Rights Handbook[6] (2013) 45–50. However, as Currie & De Waal explain at 45–48, section 8(2) has been rendered near-redundant as a result of the wide interpretation given by the courts to section 39(2). Direct horizontality is thus "a dead letter". See further *Alistair Price,* The influence of human rights on private common law, SALJ 129 (2012) 330–374; *Nick Friedman,* The South African common law and the Constitution: Revisiting horizontality, SALJ 131 (2014) 63–88.

natural or juristic person to apply, or if necessary develop, the common law in order to give effect to the rights set out in the Bill of Rights.[59] However, in addition, section 39(2) of the Bill of Rights obliges courts to develop the common law in order to promote the spirit, purport and objects of the Bill. This section has been applied both in cases in which a rule of the common law is inconsistent with a constitutional provision and in cases where, although the rights enumerated in the Bill of Rights are not obviously implicated, the common-law rule in question nevertheless falls short of or deviates from its spirit, purport and objects.[60] In this second kind of case, the courts are required to adapt the common law "so that it grows in harmony with the 'objective normative value system' found in the Constitution."[61] Accordingly, section 39(2) thus understood requires that all common-law rules be examined individually by the courts in order to determine whether they require development in this way.[62] The phrase "spirit, purport and objects of the Bill of Rights" in particular invites us to reflect on the deep normative framework on which the Bill rests; indeed, "to infuse all South African law with the spirit of [the Bill's] fundamental values so that the legal system can promote a society based upon human dignity, freedom and equality."[63]

In carrying out this task, the courts rely heavily on doctrinal lawyers: both to elucidate the current state of the law, often with reference to comparative, historical or theoretical arguments, and to work through the constitutional arguments in favour of its development. In particular, "the process of assessment call[s] upon legal historians to locate the origins and role of existing

[59] Section 8(3)(a)

[60] On the indirect application of the Bill of Rights to disputes governed by the common law see e.g. *Currie/De Waal,* Bill of Rights Handbook (n. 58) 60–65.

[61] Moseneke J in *S v. Thebus and another* 2003 (6) SA 505 (CC) at para. 28, quoting *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) at para. 54.

[62] Although cf. para. 39 of the *Carmichele* judgment. Nevertheless, the interpretation of section 39(2) given here, based *inter alia* on the decisions of the Constitutional Court in *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 and *Everfresh Market Virginia (Pty) Ltd Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) is now widely accepted: see again *Currie/De Waal,* Bill of Rights Handbook (n. 58) 60–65. But cf. *Anton Fagan,* The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law's Development, SALJ 127 (2010) 611–627, as well as the subsequent exchange between Professor Fagan and Dennis Davis: *Dennis Davis,* How many positivist legal philosophers can be made to dance on the head of a pin?, A reply to Professor Fagan, SALJ 129 (2012) 59–72; *Anton Fagan,* A straw man, three red herrings, and a closet rule-worshipper – a rejoinder to Davis JP, SALJ 129 (2012) 788–98.

[63] *Dennis Davis,* Democracy and Deliberation: Transformation and the South African Legal Order (Cape Town 1999) 162. Or as O'Regan J expressed it in *K v. Minister of Safety and Security* 2005 (6) SA 419 (CC) at para. 17, "the normative influence of the Constitution must be felt throughout the common law".

doctrine in order that the constitutional mandate […] be implemented."[64] The scrutiny of the South African common law prompted by section 39(2) is continuous with the much wider project of examining the deeper moral justifications for domestic legal rules, as for example in contemporary corrective-justice scholarship. Nevertheless, this project remains doctrinal in the sense that I initially defined that term, in that its goal is the justification or criticism of common-law rules relative to the rights enumerated in the Bill, or relative to the norms and principles implicit in it.[65] A modest example of this enterprise can be found in my own recent critique of the as-yet-undisturbed common-law rules regarding liability for seduction.[66] According to the South African common law as it currently stands, a woman[67] has a claim against her seducer under the *actio iniuriarum* as well as a claim for any patrimonial loss suffered as a result of the seduction.[68] These rules rest on two premises, both of which were unexceptional at the time of the Roman-Dutch writers:[69] first, that female virginity is an economic asset; second, that women are incapable of exercising a valid choice in this regard. Yet it does not seem that either of these assumptions has currency in modern South African society. Indeed, these rules seem obviously at odds with Constitutional values, insofar as they undermine the autonomy of women by disregarding their consent to sexual acts.[70] Thus the implications of the Bill of Rights are clear: the common-law

