

# **THE HORIZONTAL APPLICATION OF THE SOUTH AFRICAN BILL OF RIGHTS**

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## STATEMENT

**This project is an original piece of work which is made available for photocopying and for inter-library loan.**

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KD CHETTY

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## ABSTRACT

The Constitution of the Republic of South Africa, Act 200 of 1993 which operated as the interim constitution of the Republic introduced a new legal order predicated on constitutionalism and constitutional supremacy. Within it was entrenched a justiciable Bill of Rights that guaranteed the enforcement and protection of the fundamental rights of the individuals of the state.

Notionally and traditionally bills of rights have been conceived as a mechanism for the protection and enforcement of fundamental human rights against the state, the abuse of state authority and state power. Such an application has been typified as the vertical application of the bill of rights. During the drafting process of the Interim Constitution, the Technical Committees commissioned by the Multi-Party Negotiating Process for that purpose were preoccupied with the question as to whether the South African Bill of Rights should apply in the private sphere between private persons acting *inter se*; such an application being typified as the horizontal application. The result was an ambiguous text.

The question of whether the Bill of Rights was indeed capable of a horizontal application was intensely debated before the Constitutional Court of South Africa in *Du Plessis And Others v De Klerk And Another* 1996 (3) SA 850. And in an equally intense judgment the majority of the Court concluded that the Bill of Rights was not in general capable of a direct horizontal application. Although influenced by a strenuous textual analysis, there were other considerations too that influenced the Court's decision. One of the most important of these was that the operation of a bill of rights in the private sphere would be contrary to the notion of a constitutional state and that it would make the law vague and uncertain.

However, the very same Constitutional Court a few months later in *In Re: Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (10) BCLR 1253 (CC) certified that Section 8 (2) of Chapter 3 unequivocally provided for the horizontal application of the Bill of Rights.

This dissertation examines the paradigms within which the Bill of Rights operates horizontally and analyzes the apprehensions expressed in *Du Plessis v De Klerk* within the context of these paradigms.

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## INTRODUCTION

The Constitution of the Republic of South African, Act 200 of 1993, was promulgated into law as an interim constitution to be replaced by a final text within a specified period. The Interim Constitution heralded a new legal order that brought with it constitutional supremacy and a justiciable Bill of Rights in terms of which human rights guarantees were entrenched against abuse by the state. This was typically in accordance with the universally accepted notion that bills of rights operated only between the individual and the state. This relationship was subject to ultimate constitutional scrutiny by the Constitutional Court which was endowed with the residual power of review.

During the drafting process of the Interim Constitution, there was much debate as to whether the Bill of Rights should apply not only between individuals and the state, i.e. vertically, but also between private individuals *inter se*, i.e. horizontally. The result was an ambiguous text.

The debate came before the Constitutional Court in *Du Plessis And Others v De Klerk And Another* 1996 (3) SA 850 for resolution. The majority of the justices prompted by a strenuous textual analysis and interpretation, concluded that the South African Bill of Rights was not of general direct horizontal application. In arriving at its decision, the Court, however, expressed other reasons of grave concern for not readily pronouncing an application of horizontality.

Ironically and contemporaneously with the deliberation of the Court, the new text of the Constitution was being drafted and was signed into law not long after the judgment. The most significant changes introduced by the new text was that the Bill of Rights would now also apply between private persons, i.e. horizontally, and equally significantly the judiciary like the other organs of state would be bound by the Bill of Rights.

This dissertation therefore attempts to respond to the apprehensions raised by the judgment in *Du Plessis v De Klerk*. From an analysis of the judgment, it will endeavour to establish the nature and scope of the horizontal application of the South African Bill of Rights, the role and function of the courts in such an application, and the effect of horizontality in the private sphere and on African customary law.

# THE HORIZONTAL APPLICATION OF THE SOUTH AFRICAN BILL OF RIGHTS

## CHAPTER 1

### *DU PLESSIS V DE KLERK REVISITED*

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# THE HORIZONTAL APPLICATION OF THE SOUTH AFRICAN BILL OF RIGHTS

## CHAPTER 1

### *Du Plessis and Others v De Klerk and Another Revisited*

#### 1. Introduction

Traditionally, Bills of Rights were conceived and are still perceived as legal instruments acting as a bulwark against the abuse of state power vis-a-vis the subjects of the state.<sup>1</sup> Typically, the traditional notion of such an application of a bill of rights described above is commonly referred to as the vertical application. In terms of public international law, states were the recipient of rights and individuals were not.<sup>2</sup>

However, there is a tendency worldwide to recognize a need for bills of rights to afford private individuals protection against not only the abuses of state power but against the exertion of superior social and economic power of other private individuals in modern-day societies.<sup>3</sup> This tendency appeared in the drafting of the first South African Bill of Rights so as to apply not only between individuals and the state in respect of state authority but between private individuals *inter se* in private relationships. This latter notion is typically referred to as the horizontal application of the Bill of Rights.

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<sup>1</sup> See Lorenzo Togni 'A Macrocoscopic Perspective of the Human Rights Movement' in *The Struggle For Human Rights An International And South African Perspective* 1994.

<sup>2</sup> I M Rautenbach *General Provisions of the South African Bill of Rights* 1995 at 3-4.

<sup>3</sup> L du Plessis & H Corder 'The Genesis of the Operational Provisions of the Chapter on Fundamental Rights' in *Understanding South Africa's Transitional Bill of Rights* 1994 at 113.

## 1.2 The South African Bill of Rights

### 1.2.1 The Interim Bill of Rights

South Africa's first Bill of Rights which appeared in Chapter Three of the Constitution of the Republic of South Africa, 1993<sup>4</sup> and operated as an interim Bill of Rights was conceived as a compromise between those in favour of the traditional approach, the verticalists and those in favour of the modern approach, the horizontalists.<sup>5</sup> The product was an ambiguous text that spawned and generated frenetic debates amongst both legal academics and practitioners alike with the dilemma being resolved to some extent in *Du Plessis and Others v De Klerk and Another*<sup>6</sup> where the Constitutional Court held that the interim Bill of Rights did not have a general direct horizontal application.

### 1.2.2 The New Text

Contemporaneously with the issue of horizontality being deliberated by the Constitutional Court, the Constitutional Assembly of the South African government had completed the draft of the new text of the Constitution of the Republic of South Africa where the Bill of Rights is specifically made applicable between private persons. In other words, horizontality is now explicit.

While this is so, there are issues that were raised in the *Du Plessis v De Klerk* judgment that need to

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<sup>4</sup> Act 200 of 1993 hereafter the Interim Constitution.

<sup>5</sup> See Cachalia *et al Fundamental Rights in the New Constitution* 1994 at 19-21; and du Plessis & Corder *op cit* n 3 at 110-114.

<sup>6</sup> 1996 (3) SA 850; 1996 (5) BCLR 658 (CC) hereafter *Du Plessis v De Klerk* 1996 (3) SA 850.

be examined further in order to determine the extent to which the horizontal application of the Bill of Rights will be able to address them and what impact, if any, such an application will have on the development of the law.

### **1.3 *Du Plessis v De Klerk* Revisited.**

The dilemma as to whether the Bill of Rights in the Interim Constitution did in fact apply horizontally as well as vertically was finally decided by the Constitutional Court in *Du Plessis And Others v De Klerk And Another*<sup>7</sup>. Kentridge AJ writing for the Court finally concluded that although the Bill of Rights in Chapter 3 of the Interim Constitution may and should have an influence on the development of the common-law, it was not of *general*<sup>8</sup> direct horizontal application. In arriving at this finding, the Court raised the following issues that need to be resolved with reference to the horizontal application of the new constitutional text.

#### 1.3.1 The Function of the Courts and the Role of the Judiciary

Relying upon the interpretation of the jurisdiction conferred upon it in terms of Section 98 of the Interim Constitution, the Constitutional Court held that it was not suited to the exposition of the principles of private law and that the reformulation of the common law and customary law was the task of the Supreme Court. It held that it had no inherent or general jurisdiction to re-write the common law governing private relations.<sup>9</sup>

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<sup>7</sup> *Du Plessis v De Klerk* op cit n 6.

<sup>8</sup> Own emphasis.

<sup>9</sup> *Du Plessis v De Klerk* op cit n 6 para[52] at 880 and [60] at 885..



Kentridge AJ also concluded that while the Interim Constitution allowed for the ‘striking down’ of statutes inconsistent with it, a similar jurisdiction did not fall upon the courts to strike down rules of the common law as these would create *lacunae* in the law. He added that although the development of the common law by the courts was achieved incrementally, it was not done so by striking down<sup>10</sup> and that the radical amelioration of it was the function of Parliament not that of the courts.<sup>11</sup>

The issue as to the radical development of the common law was raised also by Sachs J. The learned justice was of the opinion that the issue before the Court in respect of horizontality and verticality was not about constitutional values but rather about which institutions the Interim Constitution envisaged as being responsible to give effect to those values. Somewhat critically he examines the function of the Constitutional Court with that of Parliament and concluded that a direct horizontal application of the Bill of Rights would result in what he termed a ‘dikastocracy’ in that the courts would be obliged to reformulate the common-law. This would amount to a rule by judges (a ‘dikastocracy’) which would result in a usurpation of the function of Parliament.<sup>12</sup> The learned judge also questioned the propriety of the Constitutional Court in directly examining concepts of customary and indigenous law, a function more suited to Parliament.<sup>13</sup>

In a scathing dissent, Kriegler J with whom Didcott J concurred set out to dispel the ‘egregious

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<sup>10</sup> Op cit para[58] at 884.

