

**DELICT, CONTRACT, AND THE BILL OF RIGHTS:
A PERSPECTIVE FROM THE UNITED KINGDOM**

HECTOR L MACQUEEN*

*Professor of Private Law and Director, AHRB Research Centre for Studies in Intellectual Property and
Technology Law, University of Edinburgh*

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INTRODUCTION

I would like to begin by offering my congratulations to the South African Law Journal on its 120 years of publication and on its status as the oldest continuously published English-language law journal in the world. At least for me, it has always been the readiest portal through which to enter the world of South African law, and I have long relished its unique blend of scholarship, passion and wit. It is a real privilege to be a member of the journal's Editorial Board and to be given this opportunity to contribute towards this celebration, not only of the journal's 120 years, but also of a decade of the Bill of Rights in South African law.

The impact of the Bill of Rights upon the law of delict and contract is not one upon which I can claim any special expertise. My approach is that of a Scottish private lawyer who in 1997-98 found himself obliged for the first time to consider the subject of human rights by dint of the Parliamentary passage of the Human Rights Act and the Scotland Act in the UK. A conference on the subject was held in Edinburgh in June 1998, the whole basis of which was to elicit the initial response of Scots lawyers without a background in human rights law as to its likely impact in their fields (mine being the law of obligations and intellectual property).¹ What this led to for me was the discovery that the Human Rights Act provided, at least potentially, for indirect horizontal application of the European Convention on Human Rights (henceforth ECHR) in private law and private disputes,² by way of what I later learned was what Aharon Barak, President of the Israeli Supreme Court, had dubbed an 'application to the judiciary'

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¹ The proceedings are published in A Boyle, C Himsworth, A Loux and H MacQueen (eds), *Human Rights in Scots Law* (2002).

² See H L MacQueen and D Brodie, "Private rights, private law and the private domain", in *ibid*, 141-176.

model of horizontality.³ The Human Rights Act does not say that private parties may enforce Convention rights against each other; rather, the Act makes it unlawful for public authorities to act in a way incompatible with a Convention right, and includes amongst these public authorities courts and tribunals.⁴ Thus in deciding disputes between private parties courts and tribunals had to act compatibly with Convention rights, which would include, not only their procedures and remedies, but also their handling of the substantive law being applied in the case. Another section of the Act required courts to read and give effect to legislation in a way compatible with Convention rights.⁵ In addition the courts were given power to declare legislation of the United Kingdom Parliament incompatible with Convention rights (but leaving such legislation still in force albeit subject to amendment by Parliament),⁶ while under the Scotland Act legislation of the new Scottish Parliament could be wholly avoided if it was incompatible with Convention rights.⁷

The full significance of these provisions, and in particular indirect horizontality, was difficult to read in relation to my chosen fields. It was most obvious in relation to the law of delict, in particular the liability of public authorities for harm resulting from their action (or more often, inaction), and also the law of nuisance and defamation;⁸ least obvious in the law of intellectual property, although rights of freedom of expression might well have some effect in relation to copyright and the protection of confidential information;⁹ and somewhere in between was the law of contract, in which issues about inequality of bargaining power and public policy, especially with regard to employment and consumers, might be able to find a further voice through the application of human rights.¹⁰ Above all perhaps was the protection of privacy, a right recognised by Article 8 ECHR but not as such in the common law of England, and all but invisible also in Scottish jurisprudence.¹¹

Along the way of the tentative exploration outlined above, I dipped a comparative toe in the South African jurisprudence, noting above all the finding of the indirect horizontality of the Bill of Rights in the Interim Constitution in *Du Plessis v De*

³ See A Barak, "Constitutional human rights and private law", in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (2001), 13-42.

⁴ Human Rights Act 1998, s. 6.

⁵ *Ibid*, s. 3.

⁶ *Ibid*, s. 4.

⁷ Scotland Act 1998, s. 29(1)(d).

⁸ See discussion in MacQueen and Brodie (n. 2), at 141 (n. 3), 156-61.

⁹ *Ibid*, 146-7, discussing the case of *Ashdown v Telegraph Group Ltd* [2002] Ch 149 (CA).

¹⁰ *Ibid*, 162-4.

*Klerk*¹² and academic discussion of what the difference between direct and indirect horizontality might entail;¹³ and also some instances where there had been some effect from human rights on the content of the law, particularly in contract, with regard to interpretation and the availability of remedies.¹⁴ But my investigation was very limited and *ad hoc*. Nor would I claim today to have gone much more deeply into the developing South African law. But I have at least read a little more widely, and been struck by a number of points which I will share with you today. My perspective will be comparative, considering the British (that is, the English and the Scottish) and the South African experiences to date. I will not necessarily be looking to solve any of the problems which exist in the various systems, because, as will emerge, I am not certain that any immediate conclusions can or even should be drawn; but my comments may help to stimulate further discussion and thought in and about them.

SOME CONTRASTS

Context: transformation

My first observation is the great difference in context. On 17 February 2003 Mr Justice Albie Sachs of the Constitutional Court gave a lecture in Edinburgh, from which I first fully appreciated what it means to say that the South African Constitution is a constitution for transformation of the country, and the Constitutional Court sees the document and its own jurisdiction as a strong means to this end. This perception powerfully informs the reasoning of the Court in many of the cases I have read, notably the ones on the delictual liability of public authorities and on defamation. Moreover the transformation being sought is not just one in the governance of South Africa, but in the very fabric of society as a whole – in the behaviour and perceptions of all people in South Africa, as both public and private actors. Hence the importance of the extension of the Bill of Rights into private as well as public law. There is a clear (and probably conscious) parallel with the approach of the German Constitutional Court (the Bundesverfassungsgericht), in its establishment in the *Lith* case in 1958¹⁵ of the indirect horizontal effect of the Basic Law in private law, against a background where the inter-

¹¹ Ibid, 168-71. See further, on subsequent developments, H L MacQueen, “Human rights and private law in Scotland: a response to President Barak”, [2003] 78 *Tulane Law Review* forthcoming; and below, 000-000.

¹² 1996 (3) SA 850 (CC).

¹³ In particular A Cockrell, “The Bill of Rights and private law: a threshold issue of ‘horizontality’”, *Butterworths Bill of Rights Compendium* (1997), and A Fagan, “Determining the stakes: binding and non-binding bills of rights”, in Friedmann and Barak-Erez (n. 3).

¹⁴ *Dabelstein v Hildebrand* 1996 (3) SA 42 (C); *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C); *Janse van Reensburg v Grievé Trust* CC 2000 (1) SA 315 (C).

war Weimar constitution had wholly failed to prevent the catastrophe of Hitler and the Nazi government for the German people between 1933 and 1945:

This system of values, centring on the freedom of the human being to develop in society ... must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.¹⁶

A more contemporary parallel is to be found in the constitutions of the formerly Communist states of Eastern Europe, many of which appear to be opting for the direct application of human rights in private disputes as well as those involving public bodies.¹⁷

In contrast, the United Kingdom domestication of the ECHR was not informed by a desire for a revolutionary transformation of society or even by a new vision of the State in Britain. After all the United Kingdom was one of the principal movers behind the creation of the ECHR in the late 1940s, and was a member state of the Convention from its very beginning, albeit one that only allowed its citizens access to the European Court of Human Rights (European Court of Human Rights) in 1966.¹⁸ Despite the absence of a written constitution, a stable Parliamentary democracy and welfare state are already in existence in an increasingly multi-cultural country. This did not arise by way of a revolution or an overthrow of the old order of things other than the replacement of the Stuart with the Hanoverian monarchy in 1688-89, which explains the survival until recently of such relics of the past as the hereditary members of the upper chamber of the legislature, the House of Lords. Extreme politics of either right or left have never gained enough electoral support to come anywhere near government. Parliamentary supremacy is not generally abused (although concerns exist at present about the increasing security and emergency powers being legislated for by government since the events of 11 September 2001), and political disagreements are encapsulated within a system where government changes political stripe with some regularity. The keynote of public discourse is tolerance rather than violence (with the notable exception, until lately, of

¹⁵ 7 BverfGE 198.

¹⁶ For this translation, see B S Markesinis, W Lorenz and G Dannemann, *The German Law of Obligations* (3rd edn., 1997), vol. 2, 355. On the historical background, see A Heldrich and G M Rehm, "Importing constitutional values through blanket clauses", in Friedmann and Barak-Erez (n. 3), 113-15. On the aim of the Basic Law to change the post-Nazi attitudes and values of the German people, see R Eatwell, *Fascism: A History* (1996), 218.

¹⁷ This is documented in a book review by Olha Cherednychenko, "Human rights and private law", (2003) 10 *Maastricht Journal of European and Comparative Law* 301.

¹⁸ For a detailed account of UK involvement in the ECHR down to 1966, see A W Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001).

Northern Ireland), the death penalty has been long abolished,¹⁹ and legislation against gender, racial and, more recently, disability discrimination is firmly established,²⁰ even if “one cannot create a community of saints by statute”.²¹ Legislation also exists for the promotion of health and safety at work, data protection, and now freedom of information,²² and these areas of public policy, like sex, race and disability discrimination, are largely controlled through the activities of specialist public agencies and commissioners,²³ rather than via courts and litigation. Judicial review of administrative action is well developed, but is largely respectful of the separate territories of the judiciary and the executive. There are major problems of social exclusion, organised crime, anti-social behaviour and consequential public fear of crime, but these are not the kind of problem that respond to merely constitutional change.

The main reason for domestication of human rights in 1998 was pragmatic – to stop having cases on the ECHR which originated in Britain decided only in the European Court of Human Rights at Strasbourg, and to give citizens the opportunity to raise these matters first in our courts rather than abroad. This, as well as the history of British involvement in the creation of the ECHR, lies behind the title of the White Paper published in 1997 in which the new Labour Government announced its intention to legislate for the domestication of the ECHR – *Bringing Rights Home*.²⁴ It was also hoped that decisions of the British courts on the ECHR might be taken into account by, and influence, the decision-making of the Strasbourg court, which was sometimes thought not to be as well informed as it might be on the distinctive laws and legal systems within the United Kingdom. A further context was provided by another of the new government’s constitutional reforms, devolution of legislative power to Scotland, and the decision to limit the powers of the Scottish Parliament and Executive by reference to Convention rights.²⁵

¹⁹ Murder (Abolition of Death Penalty) Act 1965.

²⁰ See the Equal Pay Act 1970; Sex Discrimination Act 1975; Race Relations Act 1976 and Race Relations (Amendment) Act 2000; Disability Discrimination Act 1996.

²¹ T B Smith, *Basic Rights and their Enforcement* (1979), 47.

²² See Health and Safety at Work etc Act 1974; Data Protection Acts 1984 and 1998; Freedom of Information Act 2001; Freedom of Information (Scotland) Act 2002.

²³ Although the UK Government is considering the creation of a single body, the Equality and Human Rights Commission, to administer discrimination laws, and to replace the Commissions for Racial Equality, Equal Opportunity and Disability Discrimination (see <http://news.bbc.co.uk/1/hi/uk/3223045.stm>), while the Scottish Executive will be creating a Human Rights Commission in the near future (see its Consultation Paper of February 2003, *The Scottish Human Rights Commission* (<http://www.scotland.gov.uk/consultations/justice/shrs-00.asp>)).

²⁴ *Bringing Rights Home: the Human Rights Bill* (Cm 3782: October 1997).

²⁵ See the Scotland Act 1998.

But the absence of any need or widespread desire for fundamental political or social transformation in the United Kingdom means that we have had no parallel to some of the fundamental questions which have been addressed – or which have begun to be addressed – through Bill of Rights litigation in South Africa. Thus in Scotland, for example, the great human rights issues have been about delay in criminal prosecutions,²⁶ the appointment of judges,²⁷ banning fox-hunting,²⁸ and the impartiality of planning inquiries;²⁹ not the kinds of issue which go to the roots of society and its values. In contrast, the South African cases I have looked at have been about such fundamentals of a free and democratic society as social welfare, the freedom of the press, and the protection of society, and women in particular, from violence clearly perceived to be endemic; and all this only in the cases which can be said to involve private or common law dimensions alongside human rights.

Legislative framework

A second point on which difference is apparent is the framework on which it all rests. The Human Rights Act continues to recognise the ultimate supremacy of Parliament in the United Kingdom, because the courts cannot declare a Westminster Act invalid, whereas Article 1 of the South African Constitution founds the Republic on human dignity, the achievement of equality, the advancement of human rights, non-racialism and non-sexism, and the supremacy of the Constitution and the rule of law. Neither the ECHR nor the Human Rights Act contain statements like the following from the South African Constitution and Bill of Rights:

s 8(1) – The Bill of Rights applies to all law and binds the legislature, executive, judiciary and all organs of the State

s 8(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.

