

NORMATIVE PLURALISM AND ANARCHY: REFLECTIONS ON THE 2007 TERM

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1 The decline of foundation and the allure of anarchy

Waren die klaren Bedeutungen aus dem Haus, tanzte die Sprache auf dem Tisch.¹

As a schoolboy, Robin Davies² was intrigued to hear that, according to the likes of DH Lawrence, if one really wanted something one ‘should have it, ought to have it, must do it or take it if you can’. However, Robin soon learnt that social norms often prevent you from taking what you want and they cause all kinds of trouble when you do. ‘You can have [me and the children], or you can have everyone else. Not both’, his wife Nancy told him, years later, laying down the law about his philandering.³ ‘You can’t do both’, his father ruled when, aged 15 or so, Robin wanted to visit a friend on an afternoon when his parents had already arranged something for that evening.

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¹ T Dorn ‘Ultima ratio’ in D Schwanitz *et al Amoklauf im Audimax: Stories* (1998) 7-46 18.

² In Kingsley Amis’s novel *You can’t do both* (2004).

³ Patrick Standish received a similar ultimatum in *Difficulties with girls* (1988), as did Amis in real life.

Kingsley Amis, ‘the most clubbable of men’ and a womaniser of note,⁴ was frustrated by restrictions on his freedom to have things his way, but he was familiar with the power of bourgeois morality – ‘taking it if you can’ wrought havoc when he decided that he should have what one of his characters called ‘marriage, 1960s style’, openly taking his mistress on holiday.⁵ Like his characters, Amis found that he could have the wife and the children or the girlfriend; not both. Several Amis characters given to ‘take it if they can’ are forced to abandon some of what they wanted or lose everything, including their dignity.⁶ It is easy to scoff at silly ‘rules’ about not having two social engagements on the same day, but not all social norms are so easily dismissed, even if they appear arbitrary.

The framing discourse for these Amis novels (and my purpose in recalling them) is not about accepting or rejecting social norms – despite his scorn for conventional morality, Amis did not subscribe to moral anarchy⁷ (and in the 2007 term the Constitutional Court said little about morality).⁸ Characters in the novels who made a life out of taking it if they could were not very nice persons and, despite flashes of defiance, Amis was not justifying their behaviour.⁹ In fact, Amis was commenting on what could be described – not in his words – as the complexity of human relationships in a time when social fundamentalism was being replaced by pluralism¹⁰ and, consequently, relativism and uncertainty. World War II liberated men and women from their traditional sexual and gendered social roles and

⁴ On the autobiographical nature of *You can't do both* see Z Leader *The life of Kingsley Amis* (2006) 3 7-9. Martin Amis confirmed that finding parallels between his father's life and novels is not ‘making the elementary mistake of conflating the man with the work’, since ‘all writers know that the truth is in the fiction’: *Experience* (2000) 28.

⁵ Jenny, in *Difficulties with girls* (1988); the girlfriend was Elizabeth Jane Howard, Amis's second wife.

⁶ ‘Better be a bastard than a fool’, Roger Micheldene told himself, without much conviction, towards the end of *One fat Englishman* (1963).

⁷ In the *Memoirs* (1991) Amis remembered that his father put his, Kingsley's, shortcomings down to his complete lack of religion. ‘And’, he says, ‘I should not be truly his son if I had never felt that he had something there.’ Amis concluded the *Memoirs* with a poem, entitled ‘Instead of an Epilogue’ and dedicated ‘To H’. In the final verse Amis lists the admirable characteristics of ‘someone’ he met when twenty-four, then proceeds: ‘Well, that was much as women were meant to be, / I thought, and set about looking further. / How can we tell, with nothing to compare?’

⁸ But see *Schaik v S* 2008 2 SA 208 (CC) par 76.

⁹ Leader (n 4 above) 468: ‘Roger [Micheldene], like Patrick [Standish], knows how horrible he is.’

¹⁰ Like J Dewar ‘The normal chaos of family law’ (1998) 61 *Modern Law Review* 467-485 I use the term to indicate a diversity of conflicting norms. See LL Mofokeng ‘The right to freedom of religion: An apparently misunderstood aspect of legal diversity in South Africa’ (2007) 11 *Law, Democracy & Development* 121-131; S Louw ‘Mysterium iniquitatis: Truth, elections, autonomy in the Southern African politic’ (2006) 33 *Politikon* 221-238 (relying on C Lefort's notion of ‘the political’ to argue that democracy relies on diversity and pluralism). See further M Koenig & P de Guchteneire (eds) *Democracy and human rights in multicultural societies* (2007).

from the remnants of Victorian and Christian morality, opening up room for experimentation and free choice,¹¹ but liberation coincided with uncertainty and disruption.¹² Freedom from tradition comes at a price: once we give up the certainty of transcendent truth, choices become contingent and dangerous. Abandoning the certainty of tradition created a normative vacuum and raised the spectre of moral anarchy and turpitude. As Amis framed it much later, reflecting on bad choices he had made: 'how can we tell, with nothing to compare?'¹³ The problem with postwar pluralism was that, once the certainty of immutable rules is abandoned, there is nothing to compare. When tradition is traded in for pluralism, everything is open for questioning, which could create the impression that everything is up for grabs; that everything goes. In an effort to avoid anarchy, the temptation is to fall back on the formalism of empty rules.

Amis's depiction of postwar English society illustrates the slippery slope in post-traumatic society from normative pluralism to anarchy or, more accurately, to a facile choice between anarchy and reactionary formalism. The modernist rejection of foundation and acknowledgement of normative pluralism was inevitable, but the resulting uncertainty proved harder than expected. A similar process took place in law: ever since Realist and Critical Legal Studies scholars destroyed the theoretical credibility of fundamentalism and pointed out the indeterminacy and contingency implied by pluralism, lawyers – who usually deny that normative choice plays any role in law – had to account for their normative choices. In the face of nihilism and anarchy a reversion to formalism seems like a small price to pay for clarity and certainty.

¹¹ Social liberalisation after World War II can be traced to the aftermath of World War I, just like the Critical Legal Studies Movement continued a trend initiated by the Legal Realists. M Tushnet 'Critical legal studies: An introduction to its origins and underpinnings' (1986) 36 *Journal of Legal Education* 505-517 argues that the question whether Critical Legal Studies continued Legal Realism is uninteresting; I take continuation between the two world wars for granted. During the wars, women were forced to take men's places in factories, liberating them from their home-maker role. Similarly, people fighting in the wars realised that the subservient social roles they were used to before the war (because of age, social status or race) no longer suited them. In both cases, liberation from tradition undermined the authority of social hierarchy.

¹² The street protests of 1968 that shocked mainstream society from Prague to Paris and from Berkeley to Berlin originated in the same context: the civil rights movement, women's lib, the hippie movement, anti-war protests and student uprisings during the 1960s were founded upon rejection of traditional authority and mainstream morality.

¹³ See n 7 above. See IJ Kroeze 'When worlds collide: An essay on morality' (2007) 22 *SA Public Law* 323-335, especially 331-332 333-335.

John Dewar¹⁴ argues that normative pluralism, which he describes as a plurality of rules and values that are chaotic, incoherent and even antinomic in that the contradictions between them cannot be resolved in the long run, is normal in so far as contradictions at the level of rules are held at bay by practices not completely determined by text. In Dewar's view, normative pluralism changes into anarchy when it combines with uncertainty about purposes; as soon as pluralism extends beyond the level of rules, normative anarchy ensues. Dewar identifies normative anarchy in situations where rights are mixed with discretion in a way that defies balancing and where regulatory legislation moves from rules to utility and back without suitable systemic adaptations.

In a way, the early Amis novels described just such a shift from rules to utility and back – like Robin Davies, Amis and thousands of others rebelled against the inflexible and arbitrary post-war dictatorship of surviving pre-war morality and craved the greater freedom and flexibility they experienced during the war. Of course, with flexibility comes the burden of discretion but, according to Dewar and Amis, abandoning foundation does not necessarily end in nihilism: normative anarchy can be avoided as long as contradictions are restricted by common purpose. In the less utilitarian language of Joseph William Singer, the Critical Legal Studies movement 'brought nihilism to centre stage' by denying the possibility of determinacy, objectivity and neutrality in legal reasoning, but the absence of foundation 'does not condemn us to indifference or arbitrariness, nor make it ridiculous to ask, or impossible to answer, the question of what we should do or how we should live'.¹⁵ In Singer's view legal theory, as a form of political activity, opens everything up for questioning without putting everything up for grabs – critical legal theory acknowledges moral and political goals that give direction to 'what we must do and how we should live'.¹⁶

Of course, on one level Dewar and Singer are vulnerable to accusations of fundamentalism – how does shared purpose or political goal that saves pluralism from anarchy differ from Victorian or Christian (or legal Formalist) sources of foundation?¹⁷ How is any

¹⁴ n 10 above, 468-473. See further J Dewar 'Reducing discretion in family law' (1997) 11 *Australian Journal of Family Law* 309-326; S Parker 'Rights and utility in Anglo-Australian family law' (1992) 55 *Modern Law Review* 311-330; M Maclean *Making law for families* (2000).

¹⁵ 'The player and the cards: Nihilism and legal theory' (1984) 94 *Yale Law Journal* 1-70 8: asking 'what shall we do and how shall we live?' opens up dissent rather than consensus. See Tushnet (n 11 above) 509; A Hunt 'The theory of Critical Legal Studies' (1986) 6 *Oxford Journal of Legal Studies* 1-45.

¹⁶ Singer (n 15 above) 66-70 identifies cruelty, misery, hierarchy and loneliness as the greatest problems that legal theory faces.

¹⁷ On foundation in law see P Fitzpatrick *Modernism and the grounds of law* (2001) 1-7.

political purpose less arbitrary than Mr Davies senior's decree that Robin cannot 'do both'? Once the foundation of traditional rules is rejected, how do we justify the new rules we place in their stead to avoid anarchy?

Developing a satisfactory answer to this challenge, if it can be done at all, will take my analysis too far off course, but a starting point is to accept the argument of Johan van der Walt and Henk Botha that 'the counter-majoritarian problem and the problem of significant social dissent [both sources of normative pluralism in constitutional discourse] are not technical hiccups' but aporias that 'open up the possibility of social deliberation that would exceed technical procedure' and technical ethics to 'give politics a chance'.¹⁸ If there were a purpose that could avoid both anarchy and fundamentalism in the face of normative pluralism, it could be nothing else than the possibility of open social deliberation and dissent that defies foundation and closure to give politics a chance.¹⁹ In the 'community without community' that Van der Walt and Botha have in mind, a society of diverse communities, cultures and conflicting normative values, without any justificatory or unifying common will, social deliberation and politics can be possible without anarchy.²⁰

In the 'community without community', recognition of the sacrificial nature of decision reveals the essence of law as its very failure to resolve social conflict with reference to a common will or purpose. In other words, politics is not to be found in a foundational, unifying common will that overcomes or mediates plurality; instead, politics is possible only in the presence of unmediated and unresolved diversity, plurality and dissent. Consequently, a purely dialogic or republican politics²¹ cannot solve conflict or bring closure by

¹⁸ J van der Walt & H Botha 'Democracy and rights in South Africa: Beyond a constitutional culture of justification' (2000) 7 *Constellations* 341-362 350. See H Botha 'Democracy and rights: Constitutional interpretation in a postrealist world' (2000) 63 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 561-581 572-574 581; K van Marle 'Lives of action, thinking and revolt – A feminist call for politics and becoming in post-apartheid South Africa' (2004) 19 *SA Public Law* 605-628 621-624; F Michelman 'Property as a constitutional right' (1981) 38 *Washington & Lee Law Review* 1097-1114 1110: 'it is the possibility of partial resolutions that allows us to experience the contradiction [between democracy and rights] as generative tension rather than as dead end.'

¹⁹ Van der Walt & Botha (n 18 above) 350. See Van Marle (n 18 above) 621, citing B Honig (ed) *Feminist interpretations of Hannah Arendt* (1995) 135. See further W le Roux 'Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism' (2004) 19 *SA Public Law* 629-665.

²⁰ n 18 above, 350-352.

²¹ See le Roux (n 19 above) 646-660 on constitutionalism as a dialogic 'clearing'.

mediating dissent or pluralism;²² nor can politics be guaranteed by constitutionalism, rights or law.²³ Robert Cover pointed out that an important function of law is to ‘kill’ or suppress plurality, dissent and meaning; not to open it up.²⁴ However, to the extent that law is inevitable, law, rights and constitutionalism are justifiable in so far as it gives politics a chance. A major issue in this article is to ask whether the interpretive and adjudicative approach that the Constitutional Court has apparently elected to follow in deciding cases where the common law tradition and legislation have to be measured against constitutional directives is justifiable in the sense that it gives politics a chance, instead of just closing up gaps and entrenching certainty.

2 Pluralism in post-apartheid constitutional theory

Our Constitution does not sanction a state of normative anarchy which may arise where potentially conflicting principles are juxtaposed.²⁵

South Africans in the post-1994 era understand the anxiety caused by abandoning normative fundamentalism. Having faced up to the wickedness of apartheid and the bankruptcy of its underlying values, the point of constitutional transformation was to replace the exclusivism of segregation with an inclusive democracy that recognises diverse communities, cultures and traditions as well as diverse social, cultural and religious values. The 1996 Constitution’s commitment to diversity is apparent from its emphasis on human dignity, equality, and freedom²⁶ and its recognition of the values of different social, cultural and religious groups,²⁷ but recognition of diversity as a positive value surpasses mere tolerance – social, cultural and religious pluralism (‘more-than-one’) creates and supports the very possibility of politics and democracy.

²² Van der Walt & Botha (n 18 above) 352 argue that judicial decisions do not solve the conflicts that arise from social complexity but suppress them at the cost of one party for the sake of a social goal. R Cover ‘Violence and the word’ (1986) 95 *Yale Law Journal* 1601-1629 1607: ‘the relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts’.

²³ Van Marle (n 18 above) 625-628 warns against ‘constitutional optimism’ based on the pervasiveness of law, constitution and rights, referring to E Christodoulidis ‘Constitutional irresolution: Law and the framing of civil society’ (2003) 9 *European Law Journal* 401-432. Compare le Roux (n 19 above) 660-665.

²⁴ R Cover ‘The Supreme Court 1982 term. Foreword: *Nomos* and narrative’ (1983) 97 *Harvard Law Review* 4-68 41-44.

²⁵ Ngcobo J, *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*, 2007 6 SA 4 (CC) par 93.

²⁶ Compare s 1 of the 1996 Constitution.

²⁷ See ss 9(3) and 9(4), 15, 30, 31; compare ss 39(3), 211-212.

Since 1994 the courts had many opportunities to confirm the Constitution's commitment to accommodation of diversity and pluralism.²⁸ Such an opportunity again arose in 2007 in *Pillay*,²⁹ the first equality case to be considered by the Constitutional Court in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).³⁰ The Court reiterated the confirmation, in the Act, of 'the Constitution's commitment to affirm diversity'³¹ and decided that reasonable accommodation in matters of religion means that

sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.³²

Accordingly, a school disciplinary code that inflexibly denied an exemption from normal dress code for pupils who wish to wear a nose stud as part of their religious or cultural practice discriminated against them unfairly, in conflict with the Act.