[64] *Davis,* Democracy and Deliberation (n. 63) 129. In fact Davis is speaking here of section 35(3) of the Interim Constitution of 1993, the precursor to section 39(2). It is unclear whether this claim was accurate at the time it was made. However, it is fair to say that it accurately describes the current position, i.e. the implications of section 39(2) as interpreted by the Constitutional Court. See now also *Dennis M. Davis/Karl Klare,* Transformative Constitutionalism and the Common and Customary Law, South African Journal on Human Rights 26 (2010) 402–509.

[65] For a precise discussion of the difference between the rights enumerated in the Bill and the object of those rights, see again *Fagan,* SALJ 127 (2010) 611, 612–618.

[66] For details and further sources, see *Helen Scott,* Compensation for harm to the personality – the actio iniuriarum, in: Wille's Principles of South African Law[10], ed. by Graham Bradfield (Cape Town 2016, forthcoming) ch. 43 at section III.3.

[67] Injurious seduction is possible only in respect of women who are both unmarried and virginal.

[68] *Scott,* Compensation for harm to the personality (n. 66) at section III.3.

[69] See, e.g., *Hugo Grotius,* Inleidinge tot de Hollandsche Rechts-geleerdheid 3.35.8.

[70] Indeed, given that the right to dignity is enshrined in section 10, it is doubtful whether these rules are consistent with the Bill of Rights itself. Furthermore, the fact that only women can sue is clearly inconsistent with section 9 of the Bill of Rights, which prohibits unfair discrimination on grounds of sex. Thus it is at least a question whether section 8(3)(b) might be the appropriate provision to apply here, in order to invalidate this common-law rule. However, in the context of litigation, these rights would necessarily be asserted by the defendant against the plaintiff qua right-holder in order to defeat her claim. Given this context, it is likely that this issue would be treated under the rubric of section 39(2).

rule should be abrogated.[71] As this example demonstrates, in examining the historical underpinnings of common-law rules and exploring their relationship to the values of the Bill of Rights, doctrinal lawyers can play a vital role in the transformative project envisioned by section 39(2).

IV. Private-Law Scholarship in the Twenty-First Century II: Doctrine in Decline?

The picture of transformative constitutionalism painted in the previous section is not an inaccurate one. However, it must be admitted that it is somewhat optimistic. While it is true that doctrinal scholarship still has much to offer the South African courts – indeed, that it is more important than ever – there are in fact unmistakeable signs that it is in decline.

1. "Out of fashion": the general decline of private law

As I have already conceded, the reasons for this are not confined to the South African context.[72] Some are associated with the decline of private-law scholarship more generally, and indeed of private law itself. Regarding the latter, the rise of arbitration (as opposed to formal litigation) in cases involving private parties and the increasing regulation by the state of formerly wholly private arenas such as compensation for work-place injuries,[73] road traffic accidents,[74] and the protection of personal information[75] are larger socio-political developments which inevitably impact private law as an academic discipline. Regarding the university context in particular, an important factor here is the ongoing diversion of intellectual resources out of private law into other areas of legal scholarship, notably public law and indigenous African law. The former is the natural site of the titanic struggles between the government and its antagonists which increasingly characterise South African political life: here of course the Constitution itself is central.[76] The latter, having been ignored by

[71] On the operation of the doctrine of precedent in the context of section 39(2), see *Currie/De Waal,* Handbook (n. 58) 63–65 as well as *Du Bois,* Common law and precedent (n. 11) at 91.

[72] Cf. *Burrows,* Challenges for Private Law (n. 1) 4–12.

[73] Compensation for Occupational Injuries and Diseases Act 130 of 1993.

[74] Road Accident Fund Amendment Act 19 of 2005.

[75] Protection of Personal Information Act 4 of 2013.