<sup>11</sup> Op cit para[53] at 881.

<sup>12</sup> Op cit para [178-181] at 931-932.

<sup>13</sup> Op cit [189] read with para [180] at 935 & 931 resp.

caricature’ in an Orwellian society resulting from a direct horizontal application of the bill of rights. The learned judge claimed that the true debate was not one of verticality versus horizontality but as one that related to the manner of the horizontal application of the Bill of Rights and it mattered not whether such application was direct or indirect.<sup>14</sup> What in fact was important was that the Interim Constitution mandated all courts to have due regard to the ‘spirit, purport and objects’ in terms of Section 35(3) of Chapter 3 when interpreting statutory law and when applying and developing the common law and customary law.<sup>15</sup>

A not too dissimilar view was expressed by Mahomed J who stated that according to his interpretation Section 35(3) would endow upon the different divisions of the Supreme Court, including the Appellate Division, ‘a very clear and creative role in the active evolution of our constitutional jurisprudence’<sup>16</sup> by examining and expanding the traditional frontiers of the common law and infusing it with the spirit, purport and objects of the Bill of Rights with the Constitutional Court having the residual power to determine whether a Supreme Court has acted properly in applying the provisions of Section 35(3).

### 1.3.2 Horizontality in the Private Sphere

In substantiating his view that only an indirect application of the Bill of Rights to the common law was intended by the Interim Constitution, Kentridge AJ held that the limitation provisions of Section

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<sup>14</sup> Op cit paras [119-122] at 909-910.

<sup>15</sup> Op cit para [141] at 917.

<sup>16</sup> Op cit para [87] at 897-898.

33(1) would lead to insurmountable problems<sup>17</sup> and that a direct application would invoke numerous provisions of the Chapter 3 in private litigation.<sup>18</sup>

A more strenuous effort at dispelling the intention of a direct application of the Bill of Rights in the private sphere is abundantly manifest in the judgment of Ackermann J. The learned judge raised grave concerns about the impact a direct horizontal application would have in practice.<sup>19</sup> These were:

- (a) A direct application of the Bill of Rights would make the law vague and uncertain and is contrary to the concept of the constitutional state;
- (b) A direct application of the fundamental rights to private relations would severely undermine private autonomy;
- (c) A direct application of the basic rights in disputes between private individuals would place duties on them and necessitate the balancing of competing rights;
- (d) A balancing of rights would lead to conflicting decisions by the courts which would result in numerous appeals to the Constitutional Court in matters that would otherwise be of a commercial nature and would cast onto the Constitutional Court the formidable task of

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<sup>17</sup> Op cit para [55] at 881.

<sup>18</sup> Op cit para [57] at 882.

<sup>19</sup> Op cit paras [97-102 & 112] at 900-902 & 906 resp.

reforming the private common law

and

- (b) A direct application of the basic rights would turn the Constitution, contrary to its historical evolution of constitutional individual rights protection, also into a code of civil obligations for private individuals with no indication as to how clashing rights and duties are to be resolved or how clashing rights are to be balanced.

The learned judge preferred the approach of the Federal Constitutional Court of Germany which adopted the *mittelbare drittwirkung* i.e. an indirect horizontal application of the Bill of Rights in disputes between private persons.

However, in contrast to the majority ruling, Madala J after reference to the preamble and post-amble of the Interim Constitution and the values enshrined in it, was of the opinion that one of its basic concerns was to transform the South African social and legal system into one that upholds principles of democracy and human rights not only as between individual and state but between individuals *inter se*. He held that as a matter of interpretation certain provisions of the Bill of Rights were capable of direct as well as indirect application. And in determining this, a court should examine every enumerated right and decide whether it could sensibly be applied in the private domain. Such a determination would depend on the nature and extent of the particular right, the values that underlie it, and the context in which the alleged breach of the right occurs.<sup>20</sup>

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<sup>20</sup> Op cit paras [161 & 165 at 926 & 927.

### 1.3.3 Customary Law

Only two judges of the Constitutional Court raised the issue as to the implications of the Constitution for customary and indigenous law. According to Mokgoro J South African customary law had been marginalised and allowed to degenerate into ‘a vitrified set of norms alienated from its roots in the community’ and that there is ‘significant scope for the dynamic application and development of customary law by the courts in a manner that has “due regard to the spirit, purport and objects” of chapter 3.’<sup>21</sup> Similarly, Sachs J was of the view that an indirect application of the Bill of Rights would allow ‘courts closer to the ground’ to develop customary law in an incremental manner so as to harmonize with the principles of the Chapter 3 rights.<sup>22</sup>

## 1.4 Conclusion

The question of horizontality is indeed a vexed question. While it may be agreed that essentially a bill of rights is typically a legal instrument protecting the fundamental rights of individuals against the awesome might of state power, control and authority, there was no unanimity as to its direct horizontal application.

With regard to the diversity of judicial opinions, Karthy Govender comments as follows, ‘[g]iven the passion with which the different positions were defended and opposing positions attacked, it is apparent that the philosophies and predilections of the different justices influenced the interpretation

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<sup>21</sup> Op cit para [172] at 929.

<sup>22</sup> Op cit para [189] at 935.

they gave to the text. The adoption of direct horizontality brings with it awesome responsibilities.<sup>23</sup>

The impact could be awesome for serious questions may be raised with reference to the content of issues discussed above.

This dissertation will attempt to seek answers to such questions as to:

- (1) how is horizontality to apply within the context of the operational provisions of the new text;
- (2) what principles of constitutional interpretation would be applied by the courts and other forums in the application and development of the common law and customary law and what would be the functions of the courts and the role of the judiciary and the legislature in reformulating the common law;
- (3) how would private common law principles which were entrenched over centuries be affected when it is necessary to balance equally competing rights between litigating private parties;  
  
and
- (4) What would be the impact on African customary law which too has developed from deeply entrenched patriarchal and agnate relationships.

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<sup>23</sup>

Karthy Govender 'Horizontality Revisited In The Light of *Du Plessis V De Klerk* And Clause 8 Of The Republic Of South Africa Constitution Bill 1996' (1996) 1.3 *The Human Rights And Constitutional Journal of Southern Africa* 20-23 at 22.

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# THE HORIZONTAL APPLICATION OF THE SOUTH AFRICAN BILL OF RIGHTS

## CHAPTER 2

### THE HORIZONTAL OPERATION OF THE BILL OF RIGHTS

#### 2.1 Introduction

The majority decision in *Du Plessis and Others v De Klerk and Another*<sup>1</sup> after an exhaustive textual analysis and strenuous interpretation of the Interim Constitution concluded that the Chapter 3 provision of the fundamental rights was not intended to have a general direct horizontal application.<sup>2</sup> Only Kriegler J, with whom Didcott J concurred entirely, in a display of judicial activism held in a dissenting judgment that the Bill of Rights was indeed capable of horizontal application. Although there was general consensus, some of the judges who agreed with the majority did so for different reasons.

However, the question arises whether the statement of Mahomed DP (as he was then) could be particularly apposite when he claimed that the debate between Kentridge AJ who wrote for the court and Kriegler J would be of no substantial practical consequence but of historical importance only in view of the fact that the 'interim Constitution [would] already have been overtaken by a new

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<sup>1</sup> 1996 (3) SA 850.

<sup>2</sup> i.e. application between private individuals on an equal footing as opposed to a 'vertical' application i.e. between individual and the state.



constitutional text with quite different formulations impacting on the problem.<sup>13</sup> This in fact has happened.

## 2.2 The New Constitutional Text

The new constitutional text was approved by the President on 10 December 1996 and promulgated into law as the Constitution of the Republic of South Africa, 1996, Act 108 of 1996. Before the adoption of the Constitution, the provisions of the draft text had to be certified by the Constitutional Court as having complied with the constitutional principles enumerated in Schedule 4 of the Interim Constitution.<sup>4</sup>

The Constitutional Court deliberated over the new text of the Constitution and dealt with specific objections that were raised.<sup>5</sup> Of relevance to this chapter was the certification of Section 8(2) of the Constitution which reads:

A provision of 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 and any duty imposed by the right.

The Court dealt with the following objections.<sup>6</sup>

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<sup>3</sup> Op cit n 1 para [73] at 892.

<sup>4</sup> Constitution of the Republic of South Africa, 1993, Act 200 of 1993, Section 71(2).

<sup>5</sup> IN RE: CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996; 1996 BCLR (10) 1253(CC).

<sup>6</sup> Op cit n 5 paras [53-56] 1280-1281.

Firstly, it was argued that the horizontal application of fundamental rights was not universally accepted. While the Court agreed that that might be so, CP II did not preclude the CA from including provisions in the NT which were not universally acceptable.<sup>7</sup> CP II of Schedule 4 provides:

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after giving due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution.