Pillay demonstrates that conflict about normative pluralism in the context of diversity requires more opportunities for politics and difference, not greater consensus. There is no reason why we should agree about the wearing of nose studs, headscarves, yarmulkes or dreadlocks or why one view about any of these cultural and religious symbols should be enforced on everybody, but open deliberation and dissent about the underlying social customs and values and about tolerance is good for the democratic order. However, difference is not tolerated when it contradicts central values of the Constitution or undermines democracy³³ – normative anarchy is not permitted. What prevents pluralism from sliding into anarchy in the context of diversity

²⁸ Mostly relating to race, gender, religion and sexual orientation: *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 1319 (SCA) (Islamic marriage); *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 4 SA 1176 (CC) (Christian public holidays); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) (sexual orientation); *Du Toit v Minister for Welfare and Population Development* 2003 2 SA 198 (CC) (married status); *Satchwell v President of Republic of South Africa* 2002 6 SA 1 (CC) (sexual orientation); *J v Director-General, Department of Home Affairs* 2003 5 SA 621 (CC) (sexual orientation); *Gory v Kolver NO* 2007 4 SA 97 (CC) (sexual orientation).

²⁹ *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).

³⁰ n 29 above, par 39. See I Currie & J de Waal *The bill of rights handbook* 5 ed (2005) 267.

³¹ *Pillay* (n 29 above) par 65.

³² *Pillay* (n 29 above) par 73.

³³ Courts refused to enforce diversity in *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC) (customary law rules of succession); *Prince v President, Cape Law Society & others* 2001 2 SA 388 (CC) (smoking of cannabis as part of religious observance); *Christian Education in South Africa v Minister of Education* 1999 2 SA 83 (CC) (corporal punishment as part of Christian education).

as a positive value is exactly what gave Amis and formalist opponents of critical legal theory headaches, namely recognising that values are contingent and that everything is open for dissent and discussion, without implying that everything goes.

The new constitutional order brought about a second kind of normative pluralism, where contradiction results not from different values but from the project of constitutional transformation itself. In this arena, the issue for debate is the direction, scope and pace of constitutional reform and, particularly, the effect of the Constitution on existing law. The effect of the Constitution on existing law is a logical locus for deliberation (politics) about social and legal reform, but the notion that a significant part of existing law – the common law – can survive or must be insulated against some or all direct or indirect constitutional influence contradicts constitutional values and threatens constitutional politics. In a word, the preservative impulse in the application debate misrepresents the democratic principle that everything is open for debate and threatens to push the normative pluralism of transformative politics into the anarchy of fractional conflict.

An important premise of my argument is that the Constitution's commitment to diversity as a positive value is premised upon the reduced authority of the common law.³⁴ The Constitution is founded on a set of values and normative commitments related to democracy, human dignity, equality and freedom and on the replacement of an immoral and discredited social and political system by a new, constitutional and democratic system. The shift from exclusivity to inclusivity that it presupposes is possible only if the existing legal order can be both purified of its exclusivist and authoritarian legacy and adapted to accommodate the normative diversity of its reformist purposes. In a largely uncodified legal system that relies on judicial finding, interpretation and application of old authorities and case law, remnants of the old legal system (characterised by exclusivity and authoritarianism) will survive political change and the establishment of the new constitutional order, for the time being,

³⁴ See s 39(3), read with ss 8(3), 39(3) and 173 of the 1996 Constitution, recognising the continued existence of the common law, to the extent that it is consistent with the Bill of Rights and subject to the power of the higher courts to develop it to promote the spirit, purport and objects of the Bill of Rights. Johan van der Walt has argued that (direct or indirect) horizontal application of the Constitution would promote plurality: JWG van der Walt 'Perspectives on horizontal application: *Du Plessis v De Klerk* revisited' (1997) 12 *SA Public Law* 1-31; 'Progressive indirect horizontal application of the bill of rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *South African Journal on Human Rights* 341-363; Van der Walt & Botha (n 18 above) 350-352.

dragging unwanted survivals from the past behind us.³⁵ Every legislative, executive and judicial decision embodies a choice between upholding remnants of the old order and enforcing change brought about by the new; every decision to uphold the existing law implies a sacrifice of constitutional reform, even when it is indubitably correct or unavoidable. Even more importantly, every decision in favour of stability and certainty or vested and acquired rights inevitably comes at the price of suppressing plurality, dissent and change.

To complicate matters the role of the Constitution is ambiguous. On the one hand, any Constitution (with a Bill of Rights) is part of the legal machinery that ensures stability and the protection of rights, particularly against state interference. In this perspective the Constitution is an agent for the protection of established privilege and power. On the other hand, though, the South African Constitution is clearly also an agent for change, including large-scale social, economic and political change that can affect established privilege and power negatively. It could be said that the danger of anarchy is reduced because the Constitution embodies a direction-giving purpose: different value systems are recognised, but we are all working towards an open society built on democracy, social justice and fundamental rights to human dignity, equality and freedom. Even in the face of diversity and pluralism, the Constitution directs us towards certain choices and away from others. Frank Michelman³⁶ argues that the constitutional supremacy principle in s 1 of the Constitution, as interpreted in *Pharmaceutical Manufacturers*,³⁷ establishes

the value of legal-systemic harmony in the service of the vision of the good society staked out by the entire list of founding values set forth in FC s 1 and instinct in the rest of the Final Constitution. We deal here with the value of the unity of the legal system – meaning the system's

³⁵ In the lyrics of Roger Waters: 'they flutter behind you, your possible pasts / some bright eyed and crazy, some frightened and lost / a warning for anyone still in command / of their possible future to take care': Pink Floyd 'Your possible pasts', from *The final cut*, subtitled *A requiem for the post war dream* (1983 © Pink Floyd Music Publishers Ltd).

³⁶ FI Michelman 'The rule of law, legality and the supremacy of the Constitution' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2005) 34-44.

³⁷ *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) par 44.

normative unity or, as one might say more poetically, its visionary unity.³⁸

The notion of such a normative unity in the goal of constitutional transformation is certainly attractive. For administrative justice, Michelman's analysis of the rule of law, legality and constitutional supremacy provisions provides a starting point based on the normative unity of the Constitution. Similar arguments can be developed for equality and non-discrimination, where transformation also amounts to wholesale replacing of apartheid law with a fundamentally new set of rules, indicating normative unity in reform. However, some constitutional provisions look less like wholesale, unidirectional transformations and more like contradictory products of difficult and inchoate compromises. In the compromise provisions, Michelman's 'visionary unity' of the Constitution is less obvious or more contested than in abolition and replacement provisions like s 9.

A striking example is the sections relating to the national flag and the national anthem. The national flag described in s 5 (and Schedule 1) is neither based on the apartheid flag, itself the patchwork product of South Africa's colonial and postcolonial past, nor on the ANC flag, nor is it a patchwork amalgam of the two. The Constitution simply replaced the apartheid flag with a new flag, signalling the clean break style of transformation that illustrates Michelman's direction-giving 'visionary unity' of the Constitution. However, the national anthem illustrates a different approach: under apartheid, *Die Stem van Suid-Afrika* (*The Call of South Africa*) was the official national anthem, although *Nkosi Sikelel' iAfrika* was favoured by political activists and refugees. Under the 1993 Constitution the Republic had two national anthems: *Nkosi Sikelel' iAfrika* and *Die Stem van Suid-Afrika / The Call of South Africa*;³⁹ under the 1996 Constitution the single national anthem consists of one verse each from *Nkosi Sikelel' iAfrika*, *Die*

³⁸ Michelman (n 36 above) 37, referring to *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) par 35 (emphasis added). Michelman (n 36 above) 38, meets the objection that the promise of a shared transformative purpose is another kind of fundamentalism (see nn 18-20 above and accompanying text) by describing legal-systemic unity as a contingent, relative value, arguing that contingency is brought about by the linkage of constitutional supremacy in s 1 with rule of law: the value is contingent on 'the direction of the pull'. When the direction of the pull is towards rule of justice rather than rule of law, the two values signify the unity of the legal system in the service of transformation by, under, and according to law'. This concern with the 'pull towards the rule of justice' points in the same direction as the 'giving politics a chance' argument of Van der Walt & Botha (n 18 above and accompanying text).

³⁹ *Die Stem van Suid-Afrika* (translated as *The Call of South Africa*) was written by Afrikaans author CJ Langenhoven in 1918; the music was composed by the Reverend ML de Villiers in 1921. The first stanza of *Nkosi Sikelel' iAfrika* was written in Xhosa and the music composed by Enoch Sontonga in 1897; seven stanzas in Xhosa were added by the poet Samuel Mqhayi. A Sesotho version by Moses Mphahlele was published in 1942. Information: <http://www.info.gov.za/aboutgovt/symbols/anthem.htm> (accessed 8 May 2008).

Stem van Suid-Afrika and *The Call of South Africa*.⁴⁰ Nothing illustrates the accommodation of post-apartheid pluralism by way of a makeshift, patchwork compromise between opposing value systems better.

However, patchwork compromises are not fatal. Like the national anthem, s 25 embodies a patchwork compromise between constitutional protection of existing property interests (s 25(1)-(3)) and constitutionally sanctioned land reform (s 25(4)-(9)).⁴¹ Although it is difficult to imagine how the land-reform goals in s 25(5)-(9) could be promoted without infringing upon existing property interests in conflict with s 25(1)-(3), Michelman's argument suggests a solution: the 'legal-systemic unity' of 'every site of law' (including both parts of s 25) is to be found in the constitutional purpose of 'pulling in the justice direction', 'in the service of transformation by, under, and according to law.'⁴² Reading s 25 in this way suggests that protection of existing property interests and promotion of equitable access to property are guaranteed *in so far as those purposes conform to the constitutional purpose of transformation by, under, and according to law* (including legislation, common law and customary law). What renders Michelman's reading compelling is not that it makes the conflict between two seemingly contradictory provisions or normative purposes disappear, nor that it identifies an overarching purpose in terms of which they can be reconciled or balanced, but that it shows that what appears like a contradiction is in fact a tension,⁴³ a locus of significant dissent, that makes social deliberation both inevitable and possible and that therefore 'gives politics a chance'. The very possibility of politics is founded on the significant dissent embodied in the tension between the two parts of s 25. Constitutional application gives politics a chance in so far as it views this tension as part of the contingent 'legal-systemic unity' of 'pulling in the justice direction of transformation by, under, and according to law'; not in order to deny or resolve the tension, but to explore it in the context of the equally contingent and contradictory justice goals of constitutional transformation itself. The constitutional purpose of transformation by, under and in accordance with law is not uncontested; it is a site for dissent and social deliberation; for politics. Again, in as far as law is inevitable in the process of social and political transformation, its

⁴⁰ Ss 2, 248(1) of the 1993 Constitution; s 4, Schedule 1 of the 1996 Constitution. The 1997 proclamation was published in *Government Gazette* 18341.

⁴¹ AJ van der Walt *Constitutional property law* (2005) 12-18.

⁴² Michelman's reading finds support in *Port Elizabeth Municipality* (n 38 above), specifically regarding s 25.

⁴³ Van der Walt & Botha call this an aporia (n 18 above and accompanying text). Michelman explored something like the 'legal-systemic unity' (n 36 above) earlier (see n 18 above, 1112): 'My suggestion is to seek a *rapprochement* of property and popular sovereignty in the idea that rights under a political constitution, including property rights, are first of all to be regarded as political rights.'

legitimacy must depend on the extent to which it ‘gives politics a chance’ by acknowledging the sacrifice and upholding the dissent inherent in this tension.

My goal here is to consider the Constitutional Court’s response, during the 2007 term, to the compromise-based, patchwork relationship between existing law (particularly the common law) and the Constitution. In earlier constitutional discourse this has mostly been debated on the basis of the so-called application issue, referring to the question how the Constitution should find application in existing law. On the one hand, based on the constitutional aspiration to rectify the injustices and heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, the intention is clearly that the Constitution is the supreme law and that all law should be subject to it⁴⁴ – in this respect, the Constitution embodies a strong imperative for change in the general direction indicated by the transformation goals set out in the Constitution, as explained by Michelman. On the other hand, the desire for stability and certainty inherent in the rule of law principle implies a constitutional obligation not to disturb settled bodies of existing law⁴⁵ – and the vested rights protected by them – unnecessarily.⁴⁶ As I have argued above, this desire for stability and certainty will have a stronger effect in areas where the relevant constitutional provisions do not reveal the ‘visionary unity’ of the Constitution – in the compromise cases, we can expect that tradition and stability will offer stronger resistance against change. What Karl Klare described as ‘professional legal sensibilities’ will also tend to favour the stability of tradition and settled law, preferring to restrict change and uncertainty to instances where it is clearly required or mandated by unambiguous constitutional or statutory prescriptions.⁴⁷

That brings me to my central premise: tension between the push for constitutional reform and the pull of traditional stability constitutes more than just a minor difference about the pace or the direction of change. Underlying this tension is a larger conflict

⁴⁴ Ss 1, 2, 7, 8(1) of the Constitution; with regard to ss 1, 2 compare Michelman (n 36 above) 34-44.

⁴⁵ The phraseology is from S Woolman ‘Application’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2005) 10.

⁴⁶ S 1 (rule of law); s 39(3): the Bill of Rights does not deny the existence of other rights or freedoms recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. Compare ss 173, 8(3), 39(2) on the higher courts’ power to develop the common law to promote the spirit, purport and objects of the Bill. Compare T Roux ‘Continuity and change in a transforming legal order: The impact of section 26(3) of the Constitution on South African law’ (2004) 121 *South African Law Journal* 466-492 466 467.

⁴⁷ K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146-188 166-167.

between two opposing normative values or ideologies, one favouring the stability of existing law, based on the presence and the presumed political neutrality of the status quo; the other relying on the political justifiability of fundamental change indicated by the presumed social construction and injustice of the status quo. Those who think that the existing distribution of wealth, privilege and power and the law that helped create and uphold it are politically neutral and therefore not in need of political reconsideration favour a regime of rights in which the direct effect of the Constitution is preservation of the status quo; those who think that the existing regime and its laws are inherently politically constructed and hence in need of political reconsideration favour the view that neither law nor rights are immune from constitutional effect or democratic redefinition. In this perspective, the relationship between existing law and Constitution is an instance of the tension between two conflicting sets of normative values, respectively favouring stability and change, certainty and justice, rights and democracy, tradition and constitution. In the absence of a 'visionary unity' of purpose, conflict between them could precipitate a slide into normative anarchy. Simply ignoring or subjugating one in favour of the other could, however, undermine the diversity and pluralism that is a prerequisite for significant social dissent, politics and democracy. In the terminology of Van der Walt and Botha, the legitimacy of constitutional review depends upon the extent to which constitutional law can 'give politics a chance' by acknowledging the aporia inherent in the tension between stability and change, and by recognising the sacrificial inevitability of upholding, in a concrete case, the one at the cost of the other, without the comfort or the certainty of an appeal to foundation.

Michelman recognises the contingency of accepting diversity, but insists that constitutional transformation is possible to the extent that the direction of the pull between conflicting values favours justice rather than law. The constitutional tension between legality, rule of law and constitutional supremacy involves an aporia; so does the tension between stabilising the old and promoting the new, in the sense that rule of law safeguards stability via the back door of legal certainty while constitutional supremacy demands transformation. Consequently, Michelman's notion of visionary unity under the Constitution applies very usefully to the problem of existing law vs reform, but we should be careful not to read his analysis as superficial pragmatism. The unifying vision he identifies does not indicate an inflexible preference for change and against stability: the visionary unity of the Constitution identifies justice as a normative guideline for making hard decisions in concrete cases, but it does not pre-empt decisions in favour of change and against stability. In the language of Van der Walt and Botha, Michelman's argument recognises that every choice for or against stability or reform is a sacrificial one: the choice cannot be justified, but making an unavoidable decision is justified in

so far as it accommodates social dissent and open democratic deliberation. In every case, the question is whether the direction of the pull favours justice.