[76] One example among many is the litigation recently concluded between the opposition political parties the Economic Freedom Fighters and the Democratic Alliance and the President of South Africa, Jacob Zuma, along with several other co-respondents, regarding impermissible expenditure by the state on his Nkandla homestead (specifically, expenditure not justified by security considerations). In fact, it is arguable that this is a matter for the law of unjustified enrichment: see *Danie Visser,* Nkandla explained: can the law of

mainstream legal scholarship for so long, is now the focus of one of the most pressing questions confronting the South African legal order, namely whether indigenous customary law and European common law can continue to run in parallel tracks, or whether the latter should be displaced by the former, and if so to what extent.[77] Added to these are several more prosaic difficulties: the lure of commercial practice[78] and the disproportionate undergraduate teaching load typically borne by private-law scholars, given that the bulk of the South African LLB curriculum is made up of bread-and-butter private law subjects taught through lectures to large classes.[79] There is also the not inconsiderable factor of changing trends in legal scholarship: bluntly, doctrinal private law is out of fashion, in South Africa as elsewhere.[80] However, as I have already indicated, I do not believe that any of these factors has been decisive in the decline of doctrinal scholarship in South Africa. The explanation for that phenomenon is to be found not in the decline of private law generally, or in the pull of other academic disciplines, but in a crisis in the authority of the common-law rules on which doctrinal reasoning depends.

1. The effect of section 39(2): a crisis in the authority of common-law rules

To the extent that this is a crisis also in the legitimacy of the pre-1994 common law, it is of course not a new problem, but rather one which dates back at least to the political transition in South Africa in the early nineties – in-

unjustified enrichment provide the key to whether the President has an obligation to reimburse the state?, in: Essays in Honour of Johann Neethling, ed. by Johan Potgieter/Johann Knobel/Rita-Marie Jansen (Durban 2015) 529–544. However, thus far it has been dealt with exclusively within the framework of the respondents' Constitutional duties. Cf. *Burrows,* Challenges for Private Law (n. 1) 4–5.

[77] See e.g. *Christa Rautenbach,* South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition, Journal of Comparative Law 3 (2008) 119–132.

[78] Cf. *Burrows,* Challenges for Private Law (n. 1) 5.

[79] See *Georgina Pickett,* The LLB Curriculum Research Report (2010, commissioned by the South African Council on Higher Education) ch. 3. At pp. 13–14 one finds a helpful table reflecting the HEQF credit weighting attached to those LLB courses which are mandatory at all seventeen universities in South Africa. Thus one is able to determine (admittedly rather roughly) both which courses predominate within the South African LLB and what weight is attached to them. Of the fifteen courses listed, seven are traditionally situated within private law departments; four are public-law courses; a further three (Criminal Law, Criminal Procedure and Evidence) are often hived off into a criminal-justice cluster; only one (Business Law, or Corporation Law as it is called at the University of Cape Town) is generally situated within the department of commercial law. As for credit weightings, here too the median weightings for private-law courses are generally higher.

[80] Cf. *Burrows,* Challenges for Private Law (n. 1) 5–6: "[M]y perception is that the new appetite for different styles of legal scholarship has itself served to undermine the position of private law."

deed, it is inherent in the South African legal order as it has existed since the European colonisation of southern Africa.[81] While the dismantling of apartheid legislation such as the Population Registration Act[82] was obviously a precondition for the negotiations which led up to the first democratic election in 1994, the future of the common law was less clearly pre-ordained: could legal rules based ultimately on Roman and Roman-Dutch legal texts, as interpreted by the courts of colonial and apartheid-era South Africa, continue to bind? If not, in the absence of systematic legislative enactment, what would take their place? It appears that the framers of the Bill of Rights envisaged that the Constitution would be directly applied, both vertically and ("if, and to the extent that, [a provision of the Bill of Rights] is applicable") horizontally, through the medium of the common law. Thus the main engine of the transformation of the common law would be section 8. The courts would apply, or if necessary develop, the common law in order to give effect to the rights in the Bill. However, as we have already seen, it is in fact section 39(2) – which envisages the indirect application of the Bill by the courts – that has driven this process. Perhaps in conflict with its literal meaning ("[…] when developing the common law […] every court […] must promote the spirit, purport and objects of the Bill of Rights"), it has been interpreted by the Constitutional Court to mean that the courts are obliged to develop the common law in order to promote the spirit, purport and object of the Bills of Rights.[83] Thus the dominant imperative is not the application of Constitutional rights themselves, but rather the infusion of the common law with the *values inherent in the Bill*. It is certainly arguable that such a piece-by-piece reworking of the common law constitutes a necessary stage in the evolution of a new South African legal culture. However, it cannot be denied that in practice this exercise has run into difficulties.