Secondly it was argued that a horizontal application between private persons would render the NT inconsistent with CP VI which required a separation of powers between the legislature, the executive and judiciary. The effect of this would be to allow the judiciary to encroach upon the legislative domain of the legislature thereby usurping the function of government in that the courts would alter legislation and particularly the common law. This objection, the Court held, was flawed in two respects. First, the courts were always regarded as the sole arm of government responsible for the development of the common law and that there could be no separation of powers objection to the courts retaining their power over the common law. Second, while the courts have no power to alter legislation, it did in terms of the New Text have the power to review legislation as to whether it would be consistent with the principles enshrined in the Constitution. This would be so even if the Bill of Rights did not apply horizontally. The Court held that even if the Bill of Rights did not bind private persons, it was, in any event, binding on the legislature and legislation would still be subject to review by the courts.

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<sup>7</sup>

CP II = CONSTITUTIONAL PRINCIPLES; CA = CONSTITUTIONAL ASSEMBLY; NT = NEW TEXT.

The third objection was that NT 8(2) would bestow upon the courts the task of balancing competing rights which was not its proper judicial function. This the Court ruled would still be its function even if the Bill of Rights bound state organs only. It added also that the task may have to be performed where the bearer of the obligation would be a private person and that although it would be a difficult one, it still fell within the competency of the courts and was within the contemplation of the CPs.

The fourth objection was based on the contention that NT 8(2) offended CP II in that private individuals were to be the beneficiaries only of universally accepted fundamental rights and freedoms and not the bearers of obligations. As bearers of obligations, private individuals would necessarily suffer a diminution of their rights and this was contrary to that which was expressed in CP II. The Court countered this argument by stating that as long as the legislature was bound by the Bill of Rights, any legislation relating to private individuals would come under judicial scrutiny which invariably would involve the courts in balancing competing claims. And together with the fact that individual rights may be justifiably limited in the recognition of the rights of other individuals by a horizontal application did not for that reason mean that the CP II principle had been breached.

Despite the fact that the nature of the enquiries was different, the certification of the horizontal application of the Bill of Rights by the Constitutional Court was in sharp contrast to its majority ruling in *Du Plessis and Others v De Klerk and Another*<sup>8</sup> and indicates a shift from its somewhat

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<sup>8</sup>

Op cit n 1.

conservatively literal and textual interpretative methodology<sup>9</sup> to one that is more sympathetic towards judicial activism. This now stimulates an enquiry into what impact will the horizontal application of the Bill of Rights have in the sphere of the private law. But before then it will be necessary to determine the nature and scope of the operational provisions of the Bill of Rights.

### **2.3 The Operational Provisions of the Bill of Rights**

The most important operational provisions of the Bill of Rights are the following:

- (i) Section 8 on the application of the Bill of Rights;
- (ii) Section 36 on the limitation of rights;
- (iii) Section 38 on the enforcement of rights; and
- (iv) Section 39 on the interpretation of the Bill of Rights.

The above provisions demand not only a cumulative interpretation but compel a structural analysis in order to determine the ambit of the horizontal application of the Bill of Rights.

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There were other considerations too. With reference to the assertions of the Interim Constitution, the majority held that Chapter 3 bound only the legislative and executive organs of the State. This was ascertained from the fact that had the Interim Constitution required that it applied to all relationships it would have expressly stated so. Further, s 33 (4) which did not preclude measures designed to prohibit unfair discrimination by bodies and persons other than the legislature and the executive and s 35 (3) allowed for the indirect application of Chapter 3 to common law disputes between private persons would not have been necessary had a general application been intended.

## 2.3.1 Section 8 on the Application of the Bill of Rights

### 2.3.1.1 Section 8(1)

Section 8 (1) provides as follows:

The Bill of Rights applies to all law, and binds the legislature,  
the executive, the judiciary and all organs of state.

In contradistinction to its counterpart, namely section 7(1) of the Interim Constitution, Section 8(1) has introduced significant additions. It applies to all law, and now binds the judiciary in addition to the other arms of government as well as all organs of state and not only executive organs of state.

The reference to all law must now be taken to mean not only statute law but the common law as well. This conclusion is obvious in the light of the Constitutional Court's declaration of the horizontal application of the Bill of Rights in the certification process. This conclusion also resolves the conflict of interpretation posited by Kentridge AJ in his strenuous textual interpretation in the use of the word law and the Afrikaans equivalent of 'wet' and 'reg'.<sup>10</sup> Further, it appeases the interpretation favoured by Kriegler J<sup>11</sup> in that the Bill of Rights governs all law in force and that 'there is no qualification, no exception. All means all' and consolidates Mahomed J's averment that there is no right which exists in the modern state that 'is not ultimately sourced in some law, even if it be no more than an unarticulated premise of the common law'.<sup>12</sup>

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<sup>10</sup> Op cit n 1 para [44] at 876.

<sup>11</sup> Op cit para [130] at 913.

<sup>12</sup> Op cit para [79] at 894.

The inclusion of the judiciary being now bound by the Bill of Rights has far reaching consequences. It puts paid to Kentridge AJ's claim that the omission was not an oversight but that its effect was to exclude the importation of the 'state action doctrine' of American constitutional jurisprudence.<sup>13</sup> It means that the judiciary is now bound to the same extent as the other organs of state in applying the Bill of Rights and that not only the judgments of the courts but their deliberations too shall henceforth come under constitutional review.<sup>14</sup>

As regards all organs of state being bound by the Bill of Rights, reference must be had to the definitions enunciated in Section 239 of the Constitution wherein an organ of state means -

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution-
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;

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<sup>13</sup> Op cit para [47] at 877.

<sup>14</sup> See the Canadian cases of *R v Rahey* [1987] 1 SCR 588, 39 DLR (4<sup>th</sup>) 481 where the Supreme Court of Canada held that a criminal court's delay in ruling on an application for directed verdict was a breach of the Canadian Charter as well as *BCGEU v British Columbia (Attorney General)* [1988] 2 SCR 214, 53 DLR (4<sup>th</sup>) 1 in which the same court held that an injunction by a judge issued on his own motion to restrain picketing by a union outside his court building was subject to the Canadian Charter.

What emerges from the above definitions is that in terms of Section 239(b)(ii), an organ which might well be a private or juristic person which performs a public power or a public function in terms of any legislation is defined as a state organ. An example of such an organ could be a commercial bank, a charitable organization, parastatals or individuals such as an ombudsperson or even the independent electoral commissioner. The effect is that if such persons could not be bound in terms of the horizontal application of the Bill of Rights, then they could be bound under the vertical application of it.

#### 2.3.1.2 Section 8(2)

To recapitulate Section 8(2) reads:

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

This section represents the most significant change in the Bill of Rights and settles at least for the time-being the Manichean debate<sup>15</sup> between the verticalist adherents and those of the horizontalists. Section 8(2) unequivocally not only binds but applies to natural persons as well as juristic persons. The type of juristic person is determined in accordance with the nature of the right and the nature of the juristic person in terms of Section 8(4). Section 8(1) does not include natural and juristic persons for the reason that it would have permitted an unqualified application of the Bill of Rights in private disputes which undoubtedly would have created insurmountable problems and would have

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<sup>15</sup> See Stuart Woolman 'Application' in Chaskalson *et al Constitutional Law in South Africa* 1996.

indeed produced an ‘egregious caricature of an Orwellian society’.<sup>16</sup> What Section 8(2) does is to qualify the manner in which the Bill of Rights is to operate horizontally between private persons, natural or juristic, by setting internal modifiers.

These modifiers are that before a right binds a natural or juristic person, the following must be met:

- (a) the right must be applicable with reference to:
  - (i) the nature of the right; and
  - (ii) the nature of the duty imposed by the right.

It is submitted that this begs both a sequential enquiry and a cumulative construction. In the first instance, if reliance is sought in this section, it must be determined whether a right that is impugned is one that is protected under the Bill of Rights. If it is so, then the second instance would demand an enquiry whether the particular right is capable of application with reference to its suitability. The question of suitability would have to be resolved with reference to not only the nature of the right but with reference to the nature of the correlative duty imposed by the right. From the above the first enquiry is sequential in that if a right is not one that is constitutionally guaranteed, then that is the end of the matter. But if it is, then it follows sequentially that the next stage of the enquiry is whether the right is capable of application with reference to its suitability by taking into consideration cumulatively both the nature of the right and the correlative duty it imposes. If with reference to its nature it emerges that a right is applicable, such a finding does not in itself satisfy the requirement that the parties are bound if it emerges also that the nature of the duty is such that it cannot be suitably imposed on a private person either natural or juristic. All preceding enquiries would collapse and the right then would not be applicable.

Facially, almost every right in the Bill of Rights will be enforceable but whether as between private persons, either natural or juristic, can ultimately be determined by the criterion of suitability which

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<sup>16</sup> Per Kriegler J op cit n 1 para [120] at 909.



can be considered crucial to such a determination. Perhaps it is this criterion of suitability that will revive the Manichean debate between ardent verticalists and horizontalist. It is this criterion of suitability that will inevitably confer upon the courts the power to exercise a discretion as to the suitability or non-suitability of an impugned right for horizontal application. In applying the above structure of analysis, the enquiry as to applicability whether at the instance of the courts or lawyers for the litigants must inevitably turn to the Bill of Rights itself for *indicia* that will aid the interpretive process and establish the result.

