

DEVELOPMENT OF THE COMMON LAW IN VIEW OF SECTIONS 39(2) AND 173 OF THE CONSTITUTION

Judge LTC Harms

Summary

The point of departure in the Constitution is that the existing legal order should largely be kept intact, despite the fact that this is disliked by some. The common (or non-statutory) law has also retained its position, subject however to the superior courts' inherent power, or rather their obligation in terms of section 173 of the Constitution, to develop the common law taking into account the interests of justice. The courts have for a long time had the task of developing the common law with reference to especially the *boni mores*, moral standards and the common notion of what is right and fair. The Bill of Rights now is a source and summation of such notion.

At times there had been an exaggerated call for *petere fontes*. The Courts however still have the competence to adapt the law to serve commercial and other needs, even without reference to the Bill of Rights. The underlying principles of the common law are largely, though not in all respects, consistent with the Bill of Rights.

There is an essential distinction between the development of a rule of the common law in accordance with constitutional norms, and the invalidation of a rule which is inconsistent with the Constitution. Courts tend not to make this distinction and this leads to inconsistencies.

Some believe that the common law is perfect and unaffected by the Bill of Rights. Others consider the Bill of Rights to have granted the judiciary a hunting license on the common law, making the positive law a matter of judicial discretion and allowing the courts to infringe upon the domain of the legislature and to ignore precedents.

The common law consists of a myriad rules developed over many centuries involving great minds. It represents a fine web, the disturbance of which at one point may have

severe unexpected consequences elsewhere. The new era makes extraordinary demands on judicial officers. The ubiquitous Constitution sets the boundaries – boundaries neither of barbed wire, nor made of rubber. Free judicial discretion is not a value of the Constitution, nor is legal uncertainty. The Constitution illuminates the legal landscape, but it is not blinding; it does not provide a trench from which the common law may be attacked, but it entrenches rights. Sections 39(2) and 173 of the Constitution do not place a machete in the hands of the judge to decapitate or to castrate, but it provides modeling clay out of which art must be created capable of withstanding the heat of the oven.