²⁶ *Dyer v Watson* 2002 SC (PC) 89; *HM Advocate v R* 2003 SC (PC) 21. See also on the latter *Attorney General's Reference No 2 of 2001* [2003] UKHL 68.

²⁷ *Starrs v Ruxton* 2000 JC 208; *Millar v Dickson* 2002 SC (PC) 30.

²⁸ *Adams v Scottish Ministers* 2003 SLT 366 (subject to appeal); *Whaley v Lord Advocate* 2003 GWD 22-651.

²⁹ *County Properties Ltd v Scottish Ministers* 2002 SC 79; *Lafarge Redland Aggregates Ltd, Petitioners* 2001 SC 298 (subject to appeal).

s 8(3) - When applying a provision of the Bill of Rights to a natural or juristic person ... 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

s 39(1) – When interpreting the Bill of Rights, a court, tribunal or forum

- (a) must promote the values that underlie an open and democratic society based upon equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

s 39(2) ... 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.

United Kingdom courts are obliged to interpret legislation to be consistent with, and give effect to, Convention rights,³⁰ but apart from the general judicial obligation to comply with the ECHR,³¹ nothing similar is said about the common law. This leaves it open for debate as to exactly how the indirect horizontality should work, and as to whether it should be ‘strong’ or ‘weak’, with Convention rights requiring, or merely influencing to varying degrees, the development of the common law.³² That debate has so far been conducted almost entirely in the academic literature, and not at all in decided cases (although there have been cases where such debate might have occurred, as I will discuss later). There is also debate in South Africa as to exactly what sections 8(3) and 39(2) mean, but it seems pretty clear that the overall effect of the sections quoted is intended to be generally direct and strong, with the common law to develop to give effect to rights.³³

³⁰ Human Rights Act 1998, s. 3.

³¹ Human Rights Act 1998, s. 6; see above, text accompanying nn. 4, 5.

³² For references see MacQueen and Brodie (n. 2), 153-154, and MacQueen (n. 11); add now D Beylveld and S D Pattinson, “Human rights and horizontality”, (2002) 118 *LQR* 623.

³³ See, in addition to references at n. 13, e.g. L Wolhuter, “Horizontality in the interim and final constitutions”, (1996) 11 *SAPL* 512; S Woolman and D Davis, “The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and final Constitutions”, (1996) 12 *SAJHR* 361; H Cheadle and D Davis, “The application of the 1996 Constitution in the private sphere”, 1997 *SAJHR* 44; C Sprigman and M Osborne, “*Du Plessis* is not dead: South Africa’s 1996 Constitution and the application of bill of rights to private disputes”, (1999) 15 *SAJHR* 42; I M Rautenbach, “The Bill of Rights applies to private law and binds private persons”, 2000 (2) *TSAR* 296; J de Waal, I Currie and G Erasmus, *The Bill of Rights Handbook* (4th edn, 2001), 45-6, 55-7.

Crucially, as is emphasised in the negligence case of *Carmichele v Minister of Safety and Security*,³⁴ the courts have an obligation to develop the common law even when the parties to a case themselves do not refer to the Bill of Rights. The Constitutional Court has held in *Fose v Minister of Safety and Security*³⁵ that common law delictual remedies may provide all the relief that is needed in respect of a breach of constitutional rights.³⁶ In the defamation case of *Khumalo v Holomisa*,³⁷ O'Regan J held section 8(3) to mean that the Constitution is not necessarily of direct application to the common law, arguing that section 8(2) qualifies its application of the Constitution to private persons (“if and to the extent that [the right] is applicable”), unlike section 8(1) with regard to the organs of the State; and that section 8(3) would be meaningless if the Constitution applied directly to all common law. This view misses the important point that section 8(1) “applies to all law” even before it applies to the organs of the State, which may necessitate a distinction between the constitutionality of legal rules, on the one hand, and that of actions by persons, public and private, acting in terms of otherwise valid rules; in other words, the Constitution does apply directly to all common law. The requirement to develop the common law in section 8(3) arises when it is decided that a right is applicable in a particular private relation and situation and that existing law does not afford sufficient protection of that right in that situation.³⁸ However in any event, in *Khumalo* O'Regan J also held that the nature of the subject matter (defamation) meant that freedom of expression was of direct horizontal application as contemplated by section 8(2). If the common law was then found unconstitutional, the common law would have to be developed under section 8(3).

There are also other significant differences between the text of the ECHR and the Bill of Rights. These could be summarised as lying in the socio-economic area, with which the Bill of Rights is much more concerned than the ECHR. So the latter contains nothing directly concerned with freedom of movement, residence, trade, occupation and profession, or on labour relations, the environment, housing, health care, food, water and social security.³⁹ Perhaps more significantly from the point of view of private law, the

³⁴ 2001 (4) SA 938 (CC).

³⁵ 1997 (3) SA 786 (CC).

³⁶ This has led Johan van der Walt to argue that the 1996 Constitution provides only for indirect horizontal application: “Progressive indirect horizontal application of the Bill of Rights: towards a co-operative relation between common-law and constitutional jurisprudence”, (2001) 17 *SAJHR* 341 at 350-5.

³⁷ 2002 (5) SA 401 (CC).

³⁸ I M Rautenbach, “Engaging the text of section 8 of the Constitution in applying the Bill of Rights to law relating to private relations”, 2002 (4) *TSAR* 741.

³⁹ Cf clauses 21-24, 26-27 of the Constitution.

ECHR contains no positive affirmations of rights to equality or dignity,⁴⁰ although it does prohibit “discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status” (ECHR Article 14). Overall, however, the ECHR provides less open country for the transformation of private law than its South African counterpart, although that may change should the Charter of Fundamental Rights of the European Union gain full legal status as part of the mooted Constitution of the European Union:⁴¹ as well as placing human dignity at the head of the list of rights (Article II-1), it covers such matters as freedom to choose an occupation and the right to engage in work (Article II-15), freedom to conduct a business (Article II-16), equality between men and women (Article II-23), rights of collective bargaining and action (Article II-28), and a high level of consumer protection (Article II-38).⁴²

Finally, it should be noted that the limitations clause of the South African Constitution (section 36) is not exactly matched by anything in the ECHR, although a number of the Articles do limit rights by reference to such concepts as the needs of a democratic society (e.g. Articles 6, 8, 9, 10, 11, 16, and First Protocol Article 1). The exercise of a right aimed at destroying other persons’ rights under the Convention, or at limiting them to a greater extent than is provided for by the Convention, is prohibited under Article 17 ECHR.

Court structure

Another contrasting aspect of the two frameworks is the court structure. In South Africa, the division between the Constitutional Court and the Supreme Court of Appeal (SCA) appears to have given rise to concerns: the latter has been seen, rightly or wrongly, as reluctant to take full account of the Bill of Rights in private law litigation, while a difficulty for the constitutional development of private law is the Constitutional Court’s relative lack of expertise in private law, and the SCA’s corresponding lack of expertise in constitutional law.⁴³ A division of the courts into constitutional and other

⁴⁰ Cf clauses 9 and 10 of the Constitution.

⁴¹ For the draft Constitution, which was rejected at the Brussels European Council in December 2003, see the UK Government White Paper, *A Draft Constitution for the European Union* (Cm 5872, July 2003). It is unclear at the time of writing whether and when the issue of a Constitution will return to the European Union agenda.

⁴² For the text of the Charter, see Official Journal of the European Communities, 18.12.2000, C364/1-22, available at <http://ue.eu.int/dj/docs/en/CharteEN.pdf>. It forms Part Two of the draft European Constitution, and references to article numbers are to the latter document.

⁴³ See van der Walt (above, n. 36).

ones has never been a feature of either the English or the Scottish legal systems,⁴⁴ and although the United Kingdom looks set to replace the House of Lords with a Supreme Court in the near future, the Government clearly does not envisage that this will be a constitutional court, save that as part of its overall jurisdiction it will deal with constitutional matters.⁴⁵ Ironically, the new arrangements are being proposed almost entirely to ensure that the structure of the highest appellate court does not fall foul of the ECHR.⁴⁶ But tension of the kind that may have existed between the SCA and the Constitutional Court is unlikely to arise in the UK, and as a result we are unlikely to see discussions such as whether a distinction exists between the constitutional and private law concepts of privacy.⁴⁷ Where tension does arise, however, is with regard to the continuing jurisdiction of the European Court of Human Rights, the decisions of which on issues related to private law have not always been well received in the United Kingdom courts.⁴⁸

Impact on private law

Having said all this, it is striking how similar the areas of impact in private law have been in the two systems, at least in the context of delict and contract. In delict there has been much litigation about the liability of public authorities, and about defamation. There has been very little indeed about contract. Nor is this surprising: Van Aswegen's shrewd comments, made in 1995 in relation to the Interim Constitution of 1993, still probably offer us the clearest explanation of the position so far in both South Africa and the UK:

Obviously, legal rules formulated with reference to policy considerations furnish the most effective method of incorporating the values underlying the protection of fundamental rights in a bill of rights into the fabric of private law. It can be accepted that the bill of rights reflects the fundamental legal values accepted in a

⁴⁴ For the jurisdiction of the Privy Council in devolution issues, see Scotland Act 1998, Sch. 6.

⁴⁵ Department of Constitutional Affairs Consultation Paper, *A Constitutional Reform: a Supreme Court for the United Kingdom*, CP 11/03, July 2003.

⁴⁶ For the difficulties see Lord Bingham's Constitution Unit Lecture of May 2002, "A new Supreme Court for the United Kingdom", accessible at <http://www.ucl.ac.uk/constitution-unit/files/90.pdf>; and Lord Steyn, "The case for a Supreme Court", (2002) 118 *LQR* 382. Not all the Law Lords are convinced: see Lord Cooke of Thorndon, "The Law Lords: an endangered heritage", (2003) 119 *LQR* 49; and the divided response of the Law Lords to the Consultation Paper, dated 27 October 2003 and accessible at <http://www.parliament.uk/documents/upload/JudicialSCR271003.pdf>.

⁴⁷ D McQuoid-Mason, "Invasion of privacy: Common law v constitutional delict – does it make a difference?", [2000] *Acta Juridica* 227.

⁴⁸ See in particular Lord Hoffmann, "Human rights and the House of Lords", (1999) 62 *MLR* 159, advocating British withdrawal from the Strasbourg court. See further below, text accompanying nn. 63, 64.

society, and as such it represents a crystallised form of public policy. The policy considerations determining the contents and application of open-ended rules can therefore to a significant extent be extracted from the provisions of the bill of rights. The South African law of delict is based on general principles of liability, and of the five general requirements for liability, two consist of open-ended standards and a third encompasses elements of policy. The tests for wrongfulness and legal causation or remoteness are text-book examples of open-ended standards: objective reasonableness in the light of the *boni mores* or legal convictions of the community in the first instance and the flexible criterion of a sufficiently close connection in the light of reasonableness, fairness and justice between conduct and harm in the second. The test for negligence, based on the conduct of the reasonable man in the circumstances, also incorporates policy in the determination of reasonable conduct. Indirect horizontal application should in principle be accomplished quite easily by utilising the values underlying fundamental rights as important policy considerations in the determination of wrongfulness, remoteness and negligence in delict cases. ... The law of contract, unlike the law of delict, does not consist mainly, or even to any significant degree, of general principles of liability in the form of open-ended standards. In fact the general principles of contractual liability consist for the most part of very precise, detailed rules with a fixed area of application. ... Moreover, different types of contracts are regulated by a legion of specific additional rules.⁴⁹

DELICT

Van Aswegen's forecast above appears to be well-borne out by the case of *Carmichele v Minister of Safety and Security*,⁵⁰ which was concerned with the delictual liability of the police for having failed to prevent the sexually motivated assault and attempted murder of the plaintiff by one Coetzee, and subsequent decisions in the SCA. The context of *Carmichele* was a small community in which Coetzee had already been arrested twice in respect of assaults on women but released pending trial; he had also been reported twice to the police as prowling around the house in which the plaintiff lived, and his mother had requested the authorities to take her son into custody. Initially Chetty J in the Cape Provincial Division and the SCA refused to hold the police liable,

⁴⁹ A van Aswegen, "The implications of a Bill of Rights for the law of contract and delict", (1995) 11 *SAJHR* 50, at 60, 65.