#### 2.3.1.3 Indiciae for Horizontality

The interpretive process will involve both a textual and contextual analysis of the Chapter 2 Bill of Rights and the Constitution. Constitutionally, the very fundamental nature of the right itself will unequivocally indicate horizontal application; for example, the common law right to equality, dignity, freedom, privacy and the like. Others too by their very nature support horizontal application such as children's rights and labour rights.

#### 2.3.1.4 The Text

Textually, the wording of the provision will provide guidance in determining horizontality. For example, Section 13 provides that no one may be subjected to slavery, servitude and forced labour implies that the right not only binds the state but other persons too, both natural and otherwise. Section 30 while conferring on everyone the right to language and culture also specifically provides that no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. Another example is that of Section 9(4) which states that no one may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. In this case a court will

probably exercise a discretion whether to apply the provision notwithstanding that legislation must yet be enacted; alternatively it might take a conservative view that in the absence of the relevant legislation the provision is inapplicable to horizontal relationships until legislation has been enacted. A further example is that of Section 32(1)(b) which confers the right of access to information that is held by another person and that is required for the exercise or the protection of any rights. Subsection 2 here again provides that national legislation must be enacted to give effect to this right. In this case it is more explicit that relevant legislation is a prerequisite for horizontal application ; that this is a plausible interpretation can be substantiated by Section 8(3) which mandates a court to apply existing legislation to a provision of the Bill of Rights in so far as horizontality is concerned before applying relevant common law. In Section 9(4) legislation is to prevent or prohibit acts of unfair discrimination whereas in Section 32(2) it is to give effect to a right.

#### 2.3.1.5 The Context

The context of the Constitution can be a useful aid to constitutional interpretation for the purpose of determining horizontality. There are indeed rights, albeit entrenched, that impose correlative duties that are more appropriate as state functions than duties to be performed by private persons. Examples of such rights that impose duties on state functionaries are the right to just administrative action in Section 33, and the rights of arrested, detained and accused persons in terms of Section 35.

Generally, it may be accepted that the socio-economic rights to housing and health care (the so-called second generation rights) and rights to an environment that is not harmful (the so-called third generation rights) are not intended for horizontal application as they are not suitable for such

application. It may be argued that in certain instances these rights may well be imposed upon private persons, for example where one spouse may demand a right to housing in a healthy environment from the other spouse. With reference to and within the context of the facts of the case, a court may conclude that the nature of the duty that the right in question imposes is too onerous a duty on the incumbent and therefore should not be applied. This, in any event, is already an established principle in the common law of contract.<sup>17</sup> However, Section 11 which provides for the right to life and Section 27(3) which provides that no one may be refused emergency medical treatment are ostensibly duties imposed upon the state, namely to provide protection for subjects of the state and for the provisioning of medical care.

The right to emergency medical treatment was dealt with by the Constitutional Court in *Soobramoney v Minister of Health, KwaZulu-Natal*.<sup>18</sup> The Court confirmed that the State had a positive obligation to provide emergency medical treatment but subject to available resources. The Court was satisfied that since the province, and the hospital also, were seriously lacking in medical resources for the treatment and since the appellant was chronically ill with renal dysfunction together with other life-threatening diseases, the denial of emergency medical treatment was not unconstitutional.

The query now is whether a court would adopt a similar inquiry in respect of the private sector such as a private hospital offering haemodialysis programmes. Madala J was of the view that such hospitals would indeed have such a function and would do much to alleviate the burden on hard-

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<sup>17</sup> *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A).

<sup>18</sup> 1997 (12) BCLR 1696 (CC).

pressed institutions of the public sector save that where a private hospital which has the resources fails to provide alternative treatment, such would be a serious indictment against it.<sup>19</sup> From this judgment, it can be submitted that in essence there would be no substantial difference between the application of the Bill of Rights applied either vertically or horizontally.<sup>20</sup>

Similarly, the question arises whether a private medical doctor who is a spectator at the scene of an accident is obliged to render medical assistance to a dying accident victim. That this may be so is already settled in the law of delict where the court in *Minister van Polisie v Ewels*<sup>21</sup> held that an omission to act was unlawful not only when such failure occasions moral indignation but where the ultimate question is whether all facts considered there was a legal duty to act reasonably. The point then is why bring an identical cause of action in common law under the purview of the constitution unless it is to constitutionalize it. It is submitted that there is nothing wrong with this as the Constitution in terms of Section 2 superimposes itself as the supreme law of the Republic and proscribes law or conduct inconsistent with it as invalid. Even if it is brought under the purview of the Constitution, the courts are mandated to apply the existing common law in the absence of legislation affecting the right in question.

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<sup>19</sup> Op cit n 18 para [48] at 1711.  
It should be noted that the Medical Schemes Bill which is being currently debated in Parliament, is attempting to make the provisioning of health care more accessible in the private sector by requiring the private sector not to discriminate against members by reason of financial incapacity, age and disability. A major objection is that current resources available in the private sector would be severely depleted.

<sup>20</sup> See the judgment of Mahomed DP op cit n1 para [72] at 891.

<sup>21</sup> 1975 3 SA 590 (A).

Contextually, the values underlying the Constitution may be both informative and instructive to a court as to the horizontal applicability of an entrenched right. The rights to human dignity, equality and freedom would appear as the most fundamental rights in the Constitution. That this is so, may be gleaned from the frequency of reference to these rights in the Constitution.<sup>22</sup> There is no reason to believe that a court must promote the spirit, purport and objects of the Bill of Rights only in cases of the indirect application of it; there is every reason why it should do so in cases of direct application as well. It is submitted that in determining horizontality with reference to the nature of the right and the nature of the duty imposed by the right, a court should always be informed by the values and norms underscoring the Constitution.<sup>23</sup>

#### 2.3.1.6 Section 8(3).

Once an issue is determined for horizontal application in terms of Section 8(2), a court must then apply the provisions of section 8(3) in resolving the matter.

Section 8(3) reads:

When applying a provision of a Bill of Rights to a natural or a juristic person in terms of subsection (2), a court -

- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

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<sup>22</sup> See Sections 1(a), 7(1) and 39(1)(a) read together with Section 39(2).

<sup>23</sup> See *Gardener v Whitaker* 1995 (5) BCLR 19 (E) at 30 G-I & *Holomisa v Argus Newspapers Limited* 1996 (6) BCLR 836 (W) at 844 I-J.

Section 8(3)(a) is highly prescriptive and mandates a court to undertake the following stages when applying the Bill of Rights horizontally:

- (i) It must look to existing legislation that gives effect to the right in question. In doing this, it must determine to what extent such legislation does give effect. If the relevant legislation gives full effect to the right, then the court must apply the relevant legislation; alternatively if the nature of the effect is to limit the right, then the court must apply the relevant legislation accordingly with reference to the limitation provisions of Section 36(1).
- (ii) If there is no legislation giving effect to the right or where it does so partly but not entirely, a court must look to the common law. If a common law rule exists that gives effect to the right, it must apply that law.
- (iii) Where there is neither legislation nor a common law rule giving effect to the right in question, or where there is legislation or a common law rule that gives partial effect to an entrenched right, a court must develop the common law to give full effect to the right.

However, Section 8(3)(b) is permissive in that in applying or developing a common law rule to give effect to the right, a court may develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1).

### **2.3.2 Limitation on Horizontality**

Section 8(3)(b) permits a court to develop rules of the common law to limit a right in terms of Section 36(1) which specifies that such limitation must be reasonable in an open and democratic society based on human dignity, equality and freedom. What should be noted that is that Section

36(1) is significantly different from its counterpart of Section 33(1) in the Interim Constitution. The most important is that any limitation of a right in terms of Section 36(1) must be reasonable and justifiable in an open and democratic society based not only equality and freedom but now also on human dignity. Further, a limitation need not be necessary as was the requirement in respect of certain specified rights nor need it negate the essential content of a right.

Perhaps, the excision of the requirement of a limitation being necessary makes for a more flexible and less restrained application of the limitation provision but that of a limitation not negating the essential content of a right would remove difficulties associated with interpretation.<sup>24</sup>

In determining the limitation of a right, Section 36(1) sets out the relevant criteria which a court must examine in the process of limiting a right. These are :

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

These criteria the legislature adopted verbatim from *S v Makwanyane And Another*<sup>25</sup> where the Constitutional Court in establishing them held that the process of limiting rights must involve the

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<sup>24</sup> *S v Makwanyane And Another* 1995 (6) BCLR 665 (CC) para [132] at 718.

<sup>25</sup> *Op cit* note 24 para[104] at 708.

weighing up of competing values and interests which ultimately will engage an assessment based on proportionality but, however despite this, there is no absolute standard to determine reasonableness. The application of the proportionality test will inevitably compel an assessment on a case-by-case basis.