Relying on the theoretical groundwork of Van der Walt and Botha and Michelman, my hypothesis is that normative pluralism in the contradictions between constitutional reform and stability could easily result in either normative anarchy or reactionary formalism, unless the normative unity, the general direction of the pull, between these opposing forces favours transformative justice, by which I mean the justice that is implied by renunciation of everything the apartheid legal order represented and espousal of the central transformative values of human dignity, equality and freedom in an open and democratic society. This normative unity does not imply an inflexible preference for change and against stability, but it indicates the direction of the normative pull against which a decision for either change or stability must be justified. The questions that I will pose are whether the Constitutional Court is in the process of developing a direction-giving approach in deciding cases involving the contradiction between constitutional reform and stability and, if it is; whether this approach is justifiable in that it does not simply entrench a new formalism but, instead, opens up space for politics.

3 One legal system

There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.⁴⁸

The tension between preservation of the common law tradition and constitutional transformation initially emerged in debates about the direct or indirect horizontal application of the Bill of Rights. Commentators and policy makers concerned that private-law enclaves should not be allowed to escape the reach of constitutional reform or to continue 'privatised' injustice proposed that constitutional rights should apply directly; others queried the wisdom and the legitimacy of 'importing' constitutional values into private law. Clothed as concern about the unnecessary abolition of a well-developed and supposedly politically neutral legal tradition, the latter often concealed anxiety about the continued existence of established privilege and wealth. Conflicting decisions in which the new constitutional order was sometimes welcomed, sometimes accepted with a measure of suspicion, sometimes rejected outright, demonstrated uncertainty about the normative scheme that informs post-1994 legal reasoning.

⁴⁸ Chaskalson P, *Pharmaceutical Manufacturers* (n 37 above) par 44.

The constitutional text makes it clear that the Constitution is the supreme law of the land;⁴⁹ that the Bill of Rights is the cornerstone of democracy and that it enshrines the values of human dignity, equality and freedom;⁵⁰ that it applies to all law and that it binds all three arms of government and all organs of state;⁵¹ that the state must respect, protect, promote, and fulfil the rights in the Bill of Rights;⁵² that the Bill of Rights binds natural and juristic persons if and to the extent that it is applicable, taking into account the nature of the right;⁵³ that the courts, in order to give effect to a right in the Bill of Rights, must apply or, where necessary, develop the common law to the extent that legislation does not give effect to that right and may develop rules of the common law to limit the right,⁵⁴ and that courts, tribunals and other forums must, when interpreting legislation and when developing the common law and customary law, promote the spirit, purport and objects of the Bill of Rights.⁵⁵ However, it was not clear how this should work out in practice – when should the Constitution or new legislation trump the common law; when should the common law be developed to promote the spirit, purport and objects of the Constitution; how much should be changed in the process? Even more importantly, what should the effect of established common law norms and values be when it is unclear whether the Constitution or new legislation trumps the common law?

Some authors and judges share Michelman's view that transformation and stability can exist together and that an application theory and practice that uphold the tension is obligatory – the very idea of transformative constitutionalism⁵⁶ is founded upon the notion of a constitutional order that guarantees stability while

49 S 2.

50 S 7(1).

51 S 8(1).

52 S 7(2).

53 S 8(2).

54 S 8(3).

55 S 39(2).

56

The concept, coined by Klare (n 47 above) 146-188, inspired a cottage industry in constitutional theory; see H Botha 'Metaphoric reasoning and transformative constitutionalism' 2002 *Tydskrif vir Suid-Afrikaanse Reg* 612-627; 2003 *Tydskrif vir Suid-Afrikaanse Reg* 20-36; D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309-319; H Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *South African Journal on Human Rights* 249-283; le Roux (n 19 above) 629-675; Roux (n 46 above); AJ van der Walt 'Transformative constitutionalism and the development of South African property law' 2005 *Tydskrif vir Suid-Afrikaanse Reg* 655-689; 2006 *Tydskrif vir Suid-Afrikaanse Reg* 1-31; M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SA Public Law* 155-166; S Liebenberg 'Needs, rights and transformation: Adjudicating social rights' (2006) 1 *Stellenbosch Law Review* 5-36; P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351-360. See further the contributions of H Botha, D Davis, J Froneman, J van der Walt and K van Marle in H Botha, AJ van der Walt & JWG van der Walt (eds) *Rights and democracy in a transformative constitution* (2003).

simultaneously requiring (and authorising or even driving) social, economic or political transformation.⁵⁷

The problem is that the debate about the place and role of the common law in the new dispensation⁵⁸ has been dominated by the largely undeclared assumption that the common law should be insulated, in some measure, against constitutional amendment, presupposing that a substantial part of the common law might remain unaffected by the Constitution and that development of the rest can take place on its own terms, without raising constitutional issues. The jurisdictional format that this turf war adopted under the 1993 Constitution⁵⁹ ended in *Pharmaceutical Manufacturers* when the Constitutional Court rejected the Supreme Court of Appeal's view that the common law grounds for review continued to exist as a body of norms 'separate and distinct from the Constitution':⁶⁰

There are not two systems of law, ... each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.⁶¹

⁵⁷ Michelman and Van der Walt & Botha argue that the tension in the Constitution is central to the possibility of politics; see nn 18-20, 36-38 above. See further Roux (n 46 above) 487.

⁵⁸ The problem of balancing constitutional supremacy and common law is not unique to South African law. A similar problem exists in German constitutional law and early commentaries on the South African Constitution found inspiration in German theory: D Davis, M Chaskalson & J de Waal 'Democracy and constitutionalism: The role of constitutional interpretation' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and constitutionalism: The new South African legal order* (1994) 1-130 89-97. In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) par 54 Ackermann & Goldstone JJ referred to German constitutional law. Michelman (n 36) 40 relies on this passage in *Carmichele* to show the Constitutional Court's support for the view that a 'comprehensive (if doubtless somewhat inchoate) vision of the good society' is inherent in the Constitution. Since the European Convention was incorporated into English law by the Human Rights Act 1998, English courts have struggled to reconcile common law with human rights standards, eg *eviction vs home interest* in art 8 European Convention of Human Rights: *Harrow London Borough Council v Qazi* [2004] 1 AC 983; *Kay v London Borough of Lambeth*; *Leeds City Council v Price* [2006] UKHL 10 (HL); *Connors v United Kingdom* [2004] ECHR 223.

⁵⁹ Michelman (n 36 above) 22.

⁶⁰ The SCA decision was *Commissioner for Customs and Excise v Container Logistics (Pty) Ltd; Commissioner for Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 3 SA 771 (SCA); the CC decision was *Pharmaceutical Manufacturers* (n 37 above). Michelman (n 36 above) 15-33 explains *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 1319 (SCA) as a model for judges who want to keep a judgment out of the constitutional arena to reserve for the SCA final control over a category of future cases (18), although *Amod* might simply have avoided 'thorny issues'; its cause of action preceded commencement of the 1993 Constitution.

⁶¹ *Pharmaceutical Manufacturers* (n 37 above) par 44. See Michelman (n 36 above) 21-22.

In *Pharmaceutical Manufacturers* the Constitutional Court ‘established, once and for all, that the SCA cannot insulate a decision on legality from CC review by dressing it as a merely common law (and hence *not* a constitutional) decision.’⁶² As far as review of administrative action is concerned, this decision established a unitary vision of the relationship between common law and Constitution: the common law continues to exist in as far as it does not directly conflict with the Constitution. However, it does not exist as an independent body of law – there is just one system of law, shaped by the Constitution as the supreme law. The common law derives its force from the Constitution and it is subject to constitutional control and the tension between the Constitution and the common law is to be understood in terms of the transformative goal, the unitary normative vision, of the Constitution. The application, interpretation and development of the common law must take place in line with this vision. The essence, in the words of Michelman, is that application of the Constitution should promote the shared vision of an open society built on democracy, social justice and fundamental human rights and on human dignity, equality and freedom.

Unfortunately, *Pharmaceutical Manufacturers* did not bring clarity about the effect of the Constitution on existing law (including the common law) as a whole;⁶³ outside of administrative law, the idea that the common law might escape constitutional influence and that development of the common law can develop on its own terms, without raising constitutional issues, retains some traction. Private law specialists tended simply to establish absence of direct conflict between common law principles and constitutional rights, instead of seeking for normative or visionary unity. This approach presupposes that the common law could coexist alongside the Constitution, more or less unchanged, as long as it is free from the pernicious influence of apartheid. The strong version of this argument, that the law in general is politically neutral and that the abolition of apartheid laws

⁶² Michelman (n 36 above) 18. This is what L du Plessis ‘“Subsidiarity”: What’s in the name for constitutional interpretation and adjudication?’ (2006) 17 *Stellenbosch Law Review* 207-231 211 refers to as jurisdictional subsidiarity.

⁶³ *Pharmaceutical Manufacturers* (n 37 above) was decided prior to commencement of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Like *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC), *Pharmaceutical Manufacturers* dealt with the broader notion of legality, which includes executive and legislative action outside of the range of administrative action regulated by PAJA. With regard to the relationship between the common law, PAJA and the Constitution see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 25: the provisions of s 6 PAJA ‘divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rests squarely on the Constitution ... As PAJA gives effect to s 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters.’

properly eradicated politics from law, thereby restoring the common law to its former glory, no longer enjoys theoretical credibility⁶⁴ outside of doctrinally conservative circles.⁶⁵ The weak version, that the common law is flexible and capable of adaptation that would bring it into line with new demands and requirements in the new constitutional democracy, is shared by many lawyers, including high-ranking judges in the new legal order.⁶⁶

In the application debate, this argument supported the view that development of the common law, although referred to in the Constitution,⁶⁷ is something the civil courts are familiar with and that they should be left to do the work as they have always done it.⁶⁸ This view enjoyed wide support and strengthened the division of work between the Constitutional Court and the Supreme Court of Appeal under the 1993 Constitution.⁶⁹ The High Courts, the Supreme Court of Appeal and the Constitutional Court now have concurrent jurisdiction to decide on the constitutionality of legislation, but the notion persists that the Supreme Court of Appeal is the specialist court on

⁶⁴ Botha (n 18 above) 561-581.

⁶⁵ See J Potgieter 'The role of the law in a period of political transition: The need for objectivity' (1991) 54 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 800-807 802: 'It must be stressed that the basic assumption that the South African legal system as a whole has become illegitimate, is unfounded. The crisis in South Africa lies primarily in the socio-political rather than the legal sphere'; J Neethling 'n Toekomsblik op die Suid-Afrikaanse privaatreë – volwaardige naasbestaan of versoenende sintese?' ('A future perspective on South African private law – full coexistence or reconciliatory synthesis?') in A van Aswegen (ed) *The future of South African private law* (1994) 1-9 at 3: 'In the first instance, the apartheid era cannot be attributed to Roman-Dutch law – the blame must be placed squarely on the shoulders of the ruling minority who introduced the system of apartheid by way of legislation, and they were primarily enabled to this end by the doctrine of parliamentary sovereignty which derives from English constitutional law.' See further T J Scott 'The future of our Roman-Dutch law: Reflections and a suggestion' (1993) 26 *De Jure* 394-400 399.

⁶⁶ MM Corbett 'Trust law in the 90s: Challenges and change' (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 262-270 264. See also I Mahomed 'The future of Roman-Dutch law in Southern Africa, particularly in Lesotho' 1985 *Lesotho Law Journal* 357-365 360; A Sachs 'The future of Roman-Dutch law' (chap 8) in A Sachs *Protecting human rights in a new South Africa* (1990) 90-103 ('we know it more or less, we have the books and the rules and the procedures available, we might as well use it'). See AJ van der Walt 'Tradition on trial: A critical analysis of the civil-law tradition in South African property law' (1995) 11 *South Africa Journal on Human Rights* 169-206 169-171.

⁶⁷ Particularly ss 8(3), 39(2) and 173.

⁶⁸ See *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Afrox Health Care Bpk v Strydom* 2002 6 SA 21 (SCA). A Cockrell 'Private law and the bill of rights: A threshold issue of "horizontality"' in *Bill of rights compendium* (1998) paras 3A8, 3A7 argues that 'the direct application of constitutional rights against private agencies must be mediated by the operation of the common law'.

⁶⁹ In the 1996 Constitution, as in the 1993 Constitution, the Constitutional Court is a specialist court and not a court of general jurisdiction. In terms of s 167 it is the court of final instance in constitutional matters only. The Constitutional Court must confirm any order of a High Court or the Supreme Court of Appeal to the effect that an Act of Parliament, a provincial Act or conduct of the President is unconstitutional before that order can have effect: s 167(5). See Currie & de Waal (n 30 above) 108-109.

common law matters.⁷⁰ In *Zantsi*⁷¹ the Constitutional Court stated that, because of the far-reaching implications of constitutional decisions, it would be better if lower courts first heard cases where constitutional issues are raised, because that would allow the law to develop incrementally.⁷² Incremental development is said to be in line with the inherent logic of the common law and *Zantsi* therefore reinforced the idea that development of the common law under the Constitution could continue largely as before.⁷³

The notion that the Supreme Court of Appeal is a specialist court in common law matters is not the only reason why cases involving development of the common law are left to the civil courts. The Constitutional Court prefers not to sit as court of first and last instance on any matter and it prefers that the High Court or the Supreme Court of Appeal decide on common law issues before it considers the matter on appeal.⁷⁴ The outcome in *Carmichele*⁷⁵ could be seen as proof that the division of labour between the

⁷⁰ *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 4 SA 753 (CC) par 33: the SCA's view on whether the common law should be developed is important because of 'the breadth of its jurisdiction and its expertise in the common law'.

⁷¹ *Zantsi v Council of State, Ciskei* 1995 4 SA 615 (CC) par 5. This echoed the decision in *S v Mhlungu* 1995 3 SA 867 (CC) par 59 that, where it is possible to decide any case without reaching a constitutional issue, that is the course that should be followed (dissenting, Kentridge J). This principle was subsequently confirmed in *Zantsi* (above) par 3 and followed in *Amod* (CC) (n 70 above) par 33. Du Plessis (n 62 above) 207-231 calls it the subsidiarity principle.

⁷² The notion of 'interstitial', incremental development that fills up small gaps in received doctrine, case by case, originated in HLA Hart *The concept of law* (1961) 37-38. The argument is that larger changes in the common law that affect acquired rights should be introduced by legislation. However, judges are well-placed and qualified to make smaller, reasoned 'elaborations' or incremental changes to the common law on doctrinal reasoning. The argument that the courts are neither democratically legitimated to bring about major changes nor qualified to judge the wisdom of policy changes is based on the deference approach of the legal process school that responded to Realism by resorting to either deference or craft: A Bickel 'The Supreme Court 1960 term: The passive virtues' (1961) 75 *Harv LR* 40-79; H Wechsler 'Toward neutral principles of constitutional law' (1959) 73 *Harv LR* 1-35.

⁷³ *Khumalo v Holomisa* 2002 5 SA 401 (CC) par 45 (not shown that the common law 'as currently developed was inconsistent with the provisions of the Constitution') can be traced to this argument. The defence of reasonable publication was developed by the SCA in *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA), contradicting earlier case law where publishers were held strictly liable for defamation. *Bogoshi* argued that this was inspired by the dynamic logic of the law of delict and not by constitutional developments, despite confirmation of the established authority (*Pakendorf v De Flamingh* 1982 3 SA 146 (A)) in *Neethling v Du Preez*; *Neethling v The Weekly Mail* 1994 1 SA 708 (A), the (then still) Appellate Division of the Supreme Court holding that a newspaper could only escape a claim for defamation if it could establish truth.

⁷⁴ *Carmichele* (n 58 above) paras 56-59.

⁷⁵ In *Carmichele* (n 58 above) par 45 the Constitutional Court referred the matter back to the trial court (paras 81-83), where it was decided that the common law would not have placed a duty upon the state; that the Constitution would place a duty upon the state; that the common law therefore had to be developed to place a duty upon the state; and damages was granted: *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C).