⁵⁰ 2001 (4) SA 938 (CC).

following previous authority on omissions,⁵¹ but on further appeal to the Constitutional Court it was held that the SCA had failed to mount an inquiry into the implications of the Bill of Rights in the case. The inquiry was a two-stage one: whether the common law needed development to meet the requirements of the Constitution, and if so, how that development should take place. In doing so, the court should bear in mind that the primary agent of law reform was the legislature rather than the judiciary; courts should only engage in the incremental kind of reform possible within particular cases. In this case, the court should have considered the rights to life, dignity, freedom and security, privacy and freedom of movement, in assessing whether or not the conduct of the police had been wrongful. The case having returned to Chetty J, he held the Minister to be liable,⁵² in the light of additional guidance from the SCA in two further police liability cases, *Minister of Safety and Security v Van Duivenboden*⁵³ and *Van Eeden v Minister of Safety and Security*.⁵⁴ In *Van Duivenboden*, the SCA said:

[T]he ‘convictions of the community’ must necessarily now be informed by the norms and values of our society as they have been embodied in the 1996 Constitution. The Constitution is the supreme law, and no norms and values that are inconsistent with it can have legal validity – which has the effect of making the Constitution a system of objective, normative values for legal purposes.⁵⁵

In *Van Eeden* this passage was more or less repeated, but the Court added:

The Constitution cannot, however, be regarded as the exclusive embodiment of the delictual criterion of the legal convictions of the community, nor does it mean that this criterion will lose its status as an agent in shaping and improving the law of delict to deal with new challenges.⁵⁶

It seems clear that the SCA has, in this area at least, fully accepted the role of the Bill of Rights in the development of the law of delict at least so far as concerns the liability of public authorities, although without giving up on the purely common law dimensions of the tests of wrongfulness.⁵⁷ This seems to be correct, given that the common law test was already a dynamic one, encompassing the possibility of development,⁵⁸ and that the court is expected first to consider the common law before moving to the question of

⁵¹ 2001 (1) SA 489 (SCA).

⁵² 2003 (2) SA 656 (C).

⁵³ 2002 (6) SA 431 (SCA).

⁵⁴ 2003 (1) SA 389 (SCA).

⁵⁵ 2002 (6) SA 431 at para. 17.

⁵⁶ 2003 (1) SA 389 at para. 12.

⁵⁷ See further *Minister of Safety and Security v Hamilton*, 26 September 2003, SCA.

constitutional compatibility. But what must also be correct is that the Constitution will outweigh any other factor in the test of wrongfulness in the perhaps unlikely event of any conflict or doubt.

However, this does not mean that the police are automatically liable to every victim of criminal violence, as the case of *Saaiman v Minister of State and Safety*⁵⁹ makes clear. There, there was no liability for harm suffered by persons who were merely passers-by at an armed cash-in-transit robbery and who were, so to speak, incidentally shot when the firearms were discharged. In *Phoebus Apollo Aviation CC v Minister of Safety and Security*,⁶⁰ PA were robbed of money, which the police traced. When the police went to recover the money, they discovered that it had been stolen again, this time by three other (dishonest) policemen. The issue in the case was whether the common law of vicarious liability should be developed to allow recovery from the Minister on the grounds of failure to protect property. Kriegler J for the Constitutional Court held not. The constitutional protection of property was to protect rights against government action, not against dishonest policemen. This was not a case about wrongfulness, unlike *Carmichele*, but was rather about the scope of liability for admittedly wrongful acts. There was no reason to develop the common law to impose absolute liability on the State for dishonest employees. The liability here was simply a common law matter for the ordinary courts to decide; the Constitutional Court would not say whether or not common law tests had been applied correctly. The second judgment of Chetty J in *Carmichele* itself is now under review in the SCA, and while the general approach to the case is clear from the Court's other decisions on police liability, there are still common law questions to be answered about such matters as negligence and causation.

In all these police cases reference is made to the comparable jurisprudence arising from the approach to the question found in the UK. In the leading case of *Hill v Chief Constable of West Yorkshire*,⁶¹ which was a claim by the mother of the last of the many female victims of the notorious serial woman killer Peter Sutcliffe (also known as the Yorkshire Ripper), it was held that the police were not liable for the consequences of their failure to identify and catch Sutcliffe before the final killing, albeit that their investigation had not been a model of detection or police procedure. The House of Lords thought that, in addition to the lack of proximity between the parties, it would not

⁵⁸ See e.g. discussions in M M Corbett, "The role of policy in the evolution of our common law", (1987) 104 *SALJ* 52, and F Du Bois, "Getting wrongfulness right: a Ciceronian attempt", [2000] *Acta Juridica* 1.

⁵⁹ 2003 (3) SA 496 (O).

⁶⁰ [2003] BCLR 14 (CC).

⁶¹ [1989] AC 53.

be fair, just and reasonable to impose duties of this kind on the police, who should not be hampered by fears of civil liability in their investigation of crime. One result of this decision was a finding of no liability by the English Court of Appeal in the subsequent case of *Osman v Ferguson*,⁶² where the killer in question was a person who, like the assailant in *Carmichele*, had been known to the police for some time as a serious threat to the ultimate victim. That case went to the European Court of Human Rights, which ruled that the rights of the victim's family had been infringed. On the facts, this was not under Article 2 ECHR (right to life) (although that Article could give rise to a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual); rather the liability was under Article 6 (right of access to a court, or to a fair trial), because the rule in *Hill* was an immunity for the police which disabled the courts from investigating claims against them.⁶³

This ruling on Article 6 was highly controversial: partly on the basis that it misunderstood English procedural rules on "striking out" cases; partly because the characterisation of the rule in *Hill* as to when there was a duty of care was mischaracterised as an immunity; and partly because the decision seemed to hold that Article 6 was not merely about access to courts but about the content of the substantive rights and obligations to be enforced there, contrary to previous decisions of the European Court of Human Rights itself.⁶⁴ Subsequently in *Z v United Kingdom* and *TP and KM v United Kingdom*,⁶⁵ the European Court of Human Rights backtracked on Article 6 in a case about the liability of a local authority for failure to use statutory powers to rescue children who were suffering from appalling parental abuse and neglect. The House of Lords had again held, in *X v Bedfordshire County Council*,⁶⁶ that it was not fair, just and reasonable to impose a delictual duty of care on the authority in this context. The European Court of Human Rights held that this was no infringement of Article 6, but was an infringement of Article 3 (right to protection against inhuman and degrading treatment). This seems much more like the approach being taken in South Africa, albeit in a very different situation.

But for South Africa *Z* shows how social welfare provision is also a context in which issues about rights to life, security and dignity can inform the delictual liability of

⁶² [1993] 4 All ER 344 (CA).

⁶³ *Osman v United Kingdom* (2000) 29 EHRR 245.

⁶⁴ For a detailed discussion, see E McKendrick, "Negligence and human rights: re-considering *Osman*", in Friedmann and Barak-Erez (n. 3), 331-56; and note also Lord Hoffmann (n. 48), at 162-4; *Barrett v Enfield LBC* [2001] 2 AC 550 at 559-60 per Lord Browne-Wilkinson.

⁶⁵ [2001] 2 FLR 549, 612.

public authorities which fail to act. On the specific facts of the case, Articles 28(1)(b), (c) and (d) – “every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment; ... to basic health care services and social services; to be protected from maltreatment, neglect, abuse or degradation” – would have applied. Again, issues about the right to life and security may arise in contexts other than criminal behaviour: in the Scottish case of *Gibson v Strathclyde Police*,⁶⁷ where the court held that the police could have a duty of care, not only in the context of their duty to investigate and suppress crime, but also in their civil functions: *in casu*, a failure to ensure the safety of road users where a road bridge had been swept away in a river flood and, as a consequence of the police withdrawing a guard at the bridging point, the victim had driven into the river and been drowned.

Looking again from South Africa back to the United Kingdom and Europe, the decisions in *Carmichele* and subsequent cases raise questions about whether Article 2 ECHR (right to life) should have been applied in *Osman*. While in *Hill* the unfortunate victim was simply a member of a very large class of women who were at some kind of risk in Yorkshire at the time of the Ripper episode, the threat was much more immediate and direct in *Osman*. The two cases are readily distinguishable, in the way that, say, *Saaiman*, the cash-in-transit case, is distinguishable from *Carmichele*. Certainly since *Osman* the English courts have been sufficiently more willing to find a duty of care upon the police and other public authorities in similar situations where physical harm has resulted from negligent conduct, to make tenable the suggestion that *Osman* itself would now be decided differently in England.⁶⁸

The argument is supported by the views of the Court of Appeal in the latest child abuse case against a local authority, *JD v East Berkshire Community Health*.⁶⁹ The Court followed *Z* in finding the denial of a duty of care upon the health authority no breach of Article 6 ECHR; but that the authority of the House of Lords’ ruling in *X v Bedfordshire County Council* was significantly restricted by the subsequent case law, and, in relation to duties to the child affected (but not to the parent) could not survive the coming into force of the Human Rights Act on 2 October 2000. Lord Phillips MR said:

Given the obligation of the local authority to respect a child’s Convention rights, the recognition of a duty of care to the child on the part of those involved should

⁶⁶ [1995] 2 AC 633.

⁶⁷ 1999 SC 429.

⁶⁸ For these English cases see H Beale and N Pittam, “The impact of the Human Rights Act 1998 on English tort and contract law”, in Friedmann and Barak-Erez (n. 3), at 149-51.

⁶⁹ [2003] EWCA Civ 1151, 31 July 2003, [2003] 4 All ER 796 (CA).

not have a significantly adverse effect on the manner in which they perform their duties. In the context of suspected child abuse, breach of a duty of care in negligence will frequently also amount to a violation of Article 3 or Article 8. The difference, of course, is that those asserting that wrongful acts or omissions occurred before October 2000 will have no claim under the Human Rights Act. This cannot, however, constitute a valid reason of policy for preserving a limitation of the common law duty of care which is not otherwise justified. On the contrary, the absence of an alternative remedy for children who were victims of abuse before October 2000 militates in favour of the recognition of a common law duty of care once the public policy reasons against this have lost their force. It follows that it will no longer be legitimate to rule that, as a matter of law, no common law duty of care is owed to a child in relation to the investigation of suspected child abuse and the initiation and pursuit of care proceedings. It is possible that there will be factual situations where it is not fair, just or reasonable to impose a duty of care, but each case will fall to be determined on its individual facts. In reaching this decision we do not suggest that the common law duty of care will replicate the duty not to violate Articles 3 and 8. Liability for breach of the latter duty and entitlement to compensation can arise in circumstances where the tort of negligence is not made out. The area of factual enquiry where branches of the two duties are alleged are, however, likely to be the same.⁷⁰

It remains to be seen whether the House of Lords will agree with this rewriting of the earlier decisions which hitherto they have been at some pains to defend.

A further dimension is the liability of public authorities in respect of the non-physical interests of those with whom they deal. In *Western Cape Premier v Fair Cape Property Developers (Pty) Ltd*,⁷¹ a property developer sought to recover damages for financial losses caused by allegedly negligent decision-making by the planning authorities. Although the SCA rejected the claim, the Constitution was nevertheless regarded as a relevant element in assessing the wrongfulness of the authority's conduct: "the duties imposed on all organs of government by the Constitution, and in particular in the light of the positive obligations imposed by s 7 (the state must 'respect, protect, promote and fulfil the rights in the Bill of Rights'); and s 41(1) (all spheres of government and organs

⁷⁰ At paras. 83-5. The Court of Appeal does not refer to another important House of Lords decision controversially denying public authority liability, *Stovin v Wise* [1996] AC 923 (a road safety issue), but there may also be questions about it under Article 2 ECHR.

⁷¹ 7 May 2003, SCA.

of state must provide ‘effective, transparent, accountable and coherent government’).⁷² It is not clear, however, whether this invocation of the Constitution adds anything of substance to the reasoning of the court in the case.

A final general observation on the South African, British and European cases considered in this section is that they all possess a strong vertical dimension, as claims against such organs of the state as the police and local authorities, and are therefore by no means instances of pure horizontal application of human rights in the law of delict. What effect, if any, will the decisions have in genuinely horizontal cases between private parties? Certainly an effect is possible: cases against public authorities have often in the past been leading ones in the law of negligence generally.⁷³ Medical negligence cases are examples of ones which may hover in the zone between the vertical and the horizontal, as defendants may operate in either the public or private sector; but such cases will always tend to involve issues about rights to life and health, and human rights issues could therefore play some part in decisions.⁷⁴ On the other hand, the SCA has rejected an argument that the right to protection of bodily integrity under Article 12(2) of the Bill of Rights requires a shift from fault-based to strict product liability, at least in relation to pharmaceuticals.⁷⁵ And it is open to debate how far developments in the law of negligence can in any event go, without the need to make reference to human rights, albeit that the development would appear to be consistent with human rights. Thus in England, despite earlier judicial observations about the possibility of an ECHR challenge on the basis of equality and access to a court,⁷⁶ the House of Lords rid the law of the immunity of barristers from liability for their forensic conduct of litigation without taking the ECHR into account – in the case of Lord Hoffmann, explicitly so.⁷⁷ But the case was decided in May 1999, before the Human Rights Act came into force,⁷⁸ and, as Lord

⁷² per Lewis AJA, para. 37.

