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Transformative Legal History and the (Re)Classification of the South African Law of Delict

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Abstract

The South African law of delict is traditionally classified as a private-law discipline. This classification is usually made with reference to the actor, power and interest theories. According to the actor theory, private law regulates disputes between non-state actors *inter se* while public law regulates disputes involving the state. The power theory maintains that private law regulates disputes between equals while public law brings equality where inequality exists. The interest theory dictates that there are some interests that are individualistic (where private law steps in) while other interests belong to the public at large (the playing field of public law). In this article honouring Prof Willemien du Plessis's contribution to legal history it is argued that none of the above traditional theories of classification can be used effectively to classify the South African law of delict as a purely private-law discipline. Instead, our law of delict fulfils a hybrid role, straddling public and private law, with much transformative potential. Actor theorists fail to account for the fact that the South African law of delict today regulates disputes between non-state actors *inter se* as well as the law on state liability. The power theory crumbles in the South African law of delict's private-law classification because oftentimes one of the strong reasons invoked to impose liability on a wrongdoer is that wrongdoer's position of relative power over the victim. The interest theory sheds doubtful light on the classification of the South African law of delict because it is difficult to justify how individual-rights infringements are either purely private or public. In the end, relaxing the absoluteness of the claim that the South African law of delict exclusively falls in the domain of private law could assist us in recognising the role that delict could play in transforming South African society in line with constitutional aspirations, fostering the responsible use of power, and working towards the collective wellbeing of our society.

Keywords

Delict; legal classification; public-private divide; transformative legal history.

1 Introduction

In honour of Professor Willemien du Plessis's contribution to legal history, in this article I will draw attention to the fact that various South African delict scholars have historically held the view (and still hold the view today) that the law of delict falls squarely and solely in the realm of private law. I will conduct a (mostly) analytical critique of this traditional classification of the South African law of delict. The critique will be "analytical" in the legal realist sense of the term in that I will be describing what the extant law really says and does, in order to evaluate the factual accuracy of delict's classification as forming part of private law. While the critique is primarily analytical, I will allude to some normative issues that arise about what our law of delict could mean for South African society.

I will show that there are notionally three dominant theories that could be used to justify the imposition of the private-law label onto a particular subject. The "actor theory" (inherited from Roman-Dutch law) dictates that private-law disciplines mediate disputes between non-state actors *inter se*. The "power theory" (a modern restatement of the actor theory) requires private-law disciplines to mediate disputes between actors who operate on a horizontal power level towards one another. The "interests theory" (inherited from Roman law) stipulates that private-law disciplines protect interests that are uniquely private instead of public. I will argue that all of these historical theories fail to give an accurate account of what delict presently does in South African law and society. Thus, my analytical endeavour is to show how the South African law of delict crosses the boundary between private and public law, as defined by the abovementioned theories.

The argument unfolds as follows. In Part 2 I will briefly explain why our classification of delict matters. The historical roots and fruit of the public/private divide and its relationship to the law of delict are my next concern in Part 3. That discussion is necessary to contextualise where the dominant theories of legal classification originate from and what they involve. In Part 4 I set out to debunk each of the theories' application to the law of delict as a private-law subject today. In the end I hope to show that a realist, analytical account of the classification of the law of delict would conclude that the South African law of delict is perhaps a hybrid of private

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and public law and, as such, that it fulfils multidimensional purposes in the South African legal system and society.

2 Why the classification of delict matters

One might wonder why this argument about the classification of delict matters at all.

It matters firstly because we can cause a great deal of confusion for our students when we tell them that delict belongs to private law while it has clear public-law dimensions, as I am about to show. This should be reason enough for us to either scrap labelling delict as a private-law course in our textbooks, or at least to relax the absoluteness of this claim.

It matters, secondly, because an uncritical acceptance of delict's historical classification as an exclusively private-law discipline could lead us to miss the opportunity for appreciating the (humble) role that delict could play in transforming South African society in line with constitutional aspirations, fostering the responsible use of power, and working towards the collective wellbeing of our society. Those are surely not traditionally thought of as core functions of private law.

Instead of pledging allegiance to the past unreflectively, Klare, in his famous work on transformative constitutionalism and the creation of a new legal culture, encourages us to be "historically self-conscious" — realising that while we are constrained by the past in many ways and can learn much from the past, we can sometimes make empowering decisions now about what we want the future to look like.[1] Indeed, we can actively decide to transform law and society as we know it today and alter the course of legal history. Aiming to be historically self-conscious, this article is geared towards providing a transformative legal history on the legal classification of delict in South Africa.

3 The traditional classification of delict as a private affair

3.1 Overview

The classification of law into branches and subdivisions, and defining the strict contours of each, is a standard feature of introductory law courses in South Africa. Introductory textbooks to South African law tend to contain a similar message, which in broad strokes goes as follows.[2]

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1 Klare 1998 *SAJHR* 155-156.

2 See Du Plessis, Raboshakga & Kotze "Classification of South African Law" 236ff; Kleyn et al *Beginner's Guide for Law Students* 136ff; Meintjes-Van der Walt *et al*

In its most elementary form, law is either applicable nationally or internationally. At national level a distinction exists between substantive law (the hardcore and binding rules and principles that dictate human behaviour) and procedural law (the rules that lay down the steps that must be taken to prove a dispute in a court). Substantively law is divided into private law (loosely: the law regulating disputes where non-state actors interact with one another), public law (roughly: the law regulating the situation where the state is a party to a dispute), and other hybrid sub-disciplines (where a subject patently straddles more than one of the former categories). Those areas of substantive law are further divided into specific subjects. For example, private law is made up of the laws of family, persons, contract, succession, property, enrichment, and — of course most importantly for this discussion — delict.

A study of the history of the public/private divide not only shows us where its point of origin is for acontextual purposes, but also usefully shows how the rationale for that divide has changed over time through different phases of legal history, and why that divide might need to be rethought today. Following Visser, this historical exercise is thus done in the spirit of critical legal history,

> to destabilise current certainties by reimagining the notions and structures of the legal system in terms of the categories of other times and other 'interpretative communities'[3]

In Visser's view,

> if [legal history] is used to reveal the alternative structures and ideas that are possible, it can assist in breaking down the restrictive, artificial barriers which every legal system tends to develop.[4]

One of those artificial barriers, I would argue, is the public/private divide, especially insofar as it applies to the law of delict.

