

THE BEST OF BOTH WORLDS? SOME REFLECTIONS ON THE INTERACTION BETWEEN THE COMMON LAW AND THE BILL OF RIGHTS IN OUR NEW CONSTITUTION

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Summary

The relationship between the Bill of Rights in the South African Constitution of 1996 and the common law is analyzed in this paper. "Common law" is understood broadly to include not only the Roman-Dutch law, but also the wide variety of legal sources and traditions which make up South African law, including African tradition, Muslim practice and the English law heritage.

Firstly an exposition of the chief characteristics of the hybrid system of South African common law is given. It is shown that the common law is not codified; that it is a living and organic system of law constantly under legislative and judicial review; that its sources vary from judicial precedent to civilian authorities, English, indigenous customary and Muslim law; that the style of litigation and adjudication is English rather than Continental in Character and that when a common law rule is modified, it is done retrospectively in conflict with principles of legal certainty.

Secondly the chief constitutional provisions relating to the relationship between the Constitution and the common law are considered. The supremacy clause (section 2) renders a common law rule which is inconsistent with the Constitution invalid from the date of the Constitution unless a court gives a different ruling in accordance with justice and equity. Courts have the inherent power to develop the common law, but the Constitutional Court may do so only in constitutional matters. Two forms of constitutional normative effects may be distinguished: direct (as in sections 2 and 8(1)) and indirect (as in section 39(2)). In terms of the latter the spirit, purport and objects of the Bill of Rights are to guide the development of the common law.

Thirdly the interaction between the common law and the Constitution is thoroughly explored with reference to common law rules that are in conflict with the Constitution as well as where the common law already provides protection for the rights provided by the Bill of Rights. These matters are explored with reference to a number of recent judgments of the Constitutional Court, in some of which the common law was effectively developed.

It is concluded that the firm normative thrust of the Constitution may well prove to be a rich source of principle for the development of the common law and that the flexibility of the common law may facilitate a cross-pollination between it and the Constitution.