⁷³ In the UK see for example *Anns v Merton LBC* [1978] AC 728 and *Murphy v Brentwood DC* [1991] 1 AC 398 in relation to liability for pure economic loss; in South Africa, *Minister van Polisi v Ewels* 1975 (3) SA 590 (A) (omissions) and *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) (negligent misrepresentation).

⁷⁴ See generally G T Laurie, “Medical law and human rights: passing the parcel back to the profession?”, in Boyle et al (n. 1), 245-74, 343-4, for an overview extending well beyond negligence cases.

⁷⁵ *Wagener v Pharmicare Ltd* 2003 (4) SA 285.

⁷⁶ *Arthur J S Hall & Co (a firm) v Simons* [2002] 1 AC 615 at 625 (para. 7), per Lord Bingham MR (now the Senior Law Lord).

⁷⁷ Lord Hoffmann’s observation is to be found at *ibid*, 707D. Lords Hope and Hutton, in forming a minority in favour of preserving the immunity in criminal cases, referred to the ECHR to show that their view was not inconsistent with Convention rights (at 718, 734).

⁷⁸ On 2 October 2000.

Millett observed,⁷⁹ had the House gone the other way on the issue, a fresh challenge based on Convention rights would have been inevitable.

An approach somewhat similar to that in the barristers' immunity case can be found in the South African defamation case of *National Media Ltd v Bogoshi*,⁸⁰ in which the SCA modified the strict liability of the press for defamation by creating a media defence of reasonable publication.⁸¹ This was done apparently without taking direct account of the Constitution, although Hefer JA, giving the opinion of the court, stated that he believed the decision to strike a proper balance between the constitutional values of the right to protect one's reputation and the freedom of the press.⁸² But, as one commentator put it, "the Court appeared to be far more comfortable in relying on English and Australian cases and a Dutch author in developing our common law than on the Constitution ... It is to be hoped that courts will grasp the opportunity and not give the impression that, where possible, the Constitution should be kept out of the realm of private law".⁸³ The better approach is, then, following the guidance of the Constitutional Court in *Carmichele*,⁸⁴ not to change the common law and then compare the result with the Bill of Rights, but to assess the existing law in the light of the Constitution, and then change it if necessary and possible for the court, i.e. make the Constitution the explicit basis for developing the law. Again, however, there are issues about the common law's own internal mechanisms for change alongside those under the Constitution.⁸⁵ In *Bogoshi* the court introduced the defence of reasonable publication by deploying the concept of lawfulness, the general criterion of reasonableness based on considerations of fairness, morality, policy and the Court's perception of the legal convictions of the community. This, as already observed in relation to the law of negligence, is a highly flexible instrument even without regard to the Constitution. But what appears from *Carmichele* is that the Constitution should be fed in along with the other elements of the common law test; and presumably it should receive the greatest weight from the court in the event of any conflict.

⁷⁹ At 753D-E.

⁸⁰ 1998 (4) SA 1196 (SCA).

⁸¹ For the pre-*Bogoshi* development of defamation, see P Q R Boberg, "Defamation South African style – the odyssey of *animus injuriandi*", in C Visser (ed), *Essays in Honour of Ellison Kahn* (1989), 35-61.

⁸² At 1217G.

⁸³ J R Midgley, "Media liability for defamation", (1999) 116 *SALJ* 211 at 224.

⁸⁴ See above, text at n. 50 and following.

⁸⁵ See e.g. D van der Merwe, "Constitutional colonisation of the common law: a problem of institutional integrity", 2000 (1) *TSAR* 12.

However, the constitutionality of the development of the common law in *Bogoshi* has been confirmed by the Constitutional Court in *Khumalo v Holomisa*.⁸⁶ Also at issue in this case was the constitutionality of the lack of a requirement that the defamatory statement be untrue (the plaintiff had not alleged that it was untrue, but the action had been allowed to proceed in the Transvaal High Court, in accordance with the common law). This was said to be contrary to the right to freedom of expression (section 16 of the Constitution). O'Regan J held that while freedom of expression was fundamental, it was not a paramount value. It had to be construed in the context of other values in the Constitution: here in particular, human dignity, freedom and equality, which was a “foundational” constitutional value. The law of defamation existed to protect this interest; did it strike an appropriate balance between the competing interests? Truth in the public interest was a defence but the onus was on the defendant, who had made the statement, to prove truth. But truth is notoriously difficult to prove, and this burden was known to have a “chilling effect” on the publication of statements which might otherwise be in the public interest. This had been much mediated by the *Bogoshi* “reasonable publication” defence. If the common law was to be changed to put the burden of proving untruth on the plaintiff, the result would be “zero-sum”, and a balance would not be struck between dignity and freedom of expression. The *Bogoshi* defence, on the other hand, did produce a balance, without involving either side in proof of truth or untruth, as the case might be. Defamation defendants should be left with two defences – truth, or reasonable publication – which was not an unreasonable burden, even if the full meaning of “reasonable publication” had still to be fully worked out. The SCA in *Bogoshi* had therefore come to the right balance in its result.

A point of interest to a British lawyer in this case is the balancing of freedom of expression with the right to dignity, and the finding that the latter outweighs the former. In the United Kingdom freedom of expression has been accorded very high value by both the legislature and the courts. The most notable instance is in the Human Rights Act 1998, under section 12 of which the courts are to have “particular regard” to the importance of freedom of expression where a party is seeking relief which may affect that right. This was inserted in the Act during its Parliamentary passage at the behest of the media lobby, and it has been considered a number of times by the courts, particularly in cases relating to privacy, confidentiality and copyright.

⁸⁶ 2002 (5) SA 401 (CC). The plaintiff was a well-known politician whom the defendant newspaper had alleged to be involved in a gang of bank robbers and under police investigation; the respondents were the applicants to the CC.

CONTRACT⁸⁷

Contract presents more difficulties than delict in any discussion of the constitutionalisation of private law. The law is founded on ideas of transactional equality, private autonomy, and voluntary inter-action, in which, within very broad limits, individuals strike their own balance of interests, rather than have it set for them by external, social or public standards. Contracting parties know their own interests better than any government agency, and the cumulative pooling of individual interests which is represented by contracts, together with their internal, bargained-for, resolution of any conflicts which may have preceded the conclusion of a contract, is thus in the public interest as well. It can be argued that this freedom of contract is itself a constitutionally protected right, as an aspect of human dignity and personal autonomy,⁸⁸ although from a European perspective it should be noted that the ECHR contains no express commitment either to the freedom and sanctity of contract as a central value, or to the protection of consumers or employees as an aspect of prohibition of discrimination in its Article 14.

But this kind of thinking about and justification for individual autonomy and freedom of contract has long been the subject of criticism for its failure to recognise the realities of market power and the actual inequalities which exist between contracting parties, depriving them of any meaningful transactional equality; most notably, but not exclusively, in the cases of employees and consumers. Some therefore see the constitutionalisation of private law as an opportunity to redress the balance in favour of the weaker party and of more general social values as reflected in the constitution, and to bring human rights to bear upon private as well as public power. In general, however, the ECHR catalogue of rights, conceived in the aftermath of the Second World War and reflecting the concerns of its times, is insufficient to be a basis for a radical approach to contractual freedom.⁸⁹ The ECHR may not enshrine, but neither does it derogate from, freedom and sanctity of contract, directly or indirectly; nor could anything in the text be used to compel parties to contract with each other,⁹⁰ apart perhaps from the prohibition

⁸⁷ See in general for South Africa, R H Christie, "The law of contract and the Bill of Rights", in *Butterworths Bill of Rights Compendium* (2002).

⁸⁸ See Barak (n. 3), 35; R Brownsword, "Freedom of contract, human rights and human dignity", in Friedmann and Barak-Erez (n. 3), 181-199, at 184-187.

⁸⁹ See further on this theme, *ibid.*

⁹⁰ Although note the common law position of the common carrier and the innkeeper, both held to be making continuous offers to the public at large and liable in damages for unjustified refusal of business:

on discrimination in Article 14.⁹¹ Section 1 of the South African Constitution, on the other hand, founds the republic on the values of “human dignity [and] the achievement of equality”. The Bill of Rights provides in Article 9 that no person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, while Article 10 declares that “everyone has inherent dignity and the right to have their dignity respected and protected”. These provisions are capable of use in contractual contexts, since they are applicable to private relationships. Thus Article 9 was used by Louw J to interpret the word “family” in an insurance contract as including a long-term homosexual partnership in *Farr v Mutual & Federal Insurance Co Ltd*,⁹² while Articles 9 and 10 were deployed by Van Zyl J to develop new purchaser remedies in the common law relating to the trade-in of motor cars in *Janse van Rensburg v Griewe Trust*.⁹³ Most striking of all, inasmuch as it is a decision compelling parties to contract with each other, is *Hoffmann v South African Airways*,⁹⁴ where the airline’s policy of not employing HIV-positive persons as cabin attendants was held by the Constitutional Court to infringe both Articles 9 and 10, and it was also ordered to employ such a person who had passed all the other requirements for the position.

Can human rights go further in addressing issues of inequality in contract, in particular substantive transactional inequalities producing unfair contracts? In Germany, broad concepts of good faith and public policy (good morals) found in the BGB “are considered the entrance gates through which constitutional values may gain access to the private law sphere”, including contract.⁹⁵ The best-known example is the 1993 decision of the Bundesverfassungsgericht (Constitutional Court)⁹⁶ in a case where a 21-year old woman earning DM1100 per month gave a guarantee to a bank in respect of her father’s

Gloag & Henderson, The Law of Scotland, (11th edn, 2001) paras. 6.07, 25.01-25.02; 2 *Chitty on Contracts*, (28th edn, 1999), paras 33-096, 36-014ff; LAWSA, vol 2, para. 81; vol 28, para. 40.

⁹¹ See above, 000.

⁹² 2000 (3) SA 684 (C).

⁹³ 2000 (1) SA 315 (C).

⁹⁴ 2001 (1) SA 1 (CC).

⁹⁵ Heldrich and Rehm (n. 16), at 115; see also A Flessner, “Freedom of contract and constitutional law in Germany”, in A M Rabello and P Sarcevic (eds), *Freedom of Contract and Constitutional Law* (1998), 87-103; and O Cherednychenko, “The constitutionalization of contract law: something new under the sun?”, *Electronic Journal of Comparative Law*, <http://www.ejcl.org/>, forthcoming. Note however that historically the BGB clauses on good morals and good faith (§§ 138 and 242) were also means by which in the Nazi era courts aligned contract law with government policy (see P G Monateri and A Somma, “The fascist theory of contract”, in C Joerges and N S Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (2003), at 61-69).

⁹⁶ BVerfG, 19 October 1993, 89 BverfGE 214, 232 NJW 36 (1994).

business debts, which extended to DM2 million. The court held that for the Bundesgerichtshof to find the daughter liable under the guarantee was a violation of the general liberty clause (article 2) of the Basic Law. While the clause guaranteed private autonomy for citizens in managing their social, economic and legal transactions with others, there has been no such autonomy if there has been a structural imbalance in negotiating power between the parties, and the civil courts have the constitutional duty to take account of this when called upon to invalidate the contract on the ground of immorality or bargaining in bad faith. In other words, in unequal contracts the “radiating” effect of the Basic Law was to be given effect through the appropriate open-ended norms applying to contract law, i.e. § 138 (good morals) and 242 (good faith) of the BGB.⁹⁷

The ability of South African law to make similar use of open-ended norms of contract law such as good faith, public policy and rationality is somewhat uncertain because, firstly, the existence and scope of such norms is disputed.⁹⁸ Thus in a study of good faith published in 1999, Dale Hutchison concluded:

[I]t seems reasonably clear that South African law has no general doctrine of good faith. By that I mean that good faith is not an independent or free-floating principle that the courts can employ directly to justify intervention in contractual relationships on the grounds of unreasonableness or unfairness. ... [G]ood faith may be regarded as an ethical value or controlling principle, based on community standards of decency and fairness, that underlies and informs the substantive law of contract. It finds expression in various technical rules and doctrines, defines their form, content and field of application and provides them with a moral and theoretical foundation. Good faith thus has a creative, a controlling and a legitimating or explanatory function. It is not, however, the only value or principle that underlies the law of contract. ... [T]he influence of good faith in the law of contract is merely of an indirect nature, in that the concept is usually if not always mediated by some other, more technical doctrinal device. Thus, for example, while good faith does not empower a court directly to supplement the

⁹⁷ See further the subsequent decision of the Bundesgerichtshof invalidating the guarantee: BGH 24 February 1994, *NJW* 1994, 1341 (translated into English in Markesinis, Lorenz and Dannemann, (n. 16), 232-9.