Against this backdrop, the historical discussion here disrupts the deterministic notion that the boundary lines drawn between public and private law have always existed in coagulated form and should thus continue to exist today. In a counterintuitive sense, the past is revisited here with the aim of disrupting the present, looking simultaneously forwards and backwards.

Introduction to South African Law 184ff; Du Plessis *An Introduction to Law* 253ff; Hahlo and Kahn *The South African Legal System and its Background* 111ff.

3 Visser "The Legal Historian as Subversive" 20.

4 Visser "The Legal Historian as Subversive" 19.

In what follows, I will briefly explain how the public/private divide has developed over time insofar as those developments are relevant for the purposes of understanding the place of the law of delict in the South African legal system today. The discussion here starts with Roman law, makes its way to the Netherlands, and then takes a ship to Cape Town, crossing the mountains, going inland.

3.2 Roman classification: The interests theory

In Justinian's *Institutes* 1 1 4 we are told that

> The study of law is divided into two branches; that of public and that of private law. Public law is that which regards the government of the Roman Empire; private law, that which concerns the interests of individuals.[5]

From the *Institutes* 4 1 – 4 5 it is apparent that the law of delict falls under private law in Romanist thought. The *Digest* 1 1 2 also clearly envisages a similar split along the lines of the interests of the commonwealth versus the interests of individuals.[6]

The basic distinguishing characteristic between private and public law, at Roman law, then relates to the interests that are intended to be protected. Even though some may argue that the classification of Roman law was simply the manifestation of a desire to give scientific structure to a chaotic mass of previously amorphous laws, on a careful reading of the *Institutes* and the *Digest*, the public/private divide is born in Rome as a political separation between individualist and state-governance laws. To use the words of Ferreira, the Roman classification of law is therefore based on what we could call the "interest theory" of classification.[7] This distinction between public and private law was extraordinarily strict.[8]

When individual interests are at stake and both disputing parties survive to manage their broken relationships (whether caused by divorce, breach of contract, a property infringement, or the commission of a delict), the Romans recognised that the individuals concerned should have the freedom to do so with as little state interference as possible. This is why, for example, theft and robbery were regarded as delicts and not crimes; the state left it to the entangled litigants to deal with their own disharmony.[9] Theft and

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5 Sandars *The Institutes of Justinian with English Introduction, Translation and Notes* 6.

6 See Mommsen, Kruger and Watson (eds) *The Digest of Justinian* 1; Scott *The Civil Law* 209.

7 Ferreira 1990 *SAPL* 58.

8 Watson *The Spirit of Roman Law* 49.

9 *Inst* 4 1 *pr*; D 13 1; Robinson "Public Law and Justinian's Institutes" 133.

robbery were thus regarded as "private" wrongs against property, or both property and the body respectively. This is a strange point for modern South African lawyers who intuitively regard theft and robbery as crimes, and thus public-law matters, even though those forms of conduct might incidentally also lead to delictual liability in the unlikely event that the criminals are caught and brought to justice.[10]

When the public good was at stake or where the individuals did not both survive to manage their relationships, the Roman state actively interfered.[11] This arguably provides a justification for why murder, although a decidedly personal ordeal, was regarded as a crime and not as a delict to the Romans.[12] Treason, being a violent act directed at the abstract concept of the state, similarly triggered public-law consequences.[13]

The take-home messages from this discussion on the Romanist classification of law is firstly that the public/private divide related to the interests supposedly being protected and, secondly, that the law of delict was a private-law matter because it aimed to protect individual interests in property and personality. The public/private divide was received, at least in form, in the Netherlands.

3.3 Roman-Dutch classification: The actor theory

At Roman-Dutch Law, De Groot's *Inleidinge* endorsed the Romanist distinction between public and private law.[14] Public law (*wet raeckende lands-stand*) included matters of governance related to state-endorsed religion, state-directed policy on the maintenance of peace, the waging of wars, and the powers to create laws, afford rights, and punish crimes.[15] The work of the state is brought to the fore in his description of public law. Private law (*wet raeckende bysonder burger-recht*) covers people, their things, and the enforcement of their rights.[16] Delict falls within the realms of private laws discussed by De Groot.[17] Considering this approach of De Groot holistically, the distinction between public and private law appears to rest on who the actors are in a given dispute. The public-law actor is the state, while private-

10 For a recent take on the concurrence of criminal law and delict in a historical context, see Hoctor 2019 *Fundamina* 43ff.
11 See generally Robinson 1998 *De Jure* 322.
12 Robinson 1998 *De Jure* 323.
13 Robinson 1998 *De Jure* 323.
14 De Groot *Inleidinge* 1 2 25. See Lee *The Jurisprudence of Holland by Hugo Grotius* 13-15
15 De Groot *Inleidinge* 1 2 26.
16 De Groot *Inleidinge* 1 2 27-28.
17 De Groot *Inleidinge* 1 3 32.

law actors are non-state players. Therefore, following Ferreira, reference could be made to the "actor theory" of the public/private divide in this regard.[18]

With a slightly different approach, Voet's public/private divide seems to incorporate both the Roman interest theory and De Groot's actor theory. On the one hand, in this context, he writes that laws are fundamentally about the regulation of behaviour (hinting that the actor matters).[19] On the other hand, in this context, he writes that public law deals with the "condition of the state" while private law deals with "the advantage of individuals" (hinting that the protected interests also matter).[20]

The maintenance of a strict differentiation between state and non-state actor laws was conceptually mostly possible because of the social, political and economic dispensation of the time and space in which De Groot and Voet found themselves. Even though the state might have been able to enter into contracts and commit delicts, the law of state contracting and state delictual liability remained underdeveloped in this time. On the delictual front there appear to be vague and uncertain instances under which the Dutch government during this time of history could have been delictually liable to its citizens. Overall, the idea of state liability in the Netherlands was underdeveloped when compared to that in other jurisdictions.[21] For the most part, delicts as instances of private law were dominantly matters of non-state actors *inter se.*

It could be said that the actor theory provided at least some type of reasonably solid justification for the public/private divide at Roman-Dutch law. The interest theory was, of course, still whispering in the background. Roman-Dutch law and its classification of law then made its way to the shores of the country that would eventually become known as South Africa, after which it took on a modified shape and character of its own.