As we have seen, there are indeed cases in which common-law rules are clearly inconsistent with the values inherent in the Bill. Indeed, in my view the affirmative duty on the state recognised in the seminal case of *Carmichele v. Minister of Safety and Security* itself constitutes a legitimate application of section 39(2):[84] whereas the pre-existing common-law position – in terms of

[81] See e.g. *Zimmermann/Visser,* Mixed Legal System (n. 15) 7–9.

[82] Act 30 of 1950. It was repealed on 28 June 1991 by the Population Registration Act Repeal Act 114 of 1991.

[83] See section III above.

[84] Ms. Carmichele was brutally attacked by a young man who had been charged with rape but released on bail. Although her claim was initially dismissed, the Minister was ultimately held vicariously liable in delict for the negligent failure of his employees, local police-officers and prosecutors, to prevent the crime from occurring. The case was heard twice in the High Court, although only the second of these judgments is reported – *Carmichele v. Minister of Safety and Security and Another*2003 (2) SA 656 (C) – once in the Constitutional Court – *Carmichele v. Minister of Safety and Security and Another (Centre*

which no such duty would have been imposed – gave expression to certain core liberal values, the post-*Carmichele* legal position, particularly as expressed in the *Van Duivenboden* case, gives greater weight to human dignity, to life and to personal security.[85] Those values, channelled through the pre-existing common-law concept of wrongfulness, clearly point towards a more expansive legal duty on the part of the state.[86] However, in truth such cases are relatively rare. Generally speaking, the rules of the South African common law already give expression to those values.[87] Or, to put the matter in less complacent terms, the values inherent in the Bill are simply too general to be determinative of specific legal questions. In most cases, the spirit, purport and objects of the Bill of Rights provide no real guidance in choosing between different ways of developing a particular common-law rule. They offer a tantalising vision of what South African society could become, but no specific instructions to the courts for turning that vision into reality.

2. Two illustrations: K v. Minister of Safety and Security and Lee v. Minister of Correctional Services

This point is well illustrated by the decision in *K v. Minister of Safety and Security.*[88] According to South African law, in order for vicarious liability to attach to an employer for the delict of his employee, it must be shown that the delict was committed by the employee while acting 'within the course and scope of his or her employment'. This phrase encompasses, in the first instance, acts committed by the employee in the exercise of the functions to which she was appointed, including such acts as are reasonably necessary to carry out her employer's instructions. However, the matter becomes more difficult when a delict is committed by an employee outside the normal performance of her duties. This difficulty is particularly pronounced where the wrongdoer is pursuing her own interests exclusively, and even more pronounced where her wrongful conduct is intentional. Prior to the decision of the Constitutional Court in *K v. Minister of Safety and Security,* liability was

for Appeal Legal Studies Intervening) 2001 (4) SA 938 (CC) – and twice in the Supreme Court of Appeal – *Carmichele v. Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) and *Minister of Safety and Security and Another v. Carmichele* 2004 (3) SA 305 (SCA).

[85] *Minister of Safety and Security v. Van Duivenboden* 2002 (6) SA 431 (SCA). For an account of the pre-existing common-law position, see *Dale Hutchison,* Aquilian Liability II (Twentieth-Century), in: Southern Cross (n. 15) 595–637.

[86] See *Currie/De Waal,* Handbook (n. 58) 61–63 on the three ways in which section 39(2) can be applied, especially at p. 62 where they describe the third method, "to give constitutionally-informed content to open-ended common-law concepts, such as 'public policy' or 'contra bonos mores' or 'unlawfulness'."