⁹⁸ See e.g. R Zimmermann, “Good faith and equity”, in R Zimmermann and D P Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996), 217-60; A Cockrell, “Second-guessing the exercise of contractual power on rationality grounds”, [1997] *Acta Juridica* 26; D Hutchison, “Good faith in the South African law of contract”, in R Brownsword, N J Hird and G Howells (eds), *Good Faith in Contract*:

terms of a contract, or to limit their operation, it might in appropriate cases enable the court to achieve these same results indirectly, through the use of devices such as implied terms and the public policy rule.⁹⁹

But there were also one or two judges prepared to go further than this. In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*,¹⁰⁰ the facts of which were comparable in some respects to the German guarantee case described earlier, a sick old woman stood as surety to a bank for the debts of her son. The woman's daughter was subsequently appointed her curatrix and obtained an order from the court that the suretyship was unenforceable. The majority decided the case on the basis of the woman's lack of capacity, but Olivier JA founded his concurring decision squarely on a doctrine of good faith. In *Mort NO v Henry Shields-Chial*¹⁰¹ Davis J argued that the constitutional obligation to develop the common law in accordance with the rights of equality and dignity required the courts to establish an active doctrine of good faith; a view which prompted Hutchison to comment:

[T]o reach directly for the baton of good faith would be to confess to a want of technical expertise or creativity. Palm-tree justice no doubt has its virtues, but as lawyers we should adhere to the ideal of justice according to law.¹⁰²

In *Sasfin (Pty) Ltd v Beukes*,¹⁰³ the Appellate Division appeared to extend the concept of public policy widely to regulate unfair or unconscionable contract terms. In the leading judgment, Smalberger JA said:¹⁰⁴

Our common law does not recognise agreements that are contrary to public policy. ... Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced. ... The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. ... In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and

Concept and Context (1999), 213-42; J Lewis, "Fairness in South African contract law", (2003) 120(2) *SALJ* 330.

⁹⁹ Hutchison (above, n. 98), at 229-31.

¹⁰⁰ 1997 (4) SA 302 (SCA).

¹⁰¹ 2001 (1) SA 464 (C), at 474-475.

¹⁰² "Non-variation clauses in contract: any escape from the *Shifren* straitjacket?", (2001) 118 *SALJ* 720.

¹⁰³ 1989 (1) SA 1 (A).

¹⁰⁴ At 7I-9G.

requires that commercial transactions should not be unduly trammelled by restrictions on that freedom. ... A further relevant, and not unimportant, consideration is that public policy should properly take into account the doing of simple justice between man and man.

If this seemed to herald a judicial approach less cautious than that to good faith, the caveat of Smalberger JA about public policy also favouring freedom of contract must nevertheless be borne in mind. It is therefore notable that the use of public policy as a way of tackling unconscionable contracts seems to have fallen into disfavour in recent years,¹⁰⁵ although arguments based on this approach continue to be made both in court and commentary.¹⁰⁶

Nevertheless, the SCA confirmed twice in 2002 that public policy in contract is now rooted in the Constitution and the fundamental values that it enshrines.¹⁰⁷ But the actual decisions in these cases have been criticised for being insufficiently radical in their approach to contractual freedom.¹⁰⁸ In *Brisley v Drotsky*¹⁰⁹ the SCA held that the common law *Shifren* doctrine – an entrenchment clause in a contract providing that all amendments to the contract had to comply with specified formalities is binding¹¹⁰ – remained in force, even although the contract in question (a lease) and the clause were embodied in a standard form purchased by the landlord in a shop, and were never the subject of negotiation, disclosure or legal advice between the parties.¹¹¹ The landlord was seeking to evict the tenant for breaches of the lease conditions, although previously he had taken no action in response to similar breaches by the tenant and might therefore, without the *Shifren* clause, have been taken to have accepted an implicit variation of the lease. The Court rejected an argument that the principle of good faith could prevent

¹⁰⁵ See, for example, *Standard Bank of South Africa v. Wilkinson* 1993 (3) SA 822 (C); *De Klerk v. Old Mutual Insurance Co Ltd* 1990 (3) SA 34 (E); *Pangbourne Properties Ltd v. Nitor Construction (Pty) Ltd* 1993 (4) SA 206 (W); *De Beer v. Keyser* 2002 (1) SA 827 (SCA). But cf *Ex parte Minister of Justice: in re Nedbank Ltd v. Abstein Distributors (Pty) Ltd, Donnelly v. Barclays National Bank Ltd* 1995 (3) SA 1 (A) (holding a ‘conclusive proof’ clause that entitles a creditor to be the sole author of the certificate of balance due by a debtor to be *contra bonos mores*) and *Baart v. Malan* 1990 (2) SA 862 (E).

¹⁰⁶ See e.g. K Hopkins, “Insurance policies and the Bill of Rights: rethinking the sanctity of contract paradigm”, (2003) 120 *SALJ* 155, arguing that claim time limitation clauses in insurance contracts infringe s. 34 of the Bill of Rights (access to fair public hearing).

¹⁰⁷ *Brisley v. Drotsky* 2002 (4) SA 1 (SCA) at paras. 33-36; *Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (SCA) para. 18.

¹⁰⁸ See e.g. D D Tladi, “Breathing constitutional values into the law of contract: freedom of contract and the Constitution”, (2002) 35 (2) *De Jure* 306; D Tladi, “One step forward, two steps back for constitutionalising the common law: *Afrox Health Care v Strydom*”, (2002) 472; D Brand, “Disclaimers in hospital admission contracts and constitutional health rights”, (2002) 3(2) *ESR Review: Economic and Social Rights in South Africa* 17-18; Lewis (above, n. 98).

¹⁰⁹ 2002 (4) SA 1 (SCA).

¹¹⁰ *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A).

invocation of the *Shifren* clause because it was in all the circumstances unreasonable, unfair and contrary to good faith. The judgment of Olivier JA in *Eerste Nasionale Bank* was disapproved. The court accepted Dale Hutchison's understanding of the legitimating and explanatory role of good faith, but observed that this did not override other important considerations such as freedom of contract. The dictum of Smalberger JA in *Sasfin*, also quoted above, was to similar effect with regard to public policy.

The court also did not take Hutchison's preferred, rule-based, route - "limiting the *Shifren* principle, possibly by recognizing exceptional circumstances where the principle will not apply, certainly by employing and developing concepts such as waiver, estoppel and pactum de non petendo"¹¹² - to implementing constitutional values in this particular context. There are however notable passages in the judgment of Cameron JA in *Brisley*, affirming the application of the Constitution in contract law, but arguing for "perceptive restraint"¹¹³ in this process, and concluding: "The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual 'freedom', and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity."¹¹⁴

In *Afrox Healthcare v Strydom*,¹¹⁵ an exclusion clause in a hospital treatment contract was challenged as contrary to public policy and good faith by a patient who had suffered irreparable harm in a hospital operation as a result of a nurse's negligence in dressing his wounds. The challenge was dismissed, the court finding that the contractual relationship was not an unequal one, that good faith was not in itself a ground for invalidating contracts,¹¹⁶ and that the clause did not promote negligent conduct contrary to the respondent's constitutional right of access to health care; other factors, such as the

¹¹¹ On these facts in the UK, it is submitted, the clause would have been subjected to the fairness and reasonableness tests of the Unfair Contract Terms Act 1977, ss. 3, 17.

¹¹² Hutchison (n. 102), 745.

¹¹³ At para. 7.

¹¹⁴ At para. 8. *Brisley v Drotsky* is cited *arguendo* as authority for the constitutional status of contractual autonomy in *Graf v Buechel* 2003 (4) SA 378 (SCA), where the Court rejected an argument that the rule against *pacta commissoria* in pledge contracts was unconstitutional and against public policy where the pledgor was not the pledgee's debtor.

¹¹⁵ 2002 (6) SA 21 (SCA).

¹¹⁶ See also on this *Boe Bank Bpk v Van Zyl* 2002 (5) SA 165 (C): bank able to enforce surety against father-in-law of principal debtor; no duress or undue influence; and no overarching principle of good faith or improper procurement of consensus recognised in South Africa by SCA; a lower court would need direction before it could make the change.

hospital's need to maintain its professional reputation, would enure to promote the right to health. Moreover freedom of contract had to be taken into account.¹¹⁷

Although the case does not involve any direct reference to the Constitution, it is also worth noting another decision of the SCA about exclusion clauses, *Van der Westhuizen v Arnold*.¹¹⁸ A contract for the sale of a car provided that “no warranty whatsoever has been or is given to [the buyer] by the seller or his agent(s)”. Negotiations had made both parties aware of the car's need for repairs. After the buyer took delivery, a bank claimed ownership of the car; the buyer paid it off, and then claimed from the seller, who pleaded the exclusion clause. The SCA held that the clause was inapplicable to the warranty of title, which arose *ex lege* rather than *ex consensu*, and to which the exclusion was not intended to apply. Lewis AJA considered, but rejected, the possibility that special rules of interpretation applied to exclusion clauses, and based her conclusion upon interpretation in the light of the surrounding circumstances. The case thus illustrates Hutchison's preferred approach of working towards the result that good faith might seem to demand, but through existing, more specific and precise rules of contract law.¹¹⁹

There have been no discussions of human rights in contract in the United Kingdom courts to compare with these South African cases. So far as concerns unfair terms in standard form contracts, the reason for the lack of discussion is quite clear: the United Kingdom already has legislation in place on this subject, passed long before the Human Rights Act, and giving the judges power to regulate clauses by way of tests of reasonableness (the Unfair Contract Terms Act 1977) and good faith (the Unfair Terms in Consumer Contracts Regulations which implement an EC Directive of 1993¹²⁰). Some kinds of clause – e.g. exclusions of liability for death or personal injury,¹²¹ exclusions of liability to consumers for defective goods, exclusions of the warranty of title in any sale of goods¹²² – are made void altogether, so that the *Afrox* and *Westhuizen* cases would have been unproblematic in the United Kingdom. Standard form contracts such as those in

¹¹⁷ See also *De Beer v Keyser* 2002 (1) SA 822, where a bank's method of recovering debts owed to it by customers to whom loans had been made, via direct deductions from salary pay-ins to the bank, was not against public policy; Constitution not considered.

¹¹⁸ 2002 (6) SA 453 (SCA).

¹¹⁹ Note that in the UK the warranty of title under Sale of Goods Act 1979, s 12, cannot be excluded by a contractual term: Unfair Contract Terms Act 1977, ss. 6, 20. See further below, text accompanying n. 122.

¹²⁰ Council Directive 93/13, OJ 1993, L95/29; implemented first in the UK by SI 1994 No. 3159, and then by SI 1999 No. 2083. The Law Commissions are considering how the Regulations and the 1977 Act might be amalgamated in a single enactment (Unfair Terms in Contracts: A Joint Consultation Paper (Law Com CP No 166, Scot Law Com DP No. 119, 2002)).

¹²¹ Unfair Contract Terms Act 1977, ss. 2, 16.

¹²² *Ibid.*, ss. 6, 7, 20, 21.

Brisley v Drotzky would be subject to a reasonableness text under the Unfair Contract Terms Act.¹²³ There are also specific judicial controls over a number of particular types of consumer contract and transaction: distance selling,¹²⁴ extortionate credit bargains,¹²⁵ and package holidays,¹²⁶ for example. So there is generally no need, at least for consumers, to resort to Convention rights in pursuit of contractual fairness, even if that were possible. Further, under the Unfair Terms Regulations a public official, the Director General of Fair Trading, is given a roving role in the regulation of standard terms in consumer contracts, and since 1999 a number of other consumer protection organisations, not all in the public sector, have also enjoyed powers of the same kind.¹²⁷

One case from the United Kingdom courts shows that human rights may have unexpected effects on consumer protection legislation, however. In *Wilson v The First County Trust Ltd*,¹²⁸ the statutory provision in issue was s. 127(3) of the Consumer Credit Act 1974 (a United Kingdom statute), under which the court could not enforce an otherwise regulated consumer credit agreement where there was no document containing all the prescribed terms of the agreement signed by the debtor. Securities related to the loan were also unenforceable. W's loan agreement, which she had signed, misstated the amount of the credit given, so both it and a related security over her BMW car were unenforceable. The Court of Appeal took the view that this was a disproportionate response, given the absence of prejudice to any party in the misstatement and having regard to the creditor's Convention rights under Article 6 (right to a hearing) and the First Protocol Article 1 (no deprivation of possessions except in the public interest and subject to law). While the policy aim, as determined from the legislative history of the 1974 Act, was legitimate, the means of achieving its goals was disproportionate and inflexible in disabling the court from consideration of all the factors in a case.