3.4 South African classification

Roman-Dutch law became the hegemonic law of the Cape.[22] Even though Dutch control was finally interrupted by British invasion in 1806, uncodified Roman-Dutch law continued to constitute the dominant foundation of what would become known as South African common law.[23] During the time of

18 Ferreira 1990 *SAPL* 58.
19 Voet 1 1 11.
20 Gane *The Selective Voet* 16.
21 Du Bois 2010 *Tulane LR* 147.
22 See Zitzke 2018 *SAJHR* 496-500.
23 See Zitzke 2017 *Fundamina* 194.

the Union of South Africa, and later the Republic of South Africa, the foundations of law brought by European powers remained intact, even though they have been subject to further judicial and legislative amendments.[24]

When the first African government took control of the historically tainted white supremacist state, the common law continued to exist, subject to compatibility with the supreme *Constitution of the Republic of South Africa, 1996*.[25] Therefore, even though the *Constitution* and its progressive bill of rights certainly attempted to signal a break from the spirit of apartheid law and policy, it aimed to transform South African law and society; not to radically decolonise it.[26] Thus, when making sense of South African law today it is invariable that the remnants of Roman law, Dutch law, and its links to the fusion of ideas known as South African law, will be visible.

Van Niekerk explains that over the years the substantive rules of Roman-Dutch law have changed significantly to meet the needs of a changing society in South Africa. She writes that despite the rather vast substantive changes to Roman-Dutch rules,

> the scientific system of Roman law, including its divisions, concepts, maxims and underlying principles, has proved to be more enduring than its actual rules and norms. This has been evidenced by the continued existence, in varying degrees, of the scientific spirit of Roman law in countries which never experienced any practical reception of Roman law and in Continental legal systems which have been codified. It is therefore not surprising that the science of Roman law has likewise proved to be a fundamental and tenacious aspect of the South African legal system.[27]

Part of the surviving "divisions" and "concepts" of the Romanist tradition that Van Niekerk speaks about is the public/private divide. More specifically, for our purposes, delict's classification at Roman and Roman-Dutch law as a discipline of private law has also survived.

An early comprehensive book on the South African law of delict was written by McKerron in 1933.[28] McKerron classified delict as a private-law discipline, but only implicitly so. His was certainly not as clear as the classification of later writers who followed after him. He referred to a delict as a "civil wrong", juxtaposed against crimes which are said to be "public

24 Zitzke 2017 *Fundamina* 193.
25 This position is made clear by a joint reading of ss 2, 8, 39(2), 172 and 173 of the Constitution.
26 Zitzke 2018 *SAJHR* 503-509.
27 Van Niekerk 2011 *SUUB Jurisprudentia* 23, footnotes omitted.
28 McKerron *The Law of Delicts in South Africa*.

wrongs".[29] The difference between private and public wrongs, McKerron said, turns on the question of what interests are being protected. True to the ghost of Roman law, he thought of delict as a discipline concerned with the interests of individuals, while crimes looked out for the interests of society as a whole.[30] The reason why McKerron probably opted for the interest theory instead of the actor theory is because, by the time his seventh edition was published in 1971, state delictual liability was already a growing field of study and practice. In that edition McKerron had a section dedicated to the delictual liability of the state.[31] Later, McKerron's successor in title at the University of the Witwatersrand, Boberg, echoed McKerron's position.[32]

A much clearer classification of delict as a private-law subject is done by Van der Merwe and Olivier.[33] My translation of the relevant part of their tome reads as follows:

> In the system of legal norms, the law of delict ought to find its home in the private law. The private law contains all the legal rules that are related to the relationship between individuals. The whole private law, and thus also the law of delict, is aimed at ordering private relationships between legal subjects through the recognition, consideration, and protection of mutual interests.[34]

Delict is then contrasted with criminal law, a discipline of public law, which the authors say is aimed at protecting the authority of the state.[35] Again, the Romanist interest theory was adopted by these authors, although the whisper of the actor theory can still be heard, especially insofar as emphasis is placed on the distinction between individuals and the state.

Neethling and Potgieter's classical work joins the beaten track in the first sentences of their book, citing Van der Merwe and Olivier as authority for the proposition that delict belongs to private law because of both interest- and actor-related concerns.[36] They are explicit about the fact that they read Van der Merwe and Olivier as endorsing both theories of classification as valid here.

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29 McKerron *The Law of Delict* 1.
30 McKerron *The Law of Delict* 1.
31 McKerron *The Law of Delict* 78.
32 Boberg *The Law of Delict* 1.
33 Van der Merwe and Olivier *Die Onregmatige Daad*.
34 Van der Merwe and Olivier *Die Onregmatige Daad* 1. The original Afrikaans reads: "In die sisteem van regsnorme hoort die reg insake die onregmatige daad onder die privaatreg tuis. Die privaatreg omvat al die regsreëls wat op die verhouding van individue onderling betrekking het. Die ganse privaatreg, en derhalwe ook die reg insake die onregmatige daad, is daarop gerig om die private verhoudings tussen regsubjekte te orden deur die erkenning, afweging en beskerming van onderlinge belange."
35 Van der Merwe and Olivier *Die Onregmatige Daad* 2.
36 Neethling and Potgieter *Law of Delict* 3.

Finally we can consider Van der Walt and Midgley, who also show support for the classification of delict as a subject of private law.[37] Delict is then contrasted against criminal law, which is said to be a matter public. After explaining the historical divide between delicts and crimes, the writers explain that the distinction between delicts and crimes is rooted in the interest theory, as delicts are wrongs committed against individuals while crimes are violations of the public interest.[38] With that said, for the first time we see delict authors expressing some doubt about the public/private divide insofar as it relates to the interest theory:

> Since public and individual interests may overlap and even be identical, the same conduct may be both a crime and a delict. The basis of the distinction is differentiation of interests in vague and overlapping categories; logical and precise definitions are therefore not possible. To a large extent the prevailing conceptions of a community, and in particular the social, economic and political structure of a community, governmental policy and the historical features of the particular system of law at a given time will determine how forms of unlawful conduct are to be redressed and classified.[39]

Even though they are really talking about the boundary lines between crimes and delicts (which are significant boundaries because of the law of procedure and evidence), they allude to the fact that the interest theory is a murky academic puddle. After all, just as the public surely has an interest in the protection of individual rights, individuals also have an interest in being kept safe as members of a community.

As I will show below, it is not only the interest theory that is opaque. The actor theory similarly cannot be accurately used to support the private classification of delict. As explained more elaborately below, a legal realist would certainly call into question the traditional classification of delict as a purely private-law discipline.