[87] See, e.g., *NM and others v. Smith and others* 2007 (5) SA 250 (CC)

[88] 2005 (6) SA 419 (CC).

not imposed in such cases.[89] However, in *K* the Constitutional Court relied on section 39(2) to develop the pre-existing common law, holding the state vicariously liable in respect of a rape committed by three on-duty policemen after a young woman, stranded in the early hours of the morning, accepted their offer of a lift home. Giving the judgment of the Court, O'Regan J held, first, that the existing common-law rule was as follows:

"It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course and scope of his employment, and that in deciding whether an act by a servant does so fall, some reference is to be made to the servant's intention… The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test."[90]

However, she said, the second part of this test should not be applied in a mechanical way.[91] In answering the question whether the link between delict and employment was sufficiently close, a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights, as required by section 39(2):[92]

"The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms but other norms as well. It requires a court to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not."[93]

In articulating the reasons for her decision, O'Regan J relied on three arguments. First, the policemen who raped Ms K all bore a statutory and constitutional duty to prevent crime and protect members of the public. That duty rested also on their employer, the state, and they were employed by it to per-

[89] See, e.g., *K v. Minister of Safety and Security* 2005 (3) SA 179 (SCA)

[90] Quoting Jansen JA in *Minister of Police v. Rabie* 1986 (1) SA 117 (A) 134, at para. 31 in the *K* judgment. But in fact the so-called *Rabie* test does not appear to have been widely applied prior to *K:* the only clear instance is *Minister van Veiligheid en Sekuriteit v. Japmoco BK h/a Status Motors* 2002 (5) 649 (SCA) at para. 11. For criticism of O'Regan J's account of the pre-existing common law see *Anton Fagan,* The Confusions of K, SALJ 126 (2009) 156–205, especially 167–173.

[91] See, e.g., at para. 22: "If one looks at the principle of vicarious liability through the prism of s 39(2) of the Constitution, one realises that characterising the application of the common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilise the common-law test for vicarious liability and purge it of any normative or social or economic considerations."

[92] See *K v. Minister of Safety and Security* at para. 32, as well as paras. 15–20 and 21–23.

[93] See *K* at para. 44.

form that duty.[94] Second, the policemen, who were on duty and in uniform, had caused the victim specifically to place her trust in them by offering to assist her, in accordance with police standing orders.[95] The Court

"must take account of the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police in order to ensure that their role is successfully performed. In this case, and viewed objectively, it was reasonable for the applicant to place her trust in the policemen who were in uniform and offered to assist her."[96]

Third,

"the conduct of the policemen which caused harm constituted a simultaneous commission and omission. The commission lay in their brutal rape of the applicant. Their simultaneous omission lay in their failing while on duty to protect her from harm, something which they bore a general duty to do, and a special duty on the facts of this case."[97]

O'Regan J concluded that,

"these three inter-related factors make it plain that viewed against the background of our Constitution, and, in particular, the constitutional rights of the applicant and the constitutional obligations of the respondent, the connection between the conduct of the policemen and their employment was sufficiently close to render the respondent liable."[98]

On its face, the outcome in the *K* case appears richly justified by these arguments. But on closer examination, it is very difficult to say what the *ratio* of the decision really is – on what rule it depends. The existence of a statutory and constitutional duty on the part of the police to prevent crime and protect members of the public clearly militates in favour of liability in general terms. However, it permits no discrimination between cases in which liability should be imposed (as in *K* itself) and those in which it seems that it should not be: for example, where a policeman has committed an act of domestic violence in his own home.[99] As for the second argument relied on by O'Regan J, that Ms K had placed her trust in the policeman as she was entitled to do, and that this trust relationship should be nurtured, in my view this argument contains the germ of a general rule capable of justifying the *K* decision – I shall return to this point below. However, the Court failed sufficiently to spell out its implications for the rules of vicarious liability – as stated, it simply appears to constitute an additional reason (if any were needed) for the delictual liability of the

[94] See *K* at para. 51.

[95] See further at para. 51: "One of the purposes of wearing uniforms is to make police officers more identifiable to members of the public who find themselves in need of assistance."

[96] *K* at para. 52.

[97] *K* at para. 53.

[98] *K* at para. 53.