Constitutional Court and the civil courts functions well. Given its declared preference for developing the common law incrementally the fact that the Constitutional Court referred the final order back to the High Court could be seen as an effort not to intrude too far into the sphere of the legislature, who should be given maximum scope to amend the common law by legislation.⁷⁶ At the same time, referring development of the common law to the high courts need not be seen as a sign of deference; the Constitutional Court has indicated that it will not compromise the supremacy of the Constitution and that it will develop the common law if that is what the interests of justice require.⁷⁷ As Du Plessis points out, the *Pharmaceutical Manufacturers* decision⁷⁸ was

the Constitutional Court's response to a tendency of the Supreme Court of Appeal (at the time) to pretend that constitution-related issues can be disposed of in an 'enlightened', rights-friendly manner without reference to (let alone reliance on) the Constitution.⁷⁹

In some cases the tendency to regard the Supreme Court of Appeal as the specialist court in matters concerning the common law did result in outcomes that restricted the influence of the Constitution on private law. In *Brisley*⁸⁰ and *Afrox*⁸¹ it was accepted that public policy (of which open-ended norms such as good faith form part) is informed by fundamental values in the Constitution⁸² and that the Constitution might 'spur on the development of new substantive rules of law',⁸³ but neither good faith nor constitutional values 'were sufficient to outweigh the traditional bias in favour of the strict enforcement of agreements',⁸⁴ and the Supreme Court of Appeal was not willing to undertake development of the common law that would amount to judicial interference with agreements willingly entered into by private parties.⁸⁵

⁷⁶ *Zantsi* (n 71 above) par 5.

⁷⁷ *Zantsi* (n 71 above) par 4; *Harksen v Lane NO* 1998 1 SA 300 (CC) par 26.

⁷⁸ n 37 above.

⁷⁹ Du Plessis (n 62 above) 217, referring to *Bogoshi* (n 73 above). Woolman (n 45 above) 10 refers to the same tendency.

⁸⁰ n 68 above. Roux (n 46 above) 485 argues that the majority in *Brisley* made a policy choice in favour of legal continuity.

⁸¹ n 68 above.

⁸² In view of *Carmichele* (n 58 above); see *Brisley* (n 68 above) par 91; *Afrox* (n 68 above) par 18.

⁸³ GF Lubbe 'Taking fundamental rights seriously: The bill of rights and its implications for the development of contract law' (2004) 121 *South African Law Journal* 395-423 401.

⁸⁴ Lubbe (n 83 above) 401 414.

⁸⁵ Du Plessis (n 62 above) 218-221, referring to *Afrox* (n 68 above). See Woolman (n 45 above) 95; T Naudé & G Lubbe 'Exemption clauses – A rethink occasioned by *Afrox Healthcare Bpk v Strydom*' (2005) 122 *South African Law Journal* 441-463; S Woolman & D Brand 'Is there a constitution in this courtroom? Constitutional jurisdiction after *Walters and Afrox*' (2003) 18 *SA Public Law* 37-82.

During the 2007 term the Constitutional Court decided three cases in which the effect of the Constitution on the common law was in issue: *Barkhuizen*,⁸⁶ *NM*⁸⁷ and *Masiya*.⁸⁸ Stu Woolman concluded that these decisions prove that ‘a penchant for outcome-based decision-making, and a concomitant lack of analytical rigour, has finally caught up with the Constitutional Court’; that ‘the court’s current process of (public) reasoning – its preferred mode of analysis – has genuinely deleterious consequences.’⁸⁹ In coming to this rather damning conclusion, Woolman attaches particular importance to ‘the court’s persistent refusal to engage in the direct application of the Bill of Rights’ and its insistence upon replacing direct application analysis with what he describes as ‘flaccid analysis in terms of three vaguely defined values’, namely dignity, equality and freedom.⁹⁰ This strategy of overemphasising the constitutional values and development of the common law (or indirect application) in terms of s 39(2) instead of direct application of the rights provisions in the Bill of Rights, so Woolman argues, ‘has freed the court almost entirely from the text, and thereby grants the court the licence to decide each case as it pleases’, thereby also unwittingly undermining the Bill of Rights and the rule of law.⁹¹

These are strong words. If the decisions criticised by Woolman indeed indicate a tendency to free the Constitutional Court from the text of the Constitution so that it can decide each case as it pleases, on the basis of ‘value-speak’, and if that tendency does undermine the Bill of Rights and the rule of law, then we are perhaps indeed seeing the fruits of normative anarchy. What Woolman is suggesting is that the decisions in *Barkhuizen*, *NM* and *Masiya* represent decision making at more or less the same level as Mr Davies senior’s ruling that Robin could not arrange a visit with a friend in the afternoon when he already had another social engagement for that evening, with his parents – the decision is arbitrary because it is based on unilateral pronouncement of vaguely defined values that are neither substantiated by foundation nor open to debate. In the absence of foundation, normative pluralism calls for deliberation and politics, not flaccid but arbitrary and inflexible rules.

⁸⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) (time-limitation clauses in an insurance contract).

⁸⁷ *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 5 SA 250 (CC) (publication that revealed HIV status of the applicants without consent).

⁸⁸ *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 5 SA 30 (CC) (common law definition of rape).

⁸⁹ S Woolman ‘The amazing, vanishing bill of rights’ (2007) 124 *South African Law Journal* 762-794 762.

⁹⁰ Woolman (n 89 above) 763.

⁹¹ As above.

In the early stages of the constitutional debate much emphasis was placed on direct horizontal application of the Bill of Rights. In two landmark decisions on direct horizontal application, the Constitutional Court first held that s 7(1) and 7(2) of the 1993 Constitution had to be interpreted restrictively so that direct horizontal application on the law of defamation would be excluded;⁹² then subsequently decided that direct horizontal application was possible under s 8(2) of the 1996 Constitution.⁹³ In terms of the application debate as it has crystallised in the case law and literature, this does not take the matter much further and we are still wavering between the preservative impulse to uphold the common law tradition unless the Constitution or new legislation explicitly requires us to depart from it and the transformative desire to change the legal infrastructure that inhibits speedy and effective social and economic reform. Most commentators who were initially enthusiastic about direct application have given up on the debate or shifted their focus,⁹⁴ but Woolman insists that the Constitutional Court's persistent evasion of direct application 'has genuinely deleterious effects'.⁹⁵ In the next two sections I evaluate decisions from the 2007 term, arguing that they hold the key to a different perspective on the application issue. In the following two sections I identify, from the case law of the Constitutional Court, indications of what I describe as a subsidiarity approach that enables the courts to simultaneously promote constitutional reforms and uphold constitutional stability, choosing between the two impulses (and justifying the choice in each case) with reference to constitutional principles of justice and democracy. In the final section of the article I argue that this approach can be justified, even in so far as it creates law that resembles fixed doctrine, in so far as it is not aimed at entrenching shallow formalism but rather at upholding and enabling a constitutionally authorised and required balance between constitution and law, rights and democracy, or stability and change, within the particular historical and constitutional context of the South African Constitution. My underlying assumption, based upon the theoretical analysis in the first two sections of the article above, is that such a balance is justified in so far as it opens up space to give politics a chance, in the sense that it recognises diversity and pluralism and creates room for real social contestation and dissent.

⁹² Du Plessis (n 62 above) 220, referring to *Du Plessis v De Klerk* 1996 3 SA 850 (CC).

⁹³ Du Plessis (n 62 above) 221, referring to *Khumalo* (n 73 above).

⁹⁴ Eg Van der Walt (n 34 above) 341-363; Roux (n 46 above).

⁹⁵ n 89 above.

4 Rights and democracy

Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored.⁹⁶

4.1 Introduction

Decisions from the 2007 term indicate the emergence of an ‘angle of approach’⁹⁷ – an analytic rhythm – according to which courts could decide upon the tension between rights and democracy, while acknowledging what Van der Walt and Botha⁹⁸ called the irresoluble dissent embedded in the countermajoritarian dilemma. Lourens du Plessis described this kind of thought process as ‘subsidiarity’, defining it as a reading strategy whereby a court refrains from taking a decision that can be taken by a lower court or avoids a constitutional decision if the matter can be decided on a nonconstitutional basis.⁹⁹ Generally speaking, the notion of subsidiarity poses conceptual and analytical problems for the politics-enhancing approach to the fundamental contradiction set out in the first two sections of the article above. This is particularly true of the way in which the principle of subsidiarity has been enunciated in earlier South African case law. In 1995 the Constitutional Court enunciated a subsidiarity principle in *Mhlungu*, holding that courts should, whenever possible, decide cases without reaching a constitutional issue,¹⁰⁰ in 1998 it formulated another one in *Amod*,¹⁰¹ stating that the development of the common law should (in terms of the 1993 Constitution) preferably be undertaken by the Supreme Court of Appeal. The latter principle was confirmed (under the 1996 Constitution) in *Carmichele*.¹⁰² Stated this blandly, the principle of subsidiarity looks like a formalist escape

⁹⁶ *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 2 SA 311 (CC) par 437 (Chaskalson CJ).

⁹⁷ I am indebted to Henk Botha, who first used this phrase at a workshop in 2007, explaining that it pointedly avoids the pretence of a technique that produces ready or final answers. The phrase originates from NS Ndebele’s novel *The cry of Winnie Mandela* (2003).

⁹⁸ See n 19 above and accompanying text.

⁹⁹ I do not set out or enter into the general subsidiarity debate or literature, where this notion has attracted various understandings and where it remains contested; see Du Plessis (n 62 above) 207-231. Currie & de Waal (n 30 above) 75-78 call this the ‘avoidance principle’, although their interpretation is narrower and more mechanistic. See further L du Plessis ‘The South African constitution as memory and promise’ (2000) 11 *Stellenbosch Law Review* 385-394 388-389; W le Roux ‘War memorials, the architecture of the Constitutional Court building and counter-monumental constitutionalism’ in W le Roux & K van Marle (eds) *Law, memory and the legacy of apartheid. Ten years after Azapo v President of South Africa* (2007) 65-90 87.

¹⁰⁰ n 71 above, par 59 (dissenting, Kentridge J); confirmed in *Zantsi* (n 71 above) par 3.

¹⁰¹ n 70 above, par 14.

¹⁰² n 58 above, paras 50-55.

from politics, but in the historical and constitutional context of the South African Constitution it could also be seen as a politics-confirming and -enhancing device that ensures interplay between constitutional principles and democratic laws, reformist initiatives and vested rights, change and stability. In the former sense, subsidiarity would serve a formalist evasion of politics; in the latter sense it could promote normative pluralism and constitutional change without succumbing to either normative anarchy or reactionary formalism.

In the next two sections I discuss decisions from the 2007 term that could indicate that the Constitutional Court is developing a more general subsidiarity approach.¹⁰³ In the final section I consider the implications of this approach for the application debate and evaluate the role that subsidiarity could play in promoting normative pluralism and avoiding anarchy.

4.2 The SANDU principle

In *SANDU*,¹⁰⁴ the Court confirmed¹⁰⁵ that, once legislation has been enacted to give effect to a right in the Constitution, litigants must rely on the legislation – and may not rely directly on the constitutional provision – *when bringing action to protect that right against infringement*. The principle establishes a subsidiarity rule because it excludes direct application of the constitutional provision once legislation has been enacted to give effect to that right. Legislation in this category include the Labour Relations Act 66 of 1995 (LRA) (s 23), the Promotion of Administrative Justice Act 3 of 2000 (PAJA) (s 33), the Promotion of Access to Information Act 2 of

¹⁰³ Aspects of this approach have been decided earlier. In *New Clicks* (n 96 above) par 97 fn 81 Chaskalson CJ cites with approval a paper in which Cora Hoexter set out the logic of both *SANDU* and *Bato Star*. The paper was published as C Hoexter “Administrative action” in the courts’ 2006 *Acta Juridica* 303-324 (also published as H Corder (ed) *Comparing administrative justice across the Commonwealth* (2008)). See to the same effect Currie & de Waal (n 30 above) 649.

¹⁰⁴ *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52. See further *Pillay* (n 29 above) paras 39-40; *Chirwa v Transnet Ltd* 2008 2 SA 24 (CC) paras 59 (Skweyiya J), 69 (Ngcobo J). In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) par 248 Ngcobo J confirmed the principle; the majority (paras 55-56) did not mention it. In *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 2 SA 319 (CC) the majority (par 24) confirmed that the National Environment Management Act 107 of 1998 (NEMA) is legislation contemplated by s 24(b) without mentioning *SANDU* (but see Ngcobo J par 62).

¹⁰⁵ Formulated in *NAPTOSA v Minister of Education, Western Cape* 2001 2 SA 112 (C) 123B, I-J; mooted in *New Clicks* (n 96 above) paras 95-96, 434-437 (Chaskalson CJ, Ngcobo J); left undecided in *National Education Health and Allied Workers Union v University of Cape Town* 2003 3 SA 1 (CC) par 17; *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe* 2003 4 SA 584 (CC) paras 23-24 (Ngcobo J). See IM Rautenbach ‘Overview of Constitutional Court decisions on the bill of rights – 2007’ 2008 *Tydskrif vir Suid-Afrikaanse Reg* 330-348 330.

2000 (PAIA) (s 32) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) (s 9).¹⁰⁶ Application of the *SANDU* principle to PAJA and PEPUDA indicates that the distinction between vertical and horizontal application becomes irrelevant in the context of this principle.

In line with s 39(2), *SANDU* requires that where ‘the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose’.¹⁰⁷ In *Goedgelegen Tropical Fruits*¹⁰⁸ the Constitutional Court applied the implications, emphasising that the Restitution of Land Rights Act 22 of 1994 is remedial legislation under the Constitution and that courts, to promote the spirit, purport and objects of the Bill of Rights, must acknowledge the historical background under which labour tenancies were cancelled. The cause of a historical dispossession will often not lie in an isolated moment in time or a single act but in the context and, as the contextual features of this case ‘constituted a grid of integrated repressive laws that were aimed at furthering the government’s policy of racial discrimination’ which ‘materially affected and favoured the ability of the [landowners] to dispossess the applicants of their labour tenancy rights’,¹⁰⁹ the former labour tenants could claim restitution.

The *SANDU* principle indicates that, once legislation has been enacted to give effect to a constitutional right, direct application of the constitutional provision is precluded. However, this applies only when litigants seek to protect rights; *when the constitutional validity of legislation is challenged*, the constitutional provision applies directly.¹¹⁰ In *Islamic Unity*¹¹¹ the Court expanded the qualification: when challenging the constitutional validity of any statute that

¹⁰⁶ In *NAPTOSA* (n 105 above), *NEHAWU* (n 105 above) and *SANDU* (n 104 above) the provision was s 23(5); the legislation the LRA. In *Sidumo* (n 104) and *Chirwa* (n 104) two provisions (ss 23, 33) and statutes (LRA and PAJA) were in dispute. In *Pillay* (n 29) the provision was s 9, the legislation PEPUDA. In *New Clicks* (n 96) the provision was s 33, the legislation PAJA; in *Ingledeu* (n 105) the provision was s 32, the legislation PAIA. In *HTF Developers* (n 104) the provision was s 24, the legislation NEMA.

¹⁰⁷ *Sidumo* (n 104 above) par 249, citing *NEHAWU* (n 105 above) par 14. Although Ngcobo J concurred in the outcome in *Sidumo*, he wrote a separate judgment: see n 104 above.

¹⁰⁸ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC).

¹⁰⁹ *Goedgelegen Tropical Fruits* (n 108 above) paras 53, 66, 69, 71.

¹¹⁰ *New Clicks* (n 96 above) par 437; *SANDU* (n 104 above) par 52; *Sidumo* (n 104 above) par 249; *Engelbrecht v Road Accident Fund* 2007 6 SA 96 (CC) par 15 (constitutional challenge against legislation involves direct application of s 34).