This provision as applied to the common law will undoubtedly present the greatest challenge to our courts in developing rules of the common law to limit a constitutional right. But it must also be observed that, in any event, our courts have always been engaged in the balancing of competing interests in the development of the common law. There is, however, the possibility that when competing interests are weighed up between one private individual against another the process may be more nuanced and delicate than in the case between a private individual and the state - the former requiring 'a more gentle adjustment of borders than the use of the shopkeeper's scales'<sup>26</sup> as would be the case in the latter. Thus in determining whether, for example, the denial of emergency medical treatment is unconstitutional will vary between where the onus rests on a private natural person, a private hospital and state hospital respectively. It is to be expected that although applying the same criteria in determining reasonableness, the manner and degree of application will differ.

Although Lourens du Plessis is of the opinion that the more 'user-friendly' text of Section 36(1) "leaves slightly less room for creative interpretation - which with a limitation clause, can either be

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<sup>26</sup> Halton Cheadle and Dennis Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 *SAJHR* 44-66 at 65. Footnote omitted.



an advantage or disadvantage<sup>27</sup>, it should be emphasized that the enunciation of the criteria for determining reasonableness serves an extremely useful purpose in the delicate but formidable task of reforming the private common law and represents a direct response to reservations expressed by Ackermann J in *Du Plessis and Others v De Klerk and Another* and snuffs out the apprehensions raised there.

### 2.3.3 The Indirect Application of Horizontality

While Section 8(2) of the Constitution provides for the direct horizontal application of the Bill of Rights, Section 39(2) which is substantially the same as its counterpart Section 35(3) of the Interim Constitution can be construed as providing for the indirect application of the Bill of Rights between private persons *inter se*. This is compatible with the construction which the majority decision gave to it in *Du Plessis & Others v De Klerk & Another*.<sup>28</sup> But then Section 35(3) of the Interim Constitution was interpreted to mean that the Bill of Rights applied indirectly to private law relationship either to ease the tension in the debate on horizontality, or (and more likely) to justify the interpretation that the Bill of Rights was intended not to be of general direct horizontal application but only indirectly.<sup>29</sup> This latter averment is borne out by the contention that if the Bill of Rights was intended to apply horizontally, then the provision for Section 35(3) would be

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<sup>27</sup> Lourens M du Plessis 'Evaluative Reflections on the Final Text of South Africa's Bill of Rights' (1996) 3 *Stell LR* 283-305 at 292.

<sup>28</sup> Op cit n 1 para [60] E-F 885.

<sup>29</sup> See the judgments of Kentridge, Mahomed & Ackermann JJ op cit n 1 at paras [60], [82] & [106] respectively.

redundant or of peripheral value at the least.<sup>30</sup>

Now that it is trite that the Bill of Rights applies horizontally, why then the retention of the provision of Section 39(2) in the Constitution? Some answers may be suggested.

It is generally recognized that the common law, hence private law also, is a coherent system of law and should therefore be interfered with as little as possible. An interpretation that Section 8(2) does not provide for an unqualified horizontal application of the Bill of Rights is compatible with the belief that ‘an insistence on the direct application of all the fundamental rights entrenched in the bill of rights in a sphere that is traditionally governed by the substantive rules of private law could cause havoc in the South African legal system.’<sup>31</sup> It is left to the courts to set out guide lines as to which rights in the Bill of Rights would come under direct constitutional scrutiny and which indirectly. Further, it may be advanced that since the development of the common law which includes the private law has traditionally always been in the domain of the High Courts,<sup>32</sup> the Constitution seeks to avoid a radical departure from such a tradition. Besides, it would serve to avoid the ‘egregious caricature’<sup>33</sup> that an unqualified application would present. From the above, it may be said that the Constitution in keeping with the belief that a constitution is not an ordinary and inflexible piece of

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<sup>30</sup> Ibid per Mahomed J.

<sup>31</sup> J W G Van Der Walt ‘Justice Kriegler’s Disconcerting Judgment in *Du Plessis v De Klerk*: Much Ado About Direct Horizontal Application (Read Nothing)’ (1996) 4 *TSAR* 732 at 739.

<sup>32</sup> See Kentridge, Mahomed & Mokgoro JJ op cit n 1 at paras [52] E-F, [72] B & [171] A-B respectively.

<sup>33</sup> Per Kriegler J op cit n 1 at para [120] E.

legislation, allows for judicial manoeuvring which in turn allows not only for the incremental development and amelioration of the common law by way Section 39(2) but also for both a radical application and, if necessary , development of it by the courts in terms of Section 8(3).

Alternatively, it may be argued that the Constitution seeks every attempt to constitutionalize all law and conduct within the ambit of the Constitution as the supreme law of the land. That this is not a far-fetched notion is manifest in Section 39(2) which mandates not only every court but every tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law or customary law. Section 39(2) is an imperative and prescriptive injunction on these institutions in that they ‘must promote’ the spirit, purport and objects of the Bill of Rights as compared with Section 35(3) of the Interim Constitution which required only courts to merely have ‘due regard’ to the spirit, purport and objects of the Bill of Rights. The imperative also is indicative that should a court, tribunal or forum not promote the spirit, purport and objects of the Bill of Rights when there are grounds for it in the development of the common law and customary law, then the matter should be subject to review or appeal to a higher forum.

However, the least that could be said of the retention of Section 39(2) is that procedurally where the constitutional issue before a court is one that does not directly engage the common law, alternatively where the issue between two private persons is the common law which does not directly violate or challenge a fundamental right, then Section 39(2) provides the vehicle through which a court may indirectly infuse the development of the common law or customary law with the values

and norms inherent in the Constitution. Horizontal seepage (Drittwirkung) is thus maintained.<sup>34</sup>

### 2.3.4 Horizontality and Standing

Before a litigant is allowed to pursue an action in court, it is a material requirement that he must not only establish a cause of action but also the capacity to litigate ie. he must establish *locus standi in iudicio*. Thus at common law in civil litigation, traditionally a litigant must establish that he has a personal, sufficient and direct interest in the issue before the court and in the relief he seeks. Ordinarily these would not be highly contentious between private litigants in private law but proved to be more problematic where institutions acted in a representative capacity on behalf of its members.<sup>35</sup>

Section 38 of the Constitution confers the right on any one listed thereunder to approach a competent court for relief whenever a right in the Bill of Rights has been infringed or threatened.

The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

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<sup>34</sup> See Stuart Woolman 'Defamation, Application, And The Interim Constitution' (1996) 3 *SALJ* 428-454 at 452.  
See also Kriegler J's judgment in *Du Plessis & Others v De Klerk & Another* op cit n 1 para[142] at 917.

<sup>35</sup> *Noll v Alberton Frames (Pty) Ltd* 1989 (1) SA 730 (T);  
*South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O);

This section apart from a rewording, is identical in content to its counterpart in the Interim Constitution, namely Section 7(4)(a) and (b).

The question of standing has been canvassed and probably settled in *Ferreira v Levin NO And Others And Vryenhoek And Others v Powell NO And Others*<sup>36</sup> where the court examined the *locus standi* of litigants within the context of the Constitution. Although writing for the Court, Ackermann J, dissenting, took the narrow and traditional view of standing in that a litigant must show that he has a direct interest by reason that a right has actually been infringed or threatened to be infringed, Chaskalson P with whom the majority concurred on this issue adopted a more expansive and liberalist notion of standing.

The learned judge adopted a broad approach to standing as being ‘consistent with the mandate given to [the] Court to uphold the Constitution and would serve to ensure that the constitutional rights enjoy the full measure of the protection to which they are entitled.’<sup>37</sup> Following Canadian case-law precedent,<sup>38</sup> Chaskalson P held that a person acting in his or her own interest need merely show that a right in the Bill of Rights is infringed or threatened with infringement in order to engage a court and need not be a person whose constitutional right has in fact been infringed or threatened. What he said was that a person is entitled to make a challenge in his or her own interest but that it would

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<sup>36</sup> 1996 (1) BCLR 1 (CC) para[35] at 24.

<sup>37</sup> Op cit para[165] at 98.

<sup>38</sup> *R v Big M Drug Mart Ltd* 18 DLR (4<sup>th</sup>) 321;  
*Morgentaler, Smoling and Scott v R* (1988) 31 CRR 1 at 26.

be for the courts to decide what a sufficient interest would be in the circumstances.<sup>39</sup>

This too was substantially the view of O'Regan J although citing the *actio popularis* of Roman law as envisaged in Section 7(4) (b) (v) as the appropriate provision for standing in that case. What is particularly interesting is that she too cautions against too facile an approach to standing and adds that while a person may act in the public interest, such a person must show sufficient interest that he or she is acting genuinely in the public interest and sets out certain criteria for determining a genuine interest,<sup>40</sup> to wit, whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the court and the opportunity that those persons or groups have had to present evidence and argument to court.<sup>41</sup> This certainly does not indicate too generous and expansive an approach if adopted as criteria by the courts.

While it is to be expected that, as far as the horizontal application of the Bill of Rights is concerned, private persons acting in their own capacities where their rights are directly infringed will generally be the litigants, nothing in Section 38 of the Constitution precludes any person to make a challenge whether acting in his or her own interest or in the interest of another on similar, if not, identical issues. Although it can be concluded that the ruling of the Constitutional Court heralds a relaxation

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<sup>39</sup> Op cit n 36 para [168] at 99.

<sup>40</sup> Op cit paras [225-235] at 118-120.