[99] Cf. *Attorney-General for the British Virgin Islands v. Hartwell* [2004] 1 WLR 1273.

policemen themselves. As for the third argument, this too amounts to the claim that where policemen commit the very sort of crime from which they are charged to protect their victim, this constitutes an additional reason for their liability. Again, it is hard to see how this argument justifies the imposition of vicarious liability on the state, however outrageous the wrongdoers' behaviour. Indeed, it is hard to say in what respect exactly O'Regan J "developed the law". It appears that in the *K* case the effect of section 39(2) was to compel a particular outcome, namely a finding of liability on the part of the state, rather than a change in the common-law rules governing vicarious liability.[100]

Moreover, just as it is difficult to discover the *ratio* of the *K* case itself, it is difficult to formulate a rule which is capable of explaining the cases in which *K* has been followed. In *F v. Minister of Safety and Security and others*[101] liability was imposed in respect of a rape by a policeman who was off duty (in fact on standby), dressed in plain clothes, driving an unmarked police car, and who had taken active steps to conceal his status from his victim.[102] Thus while there were clear similarities in the facts of the two cases, in *F* the evidence suggested that Ms. F's decision to accept a lift from the wrongdoer had been reached independently of the fact that he was a policeman – in other words, the 'trust element' relied on in *K* itself appeared to be absent. Nevertheless, liability was imposed. According to the Chief Justice, giving the judgment of the majority,

> "several interrelated factors have an important role to play in addressing the question whether the Minister is vicariously liable for the delictual conduct of Mr Van Wyk. The normative components that point to liability must here, as *K* indicated, be expressly stated. They are: the State's constitutional obligations to protect the public; the trust that the public is entitled to place in the police; the significance, if any, of the policeman having been off duty and on standby duty; the role of the simultaneous act of the policeman's commission of rape and omission to protect the victim; and the existence or otherwise of an intimate link between the policeman's conduct and his employment. All these elements complement one another in determining the State's vicarious liability in this matter."

Again, it is hard to see what weight to attach to each of these arguments, or indeed to appreciate what their individual force might be. Similar criticisms can be levelled against the decision of the Supreme Court of Appeal in *Minister of Defence v. Von Benecke*[103], in which the state was held vicariously liable for the actions of an employee of the Ministry who had stolen rifle parts, ammunition and magazines which were subsequently used to commit an armed robbery.[104]

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[100] See, e.g., paras. 11, 14, 18 and 23.

[101] 2012 (1) SA 536 (CC).

[102] When she asked him why there were police dockets in the vehicle he replied that he was a private detective: see *F v. Minister of Safety and Security* at para. 10.

[103] 2013 (2) SA 367 (SCA).

As these decisions illustrate, in practice transformative constitutionalism can sometimes amount to nothing other than result-driven jurisprudence: apparently socially progressive, claimant-centred decisions which are not, however, justified according to any rule of general application.[105] The fact that the claimant's constitutional rights have been violated – in the *K* and *F* cases, rights to bodily integrity, privacy, dignity and self-worth, freedom, and equality, "a cluster of interlinked fundamental rights treasured by our Constitution"[106] – appears to translate directly into a successful claim. Common-law rules which do not produce that result are assumed to be bad and are disregarded. Thus the effect of section 39(2) as interpreted has been to introduce a much looser approach to common-law rules, creating a general air of indeterminacy in the law. Indeed, even in areas in which section 39(2) has not been directly invoked, its effect has been to undermine rule-based reasoning. Here, rather than the purported development of legal rules under the aegis of section 39(2), we see the use of the existing common law to achieve outcomes mandated directly by equity or social justice: rules are formally invoked in support of certain outcomes, but in fact the internal logic of the law is not respected; rules are distorted in order to produce desirable results. Thus in *Lee v. Minister of Correctional Services,*[107] where the plaintiff had contracted tuberculosis while incarcerated in Pollsmoor Prison, and where it could not be demonstrated that his illness had probably been caused by the (undoubtedly negligent) failure of the prison authorities to implement appropriate measures to prevent the spread of TB, a majority of the Constitutional Court held that the but-for or *sine qua non* test for factual causation had been satisfied, relying on context-free interpretations of phrases in several leading judgments.[108] Again, it is difficult to disagree with the inarticulate premise of this decision, that where the state flagrantly violates its duties to the public it ought to be sanctioned. But the result of this decision has been to render the ordinary test for factual causation in South African law radically unclear.[109]

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[104] For further discussion of this case see *Helen Scott,* Strict Liability in: Wille's Principles of South African Law (n. 66).