¹¹¹ *Islamic Unity Convention v Minister of Telecommunications* 2008 3 SA 383 (CC) par 59.

conflicts with the constitutional principle of administrative justice, s 33 is the review measure.¹¹²

SANDU, with its qualification, was originally justified in *New Clicks*: allowing litigants to rely on s 23 directly instead of on the LRA ‘would encourage the development of two parallel streams of labour law jurisprudence, one under the LRA and the other under s 23(1)’; such a practice would be ‘singularly inappropriate’¹¹³ and would contradict the principle of ‘one system of law grounded in the Constitution’.¹¹⁴

Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.¹¹⁵

The principle expounded by the Court is grounded in the norm that ‘to permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the Legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.’¹¹⁶ The qualification, by contrast, is justified by the norm that the majority is accountable to and can be tested against constitutional limits. *SANDU* therefore reflects the tension of the countermajoritarian dilemma, with the principle emphasising democracy and the qualification emphasising rights: when the democratically elected legislature meets its constitutional obligations to enact legislation that gives effect to the rights in the Constitution, within constitutional limits, the courts should respect and give full effect to that legislation. To that extent, rights are subject to democracy. However, the courts can review the constitutionality of legislation with a direct appeal to the Constitution. To that extent, democracy is subject to rights. In so far as the *SANDU* principle promotes this

¹¹² *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC): If a constitutional challenge is brought against legislation for being inconsistent with s 33, the proper approach is to consider whether it can be consistent with s 33: s 39(2) (par 102). The next question is whether it contemplates administrative action for purposes of s 33 (par 103), whether it limits the rights in s 33 (par 106) and whether the limitation is justifiable (s 36(1)).

¹¹³ *New Clicks* (par 96 above) paras 434, 436; *NAPTOSA* (n 105 above) par 123B, J.

¹¹⁴ *Pharmaceutical Manufacturers* (n 37 above) par 44.

¹¹⁵ *New Clicks* (n 96 above) par 437 (Chaskalson CJ). Footnote omitted.

¹¹⁶ *SANDU* (n 104 above) par 52; *Pillay* (n 29 above) par 40.

balance between democracy and rights one could say that it could be employed to promote normative pluralism without falling into the trap of either normative anarchy (anything goes) or reactionary formalism (escaping real social contestation and dissent through formalist reasoning). To that extent, the principle could also be said to give politics a chance in that it promotes and enables real social contestation and dissent between the democratic push of the majority and the stabilising pull of constitutional stability.

4.3 The *Bato Star* principle

In *Chirwa*¹¹⁷ the Court confirmed a second principle:¹¹⁸ once legislation has been enacted to give effect to a right in the Constitution, and in so far as the legislation was intended to codify the common law, litigants may not rely directly on the common law *when seeking to protect that right against infringement*. The principle also establishes a subsidiarity rule in that it precludes application or development of the common law;¹¹⁹ once legislation has been enacted to give effect to a right, that right is protected through constitution-conforming interpretation and application of the legislation in accordance with s 39(2).¹²⁰

Bato Star does not render the common law irrelevant – the common law informs interpretation of the legislation.¹²¹ The stabilising role of the common law should be treated with care, though – the common law should inform interpretation of legislation only in so far as it is consistent with the Constitution, consistent with the legislation and able to augment interpretation of the legislation as foreseen in s 39(2), namely to promote the spirit, purport and objects of the Bill of Rights. Du Plessis¹²² and de Ville¹²³ explain that the relationship between the common law (favouring stability by upholding the status quo) and legislation (favouring change through policy-driven intervention) has to be inverted in view of the centripetal interpretive force of the Constitution.

The areas of existing law identified as affected by this principle are labour disputes (the LRA)¹²⁴ and just administrative action

¹¹⁷ n 104 above, par 23; see further *Fuel Retailers* (n 25 above) par 37.

¹¹⁸ Stated earlier in *Bato Star* (n 63 above) par 25 *New Clicks* (n 96 above) par 96.

¹¹⁹ In terms of ss 173, 8(3) or 39(2). See to the same effect *Currie & de Waal* (n 30 above) 650.

¹²⁰ S 39(2).

¹²¹ n 63 above, par 22.

¹²² L du Plessis *Re-interpretation of statutes* (2002) 179-181.

¹²³ JR de Ville *Constitutional and statutory interpretation* (2000) 172 66.

¹²⁴ *Chirwa* (n 104 above) par 23.

(PAJA),¹²⁵ but the Restitution of Land Rights Act 22 of 1994,¹²⁶ the National Environment Management Act 107 of 1998 (NEMA),¹²⁷ the Water Services Act 108 of 1997, the Mineral and Petroleum Resources Development Act 28 of 2002¹²⁸ and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Rights Act 19 of 1998 (PIE)¹²⁹ could also fit into this category.

Like *SANDU*, *Bato Star* is founded on the principle of ‘one system of law grounded in the Constitution’,¹³⁰ and intended to prevent the development of parallel systems of law and jurisprudence, one based on legislation and the other on the common law. Again like *SANDU*, *Bato Star* acknowledges the countermajoritarian dilemma in that it prevents the courts from circumventing democratically enacted legislation by reverting to a parallel, alternative system of rules,¹³¹ although it leaves room for constitutional review of democratic legislation. Like *SANDU*, the *Bato Star* principle enforces normative pluralism by preventing either democratic legislation or constitutional rights from usurping all adjudicative space – by forcefully holding the balance between the two, the principle gives politics a chance in so far as it enables decision-making based on consideration of the contestation between both impulses.

SANDU, *Bato Star* and the constitutional review qualification, considered together, are signs of a subsidiarity approach: once legislation is enacted to give effect to a constitutional right, litigants must rely on the legislation when bringing action to protect that right; they may not rely directly on the constitutional provision or on the common law. Direct application of the constitutional provision remains possible to attack the constitutional validity of the legislation. Neither constitutional principle nor legislative inter-

¹²⁵ *Fuel Retailers* (n 25 above) par 37.

¹²⁶ Promulgated to give effect to s 121 of the 1993 Constitution, now authorised by s 25(7). See *Goedgelegen Tropical Fruits* (n 108 above).

¹²⁷ Enacted to give effect to s 24(b): *HTF Developers* (n 104 above) par 24. Ss 31A and 32 of the Environment Conservation Act 73 of 1989 must also be interpreted to give effect to s 24: *HTF Developers* par 19.

¹²⁸ Arguably promulgated to give effect to s 24(b)(iii) and s 25(5), read with s 25(4)(a).

¹²⁹ Enacted to give effect to s 26(3): *Port Elizabeth Municipality* (n 38 above) paras 11-23; *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) par 16. S 4(1) of PIE explicitly overrides the common law. The CC declined in *City of Johannesburg* to decide whether PIE applied and what the relationship between PIE and s 26 is, but held that a local authority that evicts residents without meaningfully engaging with them acts at odds with the spirit and purpose of s 26(3).

¹³⁰ *Pharmaceutical Manufacturers* (n 37 above) par 44.

¹³¹ JW Singer & JM Beerermann ‘The social origins of property’ (1003) 6 *Canadian Journal of Law & Jurisprudence* 217-248 238 point out that the US Supreme Court majority in *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) characterised ‘traditional common law [property] rules as somehow more worthy than politics advanced through contemporary legislative action’, threatening to derail public policies.

vention or common law tradition is allowed to decide cases automatically by its own force; each case is decided only when and on the strength of contestation between the conflicting impulses of stability and change; rights and constitution; tradition and reform.

In so far as the cases discussed so far reach, these subsidiarity principles are attractive and relatively unproblematic. It is also reasonably simple to justify their application and outcome in the straightforward cases foreseen in these decisions. However, the majority of cases will not be nearly as simple, in that they will not fall within the rather narrow ambit foreseen in the decisions discussed so far. The difficulty is to decide how far the subsidiarity approach reaches; particularly, whether the subsidiarity principles apply only where legislation was enacted specifically to give effect to a constitutional right and intended to codify existing law; whether they also to apply to other legislation; and how they affect the common law.

In the sections that follow I embroider upon the logic of the subsidiarity principles that I have identified in the *SANDU* and *Bato Star* decisions, without thereby pretending either that the embroidered or expanded subsidiarity principles reflect the view (or would meet with the approval) of the Constitutional Court or that they constitute doctrinal necessity. The line of argument in what follows is simply to trace what the extent and outlines of the *SANDU* and *Bato Star* subsidiarity principles could be if their logic is developed further, into areas not so far foreseen or discussed by the Constitutional Court. I do not present this analysis as a proposal of some kind of subsidiarity or deference principle either – in the final sections of the article, I still want to subject the outcome of this logical exploration to critical scrutiny in view of the normative framework set out earlier: if the logic of subsidiarity is embroidered upon to present a fuller picture than can at present be gleaned from case law, and should this logic be adopted and followed by the courts, and in so far as it might eventually establish legal or doctrinal principles, are or would they be justified? In asking this question, my point of departure will once again be that law (including subsidiarity principles), in so far as it is inevitable, will only be justified to the extent that it promotes normative pluralism but does not descend into either anarchy or reactionary formalism. In allowing room for normative pluralism but simultaneously avoiding anarchy, it must give politics a chance by allowing for real social contention and dissent.

In this spirit, I rely on the perceived logic of subsidiarity in *SANDU* and *Bato Star* to determine whether, and how, the subsidiarity principles could apply with regard to other legislation (that it, pre-1994 legislation and partial or competing legislation) or to cases where there is no applicable legislation at all.

4.4 Application to other legislation

SANDU was formulated for legislation particularly enacted to give effect to a right in the Bill of Rights; *Bato Star* was aimed at legislation that ‘covers the field’.¹³² This raises the question whether these principles also apply to legislation that protects the right in question but that was neither enacted specifically with the constitutional provision in mind nor intended to codify existing law.¹³³

The first indication that these principles could apply more widely is the justification for the subsidiarity principles: if the underlying norm is that legislation should not be sidelined in protecting a constitutional right out of respect for the transformative role of the democratic legislature, the principles should apply as widely as possible to legislation that gives effect to a right, including legislation not specifically promulgated with the constitutional provision in mind or not intended to codify existing law on the protection of that right.¹³⁴

The second reason why flexible application of *Bato Star* makes sense is that it is often difficult to decide when legislation was intended to codify existing law.¹³⁵ On the one hand, some gaps are left on purpose: constitutional review of legislative, executive and judicial action is covered by neither s 33 nor PAJA and was made possible by a direct appeal to the constitutional legality principle.¹³⁶ On the other hand, even legislation intended to ‘cover the field’ might leave gaps on purpose or by mistake: PAJA, to which *SANDU* and *Bato Star* clearly apply, covers the grounds for review of administrative action only imperfectly and the common law probably

¹³² Stated in *New Clicks* (n 96 above) par 95 with reference to PAJA; see *Sidumo* (n 104 above) par 90. See I Currie ‘What difference does the Promotion of Administrative Justice Act make to administrative law?’ 2006 *Acta Juridica* 325-351 328-334 (whether PAJA is codifying legislation).

¹³³ The Rental Housing Act 50 of 1999 gives effect to s 25(6) (insecure tenure), but is not intended to codify landlord-tenant law.

¹³⁴ Currie (n 132 above) 328 critiques the tendency to treat the notion that PAJA codified the law on administrative review as if it meant that PAJA ‘made no difference to the existing law’; in other words, we can apply existing law as if it was legitimised by PAJA. Extending *Bato Star* to partial legislation could force interpreters to acknowledge that the common law survives only in so far as it is consistent with and augment legislation.

¹³⁵ It is normally easier to identify legislation specifically intended to give effect to a provision, but even there some cases might be difficult.

¹³⁶ See C Hoexter *Administrative law in South Africa* (2007) 169-175. Review of these actions is possible on the basis of the legality principle in the Constitution: *Fedsure* (n 63 above) paras 33-45 (legislative action); *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) par 142 (executive action); *Nel v Le Roux NO* 1996 3 SA 562 (CC) par 24 (judicial action). See C Hoexter ‘The principle of legality in South African administrative law’ (2004) 4 *Macquarie Law Journal* 165-185.

still applies in the gaps.¹³⁷ The subsidiarity principles should therefore not be restricted to implementing or codifying legislation and it should be accepted that gaps will occur in legislation. Judging on the justification argument, a gap in the field covered by legislation should mean that the subsidiarity principles do not apply in that specific area, allowing direct reference, on that specific point, to either the constitutional provision (*SANDU*) or the common law (*Bato Star*). I return to this point later.

The third argument that supports wider application of the subsidiarity principles is the common law presumption that legislation does not amend the common law more than is necessary;¹³⁸ legislation does amend the common law in so far as the intention to amend is either stated explicitly or implied clearly.¹³⁹ Considering that pre-constitutional law survives only to the extent that it is consistent with the Constitution¹⁴⁰ and that all legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights,¹⁴¹ it must now be the case that all legislation, whether specifically intended to codify existing law or not, either gives effect to the rights in the Bill of Rights and promotes the spirit, purport and objects of the Bill of Rights or is unconstitutional.¹⁴² It thus becomes axiomatic that all legislation must give effect to the rights in and promote the spirit, purport and objects of the Bill of Rights to a certain extent; the intention to amend the common law must therefore be implicit in all legislation and *SANDU* and *Bato Star* should apply to it. Lourens du Plessis¹⁴³ and Jacques de Ville¹⁴⁴ argue in the same direction when they state that the common law presumption either cannot apply or should be inverted in the context of the new Constitution.¹⁴⁵ Existing law must be interpreted to fit in with constitutional rights and therefore all legislation must be assumed to amend the common law in so far as is necessary to give effect to the Constitution, which is why the common law no longer exists as a

¹³⁷ Prior to PAJA the courts reviewed decisions taken by private bodies: *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 2 SA 1 (A); *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 3 SA 344 (W); *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 3 SA 132 (A). It has been argued that the common law still applies in this situation: Hoexter *Administrative law* (n 136 above) 180-18; Currie & de Waal (n 30 above) 645. Other gaps are left by excluding grounds for review from s 6 PAJA, e.g. the common law rule against vagueness.

¹³⁸ Du Plessis (n 122 above) 177-181; de Ville (n 123 above) 170-176.

¹³⁹ Hoexter (n 103 above) 308: the principle that PAJA cannot be sidestepped by resorting directly to the common law is logical, 'since statutes inevitably *displace* the common law' (emphasis in original). Compare Rautenbach (n 105 above) 330.

¹⁴⁰ S 39(3).

¹⁴¹ S 39(2).

¹⁴² S 172.

¹⁴³ n 122 above, 179-181.

¹⁴⁴ n 123 above, 172, 66.

¹⁴⁵ Compare *Pharmaceutical Manufacturers* (n 37 above) par 45.

parallel, alternative system of rules and cannot be reverted to directly (*Bato Star*).

To put it simply, direct application of the Constitution and the application and development of the common law should only come up in the absence of legislation. Some legislation will give effect to rights in the Bill of Rights more directly and some will affect existing law more explicitly and extensively, but in line with *SANDU* and *Bato Star* all legislation either fails constitutional scrutiny or triggers a subsidiarity principle according to which the right must primarily be protected via the legislation and not via direct application of the constitutional provision or the common law. In litigation aimed at protection of a constitutional right, the subsidiarity principles in *SANDU* and *Bato Star* postpone direct application of the constitutional provision and application or development of the common law until it is clear that legislation does not cover the case.

Once a flexible reading of the subsidiarity principles is accepted, the next question is how these principles should apply to partial legislation; in other words, legislation that gives partial effect to a constitutional right but does not attempt or manage to ‘cover the field’ as far as protection of the right is concerned. This category is difficult to define because it is impossible to say how partial legislation must be to disqualify it from being comprehensive, as the example of PAJA in the previous section proves. If the subsidiarity principles must apply to legislation that ‘covers the field’ as imperfectly as PAJA does they should arguably apply to all partial legislation *when and in so far as* the legislation gives effect to a constitutional right. An example illustrates the point.