If this decision was correct, it had major implications, not just for the Consumer Credit Act, but also in general for the legislative consumer protection technique of making void certain types of term in contracts.¹²⁹ But the decision was overturned by the House of Lords in July 2003.¹³⁰ The primary ground for the reversal was that the facts

¹²³ ss. 3, 17.

¹²⁴ Consumer Protection (Distance Selling) Regulations, SI 2000 No. 2334.

¹²⁵ Consumer Credit Act 1974, s. 137.

¹²⁶ Package Travel, Package Holidays and Package Tours Regulations, SI 1992 No. 3288 (as amended).

¹²⁷ Unfair Terms in Consumer Contracts Regulations 1999, regs. 10-12 and Sch. 1.

¹²⁸ [2002] QB 74 (CA).

¹²⁹ See for discussion of the case in the Court of Appeal, N Bamforth, "Private law remedies and the Human Rights Act 1998: an overview", in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (2003).

¹³⁰ [2003] 3 WLR 568; 4 All ER 97 (HL).

and circumstances of the case had arisen before 2 October 2000, when the Human Rights Act 1998 came into force; and while the Act could be applied to legislation passed before that date, it contained no provision enabling such application retrospectively in relation to activities before that date. However the House did also consider whether the provisions of the Consumer Credit Act were compliant with Convention rights. Article 6 was held not to apply, because it did not affect the content of civil rights and obligations, only the availability of a tribunal in which to determine them (*Z* was cited here). The court was not barred from considering whether or not s. 127 applied; but could not enforce any agreement to which the section was held to apply. But Article 1 of the First Protocol ECHR was engaged by the inability of the lender to enforce its security rights as a result of s. 127: “The lender’s rights were extinguished in favour of the borrower by legislation for which the state is responsible. This was a deprivation of possessions within the meaning of Article 1.”¹³¹ However, what had to be shown was that the legislator’s response to the problem with which it was confronted failed to balance the public interest and the protection of property interests, and was disproportionate:

Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified ... The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person’s Convention right. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.¹³²

The House emphasised the legislature’s experience from prior legislation and the views of the high-powered committee which had proposed the Act, and concluded that the sanction imposed was one Parliament was entitled to use.¹³³

¹³¹ per Lord Nicholls, para. 44.

¹³² At para. 70.

¹³³ Note Lord Nicholls’ doubt as to whether this conclusion would be reached if the provision applied, not just to loans of less than £25,000 (the upper limit for application of the CCA), but to loans in general.

A final point from the United Kingdom perspective is the capacity of the common law of contract to develop even without the prompt provided by human rights. In England, protection of a guarantor against the unfair pressure resulting from a close personal relationship with the person whose debts were being guaranteed was achieved by the House of Lords in 1994 through the equitable doctrine of constructive notice in *Barclays Bank v O'Brien*,¹³⁴ and the uncertainties to which this gave rise, especially for the professional advisers of guarantors and for the prospective beneficiaries of the guarantees (usually banks), were addressed by the House by the provision of a very detailed set of guidelines in *Royal Bank of Scotland v Etridge*.¹³⁵ In Scotland, the House of Lords followed *O'Brien* in 1997, but took the doctrinal route of “the broad principle in the field of contract law of fair dealing in good faith”,¹³⁶ the equity of constructive notice being unknown to Scots law. The use of the principle in this way was something of an innovation in Scottish contract law because, as in South African law, good faith is generally an underlying principle of an explanatory and legitimating rather than an active or creative nature.¹³⁷ But in subsequent decisions the Scottish courts have preferred to continue to use this broad principle rather than adopt the detailed guidance found in *Etridge*,¹³⁸ and it remains to be seen whether, encouraged by the use of the principle in EU-inspired legislation such as that on unfair terms in consumer contracts,¹³⁹ good faith will move beyond the realm of personal guarantees into other areas of contract law; and, if so, whether Convention rights will play any part in rendering more specific the application of the general concept. English law, on the other hand, remains resolutely against the adoption of any general principle of good faith outside the areas where it is used in legislation: the preferred approach is “to avoid any commitment to over-riding principle in favour of piecemeal solutions in response to demonstrated problems of unfairness”.¹⁴⁰

It may also be noted that both Scots and English law suffer from what has been termed a “hardening of the categories” in respect of the role of public policy in contract

¹³⁴ [1994] 1 AC 180.

¹³⁵ [2002] 2 AC 773.

¹³⁶ 1997 SC (HL) 111, per Lord Clyde, at 121B-C.

¹³⁷ See in particular the contributions of H L MacQueen and J M Thomson to A D M Forte (ed), *Good Faith in Contract and Property* (1999), 5-37, 63-76.

¹³⁸ See *Clydesdale Bank v Black* 2002 SC 555, following a dictum of Lord Clyde in *Etridge* (at 817 para. 95).

¹³⁹ See above, text accompanying n. 120.

¹⁴⁰ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, per Bingham LJ, at 439.

law,¹⁴¹ and it is certainly possible that here Convention rights may play some part in opening up what is presently a quiescent area. On the other hand, in employment contracts the courts in both countries, aided by academic writers, have not needed the stimulus of Convention rights to develop the doctrine of mutual trust and confidence to create rights and duties for both employers and employees,¹⁴² while Lord Hoffmann has led the way towards the adoption of more subjective methods of interpreting contracts¹⁴³ – with results that have occasionally surprised their progenitor.¹⁴⁴

DEVELOPING THE COMMON LAW: JUDGES AS LAW-MAKERS UNDER A HUMAN RIGHTS REGIME

In *Kleinwort Benson v Lincoln City Council*,¹⁴⁵ the House of Lords rid English law of a defence to a restitutionary (enrichment) claim which had existed at common law for nearly 200 years,¹⁴⁶ that of mistake of law. To reach this result the House needed no help from the ECHR, the entry into domestic enforceability of which still lay two years ahead. Instead the court had to discuss the conundrum arising where, as in the case before it, the mistake of law was the result of a judicial decision post-dating the payment recovery of which was being sought under the restitutionary claim.¹⁴⁷ If that post-payment decision was merely *declaratory*, so that previous understandings of the law were wrong (the view of the majority in *Kleinwort*), then the payment was indeed made under mistake; but if the decision *changed* the law (the minority view), then there was no mistake at the time of payment, but only a misprediction as to what the law on the subject would be once the courts finally determined it. The view of the majority took the classical approach to the question of what judges do in the common law; the view of the minority characterised the classical approach as “a fairy tale in which no-one any longer believes”,

¹⁴¹ H L MacQueen and A Cockrell, “Illegal contracts”, in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, forthcoming 2004.

¹⁴² See J D Brodie, “Legal coherence and the employment revolution”, (2001) 117 *LQR* 604.

¹⁴³ The leading decisions in which Lord Hoffmann has participated are *Mannai Investments Co Ltd v Eagle Star Life Insurance Co Ltd* [1997] AC 749; *Charter Reinsurance v Fagan* [1997] AC 313; and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 (HL). For cautious Scottish courts see *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657; *Bank of Scotland v Junior* 1999 SCLR 284; *Project Fishing International v CEPO Ltd* 2002 GWD 16-525; *Glasgow City Council v Caststop Ltd* 2002 SLT 47, aff’d 2003 SLT 526; *Hongate Shopping Centre Ltd v GLS 164 Ltd* 2002 SLT 820; *Hardie Polymers Ltd v Polymerland Ltd* 2002 SCLR 64. The *Caststop* case is being appealed to the House of Lords.

¹⁴⁴ *BCCI v Ali* [2001] 2 WLR 735 (HL) in which the “Hoffmann approach” was applied even though Lord Hoffmann dissented!

¹⁴⁵ [1999] 2 AC 349.

¹⁴⁶ Since *Bilbie v Lumley* (1802) 2 East 469.

¹⁴⁷ *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1.

and its own understanding as “common sense”.¹⁴⁸ In effect, the view of the majority attributed retrospective effect to judicial determinations of the law. On the other hand, while the minority agreed that the mistake of law rule was bad and should be changed, they took the view that this was a change to be made by the legislature and not the courts, since otherwise there would be considerable uncertainty about the limitation period to be applied and consequential damage to certainty in commercial and other transactions. In other words, the ramifications of the decision and its effect on cases of a kind other than that before the court were too complex to be susceptible to a purely judicial change of the law.

Legislating for the application of human rights in the common law relating to private relationships and transactions raises similar issues about how to characterise judicial power in the shaping of the common law, and the limits, if any, on that power where human rights questions are engaged. It is clear that both the Bill of Rights and the Human Rights Act enable the South African and British judges respectively to “develop” the law. But what is the ambit, the reach, the scope, of this power of development? To what extent is it trammelled by the classical idea that the judge’s function is to declare and apply the law, and that it is for the legislature to change the law if judicial decision-making leads to results deemed politically, socially or otherwise unacceptable? What about the retrospective effect of judicial “developments” in the law resulting from the application of human rights?

The declaratory theory of the common law should not be mistaken for one of stasis. *Kleinwort Benson* makes this clear: the declaratory majority ejected the mistake of law defence from the English law of restitution. Of the majority, Lord Goff gave the fullest explanation of his position.¹⁴⁹ The judge is essentially deciding the case before him (or her), and the law determined and applied by the judge in that particular set of circumstances should be capable of application in all “congruent” cases in future (whenever their circumstances arose). The “interstitial” development of the common law thus occurs principally through the ever-changing and variable facts of the cases to be decided by the courts, and the subsequent use of decisions on these facts as precedents once it is decided in a later case that they are “congruent”. In the pursuit of this incremental development of the common law, the judge may further have regard to academic writing, comparative law and “the perceived interests of justice”. Lord Goff also recognises the possibility of more major departures in the judicial development of

¹⁴⁸ *Kleinwort Benson*, per Lord Browne-Wilkinson, at 358G, and per Lord Lloyd of Berwick, at 394B.

the law, but not does not throw much light on when and how this may occur. However, if we take the law of restitution, with which his judgment was actually concerned, we can see that the major departure in *Kleinwort Benson* was permissible because earlier case law of the House had drawn together the precedents on the law of restitution under the principle of unjust enrichment,¹⁵⁰ and “a blanket rule of non-recovery [such as the mistake of law rule], irrespective of the justice of the case, cannot sensibly survive in a rubric of the law based on the principle of unjust enrichment”.¹⁵¹ The mistake of law rule was itself a mistake which occurred because the basic principle in the law had not been identified at the time it was introduced. Thus *Kleinwort Benson* was part of a realignment of principle which had already begun to be effected by the courts as part of the legitimate exercise of their law-development function.

Lord Goff’s analysis of judicial law-making within the essentially declaratory system of the common law aligns him in many ways with other great common law judges such as Oliver Wendell Holmes, Benjamin Cardozo and Lord Atkin, all of whom recognised and deployed the power of the judge to reformulate the law not only by way of analogical reasoning from precedent, but also in terms of wider principles identified as underlying these precedents viewed as a whole.¹⁵² Each made use of perceptions of justice in this process, and each had his own way of identifying justice and what it required in the case before them and for the development of the law. Although the former South African Chief Justice, Michael Corbett, has spoken of the need for the judiciary to identify and reflect the common norms and values of the community in which the law applies, and to become “the living voice of the people”¹⁵³ in developing the law, a more prosaic view would be that the judge in search of the direction to take in moving the law on is most likely to be comfortable with the guidance to be found in legal sources. Lord Goff refers to academic writing and comparative law, and Chief Justice Corbett would also have done so. Other aids to finding the right path can include the work of the legislature, with existing legislation showing the preferred policy route, or the work of official law reform bodies such as Law Commissions showing that the existing law is in need of reform. Sometimes, the inaction of the legislation on a particular matter

¹⁴⁹ *Kleinwort Benson* (n. 145), 378.

¹⁵⁰ In particular, *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] 1 AC 70.

¹⁵¹ *Kleinwort Benson* (above, n. 145), at 373.

¹⁵² See e.g. O W Holmes, *Collected Legal Papers* (1920), in particular the essay, ‘The path of the law’, first published in 1897; B N Cardozo, *The Nature of the Judicial Process* (1921); G Lewis, *Lord Atkin* (1982), 56-62, 80.