[105] This point is forcefully made with respect to a trio of earlier Constitutional Court decisions by *Stu Woolman,* The Amazing, Vanishing Bill of Rights, SALJ 124 (2007) 762–794, especially his introductory remarks at 762–765.

[106] See *F* at para. 55. In the *K* case O'Regan J held that Ms K's s rights to security of the person, dignity, privacy and substantive equality were all implicated: see, e.g., para. 18.

[107] 2013 (2) SA 144 (CC).

[108] For criticism of the *Lee* decision see *Anton Fagan,* Causation in the Constitutional Court: *Lee v. Minister of Correctional Services* Constitutional Court Review 5 (2013) 104–134; *Alistair Price,* Factual Causation after Lee*,* SALJ 131 (2014) 491–500.

[109] See, e.g., the subsequent attempts to interpret it in *Oppelt v. Head: Health, Department of Health Provincial Administration: Western Cape* [2015] ZACC 33; *Mashongwa v. PRASA* [2015] ZACC 36.

Whatever the merit of the goals pursued, offering spurious justification for judicial decision-making can only be destructive of the law's legitimacy.

3. Constructive interpretation

Faced with the erosion of doctrine in this way, doctrinal scholars lose confidence in their project. On the one hand, given the degree of indeterminacy in cases in which section 39(2) is invoked, it is difficult to continue to engage with the common law in the way that doctrinal scholars traditionally have done, that is, as a system of rules.[110] On the other hand, if rule-based arguments become mere pretexts for decisions in fact reached on wholly different grounds, subjecting these decisions to doctrinal scrutiny seems fruitless. What value can 'solving hard conceptual puzzles, understanding the fine detail of the law, and producing rigorous and elegant legal interpretations'[111] have if the courts themselves are no longer playing that game? Doctrinal lawyers have no choice but to abandon doctrinal scholarship for associated fields such as jurisprudence (in both its analytical and political forms) and substantive legal theory (the study of the deep normative justifications for legal rules).[112]

However, in fact I do not believe that such a pessimistic conclusion is justified. If we accept that rule-based decision-making is a desirable feature of a legal system based on precedent, to the extent that the courts decline to justify their decisions relative to rules of general application it must be for doctrinal scholars to provide such rules. Thus in my analysis of the *K, F* and *Von Benecke* cases for the 10th edition of *Wille's Principles of South African Law,* I attempted to furnish a rule capable of explaining these important cases, arguing that where an employee is employed to do a particular job which carries with it an increased risk that a particular species of delict will be committed, then if he does indeed commit that delict there is sufficiently close connection between the delict and his employment for vicarious liability to attach.[113] This

[110] It is also striking how little reference the majority of the Constitutional Court in *F,* for example, made to the considerable body of high-quality doctrinal writing prompted by the decision in *K*. See, e.g., *Fagan,* SALJ 126 (2009) 156–205; *Stephen Wagener,* K v. Minister of Safety and Security and the Increasingly Blurred Line Between Personal and Vicarious Liability, SALJ 125 (2008) 673–680.

[111] *Burrows,* Challenges for Private Law (n. 1) 5.

[112] A review of the *South African Law Journal* (South Africa's leading generalist law journal) over the course of the last five years yielded fewer than twenty instances of doctrinal scholarship on any aspect of the law of obligations. On the other hand, law and economics appears to have gained almost no purchase in South African legal academia.

[113] See *Scott,* Strict Liability (n. 104) at section II.1(a)(ii). That this rule was explicitly relied on by the Supreme Court of Canada in *Bazley v. Curry* [1999] 2 SCR 534 and *Jacobi v. Griffiths* [1999] 2 SCR 570, decisions extensively cited by O'Regan J in the *K* case,