4 The realist critique

4.1 Blueprint

On the legal-realist front I contend that the traditional classification of the law of delict as a part of private law fails to give a true, representational account of delict in practice. My critique here follows the American legal realist tradition to the extent that I am more interested in asking what the courts actually do with delict than what the textbooks have to say.[40]

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37 Van der Walt and Midgley *Principles of Delict* par 1.
38 Van der Walt and Midgley *Principles of Delict* para 4.
39 Van der Walt and Midgley *Principles of Delict* para 4.
40 See Johnson *et al Jurisprudence* 159 ff.

Moreover, I am interested in asking what the "law jobs" of delict are, which is also a pivotal concern of some legal realists.[41] To repeat, the argument developed here is analytical in the sense that it is simply focussed on asking what the state of the law of delict is. The normative question about what delict ought to do is mostly an endeavour beyond the scope of this article. There are a few indices that point to the fact that the boundary lines between public and private law are blurred insofar as the South African law of delict is concerned. The first are challenges to the actor theory and its close bedfellow, which has arisen in more recent classification scholarship, the power theory. Another opposes the interest theory. I will now discuss these indices in turn.

4.2 The actor detractor

The South African common law of delict very often mediates disputes where one non-state actor causes harm to another non-state actor in a culpable and wrongful manner. Examples include different types of accidents, fraudulent misstatements, assault, or defamation committed by one non-state actor against another. These certainly comfortably fit the private-law label according to the actor theory. However, delict in South Africa today also provides the legal machinery for securing the compensatory liability of the state for culpable and wrongful harm caused by its employees against non-state actors. In fact, some of the most interesting and influential cases in delict since democratisation have dealt with state liability, which has a long history in South African law.[42]

After a period during which the state was largely exempt from delictual liability, some courts in South Africa slowly introduced the concept of state liability.[43] By 1910 the *Crown Liabilities Act*[44] was in force in the Union of South Africa. In terms of section 2 of the Act delictual claims against the government would be allowed where a government servant committed a wrong in the capacity of a servant. This section essentially provided litigants with a clear mechanism to hold the state vicariously liable for the delicts committed by state functionaries acting in their capacity as agents of the state, in terms of the private-law rules of the common law of delict.[45] In 1957 the *State Liability Act*[46] came into operation. Section 1 of the latter Act

41 Johnson *et al Jurisprudence* 164 ff.
42 For a more complete history on state liability and its intricacies see Okpaluba and Osode *Government Liability* 1-25.
43 Boonzaier 2013 *SALJ* 331-332.
44 1 of 1910.
45 Boonzaier 2013 *SALJ* 332 ff.
46 20 of 1957.

similarly provides that the state can be sued for the delicts of public servants as if the state were a natural-person employer. It says:

> Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant.

The way that South African courts have understood section 1 of the *State Liability Act* is that the common law of delict applies to the state as it would to a dispute between two non-state actors, perhaps with a few differences in nuances on the rules. In most state liability cases in South Africa today, reference is not made to the Act at all — the substance of the common law of delict is usually implicitly accepted as the appropriate area of law regulating the dispute. On a strict interpretation of the actor theory, the issue of state liability fits the public-law label because the dispute is between the state and its subject. Due to the fact that the same structure of rules is used in a case of state liability as would be used in a case of non-state actor liability, there are no reasonable prospects of conceptually divorcing state liability from any meaningful discussion on the law of delict today. At first glance, then, we see the crumbling of the actor-theory justification for labelling delict as a subdivision of private law.

A conscientious defender of the private-law label for delict would be quick to tell us that the actor theory should be modified in state liability cases so that it is assumed that the state is acting on a level equal to the individual victim concerned. The argument would go that in traditional public-law disputes (constitutional review, administrative action and so forth) the state is acting from a position of power, indeed a position of inequality compared to its subjects. Delicts committed by the state, they would say, are always committed by individuals representing the state; thus the dispute is essentially between individuals and not between an individual and the abstract force that is the state. Ferreira refers to this belief as the "power or subordination theory",[47] which I would regard as a modified version of the actor theory, but I will discuss it separately in more detail below.

4.3 The power scour

If we take the idea of the power theory seriously as explained directly above, public law does not exist at all. This would be so because the government cannot exist without the people running it and thus all disputes are

47 Ferreira 1990 *SAPL* 57-58.

essentially between individuals. It is a rather bizarre fiction to assume that the state has some special elevated power when passing abusive legislation or when an unlawful administrative decision is made by a corrupt government official (supposedly conundrums for public law) but that a police officer wrongfully arresting and torturing a suspect stands on contrastingly equal footing with that victim (apparently a problem for private law).

To illustrate my point about the objective lack of equality between state-functionary delictual wrongdoers and their victims, we could consider a few cases that relate to the doctrines of wrongfulness and vicarious liability in the South African law of delict.

On the doctrine of wrongfulness, the issue of state liability for negligent omissions is particularly relevant. Wrongfulness in South African law essentially questions whether the "legal convictions of the community", read through a constitutional lens, regard the alleged wrongdoer's conduct as acceptable or not, given the alleged wrongdoer's duties to respect the rights of others and not to cause harm, and the overall reasonableness of imposing liability.[48] Contextualised to omissions in particular, the question becomes whether the alleged wrongdoer was duty bound not to cause the harm to the victim through negligence.[49] As a general starting point, the South African law of delict accepts that causing harm by an omission is *prima facie* lawful and that a victim would have to show compelling reasons why the contrary finding should be made.[50] The determination of whether such a duty is imposed on the state has received the attention of the apex courts in various cases. A useful starting point is the Supreme Court of Appeal's explanation in *Minister of Safety and Security v Van Duivenboden*.[51] It is not the earliest case on state liability since democratisation but is in my view the most conceptually clear starting point for determining the wrongfulness of negligent state omissions.

In *Van Duivenboden* the police had special knowledge of a specific gun owner's propensity for unreasonable violence. Even though the police bore constitutional and statutory duties to confiscate that gun owner's firearm, they negligently failed to do so. On a fateful day the gun owner went on a rampage and shot, among other people, a neighbour called Van Duivenboden. The relevant legal issue for this discussion was whether the state's failure to have confiscated the firearm was wrongful. In this regard

48 *Loureiro v iMvula Quality Protection* 2014 3 SA 394 (CC) para 53.
49 Fagan *Aquilian Liability* 179.
50 Fagan *Aquilian Liability* 179-186.
51 2002 6 SA 431 (SCA) (hereafter *Van Duivenboden*).

the court held that the infringement of a constitutional right of the victim invariably triggers the need for the state's accountability.[52] However, accountability can be ensured in a myriad of ways, only one of which is the imposition of delictual liability. Delictual liability as a route for accountability in the case of state omissions appears to be an avenue of last resort, after we have determined that no other less financially strenuous remedy would satiate the victim's need for corrective justice.[53] Be that as it may, it is up to a court to consider factors weighing in favour of a finding of wrongfulness versus factors weighing against a finding of wrongfulness in this context of state omissions.[54] As I am about to show, various factors weighing in favour of a finding of wrongfulness relate to the unequal power relationship between the state and its subjects. Thus, the power theory cannot be used effectively to justify labelling delict as a part of private law.