¹⁵³ Corbett (n. 58), 67-9.

may suggest that policy is against change in the law. And finally, in both South Africa and the United Kingdom there are now in addition the human rights instruments.¹⁵⁴

Chief Justice Barak of Israel has argued that human rights work *within* the old private law, imbuing old tools with new contents or creating new tools with traditional private law techniques, and enabling the court to grant a remedy that would not have been previously available. Where private law cannot develop further within its own structures, the legislature has the responsibility to fill the gap; although, for the judiciary, this leaves the question of what to do when the legislature does not act.¹⁵⁵ If we consider what the South African courts have done to develop the common law as a result of the application of the Bill of Rights, we can see that there has been movement, principally in the law of delict, but it is movement within the existing structures of, and underlying ideas of what is possible for, the common law. In *Carmichele*, for example, the Constitutional Court took a traditional approach in cautioning the judges to be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary.¹⁵⁶ The police liability cases represent, not so much a change in the principles or rules of delict, but more a recognition that the reasons for confining the operation of these principles in a particular context were now outweighed by other considerations, flowing in particular from the Constitution. In some ways, more significant changes to the substance of legal rules as such have occurred in the law of defamation, with the introduction of the reasonable publication defence,¹⁵⁷ and also the restoration of the *amende honorable*,¹⁵⁸ which earlier appeared to have fallen into desuetude. On the other hand, the courts have refused to introduce strict product liability,¹⁵⁹ or, in the law of contract, an active doctrine of good faith to control unfair terms.¹⁶⁰ In the former case, the court was concerned that the future actions of the legislature might be unduly hamstrung by a declaration that the Constitution required a strict products liability

¹⁵⁴ See, for a good example of judicial law reform in Scotland, *Webster v Dominick* 2003 SLT 975, where the High Court of Justiciary replaced the controversial offence of shameless indecency, used against homosexuals and retailers of pornography, with a new, much narrower, offence of public indecency. The leading judge was a former Chair of the Law Commission; used comparative law, not least from South Africa; drew on academic commentary and criticism; and pointed out that the existing law was all a departure from and misunderstanding of the law as it had been understood in the mid-19th century. There were arguments also addressed to him on the ECHR, but he did not find it necessary to go down that route!

¹⁵⁵ See generally Barak (n. 3).

¹⁵⁶ para. 36.

¹⁵⁷ See above, text accompanying nn. 80-6.

¹⁵⁸ *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W). On the previous desuetude of the *amende honorable*, see *McQuoid-Mason* (n. 47), 236.

¹⁵⁹ *Wagener v Pharmacare Ltd* 2003 (4) SA 285 (SCA).

¹⁶⁰ See above, text accompanying nn. 98-117.

regime, in particular in the field of pharmaceuticals, so critical to the highly political problem of access to drugs in South African health care.

On the whole, the decisions of the South African courts in these matters seem to me both to illustrate Chief Justice Barak's point and to be soundly based in terms of the limits of judicial power as assessed by Lord Goff and his great predecessors. Strict liability for products and control of unfair contract terms involve complex issues of policy better regulated by the legislature than by courts responding to the hard facts of particular cases which may or may not be representative of an overall problem. In the United Kingdom and the European Union, unfair contract terms and strict product liability have both been the subject of detailed legislation.¹⁶¹ In South Africa, there is a Law Commission report on unfair contract terms, submitted in 1998 and over 200 pages long, but upon which the legislature has not yet chosen to act.¹⁶² What is the significance, if any, of this inaction for a court deciding whether or not to introduce controls based on the principle of good faith? What significance should be attached to the deep divisions of opinion on the subject amongst Law Commission consultees? The draft Bill appended to the report has 26 guidelines on how to determine whether a contract is unreasonable, unconscionable or oppressive; can a court create such guidelines on the basis of the case before it?¹⁶³ Should the protection be applicable to all contracts, as the Law Commission proposes, or confined to standard form and/or consumer contracts, as would be the case in many other jurisdictions? It looks like a subject inapt for merely judicial reform, albeit that the judges can use some of the existing, less general, rules of contract law to overcome some of the apparent difficulties in particular cases.

What of the United Kingdom? In general, there has been little development of the law of delict, and none at all to speak of in the law of contract, that can be attributed to the impact or influence of Convention rights.¹⁶⁴ As with the South African police cases, Convention rights have forced a reconsideration, not yet complete, of the application of existing general principles of negligence to the liability of public authorities in a number of contexts; but the general principles themselves remain unaffected by this

¹⁶¹ Council Directive 85/374 on product liability, giving rise to the Consumer Protection Act 1987, Part I, in the UK; and see above, n. 120, on unfair contract terms.

¹⁶² South African Law Commission Report, Project 47, Unreasonable Stipulations in Contracts and the Rectification of Contracts (April 1998).

¹⁶³ The *Etridge* case in England is an example of a court providing such guidelines, but the basis on which it does so is not clear and has not been followed in the Scottish courts (above, text accompanying nn. 134-9).

process. Contract law is already developed in a number of areas that might otherwise be relevant for Convention rights, as a result of both legislation and judicial decision pre-dating the coming into force of the Human Rights Act. It is not clear, for the moment, that in these areas further development of the law is required.

The area which has proved problematic in the United Kingdom is the protection of privacy. One anticipated effect of the coming into force of the Human Rights Act was judicial reconsideration in the light of Article 8 ECHR (right to privacy) of the previous denial by the English courts of such a right.¹⁶⁵ And indeed there has been a considerable amount of litigation on the subject since 2 October 2000; litigation which incidentally has assumed rather than argued out the issue of horizontality of Convention rights under the Human Rights Act, but has not definitively clarified the nature of the horizontality. There has been no declaration that English law now recognises a general right of privacy. Instead, what has happened has been the gradual extension of the law of breach of confidence into areas where previously it would have had no place.¹⁶⁶ The main extensions can be summarised thus: (1) the widening scope of the information recognised as confidential, the assessment of which includes the impact of the *form* of the proposed publication, the test being whether the disclosure would be highly offensive to a reasonable person of ordinary sensibilities and would shock the conscience (rather than the more privacy-oriented approach of asking whether the information fell within the private sphere); and (2) there may be an obligation of confidentiality even although the information was not really imparted in a relation of confidence. It is the latter which pushes the developing tort of breach of confidence closest to a privacy action.¹⁶⁷

However, as Lindsay J pointed out in *Douglas v Hello!*,¹⁶⁸ one of the leading examples of this extension of breach of confidence, “further development by the courts may merely be awaiting the first post-Human Rights Act case where neither the law of confidence nor any other domestic law protects an individual who deserves

¹⁶⁴ *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; [2003] 3 WLR 1603, handed down after this paper was concluded, is another instance of the House of Lords deciding against use of the ECHR in a case about nuisance, negligence and public authority liability.

¹⁶⁵ *Malone v Metropolitan Police Commissioner* [1979] Ch 344; *Kaye v Robertson* [1991] FSR 62.

¹⁶⁶ The main cases are: *Douglas v Hello!* [2001] QB 967 (CA); *Venables and Thompson v News Group Newspapers Ltd* [2001] 2 WLR 1038 (QB, Butler-Sloss P); *Theakston v Mirror Group Newspapers Ltd* [2002] EMLR 22 (QB); *A v B and C* [2003] QB 195; *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB); rev'd [2003] QB 633 (CA); *Douglas v Hello!* [2003] 3 All ER 996 (Lindsay J); *X, a woman formerly known as Mary Bell v O'Brien* [2003] EMLR 37 (QB, Butler-Sloss P).

¹⁶⁷ See for full discussion G Phillipson, “Transforming breach of confidence? Towards a common law of privacy under the Human Rights Act”, (2003) 66 *MLR* 726, and J Morgan, “Privacy, confidence and horizontal effect: ‘Hello’ trouble”, (2003) 62 *CLJ* 444.

¹⁶⁸ [2003] 3 All ER 996 (Lindsay J).

protection".¹⁶⁹ Lindsay J drew attention to the latest European Court of Human Rights case on the subject, *Peck v United Kingdom*, decided on 28 January 2003,¹⁷⁰ in which P's Article 8 rights were held to have been infringed by a local authority's publication of closed circuit TV camera pictures of him carrying a knife in a public street. The context in which this had occurred, however, was P's attempt to commit suicide by slashing his wrists with the knife while suffering from clinical depression. The authority's publication of the material had been intended to show how the use of CCTV could deal with dangerous situations – the police had been prompted to arrest P after sighting the images – but the publicity failed to disguise P's identity. Lindsay J added:

[*Peck*] shows that in circumstances where the law of confidence did not operate our domestic law has already been held to be inadequate. That inadequacy will have to be made good and if Parliament does not step in then the courts will be obliged to.¹⁷¹

Nevertheless, the House of Lords has now ruled that, at any rate before 2 October 2000, English law did not have a general tort of invasion of privacy although the case in question was not covered even by the extended action for breach of confidence. The alleged invasion in *Wainwright v Home Office*¹⁷² was strip-searches of visitors to a prison by prison officers, which went beyond what was allowed under (non-statutory) prison rules, and caused emotional distress to one victim and post-traumatic stress disorder to the other, a young man with physical and learning difficulties. The purpose of the searches was the detection of drugs being smuggled into the prison for prisoners, a major problem in British prisons. Although the case is thus concerned with a very specific situation, the speech of Lord Hoffmann is clearly intended to be of wider scope. Thus, although the facts of *Wainwright* occurred before 2 October 2000, Lord Hoffmann expresses the obiter view that Article 8 was not infringed by the strip-search unless the harm done by the invasion of privacy was inflicted intentionally. He also suggests that *Peck v United Kingdom* showed, not that English law failed to protect privacy, but that a system of control of CCTV cameras was needed to protect the sensitivities of persons whose image was captured by the all-seeing lens. This, he went on, required the detailed approach of legislation rather than the broad brush of common law principle. A number of the other cases in which it had been held that English law did not protect privacy had

¹⁶⁹ *Douglas v Hello!*, para. 229.

¹⁷⁰ (2003) 36 EHRR 41.

¹⁷¹ *Douglas v Hello!*, para. 229.

¹⁷² [2003] UKHL 53; [2003] 3 WLR 1137 (HL).

been dealt with subsequently by way of legislation: telephone tapping by the Interception of Communications Act 1985, “stalking” through the Protection from Harassment Act 1997, police surveillance by the Police Act 1997. In addition there was the Data Protection Act 1998, regulating the processing of personal data and providing a civil action against misuse. Privacy was too protean a concept to lend itself to other than this kind of detailed protection, together with an appropriate range of exceptions, which could be achieved only by statutory provision.

It is not altogether clear where this decision leaves the law with regard to events after 2 October 2000; the Human Rights Act means that there is a statutory remedy against invasions of privacy by a public authority (i.e. in vertical cases), but Lord Hoffmann is careful to avoid “pre-emption” of “the controversial question of the extent, if any, to which the Convention requires the state to provide remedies for invasions of privacy by persons who are not public authorities”,¹⁷³ (i.e. in horizontal cases). The House of Lords may have the opportunity to consider that question when they hear *Campbell v Mirror Group Newspapers*,¹⁷⁴ a case between a private individual and a newspaper (the Press not being a public body). Here the privacy issues are the publication of personal information and surreptitiously taken photographs; for the newspaper there is also an issue about Press freedom of expression, since it published the information to counter untrue publicity about herself put about by Campbell. The case so far has proceeded on the basis of breach of confidence.¹⁷⁵ The House may be faced with the question of whether the law in this area has moved so far to take account of Article 8 ECHR that it should be re-labelled invasion of privacy, with breach of confidence being returned to its narrower former ambit; and if so, whether this newly developed tort should be confined to media intrusions upon private life, or left potentially wide enough to reach the wholly different problems illustrated by the *Wainwright* case. Lord Hoffmann’s speech will make it very difficult to take the latter step; and he also expresses some doubts about the former.¹⁷⁶

¹⁷³ At para. 34.

¹⁷⁴ For references for the decisions of the courts below, see above, n. 166.

¹⁷⁵ There are also claims under the Data Protection Act, under which the case may ultimately be decided.

¹⁷⁶ See paras. 28-31 of Lord Hoffmann’s speech. *Campbell v MGN Ltd* [2004] UKHL 22 was decided by the House of Lords on 6 May 2004. The House did indeed develop the law of confidential information the better to protect privacy in accordance with Article 8 ECHR (by removing the need to show a prior relationship of confidence between the parties). But the court recognised that this would not capture all cases in which privacy was in issue – for example, in the strip-searching which was the subject of the *Wainwright* case. Once again, therefore, the House declined to recognise a general right of privacy, preferring instead incremental development of the existing law. Even so the court found in favour of the appellant Campbell by only the narrowest of majorities, 3-2.