<sup>41</sup> Ibid para [234] at 120.

in respect of the hitherto traditional and conservative approach to standing in common law cases, it does not in the same breath make for unqualified and frivolous engagement of the courts. What the courts are expected to do is to infuse the common law rules of standing with the values and norms underpinning the Constitution.

## 2.4 Conclusion

Section 8(2) formally engages the Constitution in the adjudication of common law matters which constitutes the largest body of private law. But while it must be borne in mind that '[t]he injunction in Section 8(3) [of the Constitution] to develop the common law is hardly a revolutionary initiative [as the] Courts are continuously engaged in the development of the common law'<sup>42</sup> and while the courts have always developed the common law with reference to public policy, the *boni mores* and legal convictions of the community, these were done against the backdrop of a legal system premised on parliamentary sovereignty and legal positivism. What horizontality now means is that in the adjudication of common law disputes between private person revolving around property, contract and delict would henceforth be informed by the order of values and norms enshrined in the Constitution. In effect it envisages the constitutionalization of the common law in that the courts will have to develop new causes of action and more so new remedies previously sought in Roman and Roman-Dutch law and even English law predicated on legal positivism. It envisages a reformulation of the common law - a common law possibly 'trapped within the limitations of its past' and 'interpreted in conditions of social and constitutional ossification.'<sup>43</sup>

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<sup>42</sup> Op cit n 26 at 64.

<sup>43</sup> Per Mahomed J op cit n 1 para [86] E-F at 897.

However, the extent to which the application of horizontality will make inroads into existing areas of substantive law and zones of private autonomy have yet to be plumbed. Guidance from the constitutional jurisprudence of foreign countries especially the ‘state action’ cases of the American Supreme Court may prove to be particularly instructive. Another matter of interest is that while Section 8(3) of the Constitution makes provision for the development of the common law no mention is made of customary law although Section 39(2) makes provision for its development in the indirect application of horizontality. This too needs to be plumbed and in attempting this, an examination of the role and function of the judiciary in the interpretation and application of the Bill of Rights is also necessitated.



## **CHAPTER 3**

### **THE FUNCTION OF THE COURTS AND THE ROLE OF THE JUDICIARY IN THE HORIZONTAL APPLICATION OF THE BILL OF RIGHTS**

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# THE HORIZONTAL APPLICATION OF THE SOUTH AFRICAN BILL OF RIGHTS

## CHAPTER 3

### THE FUNCTION OF THE COURTS AND THE ROLE OF THE JUDICIARY IN THE HORIZONTAL APPLICATION OF THE BILL OF RIGHTS

#### 3.1 Introduction

Kentridge AJ relying upon the distinction between the common law and statute law and the interpretation of the Afrikaans ‘wet’, concluded that it was not the intention of the legislature that the Constitutional Court adjudicate over common law issues but that the task of reformulating the common law was the function of the Supreme Court.<sup>1</sup>

In his dissent, Kriegler J relying on the interpretation of Section 35(3) of the Interim Constitution held that all the courts including the Constitutional Court were enjoined in interpreting statutory law as well as applying and developing the common law and customary law and that in performing this function the purpose of the Constitution ‘is to permeate all that judges do.’<sup>2</sup>

Such differences in legal interpretation is typical of the literalist-cum-intentionalist predilection of English-trained judges and hence also of the majority of South African judges whose training was predicated on a legal philosophy imbibing parliamentary supremacy.

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<sup>1</sup> *Du Plessis And Others v De Klerk And Another* 1996 (3) SA 850 para [51-52] at 879-880.

<sup>2</sup> *Op cit n 1* para [141] at 917.

Although the new text of the Constitution<sup>3</sup> now makes provision for the more explicit function of the courts, these features of the judgment raise important issues in respect of the horizontal application of the Bill of Rights. What would be the function of the courts in the horizontal application of the Bill, and what are the implications for the judiciary and the legislature as well as what type of constitutional interpretation and jurisprudence is to be applied, are some of the aspects that require examination.

## **3.2 The Function of the Courts**

### **3.2.1 Testing Power of the Courts**

Judicial review and constitutional adjudication are the hallmarks of any modern democracy predicated on constitutionalism. This being so the Constitution like its predecessor has provided for a hierarchy of courts with varying degrees of jurisdiction to test the constitutionality of legislative, executive and administrative acts and conduct,<sup>4</sup> against the norms and values enshrined in the Constitution. Although there are other institutions for supporting constitutional democracy like the Human Rights Commission and the Public Protector,<sup>5</sup> it is ultimately the courts that are invested and entrusted with judicial authority and 'testing power' or judicial review in respect of the validity of constitutional acts and conduct. The 'testing power' or constitutional review 'implies the right and duty of a court or courts to interpret authoritatively the constitution of the country, to decide authoritatively the constitutionality of laws, executive and administrative acts and, in appropriate cases, to declare such

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<sup>3</sup> Act 108 of 1996.

<sup>4</sup> Op cit n 3; see generally ss 165 to 173 but more specifically s172.

<sup>5</sup> Op cit n 3 Chapter 9.

laws and acts invalid and unenforceable when they conflict with the country's constitution.<sup>6</sup>

### 3.2.2 The Inherent Power of the Courts

Unlike its predecessor which made elaborate provisions<sup>7</sup> for the adjudication of constitutional matters<sup>8</sup> including depriving the Supreme Court of Appeal of jurisdiction in such matters,<sup>9</sup> the Constitution now not only confers constitutional jurisdiction on the Supreme Court of Appeal it confers also inherent jurisdiction on the Constitutional Court in the development of the common law in terms of Section 173 of the Constitution. Section 173 provides as follows:

The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.

This overcomes the difficulty presented by Kentridge AJ when he held that the Constitutional Court did not have the inherent or general jurisdiction in respect of the common law adding that its jurisdiction '[was] not suited to the exposition of the principles of private law.'<sup>10</sup> The development of the common law is now no longer within the exclusive jurisdiction of the High Courts only; but that of the Constitutional Court may now also be engaged. This consolidates what Kriegler J claimed

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<sup>6</sup> Johan van der Westhuizen 'The Protection of Human Rights and a Constitutional Court for South Africa: Some Questions and Ideas, with reference to the German Experience' (1991) *De Jure* 1 at 2.

<sup>7</sup> Chapter 7 op cit n 3.

<sup>8</sup> A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. S170 of Act 108 of 1996.

<sup>9</sup> Act 200 of 1993, s 101(5).

<sup>10</sup> Op cit n 1 para [58] at 883.

namely, 'the purpose of the Constitution is to permeate all that judges do.'<sup>11</sup>

The least that could be said is that Section 173 of the Constitution is a textually literal and unequivocal confirmation that the Constitutional Court, together with the High Courts, now has inherent jurisdiction in the development of the common law - such determination not being left to a conjectural interpretation established on an ambiguous text like that of the Interim Constitution. It is submitted that the confirmation of an inherent jurisdiction is consonant with the operation of horizontality.

At this stage it might be prudent to examine the construction that the High Court gave to the jurisdiction of the courts in developing the common law. In *Amod v Multilateral Motor Vehicle Accident Fund*<sup>12</sup> the Court examined the meaning of development of the common law with reference to Sections 8(3) and 39(2) of the Constitution. It held that the connotation regarding the meaning of development was the same in both sections. The Legislature had not intended to confer on the courts a general power of development of the common law; although the courts could develop the common law, it did not mean that the courts could eliminate or alter the common law. Rather where the common law was silent, it was left to the courts to amplify it in order to give effect to a right where the legislature had not done so.

It is submitted that this is so where institutions other than the High Courts and the Constitutional

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<sup>11</sup> Op cit n 2.

<sup>12</sup> 1997 (12) BCLR 1716 (D).

Court are concerned. These would be the courts lower in status than the High Courts as well other forums and tribunals. However, if recourse is had to Section 173, the Legislature specifically confers on the Constitutional Court and the High Courts the inherent power to develop the common law in the interests of justice. It is suggested that these courts indeed have the power to eliminate or to alter the common law where the Legislature has not done so.<sup>13</sup>

### 3.2.3 The Magistrates' Courts and Other Courts

However, Section 173 by necessary implication excludes the magistrates' courts and other courts in exercising inherent power in the development of the common law. It is in apparent conflict with Section 39(2) of the Constitution which enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation, and when *developing the common law or customary law*.<sup>14</sup> Perhaps the anomaly could be written away if the word 'developing' could be construed as meaning 'applying' as was the case with the counterpart of Section 39(2) of the Constitution, namely Section 35(3) of the Interim Constitution. Section 39(2), if so construed and premised upon the fact that it is traditionally the duty of the High Courts to develop the common law, effectively limits the ambit of the application of Section 35(3) of the Interim Constitution which Kriegler J interpreted as mandating what all courts, including the Constitutional Court, do when there is no direct infringement or claim of an infringement of a right protected under the Bill of Rights.

But again Section 173 of the Constitution would be in conflict with Section 8(3) which mandates a

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<sup>13</sup> See *Ryland v Edros* 1997 (1) BCLR 77 (C).  
See also *infra* Ch 5 at 5.4.

<sup>14</sup> Own emphasis.

court of law to apply ,or if necessary to develop, the common law to the extent that legislation does not give effect to that right when applying a provision of the Bill of Rights horizontally to a natural or a juristic person. This conflict is apparent if ‘a court’ is understood to include all other courts, namely the magistrates’ courts and other courts, other than the High Courts and the Constitutional Court.