In the famous earlier case of *Carmichele v Minister of Safety and Security*[55] the victim was brutally assaulted by a fellow civilian. In 1994 the assaulter obtained a criminal record indicating a propensity for violence against women. After his short prison term, in 1995 he attempted to murder and rape one of his acquaintances. When he appeared in court for the attempted murder and rape, the prosecutor failed to oppose bail on the basis of the accused's previous conviction. The accused was released to return on his own recognisance. During this period of his release pending trial, the prosecuting authority and the police received complaints about the accused's release despite his criminal history. Both state authorities responded that their hands were tied and that nothing could be done to secure the accused's detention pending trial. The accused subsequently violently assaulted Ms Carmichele during his period of release pending trial. On the question of whether the state bore a duty towards Ms Carmichele for purposes of the wrongfulness enquiry, the Constitutional Court highlighted the particular vulnerability of many women in a world where violence towards them in rampant and the state's special role that it ought to play in protecting women in this context.[56] Vulnerability, as used by the Court here, is the flip side of power.

Not wholly dissimilar to *Carmichele* is the case of *Van Eeden v Minister of Safety and Security*,[57] where a dangerous criminal escaped from prison due

52 *Van Duivenboden* para 20.
53 *Van Duivenboden* para 21.
54 *Van Duivenboden* para 22.
55 2001 4 SA 938 (CC) (hereafter *Carmichele*).
56 *Carmichele* para 62.
57 2003 1 SA 389 (SCA) (hereafter *Van Eeden*).

to the state's negligent failure to keep the gates locked. A factor heavily weighing in favour of a finding of wrongfulness there was the state's power that it held over the dangerous criminal and the concurrent responsibility to keep the danger from the public.[58]

The same theme is apparent in *Minister of Safety and Security v Hamilton*,[59] where the police issued a firearms licence to a drunken drug addict with psychosocial disabilities. The failure to protect vulnerable members of society plagued by gun violence was a consideration weighing in favour of wrongfulness there.[60] Likewise in *Minister of Safety and Security v Venter*[61] it was decided that the state's failure to issue a protection order, upon the request of an abuse victim, against an abusive ex-partner was wrongful because of the important role that the police has to play in upholding the law to protect vulnerable members of society.[62] The protection of vulnerable members of society by the state has most recently been confirmed by the Constitutional Court in the case of *Mashongwa v PRASA*,[63] where a train passenger was robbed and thrown off a moving train by three fellow passengers, the latter conduct ultimately made possible by the fact that the train's doors were faulty and remained open while the train was moving.

This principle of victims' vulnerability has also played out in the context of the infliction of pure economic loss by the state, where a material consideration is usually whether the victims could have protected themselves from the harm caused by the state — implying that more vulnerable individuals would be more prone to receiving legal protection in this regard.[64]

Now the power theory intends to assure us that in these cases the state was acting on an equal footing to that of the victims. This suggestion cannot be supported. In all the scenarios canvassed above, the state functionaries concerned had powers that the victims did not have. Sometimes the victims approached the state for assistance, respecting and needing the state's authority precisely because the victims could not prevent the impending harm that they were about to endure. In all these cases, though not articulated explicitly in these terms, the power imbalance between the

58 *Van Eeden* para 24.
59 2004 2 SA 216 (SCA) (hereafter *Hamilton*).
60 *Hamilton* para 33.
61 2011 2 SACR 67 (SCA) (hereafter *Venter*).
62 *Venter* para 27.
63 2016 3 SA 528 (CC) par 18.
64 See *Country Cloud v MEC, Department of Infrastructure and Development* 2015 1 SA 1 (CC) para 51 ff; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 3 SA 121 (CC) para 42.

victims and the state was a fundamental consideration in holding the state delictually liable for its omissions. Whether we follow the classical or modified version of the actor theory, delict thus takes on a public-law function when state liability is imposed.

In the doctrine of vicarious liability we see a similar theme arising. For the state to be held vicariously liable for the misdeeds of its employees, there must be a valid employment relationship; the employees must have committed a delict; and the employees must have been acting in the course and scope of their employment when committing the delict.[65] The last requirement is a thorny issue in the context of the intentional malfeasance of state functionaries.

In the cases of *K v Minister of Safety and Security*[66] and *F v Minister of Safety and Security*[67] police officers, who were known to be police officers to their victims, offered assistance to unsuspecting victims. After the victims placed their hope for protection in the hands of the police officers, the police officers raped them. The position of trust between the victims and their wrongdoers on account of the known public servanthood of the wrongdoers was one of the weighty considerations in determining that there was a strong enough link between the police officers' employment and their delicts such that the state had to be held delictually liable.[68] A corollary of these determinations can be observed in the case of *Booysen*,[69] where a police officer shot his romantic partner with his service firearm. There the position of trust between the parties arose from the romantic relationship and not the wrongdoer's position as a police officer *per se*. For this reason the state was not held vicariously liable in the instance.[70]

In summary, whether we are dealing with the determination of the wrongfulness of negligent state omissions or the vicarious liability of the state for the intentional positive conduct of its functionaries, the vulnerability of the victim in relation to the state (its functionaries) and the trust that the victim placed in the state (its functionaries) are significant considerations in establishing the delictual liability of the state. Vulnerability and trust, as they play out in wrongfulness and vicarious liability respectively, are concepts of

65 Boonzaier 2013 *SALJ* 330-331.
66 2005 6 SA 419 (CC) (hereafter *K*).
67 2012 1 SA 536 (CC) (hereafter *F*) para 62-68.
68 K para 50-51 and *F* para 62-68.
69 *Minister of Safety and Security v Booysen* 2016 JDR 2304 (SCA) (hereafter *Booysen SCA*). An appeal was made to the Constitutional Court in *Booysen v Minister of Safety and Security* 2018 6 SA 1 (CC) but it was disallowed and the SCA decision stands.
70 *Booysen SCA* para 20 ff.

power. Concepts of unequal power, to be exact. The view that the law of delict regulates disputes between equals in the context of state liability must surely be incorrect.