In *Magudu Game Co*¹⁴⁶ the KwaZulu-Natal High Court argued that the common law principles regarding ownership of wild game should be developed, in line with s 39(2), to provide for the exigencies of commercial game farming. However, the state had already enacted the Game Theft Act 105 of 1991 to protect the rights of commercial game farmers. The Act does not codify the law on wild game – outside of commercial game farming the common law remains unchanged. However, the Act does regulate commercial game farming, and the game farmer in this case could not rely on it purely because he failed to comply with registration requirements. According to the expanded version of *Bato Star*, development of the common law should not be an option in litigation to protect the right in so far as the legislature has enacted legislation to give effect to it, which in this case it had.

¹⁴⁶ *Magudu Game Co (Pty) Ltd v Mathenjwa and others* NNO 2008 2 All SA 338 (N).

SANDU and *Bato Star* must therefore be applied flexibly; even supposedly codifying legislation will leave gaps and, if the Constitution or the common law provides for such a gap, the next step could be to turn to the Constitution or the common law to fill that gap rather than challenge the legislation. Shifting the problem up to the Constitution or down to the common law before reverting to a constitutional challenge makes sense if a gap in the legislation means that the specific aspect is not covered by the legislative scheme, which means that the subsidiarity principles do not apply and the gap can be filled by application of constitutional provisions or the common law, as illustrated by constitutional review of legislative, executive or judicial acts¹⁴⁷ and by judicial review of administrative action in cases where private bodies exercise public power.¹⁴⁸

It should have become clear by now that application of the subsidiarity principles in *SANDU* and in *Bato Star* respectively to partial legislation would work out differently. Applying *SANDU* to partial legislation involves the question whether litigants should be allowed to appeal directly to the constitutional provision *to protect a right* if legislation that does provide for its protection but was not made specifically to give effect to the right does not provide the required remedy in a particular case. The extension would probably work better with pre-constitutional than with new legislation, but generally there is no reason why such a relaxation of *SANDU* should be impossible in principle. Two qualifications should probably apply, though. Firstly, the actual purpose and scope of partial legislation should be decisive in deciding whether a direct appeal to the constitutional provision would be justified if the legislation fails to provide a remedy. Secondly, to prevent the development of parallel systems of law, this relaxation of *SANDU* should arguably only be possible if the gap cannot be filled by applying or developing the common law. In other words, as long as a gap in legislation can be filled by application of the common law, a direct appeal to the Constitution should not be possible *in an action to protect the right* – this is why the Supreme Court of Appeal’s decision in *Tswelopele*¹⁴⁹ to leave the common law ‘untouched’ and to create a new constitutional remedy was arguably a mistake. The result of *Tswelopele* is two parallel remedies for *ante omnia* restoration of spoliated possession, based on the Constitution and the common law, the only difference being that the constitutional remedy permits a restoration order that includes the use of replacement materials. Developing the common law, for a clearly circumscribed range of cases, would have vindicated and celebrated judicial victories over

¹⁴⁷ n 136 above.

¹⁴⁸ n 137 above.

¹⁴⁹ *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA).

apartheid injustice in decisions such as *Fredericks*¹⁵⁰ and could have made a contribution to the rehabilitation of the common law of property, which did not cover itself in glory during apartheid, by demonstrating how it can support social justice.¹⁵¹

Since *Bato Star* purely prevents direct appeals to the common law by circumventing legislation, it is easier to argue that the principle should be qualified so that the common law still applies (and can be developed) in cases where partial legislation does not in fact give complete, covering effect to a constitutional right. However, a qualification is once again necessary in line with s 39: the common law can only fill gaps in legislation if and to the extent that it is not only consistent with the Bill of Rights and with the legislative scheme but, in so far as the legislation leaves a gap, offers the possibility (where necessary through development) of augmenting the legislation, keeping in mind the constitution-enhancing interpretive rule in s 39(2). The governing principle should not be that the common law survives where it remains unaffected by constitutional or legislative provisions, but rather that the common law survives only if and in so far as it is consistent with the Bill of Rights, consistent with existing legislation, and capable of complementing the legislation in giving effect to constitutional rights, either as it stands or through being developed for the purpose.

The *Magudu Game Co*¹⁵² example suggests that *SANDU* and *Bato Star* could also apply to pre-constitutional legislation. According to s 39, pre-constitutional law only survives in so far as it does not conflict with constitutional provisions and can be interpreted in conformity with constitutional rights and values. Accordingly, the 1991 Act protects ownership of game to give effect to the property clause (s 25) in a specific area, namely commercial game farming. A similar argument applies to all pre-constitutional legislation that can survive the new Constitution and therefore *SANDU* and *Bato Star* should apply to it. However, although it has to be interpreted in line with the Constitution, pre-constitutional legislation cannot be assumed to reflect the legislature's effort to comply with constitutional obligations. The Expropriation Act 63 of 1975, being the only general expropriation legislation currently in force, predates the Constitution and must therefore be interpreted in line with s 25(2) and (3).¹⁵³ Legislation is required to give effect to the expropriation and compensation provisions in s 25 and since there is nothing else, the

¹⁵⁰ *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (C).

¹⁵¹ See AJ van der Walt 'Developing the law on unlawful spoliation and squatting' (2008) 125 *South African Law Journal* 24-36.

¹⁵² n 146 above.

¹⁵³ A Draft Expropriation Bill 2008 was tabled in the Portfolio Committee on Public Works on 26 March 2008: Parliamentary Monitoring Group's website at www.pmg.org.za. This Bill was recalled for further consideration in August 2008.

1975 Act applies to all expropriation, but it was drafted in another era and not intended for application in the remedial and transformative context of s 25, and therefore the Act must be read through the corrective lens of s 39(2). *SANDU* and *Bato Star* should apply to the 1975 Act, but in applying it the courts must keep in mind that it embodies the policies of another time and a different government and therefore it requires conscious and comprehensive re-interpretation to ensure that it gives effect to current constitutional rights and values. The majoritarian consideration that justifies *SANDU*, namely that the legislature's role in the transformation process must be respected and that it must be given full effect, applies only indirectly to pre-constitutional legislation: it can only be assumed to embody the legislature's effort to give effect to constitutional rights in so far as it allows constitution-promoting interpretation according to s 39(2), but there is always the possibility that parts of the old legislation still reflect the policies of a disgraced pre-constitutional legislature and then a constitutional challenge might be required. Up to that point, the subsidiarity principles apply in the form of the obligation to read the legislation in conformity with the Constitution, as s 39(2) requires.

4.5 Competing and complementary legislation

A further problem created by flexible application of *SANDU* and *Bato Star* is that several pieces of legislation, including supposedly codifying legislation like PAJA and the LRA and partial, even pre-constitutional legislation, sometimes apply to the same dispute simultaneously.¹⁵⁴ If more than one statute compete with or complement each other, the subsidiarity principle should be that competing or complementary legislation must be applied to optimally give effect to the Bill of Rights and to promote the spirit, purport and objects of the Bill.¹⁵⁵ As a starting point this will require purposive interpretation that aligns all the applicable laws with the

¹⁵⁴ Eg *SANDU* (n 104 above); *Sidumo* (n 104 above); *Chirwa* (n 104 above); *Fuel Retailers* (n 25 above).

¹⁵⁵ In *Nakin v MEC, Department of Education, Eastern Cape Province* 2008 2 All SA 599 (EC) paras 49-51 Froneman J argues that courts should not be forced to 'compartmentalise', by conceptual exclusion, the possibilities for adjudicating labour disputes, namely common law of contract, labour relations and administrative justice, since a conceptual selection between the alternatives could rob the applicant of an effective remedy because the route selected (e.g. PAJA) might not offer the remedy (e.g. payment of money) the applicant asks for. If this suggests that *SANDU* / *Bato Star* should not apply and that litigants (or the courts) should have a free choice, it conflicts with normative arguments in favour of subsidiarity. However, in so far as it points out that a meaningful remedy is important the problem could be overcome by applying subsidiarity (e.g. PAJA applies) but then, if PAJA does not offer a remedy, cascade the issue on remedy down the subsidiarity hierarchy, ie by either reverting to the common law, if that offers a suitable remedy, or to constitutional review, possibly opening up space for reading in a remedy.

constitutional scheme. Some remaining problems could be solved by focusing on the separate fields of application of each law¹⁵⁶ or by identifying their position in a subsidiarity grid. It has, for example, been proposed that PAJA embodies general administrative law while other statutes grant particular administrative powers, thus indicating their relative status: the LRA is particular legislation with regard to labour disputes and therefore its provisions with regard to administrative action supersede but are 'suffused' by the general reasonableness principles of PAJA, which is general legislation.¹⁵⁷ A similar hierarchical relationship was construed between NEMA and the Environment Conservation Act 73 of 1989.¹⁵⁸

When legislation limits one right in the process of giving effect to another, the affected person can protect her right with a direct attack on the constitutional validity of the offending legislation; *SANDU* allows a direct appeal to the constitutional provision. When constitutional rights provisions come into conflict, the Constitutional Court supports an optimising interpretation strategy.¹⁵⁹ In other cases s 39(2) requires the courts to select the interpretation that avoids the conflict or promotes the spirit, purport and objects of the Bill of Rights. In these cases there does not seem to be a reason to depart from the subsidiarity principle that protection of a constitutional right should primarily be based on legislation giving effect to that right and not on the constitutional right itself or on the common law, except in so far as the constitutional validity of the legislation or the common law is attacked (in which case the constitutional provision applies directly) or in so far as the legislation does not cover the field (in which case a direct appeal to the Constitution or the common law could be possible).

Several decisions from the 2007 term concerned regulatory legislation that limits a constitutional right, without the legislation being intended to give effect to that or any other right. *Mohunram*¹⁶⁰ is the latest decision¹⁶¹ in which the proportionality of civil forfeiture of instrumentalities of crime in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA) was contested, without attacking the

¹⁵⁶ Land reform laws enacted under s 25(6) to improve security of tenure, e.g. the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997 and the Rental Housing Act 50 of 1999, each has its own field of application.

¹⁵⁷ *Chirwa* (n 104 above) par 23 confirmed *Bato Star* (n 63 above) paras 59, 149; I Currie & J Klaaren *The Promotion of Administrative Justice Act benchbook* (2001) par 1.24; Currie & de Waal (n 30 above) 643 fn 4. *Sidumo* (n 104 above) paras 104, 110 states that the LRA is suffused by the constitutional reasonableness principle but in fact reads it via PAJA.

¹⁵⁸ *HTF Developers* (n 104) par 24; *Fuel Retailers* (n 25).

¹⁵⁹ See e.g. *Christian Education* (n 33 above) par 42.

¹⁶⁰ *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* 2007 4 SA 222 (CC).

¹⁶¹ See *Prophet v National Director of Public Prosecutions* 2007 6 SA 169 (CC).

constitutional validity of the Act. It has been accepted that civil forfeiture (particularly beyond the ambit of organised crime) could result in disproportionate and arbitrary deprivation of property; hence the Constitutional Court devised a definition of instrumentalities of crime¹⁶² and a proportionality test to determine whether forfeiture is justified.¹⁶³ Both tests are aligned with the non-arbitrariness test in *FNB*¹⁶⁴ to ensure that civil forfeiture orders under POCA would not offend the protection of property against arbitrary deprivation in s 25(1). The proportionality test employed in these cases to interpret the legislation in a constitution-complying way confirms *SANDU*.

In two other forfeiture cases, *Armbruster*¹⁶⁵ and *Van der Merwe*,¹⁶⁶ the facts were similar – the affected persons had large sums of foreign currency in their possession when boarding an international flight; the currency was seized by customs officials and declared forfeit; the affected persons attempted to reclaim the money. In *Armbruster* the applicant launched a constitutional attack against the regulations with an appeal to s 34; in *Van der Merwe* he appealed to the common law. *SANDU* allows a direct appeal to a constitutional provision in an attack on the validity of legislation, but according to *Bato Star* a direct appeal to a common law remedy should only be available if legislation does not ‘cover’ that particular aspect and the common law is capable of interpretation that conforms with the Constitution and complements the legislation.

In *Armbruster* the Constitutional Court held that the connection between the purpose of the forfeiture, the property and the person deprived ‘could hardly be closer’; that there is sufficient reason for the deprivation and that forfeiture would not be arbitrary.¹⁶⁷ Forfeiture could produce ‘arbitrarily harsh consequences’ but the

¹⁶² *Prophet* (n 161 above) was applied in *Mohunram* (n 160 above) par 44: instrumentalities had to be given a wide meaning, but the property must play a reasonably direct role in commission of the offence. This test is based on the non-arbitrariness standard in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 51, 100.

¹⁶³ *Prophet* (n 161 above) par 65; *Mohunram* (n 160 above) paras 64, 145-147. In *Mohunram* the majority decided that the forfeiture would be disproportionate because part of the immovable property was used for legal purposes and because the owner had already been prosecuted, convicted and fined.

¹⁶⁴ The non-arbitrariness standard was set out in *First National Bank* (n 162 above) paras 51, 100.

¹⁶⁵ *Armbruster v Minister of Finance* 2007 6 SA 550 (CC). The Treasury declared the foreign currency forfeit in terms of the Exchange Control Regulations under s 9 of the Currency and Exchanges Act 9 of 1933.

¹⁶⁶ *Van der Merwe v Inspector Taylor* 2008 1 SA 1 (CC). Various grounds were raised, ranging from the Criminal Procedure Act 51 of 1977 to the Income Tax Act 58 of 1962; before the CC consensus was that the seizure was authorised by s 20 of the Criminal Procedure Act.

¹⁶⁷ *Armbruster* (n 165 above) par 71. The nexus remarks are inspired by *First National Bank* (n 162 above) paras 51, 100.

regulations grant an opportunity for representations and a discretion to return the currency ‘to ameliorate undue hardship or injustice that might be perpetrated on the person affected’; therefore the regulations do not allow for arbitrary deprivation.¹⁶⁸ The Court also rejected the attack based on s 34, pointing out that the reasons why legislation was struck down in *Zondi* and *Chief Lesapo*, namely a particular historical and social context and complete lack of judicial control, were absent in this case.¹⁶⁹

In *Van der Merwe*, the applicant elected to claim the money on the basis of the common law *rei vindicatio*, arguing that foreign currency bought with funds from his banking account was his property. The High Court decided that some of the currency did not belong to him because he held it for someone else. The Constitutional Court was divided; the majority held that he proved ownership of the amount bought and held for himself, but O’Regan J would have dismissed leave to appeal because the issues have not been properly ventilated.¹⁷⁰ One has to agree that the Court had not seen enough evidence or heard enough argument on whether the *rei vindicatio* is at all feasible when cash is reclaimed;¹⁷¹ when ownership vests in cash withdrawn from a bank; and whether the applicant’s state of mind with regard to ownership of currency could have had any effect. In terms of *Bato Star* the primary question in *Van der Merwe* should have been whether reclamation of the money was regulated by the authorising legislation – if it was, a direct appeal to the common law remedy should have been precluded.

When there is no legislation to trigger *SANDU* or *Bato Star*, the tug of war between the Constitution and the common law is most intense. The question is then whether the civil courts should be allowed to withdraw into the comfort zone of the common law, where the reach of democratic reform is weak and where the influence of the Constitution could be reduced to that of an ally in entrenching vested rights, privilege and power against democratic interference. The most difficult issues of application feature in this area, with the focus ultimately on the question whether (and how far) the independence of private law is affected by the supremacy of the Constitution.

¹⁶⁸ *Armbruster* (n 165 above) par 80, relying on *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 53.

¹⁶⁹ *Armbruster* (n 165 above) paras 59-60, referring to *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC), *Zondi* (n 112 above), *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 1 SA 1109 (CC).

¹⁷⁰ *Van der Merwe* (n 166 above) par 103.