Wainwright is therefore, despite the fact that it deals with facts before 2 October 2000, a demonstration of the difficulties some, and perhaps most, English judges will feel in using Article 8 ECHR to develop the common law to create a general obligation to respect individual privacy. In part, these difficulties stem from the view that, like good faith in contract, or strict liability in delict, privacy is so multi-faceted that generalisation by judges arising from particular cases is dangerous, and that the responsibility should fall on the legislature. Where the legislature wishes to act to protect privacy, it has done so. In the case of media intrusion, the Government has clearly wished not to intervene directly, but rather to encourage and support Press and broadcaster self-regulation through voluntary codes, while the Human Rights Act itself seeks to privilege freedom of expression amongst human rights by requiring courts to have “particular regard” for its importance.¹⁷⁷ It is not for the judges to undo that approach by developing sweeping common law regulation where none or little existed before.

One may also detect in *Wainwright* the traditional English suspicion of general principles and the preference for regulating specific problems piecemeal. Lord Bingham’s rejection of good faith on those grounds has already been noted,¹⁷⁸ and even after a general principle is identified, as in the case of negligence, the courts often develop it only incrementally and within established categories of cases.¹⁷⁹ Privacy, as with other interests, is protected, but in pockets of liability rather than in general. There is too a hint of English law being founded on freedoms rather than rights, when Lord Hoffmann rejects the relevance of the breach by the prison officers of the non-statutory prison rules on strip searches: “the acts of the prison officers needed statutory authority only if they would otherwise have been wrongful, that is to say, tortious or in breach of statutory duty.”¹⁸⁰

The apparent conclusion that strip searching is not a wrong unless made so by positive law is however surprising if the prison saw fit to regulate the practice by its own internal rules; and one might also ask questions about the *Wainwrights*’ freedom not to be intimately touched by others. As Lord Hoffmann rightly says, “having to take off your clothes in front of a couple of prison officers is not to everyone’s taste”;¹⁸¹ even less

¹⁷⁷ Human Rights Act, s. 12; and see further the Government’s negative response (Cm 5985, October 2003) to the Fifth Report of the House of Commons Culture, Media and Sport Select Committee on Privacy and Media Intrusion (HC 458-1, June 2003) and its recommendation of the introduction of a new privacy law against media intrusion.

¹⁷⁸ See above, text accompanying n. 140.

¹⁷⁹ See *Caparo v Dickman Industries* [1990] 2 AC 605 at 618 per Lord Bridge of Harwich.

¹⁸⁰ At para. 7.

¹⁸¹ At para. 3.

so is then having your private parts fingered and handled by the officers in question. The surprise is all the greater in a legal system which takes a more generalised approach to delictual liability than that apparent in *Wainwright*. In the pre-Human Rights Act Scottish case of *Henderson v Chief Constable of Fife*,¹⁸² Mrs Henderson was in police custody, subject to a lawful detention; but the police, following a normal practice for which there was no statutory authority, required her to remove her bra while she remained in a police cell. This was to prevent her using the garment to harm herself, even although there was no indication of any danger of this being at all likely in the particular situation. Lord Jauncey held that the police action was a clear invasion of Mrs Henderson's liberty without justification, from which it followed that she had a remedy in damages. He continued:

I should perhaps add that the researches of counsel had disclosed no Scottish case in which it had been held that removal of clothing forcibly or by requirement could constitute a wrong but since such removal must amount to an infringement of liberty I see no reason why the law should not protect the individual from this infringement. ... I consider that an award of £300 would fairly reflect the invasion of privacy and liberty which Mrs Henderson suffered as a result of having to remove her brassiere.¹⁸³

Apart from this case and its clear contrast in approach with that of Lord Hoffmann in *Wainwright*, however, modern Scots law has been non-committal on the subject of privacy, although in an unreported case in 1957 Lord Justice Clerk Thomson said: "I know of no authority to the effect that mere invasion of privacy however hurtful and whatever its purpose and however repugnant to good taste is itself actionable."¹⁸⁴

The law of South Africa clearly takes a much more generalised approach to delictual liability which by way of the *actio injuriarum* achieved the protection of privacy, founded upon the concept of individual *dignitas*, long before the enactment of the Bill of Rights.¹⁸⁵ It seems clear that a person's naked body is regarded as part of their "inner sanctum", not to be intruded upon by others intentionally or with *animus injuriandi* (consciousness of wrongfulness). That *animus* is presumed if the invasion of privacy is proved; strict liability is imposed if the wrong affects the liberty of the subject. There are defences such as statutory authority and, perhaps, following the *Bogosbi* case,

¹⁸² 1988 SLT 361.

¹⁸³ At 367.

¹⁸⁴ *Murray v Beaverbrook Newspapers* Second Division, 18 June 1957. See further M A Hogg, "The very private life of the right to privacy", (1994) 2(3) *Hume Papers on Public Policy* 1.

¹⁸⁵ See generally for what follows McQuoid-Mason (n. 47).

reasonableness. This is now reinforced¹⁸⁶ by the constitutional protection of dignity and privacy, which includes a prohibition upon searching the person, although this may be subject to justification under the limitations clause.¹⁸⁷

The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.¹⁸⁸

The Constitution does however mean that searching of a person must have a legal basis, which in turn must respect the limits created by the Constitution.¹⁸⁹ It has been suggested that to be constitutionally valid laws giving power to search must define the power and provide for appropriate prior authorisation.¹⁹⁰ Fault is not a requirement for an invasion of the constitutional right to privacy.

Long ago T B Smith suggested that the principles of the *actio injuriarum* might be a basis in Scots law for challenging “the infliction of affront upon an individual by invading his privacy”.¹⁹¹ When he was a Scottish Law Commissioner, the Commission put forward a comparison with South African law in this respect.¹⁹² But there have been few signs of any subsequent development of this comparative nature by the Scottish courts. In April 2003, however, arguments based upon the *actio injuriarum* were deployed in a case concerned with the admissibility of evidence procured by private investigators through intrusions upon an individual’s privacy contrary to Article 8 ECHR, by way of unmasked-for visits to his home and surveillance of his house from a neighbouring

¹⁸⁶ On the relationship between the common law and the Constitution in the context of privacy protection see *Bernstein v Bester* NO 1996 (2) SA 751 (CC).

¹⁸⁷ Constitution, sections 1, 14, 36.

¹⁸⁸ *Bernstein v Bester* NO (above, n. 186), per Ackermann J, at para. 67.

¹⁸⁹ *Mistry v Interim National Medical and Dental Council* 1998 (4) SA 1127 (CC).

¹⁹⁰ De Waal, Currie and Erasmus (n. 33), 277.

¹⁹¹ T B Smith, *A Short Commentary on the Law of Scotland* (1962), at 655-6. See also Lord Kilbrandon, “The law of privacy in Scotland”, 1971 *Cambrian Law Review* 35.

¹⁹² Scottish Law Commission Memorandum No 40, Confidential Information (April 1977), 28-35.

property.¹⁹³ Counsel for the pursuer argued that the court had a duty to develop the existing law to be compatible with the ECHR, and that the *actio injuriarum* provided a basis for protection of privacy in Scots law. Counsel for the defenders, referring to Reinhard Zimmermann's book on the law of obligations¹⁹⁴ and the Digest, argued that the principles of the *actio injuriarum* were not wide enough to cover privacy in general, but only attacks on personality for an unlawful purpose. The purpose of the surveillance here, to discover whether or not the party being watched was truly suffering from the injury for which he was claiming damages in a delict action, was not unlawful. Lord Bonython merely recorded the submissions made on this point, however, and decided the case on other grounds, giving little support to any development of the law in this particular way.

In conclusion, the judicial power to develop the common law in the light of human rights protection depends, not only on the factors which have traditionally, and quite properly, hemmed in the judges, such as respect for the legislature and recognition of the limits of their own vision of policy, but also on the legal culture in which the judges themselves have operated. The contrast between the general English and the South African legal cultures can be seen, not only in the privacy cases just discussed, but also in the reluctance of the English courts (or at least the House of Lords) to take on board the full implications of the ECHR with regard to the negligence liability of public authorities, whereas the South African judges appear to have made much more decisive moves. Nor are privacy and negligence the only examples of this English reluctance: as Conor Gearty has remarked of the approach in criminal law, "at times it has seemed as though the operating assumption has been that the Human Rights Act 1998 must be interpreted 'as far as possible' to be compatible with pre-existing law, rather than the other way round".¹⁹⁵ Much of this difference between South Africa and England has to do with the very different social, political and economic realities in which the two systems took human rights on board; but it is a fair question whether the English approach has always reached the right conclusions. In particular, while the *Wainwright* case may or may not be rightly decided as a matter of the law applying in England before 2 October 2000, it is submitted that it cannot govern the result on facts arising after that date. The right approach then will be to ask whether the private sphere of persons such

¹⁹³ *Martin v McGuiness* 2003 SCLR 548.

¹⁹⁴ R Zimmermann, *The Law of Obligations; Roman Foundations of the Civilian Tradition* (1990, repr 1996).

¹⁹⁵ "The Human Rights Act and the criminal law: an overview of the early case-law", in Boyle et al (n. 1), at 294. The reference is to Human Rights Act 1998, s. 3(1): see above, text at n. 5.

as the *Wainwrights* has been invaded (answer, surely, yes) and, taking into account Article 8's self-limitation to allow for "the prevention of disorder or crime, protection of health or morals [and protection of the rights and freedoms of others]" as well as the Human Rights Act's privileging of freedom of expression against other Convention rights,¹⁹⁶ whether that invasion was justified in the whole circumstances of the case.

And what of the Scots? The legal culture of Scotland, at least when it comes to judicial development of the law and the approach to general principles, is probably closer to that of England than that of modern South Africa, despite the neo-Civilian crusade of T B Smith and others to make it otherwise.¹⁹⁷ But, as shown by the contrast between the case of *Henderson* and the decision in *Wainwright*, acculturation has by no means reached the point of complete assimilation. Indeed, it is worth noting that Lord Jauncey, who decided the *Henderson* case, was a conservative even amongst Scottish judges.¹⁹⁸ Those same Scottish judges were, at least to begin with, much more adventurous with the ECHR than their English counterparts, although their enthusiasm may have been tempered by the outcomes of subsequent appeals to and decisions of the House of Lords and the Judicial Committee of the Privy Council.¹⁹⁹ At least with regard to privacy, however, the way is still open, it is suggested, for the Scottish courts to take their own approach to the question, and to develop a general principle informed by Article 8 of the ECHR and subject therefore to the other Articles of the Convention and such general defences as may seem appropriate in that light and under other principles of the common law. In that process, lessons can certainly be learned from the jurisprudence being developed under the Southern Cross.

¹⁹⁶ Human Rights Act, s 12. Whether this provision can stand if an EU Constitution gives human dignity a foundational position (see above, text accompanying nn. 41, 42) is a moot point, but probably academic at this stage.

¹⁹⁷ On T B Smith's interest in human (or, as he preferred to call them, basic or fundamental) rights, see his book on the subject, cited at n. 21 above.

¹⁹⁸ See e.g. his dissent in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] 1 AC 70; his very reluctant assent in *Smith v Bank of Scotland* 1997 SC (HL) 111; and his refusal to accept the argument of principle in *Sharp v Thomson* 1997 SC (HL) 66.

¹⁹⁹ See e.g. *Starrs v Ruxton* 2000 JC 208; *Hoekstra v HM Advocate (Nos 1-4)* 2000 JC 387, 391, 599; 2001 SC (PC) 37; 2001 JC 131; *Brown v Stott* 2001 SC (PC) 43; *McIntosh v HM Advocate* 2001 SC (PC) 89; *Millar v Dickson* 2002 SC (PC) 30; *County Properties Ltd v Scottish Ministers* 2000 SLT 965, rev'd 2002 SC 79, after the decision of the House of Lords in *R v Secretary of State for ETR, ex parte Alconbury* [2003] 2 AC 295. See also *HM Advocate v R* 2003 SC (PC) 21, where three Scottish Law Lords formed a majority over two English ones on an ECHR point (but none the less an appeal from the High Court of Justiciary, for which see 2001 SLT 1366 and 2002 SLT 834, was allowed). This case has now been reviewed by nine judges (including two Scots) in the House of Lords from an English perspective; by a majority of 7-2 (the 2 being the Scots judges), a different result has been reached: *Attorney-General's Reference No 2 of 2001* [2003] UKHL 68. The constitutional implications of this are unclear.