At this point I have said a lot about the state's power dynamic vis-à-vis its subjects, highlighting special modulations to the rules of delict that apply to the state. An unintended conclusion that could be drawn from this discussion thus far could be that the state has its own special rules for delictual liability that stand completely isolated from the rules of delict as applied to non-state actors. However, this conclusion would be unfounded.

Firstly, we are dealing with internal modulation in the law of delict. There is no truly separate scheme for state liability in South African law. Whether we should have such a separate scheme for state liability is a discussion for another day.[71] In the meantime I can simply say that the liability for both state and non-state actors fits into the macrostructure of the South African law of delict in terms of the law as it stands.

Secondly, the core themes of vulnerability and trust also feature in the determination of the liability for non-state wrongdoers. The actor theory, insofar as it plays out as questions of equal versus unequal power, also does not provide much joy in the context of explaining delictual disputes among non-state actors. The fundamental idea is that even though our constitutional democracy aspires to equality, inequalities between people still exist. For example, many of the rules related to the determination of the wrongfulness of negligent harm-causing omissions perpetrated by non-state actors also pivot on the question of unequal power. Two well-known examples will suffice to illustrate this point.

The first example is where the non-state wrongdoer controls dangerous property and a duty arises for that wrongdoer to take reasonably practicable steps to prevent reasonably foreseeable harm to victims.[72] The second example is if a non-state wrongdoer creates a risk of harm through prior positive (non-wrongful, non-culpable) conduct and a duty arises on the wrongdoer to take preventative steps to avoid the risk from materialising.[73]

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71 For a specific argument about why we might need to rethink the law on state liability as we know it see Wessels 2019 *Stell LR* 361.

72 The most pertinent examples from the Appeal Court are *Za v Smith* 2015 4 SA 574 (SCA) para 20-21; *Minister of Forestry v Quathlamba* 1973 3 SA 69 (A) 80H-82E and *Regal v African Superslate* 1963 1 SA 102 (A) 111D–H. Arguably another example can be found in *Pro Tempo Akademie v Van der Merwe* 2018 1 SA 181 (SCA) (hereafter *Pro Tempo Akademie*) para 20-21.

73 The most pertinent examples from the Appeal Court are the *Pro Tempo Akademie* para 20-21 and *Silva's Fishing Corporation v Maweza* 1957 2 SA 256 (A) 261.

A case that straddles both examples is *Pro Tempo Akademie*. A school for learners with disabilities placed metal guiding rods in the ground next to newly planted saplings. One learner tried to stand on the rod, slipped and was impaled, suffering terrible bodily injuries. On application of the dangerous-property and the prior-conduct rules, the school's failure to take reasonable measures to protect learners from the harm imposed by the rods was held to be wrongful. With the dangerous-property rule, the school bore special knowledge of and had control over the risks posed by the rods, which is why its duty of harm prevention arose. Similarly, under the prior-conduct rule, the mere insertion of rods in gardens is not wrongful but a subsequent failure to ensure that the risks of harm do not materialise is wrongful. In my view, the rationale for these rules relates to the relative power imbalance between the wrongdoer and the victim. The wrongdoer has special knowledge or control over risks that the victim does not have, which places the wrongdoer in a position of power relative to the victim.

In the application of both of these rules we see a similar consideration of balancing the unequal power dynamic between the non-state wrongdoer and the victim as we did in the discussion on state liability. Perhaps the law of delict in its entirety has an important role to play in ensuring that those in power — both public and private — are held accountable when that power is not used responsibly. In this way the law of delict serves a potentially important function in ensuring the achievement of equality as demanded by the Constitution in its preamble, read with section 9.

In short, in terms of a legal realist view the actor theory in its classical form and the modified version as the power theory fail to provide any convincing reasons for the labelling of the law of delict as a subject of private law. This still leaves the interest theory.

4.4 The interest twist

4.4.1 Crimes versus delicts

Now that we know that the actor and power theories are potentially not viable to accurately capture what the law of delict does, we can ask whether the law of delict aims to protect interests that are uniquely private instead of public.

The typical treatment of this issue in major delict works is cast as the importance of the distinction between criminal law (the archetype of public

law) and the law of delict (its private-law rival).[74] I will thus deal with this theory in a similar way.

Popular criminal-law textbooks convey the same message that criminal law protects the so-called public interest while delict is concerned with private interests.[75] The key difference in interests protected by the two areas of law is said to be rooted in the leading litigant, the procedures to be used coupled with the onus of proof, and the aims and outcomes of liability.[76] These differences require closer inspection.

Typically it is said that the state is the *dominus litis* in criminal litigation while the state will not be the *dominus litis* in a delictual dispute.[77] The spin-off is that criminal litigations aims to protect the interests of the state, while delictual litigation aims to protect the interests of the individual who brings the dispute to court. Even though it is surely true in most cases that the *dominus litis* is the state, under South African law private prosecutions are possible (though admittedly rare).[78] Therefore, the state will not always be a party to a criminal dispute and we cannot lay this down as an absolute general principle. Furthermore, nothing legally technically bars the state from suing another person (natural or juristic) for a delict that has been committed against it. In fact, Treasury Regulations encourage the recovery of damages for harm done to state departments.[79] For example, if a negligent driver of a grocery store's delivery truck bumps into a police van that was operated non-negligently, the state cannot have its hands tied in terms of recovering its expenses from the wrongdoer. In such a case the state's delictual lawsuit against the grocery store is ultimately geared towards protecting the state — the public interest in having functional police vans. Cumulatively, then, who the leading litigant is cannot provide an absolute justification for viewing criminal law and delict as public and private flipsides of the same coin.

Title to sue aside, perhaps the combination of the rules of procedure, the law of evidence, and the consequences for liability for delict versus criminal law paints a different picture about the interests that the two subject areas

74 Van der Walt and Midgley *Principles of Delict* para 4; Neethling and Potgieter *Law of Delict* 7-8; Van der Merwe and Olivier *Die Onregmatige Daad* 1; Boberg *The Law of Delict* 1 and McKerron *The Law of Delict* 1-2.