¹⁷¹ *Woodhead Plant & Co v Gunn* (1894) 11 SC 4: the currency status of money is incompatible with the right of anyone to follow stolen money into the hands of an honest receiver for value, whether it had been mixed up with other money or not.

5 Constitutional supremacy vs independence of private law¹⁷²

Mir scheint es sich [bei der Konzeption einer ‘Grundrechtsfreiheit des Privatrechts’] um eine Art Münchhausentheorem zu handeln, das den Privatrechtlern die Möglichkeit verschaffen soll, sich am eigenen Schopf aus dem Sumpf des Verfassungsrechts herauszuziehen.¹⁷³

5.1 *SANDU* and *Bato Star* in the absence of legislation

When no legislation applies to the protection of a constitutional right, the logic of the *SANDU* subsidiarity principle would imply that a litigant who wants to protect that right must rely on the common law and may not rely directly on the constitutional right, unless she challenges the constitutional validity of the common law. *Mhlungu* and *Zantsi* were no doubt intended to justify exactly such a subsidiarity principle to prevent every private quarrel being blown up into a constitutional issue when it could be dealt with in terms of common law. In terms of s 39(2), the obligation to have first resort to the common law includes development of the common law to align it with the spirit, purport and objects of the Bill of Rights. However, once it is clear that the constitutional right cannot be given effect to, according to the spirit, purport and objects of the Bill of Rights, by either application or development of the common law a litigant can resort directly to the constitutional provision,¹⁷⁴ either to launch a constitutional attack against a rule or institution of the common law that limits or is in conflict with the constitutional right¹⁷⁵ or to craft a special constitutional remedy.¹⁷⁶

It can be argued that the legislature, in so far as it leaves the common law unamended by legislation, accepts that the common law, for the moment being, sufficiently gives effect (or can be developed to give effect) to the rights in the Bill of Rights – if the legislature is dissatisfied with the common law it can change it. Out of respect for the legislature’s democratic role, protection of the constitutional rights should, therefore, in the absence of legislation begin with the common law – a direct appeal to the Constitution should be reserved for cases where it is impossible to interpret the common law in a constitution-compliant way. This is possibly what

¹⁷² Based on the title of M Ruffert *Vorrang der Verfassung und Eigenständigkeit des Privatrechts* (2001). I am indebted to Friedrich Schoch for bringing it to my attention and to him and Michael Sachs for explaining German theory to me.

¹⁷³ CW Canaris *Grundrechte und Privatrecht* (1999) 18.

¹⁷⁴ *Masiya* (n 88 above) par 27.

¹⁷⁵ The CC declared the common law crime of sodomy unconstitutional: *Gay and Lesbian* (n 28 above).

¹⁷⁶ In line with s 172.

inspired the unfortunately phrased remark that the common law should be allowed to develop incrementally so as not to interfere with legislative authority.¹⁷⁷

The justification for this residuary principle is similar to that of *SANDU*: if litigants are allowed to choose freely between constitutional provisions and common law remedies as if they were independent, parallel systems of law, the common law will never be 'brought into' the new constitutional dispensation. This is what happened in *Tswelopele*:¹⁷⁸ crafting a constitutional remedy and leaving the common law 'untouched' created two parallel remedies instead of developing the common law in line with constitutional values. The goal of ensuring one system of law under the guidance of the Constitution is promoted not only by preventing the common law to develop as a parallel system (*Bato Star*), but also by preventing development of a parallel system of unnecessary constitutional remedies. Leaving some aspect of the common law intact and crafting a new constitutional remedy should be justifiable only on constitutional grounds.

It was argued in the previous section that *SANDU* and *Bato Star* apply to legislation regardless of horizontality;¹⁷⁹ the same should hold in the absence of legislation. Direct application and development of the common law are broader than and should not be confused with or collapsed into horizontal application; the former two will come up in vertical and horizontal relationships.¹⁸⁰

5.2 Direct vs indirect application

The most intractable question when no legislation exists is whether the constitutional provisions apply directly or whether they should be mediated through the common law. This issue came up in three 2007 decisions.

¹⁷⁷ *Zantsi* (n 71 above) par 5; *Masiya* (n 88 above) par 31. Roux (n 46 above) 487 notes, with reference to RG Teitel *Transitional justice* (2000) 24, that judges may have to do more work in transitional or transforming societies and leave less for the legislature.

¹⁷⁸ *Tswelopele* (n 149 above).

¹⁷⁹ The principle finds support in s 8(3)(a), which applies particularly to horizontal relationships: in applying the provisions of the Bill of Rights to natural and juristic persons in terms of subs 8(2) a court, 'in order to give effect to a right in the Bill, must apply, or where necessary, develop, the common law *to the extent that legislation does not give effect to that rights*' (emphasis added). I pay no direct attention to development of the customary law because none of the 2007 decisions dealt with it.

¹⁸⁰ *Tswelopele* (n 149 above); *Masiya* (n 88 above).

In *Masiya*¹⁸¹ the question was whether the common law definition of rape should be developed to include anal penetration.¹⁸² The Constitutional Court decided that the common law definition was not unconstitutional because it criminalised morally and socially unacceptable behaviour. However, the definition fell short of the spirit, purport and objects of the Bill of Rights and had to be expanded.¹⁸³ The Court distinguished between its roles in testing whether legislation is consistent with the Constitution and developing the common law, adding that the courts should not ‘appropriate the Legislature’s role in law reform’ by developing the common law in a way ‘closer to codification than incremental, fact-driven development’.¹⁸⁴ This supports the subsidiarity principle that direct application (validity challenge) should only follow once it is clear that the common law cannot be developed appropriately. Accordingly, the case was decided as an opportunity to develop the common law rather than a constitutional validity challenge. The majority decided to develop the common law only as required by the facts of this case, to include non-consensual anal penetration of a female,¹⁸⁵ but in a dissenting judgment Langa CJ opined that the development should have included anal rape of men.¹⁸⁶

Woolman¹⁸⁷ criticises *Masiya* because it ‘never *truly* considers the direct application of the substantive provisions of the Bill of Rights to the challenged common-law definition of rape’; instead, the ‘entire analysis of the common-law rule takes place within the rubric of s 39(2) and in terms of indirect application.’ Woolman argues that, in

¹⁸¹ n 88 above.

¹⁸² The regional court decided that the common law definition was underinclusive and extended it to non-consensual anal penetration of any person, but it did not have the power to develop the common law: *Masiya* (n 88 above) par 66. Magistrates’ courts are prevented from pronouncing on the validity of any law: s 110 of the Magistrates’ Courts Act 32 of 1944. The High Court endorsed the a quo decision and it came before the CC for confirmation under s 172(2)(a).

¹⁸³ *Masiya* (n 88 above) paras 27, 32, 70. *Masiya* paras 66, 69 underlines the point that s 39(2) has a restricted purpose: the power to develop the common law is granted to the CC, the SCA and the High Courts by s 173 and not in s 39(2), which merely instructs the courts, *when* developing the common law or customary law, to do it so as to promote the spirit, purport and objects of the Bill of Rights – the section concerns the *how* of constitutional development of the common law but not the *when*. For similar reasons, s 8(3) should not be seen as the authorising provision for a general obligation or power to develop the common law either; the subsection pertains to cases of horizontal application, as is evident from the introductory phrase ‘[i]n applying the provisions of the Bill of Rights to natural and juristic persons *in terms of subsection (2), ...*’ (emphasis added). In spelling out the direction of development s 39(2) indicates *when* the common law might require development, but it is not the authorising provision.

¹⁸⁴ *Masiya* (n 88) par 31.

¹⁸⁵ *Masiya* (n 88) par 45.

¹⁸⁶ *Masiya* (n 88) par 75. Sachs J concurred in the dissenting judgment.

¹⁸⁷ n 89 above, 768.

view of the language of ss 8(1)¹⁸⁸ and the decision in *Khumalo*,¹⁸⁹ the substantive provisions in the Bill of Rights should have been applied directly instead of via the development of the common law. The point in which Woolman differs from *Masiya* is not easily identifiable; his statement that direct application ‘takes the rights and freedoms, and the general rules derived from them, as our point of departure for determining whether law or conduct is invalid’ echoes the *SANDU* principle almost exactly,¹⁹⁰ as does his view that indirect application (protection of the right) does not permit a finding of invalidity.¹⁹¹ The problem is that he describes indirect application as ‘a mode of analysis that *neither specifies whether a particular right demands vindication nor permits a finding of invalidity.*’¹⁹² Woolman’s view that indirect application does not tell us whether the right requires vindication is based on the narrow assumption that vindication of constitutional rights primarily takes place via direct application. In terms of *SANDU* logic, constitutional rights can also be vindicated indirectly, via constitution-compliant interpretation of the common law. According to *Masiya*, indirect protection should precede direct constitutional challenges as a matter of subsidiarity, out of respect for democratic processes, while *SANDU* declares direct appeals to the constitutional provisions impermissible when protection of the right is in issue.¹⁹³

Woolman therefore differs from the principle laid down in *SANDU* in that he claims the major part of constitutional litigation for direct application and assigns indirect application to a vague and apparently insignificant area of ‘law and conduct not engaged by any of the specific provisions set out in Chapter 2’, ensuring that this part of *all law* is also brought ‘into line with the “spirit, purport and objects of

¹⁸⁸ Although s 8(1) provides that the Bill of Rights applies to all law and that it binds the legislature, the executive, the judiciary and all organs of state, it does not say that the Bill of Rights applies *directly* or *horizontally* to all law. See to much the same effect *Khumalo* (n 73 above) paras 31-33. Woolman (n 45 above) 44 disagrees, arguing that s 8(1) alone makes all law subject to the *direct* application of the Bill of Rights.

¹⁸⁹ In *Khumalo* (n 73 above) the CC indicated that direct application was possible under the 1996 Constitution.

¹⁹⁰ Woolman (n 89 above) 769. As far as legislative, executive and judicial conduct is concerned Woolman reflects the approach of the courts: these forms of conduct are excluded from PAJA by the definition of ‘administrative action’ but review is possible on the basis of legality: n 136 above. However, as far as conduct by organs of state generally is concerned, at least some of it is administrative action covered by PAJA, in which case Woolman’s formulation does not reflect *SANDU* in that review of this conduct takes place via PAJA and not directly.

¹⁹¹ All law, including legislation and the common law, should only be declared unconstitutional once it has been established that it is impossible to find a constitutionally consistent interpretation: *Masiya* (n 88 above) par 27. However, rules of the common law can be declared unconstitutional when it is impossible to interpret or develop it according to values of the Constitution: *Gay and Lesbian* (n 28 above).

¹⁹² Woolman (n 89 above) 769 (emphasis added).

¹⁹³ The legality principle case law is explained by this formulation; n 136.

the Bill of Rights” and the “objective, normative value system” made manifest in the text of the Constitution as a whole’.¹⁹⁴ By contrast, the residuary principles establish a rational link between direct application and constitutional remedies or validity challenges on the one hand and indirect application and protective litigation on the other. As was argued earlier, this link is justifiable in view of the normative roles it assigns to democratic processes and judicial review respectively. Moreover, it makes sense if considered from the perspective of remedies: direct application is aimed at reviewing the constitutional validity of legislation or the common law and will at least sometimes result in declarations of invalidity, which might not be what a litigant was after when seeking to protect her right. In some cases direct application can admittedly produce a special constitutional remedy and therefore the subsidiarity principles keep the possibility of direct application open for that purpose, but based on the respect-for-democracy norm the subsidiarity approach restricts this to a last resort solution rather than an open option that exists parallel to statutory or common law protection.

By shifting the focus from constitutional validity challenge to protective litigation, where the point is to develop the common law in line with s 39(2), *Masiya* is consistent with *SANDU*. The Constitutional Court decided that the correct approach was to expand the common law definition by developing it in line with s 39(2), in this case to include at least non-consensual anal penetration of females.¹⁹⁵ The minority decision shows that one can disagree with this narrow development of the definition and still agree that indirect development of the common law was the right approach. The cautious, restricted development undertaken by the majority cannot be blamed on their choice not to apply the constitutional provisions directly but to develop the common law; much rather, it results from earlier decisions in which it was said that the avoidance principle (subsidiarity) implies deciding just what is necessary for the facts of the case and no more.¹⁹⁶ This is an exaggerated interpretation of subsidiarity and hardly defensible in view of constitutional provisions and decisions to the effect that all law is governed by the Constitution. The subsidiarity principle in *Mhlungu* and *Zantsi* could be read less restrictively (in view of *SANDU*) as saying that a court should not protect a constitutional right by way of a direct validity attack or by way of a direct constitutional remedy before considering whether the legislation or common law in question could be interpreted in a constitution-conforming and -confirming way.

¹⁹⁴ Woolman (n 89 above) 769.

¹⁹⁵ *Masiya* (n 88 above) par 27.

¹⁹⁶ Especially *Zantsi* (n 71 above) par 8.

Apart from an unnecessarily narrow view of subsidiarity or the avoidance principle, the Constitutional Court should also not have allowed itself to be pulled into common law talk about incremental development of the common law. Constitutional transformation will sometimes require large developments and changes. The warning in *Mhlungu* and *Zantsi* against undermining the separation of powers is important, but the subsidiarity principles in *SANDU* and *Bato Star* promote respect for the role of the legislature, without confusing that with respect for the common law logic of incremental development. Respect for democratic processes should not prevent the courts from rooting out remnants of tradition such as discrimination or inequality in conflict with the new constitutional dispensation; anal rape will be unconstitutional regardless of the sex or gender of the victim and hence the courts need not shy away from larger development of the common law out of respect for the legislature.

The decision in *NM*¹⁹⁷ also turned on a choice whether to develop the common law; Woolman¹⁹⁸ again criticised it for failure to apply the constitutional provisions directly. The applicants claimed that the respondents had violated their rights to dignity and privacy by publishing their names and HIV status without permission. The case could support direct horizontal application of ss 10 and 14, but the applicants claimed on the basis of the common law *actio iniuriarum* and accordingly, in terms of residuary, their claim must be considered on the basis of s 39(2) first. Initially, the question is therefore whether the common law provides a remedy as it stands and, if it doesn't, whether it can be developed. The applicants brought the matter in the form of a constitutional case because they argued that the common law would have to be developed; the Constitutional Court decided that the case 'involves a nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity of the applicants irrespective of whether it is based on the constitutional law or the common law.'¹⁹⁹ In other words, even though the claim is brought under the common law and the application and development of the common law are the main issues, balancing of the constitutional rights raises a constitutional issue. This reflects the meaning of s 8(1) according to *SANDU* subsidiarity logic: the Constitution applies to all law, but not necessarily directly.

The decision eventually turned on the majority's factual finding that the respondents were aware that the applicants had not given permission for the publication of their names, followed by the legal decision that this was sufficient to establish intent for the *actio*

¹⁹⁷ n 87 above.

¹⁹⁸ n 89 above, 781-783.

¹⁹⁹ *NM* (n 87 above) par 31.

iniuriarum and that the requirements for the action were thus met. On the factual finding it was unnecessary to develop the common law. The minority, who disagreed with the majority's factual finding, would nevertheless have developed the common law so that negligence could also satisfy the requirements.²⁰⁰ In either case, direct application of the constitutional provisions remains uncalled for under the subsidiarity principles.