A textual examination and interpretation of the relevant provisions of the Constitution is compelled to arrive at a definitive answer.

Section 34 of the Constitution reads as follows:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In terms of this section not only a court or forum but now also a tribunal may be constitutionally engaged by a person to adjudicate in a dispute brought before it. If this is done, then Section 39(1) of the Constitution mandates a court, tribunal or forum when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and when interpreting any legislation and developing the common law or customary law these institutions must promote the spirit, purport and objects of the Bill of Rights. What emerges from an analysis of these sections in comparison with their counterparts of the Interim Constitution namely Section 22 and Section 35(1) and (3), is that the reach of the Constitution in the adjudication and settlement of disputes has become more expansive. Decisions not only of the courts but of other



forums as well must now also be informed by the values underlying the Constitution.

While this is so, judicial authority as the ultimate authority is still reposed in the courts in terms of Section 165(1) of the Constitution. However, specific powers have been reserved for the courts in terms of Section 172(1) which provides as follows

When deciding a constitutional matter within its power, a court -

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;  
and
- (b) may make any order that is just and equitable, including -
  - (i) an order limiting the retrospective effect of the declaration of invalidity; and
  - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Other specific powers too have been conferred on the courts in terms of the Constitution. For example, where a right is alleged to be infringed or threatened with infringement, a court may grant appropriate relief including the issue of a declaratory order in terms of Section 38. More cogently, where a provision of the Bill of Rights is applied horizontally only a court is enjoined to apply the procedure set out in terms of Section 8(3). No mention is made of the other tribunals or forums. This indicates that where a right in the Bill of Rights is directly challenged, the courts constitute the ultimate authority. But to state that 'a court' includes courts other than the High Courts and the Constitutional Court must be deduced with reference to other relevant provisions in the Constitution.

Section 170 of the Constitution which reads as follows specifically defines the jurisdiction of the Magistrates' Courts as well as courts lower in status than a High Court:

Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.

This provision unequivocally confirms the status of Magistrates' Courts and other lower courts such as the Small Claims Court, the Short Process Court and the like as being creatures of statute wherein their respective jurisdictions will be prescribed and perhaps even circumscribed. But their jurisdiction is clearly excluded from enquiring into or ruling on the constitutionality of any legislation or any conduct of the President, a jurisdiction which is vested in the High Courts.<sup>15</sup> Nothing is said of their jurisdiction in respect of constitutional matters engaging the common law.

Section 170 is in sharp contrast with the equivalent provision of the Interim Constitution where it was unequivocally stated that in any proceedings before such courts i.e. the lower courts, if it was alleged that any law or provision of such law was invalid on the ground of its inconsistency with a provision of the Constitution, the court should decide the matter on the assumption that law or provision is valid.<sup>16</sup> This is absent in Section 170. Absent also is the provision for the postponement and suspension of proceedings in respect of claims of constitutional invalidity and consequent referrals of matters to a higher court.

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<sup>15</sup> Op cit n 3 S172(2)(a).

<sup>16</sup> See Section 103(2) of Act 200 of 1993.

If any uncertainty still exists, then recourse must be had to the transitional arrangements of Schedule 6 of the Constitution to eradicate it. Section 16(6)(a) of Schedule 6 states that after the new Constitution takes effect and as soon as is practical, all courts including their structure, composition, functioning and jurisdiction, and all legislation, must be rationalized with a view to establishing a judicial system suited to the requirements of the new Constitution.

What all this does is to show that the Constitution makes a concerted and compelling demand for the reformation and restructuring of society. That apart, the more inclusive the jurisdiction of the courts, the lesser the burden on the Higher Courts whether by way of appeal or by way of engaging the court as a court of first instance. Not only that, this conclusion exorcizes the apprehensions of Kentridge AJ and Ackermann J in that a direct horizontal application would result in the Constitutional Court being inundated with appeals to reformulate the common law.<sup>17</sup>

In the premises, it can be concluded that the new text is far more articulate and succinct in respect of the courts than was its predecessor which was a labyrinth of copious legal provisions couched in numerous and even more numerous sub-sections and paragraphs reserving as far as possible constitutional matters for the ultimate adjudication of the Constitutional Court.

However, the function of these courts in applying and developing the common law in respect of a right is restricted to the extent that legislation does not give effect to that right. This means then that the Legislature would also be involved in the development of the common. This accords with

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<sup>17</sup> Op cit n 1 paras [57 & 112] at 882-883 & 906 resp.

Kentridge AJ's claim that the radical amelioration of the common law has always been the function of Parliament.<sup>18</sup> It also confirms Sach J's contention that the role of the courts is not to usurp the function of the legislature for to do so would lead to the judicialization of politics which was clearly not the function of the courts. According to Sachs J, the function of the courts 'is, in the first place to ensure that legislation does not violate fundamental rights, secondly, to interpret legislation in a manner that furthers the values expressed in the Constitution and, thirdly, to ensure that common law and custom outside the legislative sphere is developed in such a manner as to harmonise (*sic*) with the Constitution. In this way, *the appropriate balance between the Legislature and the Judiciary is maintained.*<sup>19</sup>

From the above it can be concluded that the courts having jurisdiction would not only apply and develop the common law but would also interpret and apply legislation affecting the common law within the spirit, purport and object of the Constitution. The question that arises is whether our courts are eminently suited for such an exposition of the principles of the common law vis-a-vis the Bill of Rights.

### **3.3 The Role of the Judiciary**

#### **3.3.1 A Crisis of Legitimacy**

The moral imperatives implicit in the horizontal application of the Bill of Rights imposes a duty on the judiciary to develop a constitutionally sound social jurisprudence and judicial policy that will

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<sup>18</sup> Op cit n 1 para [53] at 881.

<sup>19</sup> Own emphasis. Op cit n 1 para [181] at 932.

reinstate the rule of law premised on logical consistency, legal certainty and uniformity.

During the apartheid era, the judiciary was subordinate and subservient to parliamentary sovereignty; the law courts were undermined by successive governments which used them 'as instruments of domination to work injustice, thus creating a crisis of legitimacy in the legal system as a whole.'<sup>20</sup>

When recourse is had to the legal tradition of this country, it is generally accepted that parliamentary sovereignty as applied by the apartheid government had a deleterious and stifling effect on the judiciary and judicial activism. Judicial independence and the growth of judicial activism were compromised by the 'inarticulate premises' of judges<sup>21</sup> that either consciously or unconsciously pandered to the whim and fancy of a racist government premised upon parliamentary supremacy and sovereignty as well as legal positivism which was 'invoked as a jurisprudential creed supportive of this approach'.<sup>22</sup> Parliamentary sovereignty and its cognate, legal positivism, did not nurture a culture of judicial activism and legal realism but rather one that typified a sterile and impotent judiciary.<sup>23</sup>

The apartheid regime engendered and fostered a legal system identified with a legitimacy crisis<sup>24</sup> and complemented by a 'judiciary (that was) not only believed to be hardly representative of the

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<sup>20</sup> L du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* 1994 at 191.

<sup>21</sup> J Dugard *Human Rights and the South African Legal Order* 1978 374-382.

<sup>22</sup> Op cit at 82.

<sup>23</sup> George N Barrie 'The Challenge of the South African Judiciary in the 1990's' (1989) 4 *TSAR* 515 at 516.

<sup>24</sup> See Carmel Rickard Unanimous Verdict on Law under Apartheid: 'Guilty' *Sunday Times* 19 October 1997 at 25.

population of South Africa, but to be out of touch with popular needs and notions of justice.<sup>25</sup> The predilections of judges coupled with the notion of the ‘inarticulate premises’ was perceived as perpetuating not only the concept of parliamentary supremacy but worse still a minority white hegemony predicated on racism. ‘The legal order of apartheid [had] brought not only white South Africa into disrepute. It [had] undermined faith and confidence in the whole South African legal system.’<sup>26</sup>

### 3.3.2 The Judicial Ideology

Although these criticisms against the judiciary were levelled against it by legal academics<sup>27</sup> in the context of the judiciary’s function vis-a-vis the legislature, these criticisms are not wholly inapposite in the context of the judiciary’s function in relation to the reformulation and the development of the common law. It must be borne in mind that the ‘executive-mindedness’ of judges either consciously or subconsciously infused in them a judicial ideology that effectively emasculated the rule of law, if this concept is understood to mean the protection of the fundamental rights of human beings.<sup>28</sup> However, this ideology was extended by the influence of other factors such as the social, economic and psychological prejudices of judges.<sup>29</sup>

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<sup>25</sup> Op cit n 6 at 5.

<sup>26</sup> Op cit n 21 at 401.

<sup>27</sup> For a list of legal academics who criticized judicial attitudes, see footnote 6 Lourens M du Plessis & J R de Ville ‘Bill of Rights Interpretation in the South African Context (1) : Diagnostic Observations’ (1993) 1 *Stell L R* 63 at 64.

<sup>28</sup> M G Cowling ‘Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss’ (1987) *SAJHR* 177 at 179.

<sup>29</sup> Op cit n 27 at 83. See also George N Barrie ‘The Challenge of the South African Judiciary in the 1990’s’ (1989) 4 *TSAR* 515 at 516.