appears to be the true import of the second argument relied on by O'Regan J, that Ms K had placed her trust in the policemen who raped her. Moreover, it is capable of explaining the outcome in the *Von Benecke* case – given that the thieving employee's job involved access to dangerous weapons stockpiled by the defendant, weapons not otherwise freely available, it seems clear that his employer had created the risk which eventuated[114] – and even that in the *F* case, at least if the majority's finding that Ms F accepted a lift from Van Wyk precisely because of his status as a policeman is accepted.[115] Similarly, my colleague Alistair Price has argued in respect of the decision in *Lee* that it is best understood as an expression of the 'material contribution to risk' rule developed in other jurisdictions, specifically in England and Wales. According to this rule it is sufficient for a finding of factual causation that the defendant materially contributed to the risk of the harm's occurring. Price argues that the application of this rule is justified in cases, such as *Lee,* which involve the systematic failure of the state to provide an obligatory government service.[116] Thus academics treat as authoritative the progressive outcomes in key judicial decisions such as *K, F* and *Lee,* but take upon themselves the responsibility of justifying those decisions in terms of rules of general application. The partnership between judge and doctrinal scholar characteristic of common-law systems endures, but in a different form.

In the language of Dworkin, each time a judge decides a case she ought to seek to make of the law the best that it can possibly be.[117] As I suggested in the introduction to this chapter, the task of the doctrinal scholar is essentially the same, but with a wider scope. Of course doctrinal scholars in South Africa should continue to carry out their regular functions: to criticise judicial decisions as imperfect expressions of the rules and principles of the law; to point the way for future decisions; and, exceptionally, to seek to show that a decision cannot be substantively correct in the context of the legal system as a whole, even while it continues formally to bind.[118] But in some cases at least, it seems that the first duty of the South African scholar is to "look a judge in the eye and have the courage to tell him exactly why he is right."[119]

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appears to lend it greater weight. However, for criticism of this argument in the South African context, see *Fagan,* SALJ 126 (2009) 156, 199–204.

[114] "It goes without saying that because of the enormous potential for public harm inherent in the inadequate preservation and control of arms, the department […] should not in general be able to avoid liability […]" (at para. 24); "That the risk should fairly fall on its creator when the public is exposed to weaknesses in its systems or frailties in its personnel is merely reciprocal to the powers that the defence force exercises […]" (at para. 26).

[115] See especially paras. 78–82.

[116] *Price,* SALJ 131 (2014) 491, 495 ff.: "A constructive interpretation of *Lee*".

[117] *Ronald Dworkin,* Law's Empire (Cambridge 1986) ch. 7.

[118] See again the account of the common-law doctrinal method provided by Burrows in *Burrows,* Challenges for Private Law (n. 1) 10.

V. Conclusion

Perhaps the overarching theme of this chapter has been the way in which common-law judges and doctrinal scholars, notionally partners in a joint enterprise, can nevertheless talk past each other; much of it has been devoted to describing the different ways in which that partnership or conversation can break down. Historically, doctrinal legal scholars have exerted a high degree of influence over the decisions of the South African courts; indeed, at times they appear to have regarded themselves as law-making authorities in their own right, in open competition with the judiciary. There is still much work for doctrinal lawyers to do in contemporary South Africa, specifically in rationalising the ancient actional categories of the uncodified civil law and in testing common-law rules for compliance with Constitutional rights and values. However, their influence is now considerably lessened. Increasingly the courts themselves do not speak the language of doctrinal law, in that they do not justify their own decisions according to rules of general application. At best, the conversation is rather one-sided.

Nevertheless, I have argued that doctrinal scholarship still has a vital role to play in the context of the South African legal order. Understanding *what the law is* – that pursuit of the values of consistency and coherence which is the distinctive genius of doctrinal scholarship – is indispensable in the context of a legal system based on precedent. To the extent that judges neglect this question, doctrinal scholars can fill the void. The equivalence of doctrinal scholarship with 'legal formalism' has led to its being reviled as socially conservative, both in South Africa and elsewhere.[120] Arguably doctrinal analysis devoid of any awareness of the wider social, economic, political or theoretical context of law is deficient.[121] Yet it can only be absurd to suppose that the quest for transparent rationality in law is somehow innately regressive. It is in advancing that cause that South African doctrinal lawyers can make their greatest contribution yet.

[119] This quote (with minor amendments) is taken from the preface to *Ben McFarlane,* The Structure of Property Law (Oxford 2008).

[120] In the South African context see, e.g., *Davis,* Democracy and Deliberation (n. 63) 130 ff.

[121] Although it is equally true that "[l]egal scholarship must focus on what it can do better than other disciplines." See *Bódig,* Erasmus Law Review 8 (2015) 43, 54.