Woolman²⁰¹ criticises *Barkhuizen*²⁰² for the same reason as *Masiya* and *NM*, namely that the Constitutional Court should have applied the constitutional provisions directly. Although it is difficult to tell whether *Barkhuizen* was decided in line with *SANDU*, the case was clearly brought as a direct constitutional challenge but not decided as one. The constitutional challenge was brought against a time-limitation clause in a short-term insurance contract; the applicant argued that the clause violated his s 34 right of access to court. The High Court upheld the claim but the Supreme Court of Appeal dismissed it, arguing that the Constitution did not prevent time-limitation clauses in contracts entered into freely and voluntarily and that there was inadequate evidence in this case to indicate that the contract was not entered into freely and voluntarily. The Constitutional Court found that the 90 day time limitation was not manifestly unreasonable on the face of it, nor was it unfair, because there was no evidence that the contract was not concluded freely between parties in equal bargaining positions. Since the applicant did not furnish reasons for non-compliance it would not be unjust to enforce the time bar against him.²⁰³

Testing a contractual provision directly against a provision in the Bill of Rights (s 34) amounts to horizontal application under s 8(2)-(3).²⁰⁴ The Constitutional Court was uncomfortable with horizontal application, noting that the contractual time limitation reveals no law of general application. The Supreme Court of Appeal identified the underlying principle *pacta sunt servanda* as the law of general application, but the Constitutional Court dismissed this option, pointing out that the contractual term was challenged, not the general principle.²⁰⁵ Enforcement of an allegedly unfair contractual term admittedly is not law of general application, but it is conduct that can be declared unconstitutional in terms of s 172(2). The fact

²⁰⁰ *NM* (n 87) paras 44-47 57. Langa CJ and O'Regan J agreed that the journalist and publisher might have been negligent, but not that intent had been proved: paras 111, 125. See Woolman (n 89) 781.

²⁰¹ n 89 above, 772-781.

²⁰² n 86 above.

²⁰³ *Barkhuizen* (n 86 above) paras 63 66-67 84 86.

²⁰⁴ *Barkhuizen* (n 86 above) par 23. It is untrue that the Court yet had to consider this issue: *Khumalo* (n 73 above).

²⁰⁵ *Barkhuizen* (n 86 above) paras 24 26.

that conduct does not establish law of general application merely means that it cannot limit a constitutional right and cannot be saved by the general limitation clause, which is not surprising – the limitation clause is intended to give *the state* the opportunity to save otherwise unconstitutional *law*. However, conduct can infringe upon a right and can therefore be the focus of a constitutional validity attack.²⁰⁶ It was therefore conceivable that this case could have been decided as a direct constitutional attack on allegedly unconstitutional private conduct. If the court should find, in such a case, that enforcement of the contract would indeed infringe s 34 or any other constitutional right, it would have to declare the conduct invalid. At the same time, private conduct that infringes a private right should, in most cases, be regulated by private law unless there is a constitutional reason for deciding the conflict on a constitutional basis.

Barkhuizen could also have been decided purely on the basis of private law – time limitation clauses in private contracts are generally invalid if they are against public policy. The question is therefore whether there was a reason to decide the case on constitutional grounds. One such a reason could have been the desire to set a constitutional standard for contractual time limitation clauses that limit the right of access to courts. In that case the format of a direct constitutional attack on validity of the conduct would have been suitable. Another possibility could have been the need to develop the common law principle that gives credence to time limitation clauses, namely that contracts entered into freely between equal parties should be enforced – *pacta sunt servanda*. Such an approach would arguably have been justified if the Constitutional Court thought that the common law gave too much weight to the sanctity of contract principle and too little to justice, and that the common law should be developed in terms of s 39(2) to rectify the balance. However, this would have required the case to be transformed from a direct validity challenge to an indirect development of the common law protection case, as happened in *NM* and in *Masiya*. In the latter instance one would expect the court to test the relevant common law principle against central constitutional values and explain how it is to be amended in view of those values.

In the event, the Constitutional Court did neither of the above, preferring to decide the case in another way altogether, namely to determine whether the contractual clause was contrary to the values underlying the constitutional democracy and contrary to public policy.²⁰⁷ The Court pointed out that contractual terms denying

²⁰⁶ Woolman (n 89 above) 774-775 makes much the same point.

²⁰⁷ *Barkhuizen* (n 86 above) par 36.

access to the courts were contrary to public policy and therefore invalid in common law²⁰⁸ – in principle, the time limitation clause could have been tested for fairness and validity purely on common law grounds, without any input from the Constitution. It then proceeded to analyse, in great detail but without much clarity, the relations between the substantive constitutional rights provisions such as s 34, the values of the Constitution and public policy. In effect, the Constitution and its underlying values are described as a source of values that inform the public policy that plays a yardstick role in the common law. Woolman correctly describes this as deciding a direct constitutional challenge indirectly by ‘speaking in values’,²⁰⁹ that is, not with reference to the relevant rights provisions in the Bill of Rights but mediated through a veil of values and policy vaguely infused by the substantive content of the constitutional provisions. In deciding the case this way, the Court did not set a constitutional standard for contractual time limitation clauses, but it also failed to either test or develop the underlying common law principle – in fact, the Court confirmed that the principle *pacta sunt servanda* ‘gives effect to the central constitutional values of freedom and dignity’, of which ‘self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment’ is the very essence.²¹⁰ In other words, the Court not only implied that value analysis, rights analysis and policy analysis is the same thing²¹¹ but also accepted that the central private-law principle *pacta sunt servanda* operates on the same level and enjoys the same status as constitutional values, without giving much indication how this should work out in the larger constitutional project.

In a society torn apart by historical injustices and inequality, transformation under the aegis of a democratic and supreme Constitution means that the seemingly neutral but in fact highly contested principal tenets of private law, with *pacta sunt servanda* and absolute ownership top of the list, have to be treated with contextual sensitivity in the reconstruction of a new democratic legal order. By reducing concrete constitutional rights provisions to a veil of values that inform public policy, and by allowing private law principles like *pacta sunt servanda* to join those values in the shaping of public policy, the Constitutional Court might appear to subscribe to the highly problematic view, in decisions like *Brisley*²¹² and *Afrox*,²¹³ that there are no significant differences between constitutional and common law values and that the two systems could co-exist in a way

²⁰⁸ *Barkhuizen* (n 86 above) par 34.

²⁰⁹ n 89 above, 763.

²¹⁰ *Barkhuizen* (n 86 above) par 57.

²¹¹ Woolman (n 89 above) 779.

²¹² n 68 above. The critical comments of Roux (n 46 above) are highly relevant here.

²¹³ n 68 above.

that does not demand substantive changes of the common law. Instead of adapting the common law, it looks as if the constitutional values have been integrated into the common law.

One could argue that this result is justifiable in view of the importance of the principle involved, namely sanctity of contract, but even the Supreme Court of Appeal is apparently not that set on *pacta sunt servanda*. In *Linvestment*²¹⁴ the Court overturned long-standing precedent and decided that the owner of a servient tenement can insist upon relocation of a defined and registered servitude of right of way and that the dominant owner would be obliged to accept the relocation, against her will, if non-relocation would cause significant harm for the applicant and relocation would not cause significant harm for the respondent. The reasons for the decision and the result are justifiable on policy grounds, but it is puzzling that the Court would be so willing to make what is really a dramatic change to the common law on policy grounds, while being so unwilling, despite equally strong or stronger policy reasons, to change the common law very slightly in *Tswelopele*. Judging from *Linvestment* the best solution in *Barkhuizen* was the approach of the Supreme Court of Appeal, namely to focus on the general common law principle that supports enforcement of time limitations, *pacta sunt servanda*. Even when subjected to a healthy dose of constitutional skepticism, this principle embodies significant social and moral values and therefore it is highly unlikely that the courts would be willing to declare it unconstitutional just because it sometimes allows enforcement of unfair contracts. Instead, the approach in *Masiya* indicates that the courts would most likely, if this principle were challenged, attempt to rectify any shortcomings by developing it in view of s 39(2).

Deciding *Barkhuizen* on this basis would have confirmed the subsidiarity approach that the Court seems to be developing, and it would have given a welcome indication that the Court is working towards a truly substantive, critical analysis of the common law in view of s 39(2). The point should not be whether the common law protects values like freedom and autonomy that are also important in constitutional law, but where and how common law principles need to be developed to give effect to the spirit, purport and objects of the Bill of Rights. More concretely, it was necessary in *Barkhuizen* to ask where and how the principles of contract need to be developed to give effect to the right of access to the courts in s 34, given the historical and constitutional context within which inequalities in privilege and power developed and within which the right of access to courts was denied the poor and weak. It is in this context that the mere possibility that contractual time limitations could be unfair and

²¹⁴ *Linvestment CC v Hammersley* 2008 3 SA 283 (SCA).

against public policy in current private law doctrine might not pass constitutional muster – the test that was ultimately applied by the Constitutional Court majority in *Barkhuizen* is little more than the private law test and it lacks the critical sensitivity for context that one would expect of a full-on constitutional challenge. Moreover, as in *NM*, the Court’s analysis of the facts in *Barkhuizen* was disappointing; the factual analysis of Sachs J is a much better example of the kind of analysis that was required and that is to be expected.

As it stands, *Barkhuizen* neither tested the parties’ conduct for constitutional validity, nor did it consider either development of or a challenge to the supporting common law principle; instead, common law principle was elevated to the sphere of constitutional values that indicate whether conduct is against public policy. In the broader context of the 2007 decisions, *Barkhuizen* looks like a constitutional *non sequitur*.

6 Conclusions

The subsidiarity principles set out in *SANDU* and *Bato Star* could, according to the analysis above, reasonably be expanded so as to include pre-1994 legislation, partial and competing legislation, and instances where no legislation is applicable at all. As has been argued in the sections above, the subsidiarity logic of these cases could be developed in a way that would make it possible simultaneously to promote constitutional reform goals and to respect democratic legislative interventions that reflect reformist or stabilising policies. Obviously the wider implications of subsidiarity have not been worked out by the courts and therefore the analysis above is purely speculative. Furthermore, the more comprehensively worked out subsidiarity logic set out in the previous sections is not presented as a proposal to develop or entrench a judicial doctrine of subsidiarity or deference – it is nothing more than an exercise in the logic of the *SANDU* and *Bato Star* decisions, and it is presented here purely in order to have an opportunity to test whether such a logic, if it were in fact adopted by the courts, would be justifiable in view of the broader normative and constitutional principles discussed in the first sections of the article.

With the exception of *Barkhuizen* (and perhaps *Sidumo*), the Constitutional Court’s decisions in the 2007 term display a growing and reasonably consistent tendency to favour a particular subsidiarity approach, always present in our constitutional setup but apparently now emerging with increasing clarity, according to which direct application of the constitutional rights provisions is restricted to constitutional challenges against the validity of legislation. In the absence of such a challenge, the Court prefers to treat cases for the

protection of constitutional rights as indirect application cases, involving either the interpretation of legislation or development of the common law in terms of the constitution-compliance and –confirming prescriptions of s 39(2). By extension, taking into account earlier jurisprudence, direct application could also be possible in the absence of a direct validity challenge, if the goal is to craft a special constitutional remedy. However, again extrapolating from earlier jurisprudence, the subsidiarity approach indicates that direct application (to craft a constitutional remedy or to challenge a law) is considered only when indirect protection (interpretation of legislation or development of the common law) proves impossible for some reason. Furthermore, the subsidiarity hierarchy in the category of indirect protection cases prescribes that application and development of the common law should only be considered once and in so far as there is no legislation to apply.

The subsidiarity approach of the 2007 cases offers a fresh perspective on *Mhlungu*, according to which courts should, whenever possible, decide cases without reaching a constitutional issue.²¹⁵ Woolman articulated five objections against the implication that the salutary ‘principle of avoidance’ – or subsidiarity – in *Mhlungu* should turn into a ‘full-blown doctrine in which a court must *never* “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied”’,²¹⁶ some of these objections are relevant to my analysis. Firstly, a too narrow interpretation of the avoidance rule (as in *Zantsi*) contradicts the project that constitutional interpretation should evolve into a principled dialogue between the Constitutional court, other courts, the legal profession, law schools, Parliament and, indirectly, the public at large.²¹⁷ In addition, a too narrow interpretation would undermine rational political discourse and the possibility of a coherent jurisprudence. These are convincing reasons why the subsidiarity principle should not be understood too narrowly, as it arguably was in at least *Zantsi* – it should not become a directive to avoid deciding constitutional issues per se. Subsidiarity should be understood in terms of its constitutional purpose and justification, as that has been spelled out in 2007: to preserve the constitutional power and obligation of the courts to control the constitutional validity of legislation, while at the same time paying due respect to the democratic power and legitimacy of policy makers and legislatures in giving effect to their reform obligations under the Constitution.

²¹⁵ n 71 above, par 59 (dissenting, Kentridge J); *Zantsi* (n 71 above) par 3.

²¹⁶ Woolman (n 89 above) 784-785, citing *Zantsi* (n 71 above) par 8.

²¹⁷ *Mhlungu* (n 71 above) par 129.

The purpose of subsidiarity can therefore not be pure avoidance. Much rather, it should be acknowledgement and respect for the fact that courts face the aporia of the countermajoritarian dilemma every time they hear a constitutional case. On the one hand they must respect and give full effect to the legitimate efforts of the democratically elected branches to honour their constitutional obligations in bringing about the reforms legitimised by the Constitution. Doing that requires the courts to consider the interplay between Constitution and legislation and to give the fullest possible purposive effect to legislation enacted by the legislature. At the same time the courts must apply pre-constitutional legislation and the common law in a way that acknowledges the undemocratic origin and history of those sources of law and the dilemmas caused by their continued validity, in both instances by reading them through the corrective lens of s 39(2). In addition to its obligations concerning the interpretation of legislation and development of the common law, the courts have the constitutional duty and power to control the legitimacy of new legislation made by democratically elected legislatures, testing it against Constitutional requirements and limits. The only way to juggle these tasks is to acknowledge, upfront, that these duties of the courts imply contradictory and conflicting normative values and that every decision sacrifices one for the sake of the other.

In the introduction I identified the push for constitutional transformation and the preservative pull of the common law tradition as conflicting normative impulses. I pointed out that this instance of normative pluralism differs from normative diversity as a positive constitutional value in that, in the case of the conflict between tradition and change, the complete picture is not enriched by the simultaneous presence of the more-than-one; these two impulses are locked in a zero-sum game for control over the balance between stability and reform. Either one wants and gets the upper hand at the direct cost of the other. Stability is attainable only at the cost of reform; change is possible only by sacrificing certainty. You can't do both. And yet, if you are a judge in the new South African constitutional order, you have to.

Normative anarchy, always a threat in a situation like this, is only to be avoided, I argued in the introduction, by giving politics a chance, which starts with realising that all law is political, but politics cannot be enclosed in law. It proceeds with acknowledging that law does not resolve the aporia of stability and change; it merely sacrifices one for the other, for now. It requires making the sacrifice, as far as possible, with a view to open up rather than close down room for social deliberation and significant dissent. Obviously, any choice for an approach that would avoid anarchy could easily end up by entrenching reactionary formalism; in the face of uncertainty and

anarchy it is only too easy to settle for the false security of shallow and cheap certainty.

Giving effect to constitutional rights in a fragmented legal system consisting of legislation that was purposely enacted to protect and support those rights, legislation that pre-dates the political transformation and common law that was traditionally applied as if it embodied a-contextual neutral principles is a complex task. This task becomes more difficult when the courts are empowered both to protect constitutional rights and to control the constitutional validity and fittingness of all law, finding a justifiable balance between democratic will and constitutional legitimacy. Above all, the courts exercise this awesome responsibility as just one small part of the large project of social and political transformation, within a dynamic context that reflects both the ills of the past and the aspirations of the future.

The Constitutional Court appears to have chosen the analytic rhythm of a set of subsidiarity principles to direct the choices it must make in this arduous process; in 2007 it followed these principles with a measure of consistency and some sense of purpose and justification. Developing a subsidiarity approach to give effect to its contradictory and conflicting powers and responsibilities is dangerous because it could easily disintegrate into shallow formalism, but it also holds the possibility of evolving into a more reflective, democracy-confirming recognition of the tension between the Constitution and existing law than has been evident from earlier judicial explorations into application issues. In that respect the direction of the pull of 2007 must be welcomed.