75 Burchell *Principles of Criminal Law* 3 and Hoctor *Snyman's Criminal Law* 4.

76 Hoctor *Snyman's Criminal Law* 5.

77 Hoctor *Snyman's Criminal Law* 4.

78 See generally ss 7-16 *Criminal Procedure Act* 51 of 1977 and Mujuzi 2019 *Fundamina* 131.

79 Regulation 12.3 of the *Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities* GG 27388 (15 March 2005) GN R225.

serve to protect. The *Criminal Procedure Act* applies to criminal disputes while various rules of different courts regulate civil procedure.[80] These procedural rules by themselves do not reveal too much about the nature of the interests being protect *per se*. But the rules of procedure work together with the law of evidence to maintain the key adjective distinction between criminal and civil disputes, namely that a criminal must be found guilty beyond reasonable doubt while a delictual wrongdoer need be found liable only on a balance of probabilities.[81] The reason for this distinction on onus of proof is rooted in the distinction between the consequences for each area of law. Criminals will be given a criminal record and might have their freedom deprived by being sent to prison, while delictual wrongdoers will not receive any formal taint against their name and will not, in terms of the rules of delict, be sent to prison. The reasoning goes that the consequences for criminal liability are potentially further reaching than the consequences of the law of delict and so we should maintain a conceptual difference between the two areas. This is certainly a significant point of diversion between criminal law and delict. However, as I will show below, this distinction could be invoked to maintain a conceptual difference between criminal law and the law of delict, but the labels of "public law" and "private law" have little meaningful to offer in understanding this distinction.

To see why the criminal/delict split is one that can be made while the supposed concurrent public/private should not necessarily be made, we must briefly survey the functions of the law of delict and criminal law as understood by South African legal theorists.

Loubser and Midgley's textbook is the only South African book on delict that attempts in a meaningful way to think about the social role of the law of delict. For Loubser and Midgley the law of delict serves the functions of ensuring interpersonal corrective justice through compensation, the protection of the legal interests of victims, promoting social cohesion and a sense of social order, instilling values including those related to personal responsibility, providing a vehicle through which competing interests are mediated, the deterrence of harm and, in some instances (especially where social insurance regimes are involved), the spreading of losses.[82] According to Loubser and Midgley, all of these functions in varying degrees, depending on the dispute involved, could arguably play a role in understanding what the law of delict aims to achieve in South African society.

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80 See generally Harms *Civil Procedure in the Magistrates' Courts* and Harms *Civil Procedure in the Superior Courts*.

81 See Schmidt and Rademeyer *Law of Evidence* para 3.1.

82 Loubser and Midgley (eds) *The Law of Delict in South Africa* para 1.5.

This should be contrasted against the functions of criminal law. For Hoctor and Snyman the ultimate aim of criminal law is to impose a sanction by means of punishment.[83] Punishment in the South African context usually refers to adverse consequences on the convicted criminal's freedom of movement and/or finances, taking on the form of varying degrees of imprisonment or the payment of fines to the state. These forms of punishment can be justified normatively in different ways. On my reading of Hoctor and Snyman, the normative justifications of punishment and criminal law also indicate the functions of criminal law.[84] The normative justifications in question are retribution (a mechanism of corrective justice owed to society at large for the breach of certain legally protected interests),[85] prevention (the removal of an individual from society on account of the danger that the individual poses to the community as a whole),[86] deterrence (to provide individuals with an incentive to refrain from committing crimes),[87] and reformation (rehabilitating criminals from their immoral behaviour and guiding them towards a path of righteousness to live in harmony with others).[88]

From the above we could conclude that the key overlapping functions of delict and crimes relate to their concern with protecting certain legal interests, ensuring some type of mechanism for corrective justice in the case of unlawful interferences with those legal interests, and the deterrence of unlawful interferences with the interests of others. While Hoctor and Snyman do not mention the maintenance of social cohesion and order, the instilling of values like responsibility, or mediating competing interests, it should be trite how criminal law also takes on these roles alongside delict.

The divergence between criminal law and delict seems to lie in (1) the nature of the corrective justice obligations owed by criminals compared to delictual wrongdoers, (2) criminal law's uniquely preventative function, (3) the reformation of perpetrators of wrongs, which does not seem to feature in South African delict theory as canvassed above, and (4) delict's unique role in loss spreading (in some cases of social insurance schemes).

83 Hoctor *Snyman's Criminal Law* 9 ff.
84 Hoctor *Snyman's Criminal Law* 9.
85 Hoctor *Snyman's Criminal Law* 11-13.
86 Hoctor *Snyman's Criminal Law* 13.
87 Hoctor *Snyman's Criminal Law* 14.
88 Hoctor *Snyman's Criminal Law* 15-17.

4.4.2 Loss spreading and the public interest

As a starting point in dealing with these divergences, the fourth distinction quickly takes us to fifteen-love for delict: The spreading of losses through statutory compensation schemes like the Road Accident Fund surely looks after the public's interests. It aims to ensure adequate protection for road accident victims while also saving road wrongdoers from financial ruin, thus striving to protect all of us who participate daily in South Africa's traffic Hunger Games.

The other three notional distinctions between delicts and crimes certainly show that the two are distinct fields of study. However, the distinction is not absolute. And the distinction probably has less to do with public versus private interests than we might be tempted to think.

4.4.3 Corrective justice and reformation

Back to the first distinction listed above: The most common logical end of a common-law delictual dispute is the paying of damages by the wrongdoer to the victim. However, the law of delict is not concerned only with compensation.[89] The law of delict is also geared towards the issuing of interdicts against wrongdoers to prevent further harm,[90] as well as other remedies such as the issuing of apologies,[91] and/or (more recently) reparations in kind.[92] When the law of delict's remedies are holistically considered it becomes apparent that this area of law is not interested only in corrective justice through the payment of money. Rather, the law of delict is committed to effecting reparations, in different forms, for wrongs that have been committed. Those reparations do not have a corrective justice function only in mathematical, compensatory terms. Those reparations can also have a humane, relationship-restoring dimension to them.

One line of reasoning could be that the issuing of an order for retraction and apology of a defamatory statement could involve a first step towards the rehabilitation of delictual wrongdoers (in the sense that the wrongdoers would have to stop for a moment and reflect on their actions and express an acknowledgement of wrong, which is generally not required in a criminal context, laying the foundation for true repentance) and, more importantly,

89 A point also emphasised by Du Bois 2000 *Acta Juridica* 22.

90 See Neethling and Potgieter *Law of Delict* 269-270.

91 See *Le Roux v Dey* 2011 3 SA 274 (CC) para 195-203.

92 The possibility of compensation in kind was left open in in the apex court decision of *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 1 SA 335 (CC) para 58 but has more recently been implemented by the High Court in *MSM obo KBM v MEC for Health, Gauteng* 2020 2 SA 567 (GJ).

the restoration of peace between the wrongdoers and victims. The notion of restoring peace between wrongdoers and victims is also reflected in more recent criminal law practice where the principles of restorative justice are becoming increasingly important, in South Africa and beyond.[93]

With that said, the restoration of peace between the wrongdoer and victim ultimately also results in the restoration of peace between the wrongdoer and the cosmos. While one brand of the Eurocentric worldview regards individuals as atomistic with duties of interpersonal amends between the wrongdoer and the victim alone, an African worldview could involve viewing a delict as a disruption of social order more expansively understood, on account of the fact that all individuals find themselves in an interwoven web of obligations towards others.[94] A wrong to one victim is thus automatically also a wrong to all. Cosmic harmony can be restored only once the wrongdoer has made reparations to the victim.[95]

If we allow an African worldview to inform our understanding of harm-causing, this then dilutes the idea of delict as "corrective justice between two parties" juxtaposed against criminal law as "corrective justice between the wrongdoer and society as a whole". This interpretation of African philosophy also appears to be supported by customary-law commentators who observe that no clear distinction between "crimes" and "delicts" exists in various customary-law systems.[96] If we can accept for a moment that the "South African law of delict" comprises not only of the common-law rules of delict but also of functionally similar customary law rules, then our understanding of what delict is and what delict does must be broad enough to accommodate both sets of laws. The customary-law position clearly resists against any type of watertight distinction between what is private and public. This further supports the notion that the law of delict, properly and expansively understood, is neither definitely public nor private.

Interestingly, the spirit of the customary-law approach to the public/private divide is also reflected in the strong horizontality provisions in our *Constitution*, like sections 8, 39(2) and 173. While constitutional rights are traditionally thought of as public-law interests, these rights now infiltrate South African private law (and delict) discourse very strongly. We need only make passing reference to the impactful case of *Carmichele* in this regard.

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93 Explained in detail by Burchell *Principles of Criminal Law* 5.

94 See Coetzee "Particularity in Morality and its Relation to Community" 321-337.

95 See Ramose "I Conquer Therefore I am the Sovereign: Reflections upon Sovereignty, Constitutionalism and Democracy in Zimbabwe and South Africa" 567-568.

96 Hoctor 2006 *Fundamina* 170.

This means that both criminal law and delict can serve the function of promoting constitutional values and rights, simultaneously protecting individuals and the cosmos harmoniously.

The corrective-justice fusion between criminal law and delict is further highlighted by the fact that section 300 of the *Criminal Procedure Act* provides for the possibility of ordering the payment of damages in a criminal trial by a wrongdoer to a victim to ensure that corrective justice is done. Even though some could regard this as an exceptional instance of an incidental statutory delict (thus falling outside of the ambit of criminal law), they cannot simultaneously highlight the *Criminal Procedure Act* as a defining characteristic of what separates crimes from delicts and sever parts of the Act to maintain a conceptual difference between the two. A plain reading of this provision in the Act indicates that criminal law and corrective justice in the sense of interpersonal compensation in the South African context are not mutually exclusive.

4.4.4 Prevention and deterrence

The issuing of an interdict as an attempt at securing reparations for a civil wrong can involve the actual prevention of harm, which is traditionally thought of as being an exclusive function of criminal law. The conscientious defender of the public/private divide might shout that criminal law's preventative function through imprisonment is aimed at preventing harm to unsuspecting victims (other than the original victim), while delict's interdicts are narrowly focussed on preventing harm between the wrongdoer and the original victim only. Though a valid point, one must not lose sight of the fact that prevention and deterrence walk side-by-side on a tightrope. The delict wrongdoer who is interdicted to refrain from causing harm to one specific victim will surely be deterred from causing similar harm to another unsuspecting victim, lest they face similar legal action. Admittedly, criminal law's preventative function is certainly more extreme than that of delict. But there is a degree of overlap.

4.4.5 Final clarity

We have seen that interpersonal corrective justice, cosmic corrective justice, prevention, deterrence and reformation feature (in varying degrees) as functions in both delict and criminal law. Overall, it is surely correct to say that criminal law has the potential to have stronger "public-law moments" in terms of Western concepts of corrective justice, prevention, deterrence, reformation and long-term consequences for the wrongdoer. But that does

not mean that the picture painted is that criminal law is inescapably public as opposed to private.

Thus, to conclude our discussion on the interest theory, the nuanced differences on the conditions for liability and the consequences of each branch of law cannot necessarily be said to be uniquely or specially public or private. In sum, an analytically, legal realist reading of the delict/criminal law divide leaves little of the interest theory too. The interest theory bows and leaves left stage.

5 Conclusion: Towards hybridity?

The actor theory cannot be used to justify labelling delict as a private-law subject because of the prominence of state-liability jurisprudence under the modern South African law of delict, surely enhanced by the constitutional value of state accountability. The power theory is also an inadequate justification of delict's traditional classification because the levelling of the field between victims on an unequal footing towards their wrongdoers is one of the currently unarticulated functions of the South African law of delict. This has a significant constitutional flavour of substantive equality. The interest theory also fails to convince us that delict serves particularly private interests when compared with criminal law. Surprisingly perhaps, delict fulfils preventative, rehabilitative and restorative functions not dissimilar to criminal law and its aims of punishment. Indeed, both of these areas protect private and public interests as traditionally understood. This is rather apparent in the constitutional era where the bill of rights reaches into all areas of law. Perhaps then it would be more accurate, on an analytical realist level, to describe the extant law of delict as a hybrid of public and private law.

In the end, even though delict certainly can protect traditionally "private" interests, we have also seen how delict can be said to have a much stronger "public" function than traditional delict scholarship admits. As I mentioned at the start, this could cause confusion to students who are told to think about delict in exclusively privatist terms while simultaneously observing a constitutional tension pulling in the opposite direction. Furthermore, an uncritical acceptance of delict's historical classification as an exclusively private-law discipline could lead us to miss the opportunity for appreciating the (humble) role that delict could play in transforming South African society in line with constitutional aspirations, fostering the responsible use of power and working towards the collective wellbeing of our society. Finally, the argument presented here shows that legal historians do not have to pledge

unthinking allegiance to the past for the sake of upholding tradition. Taking legal history seriously may, in fact, open us up to thinking much more reflectively about the present and the future. And that is what the critical, transformative study of law and its history is surely about.

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List of Abbreviations

CC	Constitutional Court
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law
SCA	Supreme Court of Appeal
Stell LR	Stellenbosch Law Review