### 3.3.3 The Composition of the Judiciary

Given the above and the fact the present judiciary is still predominantly comprised of white male judges who received their training and appointments during the apartheid era, it is not unreasonable to conclude that conservative activism would prevail. But then a radical transformation of the judiciary is neither practicable nor advisable, this notwithstanding that '[t]he judiciary is not only believed to be hardly representative of the population of South Africa, but also to be out of touch with popular needs and notions of justice.'<sup>30</sup> That apart, it is probably not reckless to observe that there is a dearth of suitably qualified and experienced African lawyers that would be available to fill vacancies on the bench. Alternatively, if there is not, then indiscriminate appointments would lead to a legitimacy crisis not dissimilar to that which the predominantly white judiciary is faced.

It does appear though that attempts to make the bench more representative has led to undesirable reactions as evidenced from the Natal bench where a group of judges somewhat precipitously objected to the appointment of an African judge by the Judicial Service Commission as Deputy Judge-President of the KwaZulu-Natal Provincial Division of the High Court.<sup>31</sup> This in turn seems to have inspired a threat of political interference rather than intervention.<sup>32</sup>

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<sup>30</sup> Op cit n 6 at 5.

<sup>31</sup> See Catalogue of Errors in Judicial Debacle *Sunday Times* 12 April 1998 at 20. See also *Sunday Times* 26 April 1998 & 3 May 1998 respectively for further editorial comment .

<sup>32</sup> See *Sunday Times* 3 May 1998 at 1. See also Constitution Represents the Times *Daily News* Monday May 11 1998 at 10.

### 3.3.4 Judicial Revisionism

However, despite the denunciation of the judiciary for its ‘executive-mindedness and conservatism’ the most recent example of which is the judgment handed down against the President and is perhaps a classic example of articulating the ‘inarticulate premiss’,<sup>33</sup> Cowling citing Corder states that ‘at no stage has there been “an allegation of conscious or deliberate bias or prejudice by the judiciary”’.<sup>34</sup> Either this is true or that there is a great deal of reluctance on the part of legal academics to ‘grab the thistle by the thorn’ to criticise the judiciary and face the wrath of judges who are generally perceived to be averse to criticism.<sup>35</sup>

But the judiciary despite the criticisms levelled against it, does possess the necessary skills, experience and intellectual capacity to interpret a Bill of Rights. While this may be so, ‘a liberal and active judiciary has not been the predominant legal tradition in South Africa.’<sup>36</sup> Given that a cataclysmic transformation of the judiciary is neither possible nor desirable, what is required though to alter the mind-set of parochial and conservative-minded judges is a concerted judicial revisionism that would activate judicial thinking and constitutional jurisprudential development. Although it is anticipated that there will be a cautious, narrow approach by the courts in accordance with conservative activism,

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<sup>33</sup> The judgment by Mr Justice William de Villiers in the South African Rugby Football Union case against the President.

<sup>34</sup> Op cit n 28 at 195.

<sup>35</sup> Hugh Corder ‘Lessons from (North) America’ (1992) 109 *SALJ* 204 at 222. For an example of a display of the wrath of a judge, see G E Devenish ‘A Critical Analysis of Constitutional Interpretation in Certain Constitutional Judgments’ (1996) *Society of Law Teachers Bulletin* 19 at 20. Ironically, this was a reaction by Mr Justice Didcott who is a judge on the Constitutional Court.

<sup>36</sup> David Beatty ‘The Rule(And Role) of Law in a New South Africa: Some Lessons From Abroad’ (1992) 109 *SALJ* 408 at 422.



judicial revisionism must transform the judiciary's intellectual and attitudinal inclinations to manifest creativity, tact, imagination and sensitivity in the interpretation and application of the Bill of Rights. To re-instate the confidence of the public in the impartiality, neutrality and independence of the judiciary, judges will be required to develop a judicial framework and policy that will produce a constitutional jurisprudence for the reconstruction of society.

Since the courts are seen as the sentinel of the Constitution, they are entrusted with its interpretation, protection and enforcement and as such must be perceived as impartial and independent. 'In a society such as ours in the throes of great social change and constitutional transformation only an imaginative judiciary with an instinctive sense of justice will be able to transcend the forces of social change and deliver judgements which will be respected by all sections of society.'<sup>37</sup>

Judicial review as required by the Constitution will create 'the judicial framework and philosophy for judicial independence and legitimacy, as well as the potential for judicial activism, thereby allowing the judiciary to facilitate the socio-economic upliftment of disadvantaged communities.'<sup>38</sup>

### 3.3.5 The New Legal Order and Constitutional Interpretation

The new constitution heralds a new legal order in South Africa. It brings with it not only a new philosophy of constitutionalism but also the potential for a new constitutional jurisprudence.

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<sup>37</sup> Op cit n 23 515 at 517.

<sup>38</sup> G E Devenish 'The Courts And The Administration Of Justice' 1997 unpublished text University of Natal, Durban.

The Constitution invests the courts with the power and function of judicial review<sup>39</sup> which necessitates that all law be examined against the standard of values that are enshrined in the Bill of Rights in Chapter 2 and where the law is inconsistent with these norms and values, the courts must declare it either in whole or in part constitutionally invalid.

This power of judicial review it is anticipated will infuse into the courts a new interpretative function that ought to shed the shackles of a positivistic jurisprudence in favour of one premised on judicial activism and legal realism.

This metamorphosis from a positivistic jurisprudence to one premised on constitutionalism was prescribed nearly two decades ago when Dugard advocated the adoption of a realist approach coupled with 'the new relativist natural law, that recognises the intersection of law and legal values'.<sup>40</sup> This call has been more cogently echoed by other legal academics lately. Devenish envisages that a value-oriented and a value-coherent approach will engender a 'bold and empirical constitutional interpretation' and is of seminal importance 'for bold, exploratory and even provocative judgements'.<sup>41</sup> Johan van der Westhuizen opines that '[a] court which enforces the constitution will have to do more than merely interpret and apply norms and prescriptions - *it must develop a South African legal and constitutional philosophy*'.<sup>42</sup> George Barrie is of the opinion that '[it] is imperative that judicial

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<sup>39</sup> Chapter 8 of the Constitution of the Republic of South Africa, 1996, Act 108 of 1996.

<sup>40</sup> Op cit n 21.

<sup>41</sup> Devenish GE 'A Critical Analysis of Constitutional Interpretation in Certain Judgments' (1996) *Society of Law Teachers Bulletin* at 21.

<sup>42</sup> Op cit note 6 at 7.

activism be seen to be an exercise in the attainment of not only national security but also of societal development. In such a way judicial activism inspired by constitutional values can be regarded a vital human technology for social change in a society in the throes of transformation.<sup>43</sup>

It is against the backdrop of a newly created society based on democratic values, social justice and fundamental rights that the courts will be required to interpret the constitution in order to deliver sociologically and value-based judgements. This function of interpretation would be entirely consistent and compatible with and in addition to the 'generous and purposive' interpretation as approved by the constitutional court in *S v Zuma And others*<sup>44</sup> in terms of which the values which are to be considered must be done so with regard to the 'legal history, traditions and usages'<sup>45</sup> of the country. This would result in a creative constitutional jurisprudence that will discard the positivistic, literal and textual interpretative methodology in favour of a purposive methodology established on the ethical and moral norms encapsulated in the Constitution . It will produce a constitutional interpretation based on the rich heritage of South African law and will represent a shift from a Euro-centric jurisprudence and philosophy to one that is Afro-centric in nature and character.

Although there are indications of judicial activism,<sup>46</sup> a healthy tension is expected to exist between the Constitutional Court and the High Courts where the former made up of judges reputedly

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<sup>43</sup> Op cit n 23 at 520.

<sup>44</sup> 1995 (2) SA 642 para [15] at 651.

<sup>45</sup> Op cit at 651 H.

<sup>46</sup> See *Gardiner v Whitaker* 1994 (5) BCLR 19 (E); *Baloro v University of Bophuthatswana* 1995 (8) BCLR 1018 (B); *Holomisa v Argus Newspapers Limited* 1996 (6) BCLR 836 (W).

associated with human rights issues either as judges or as legal academics and pursuing a constitutional jurisprudence predicated on value-based and value-coherent norms would be expected to set the yardstick in the transition from judicial conservatism to judicial liberalism. Judicial revisionism and judicial activism can also be stimulated by legal academic activity as well as that by the role played by lawyers provided that judges should be positively susceptible and sensitive to judicial scrutiny.<sup>47</sup>

### 3.3.6 The Judicialisation of Politics and the Politicisation of the Judiciary

Another area of contention is that raised by Kentridge AJ and Sachs J regarding the function of the Parliament and the development of the common law.<sup>48</sup> The point in issue here is the question of the judicialisation of politics and conversely the politicisation of the judiciary. Traditionally, the *trias politica* comprises the three arms of government, namely the legislature, the executive and the judiciary with nearly clearly defined spheres of function. However, a degree of tension has always existed between the legislature and the judiciary where the judiciary has always maintained an attitude of deference towards the legislature so as not to encroach onto its domain. But this attitude of deference may be ascribed to the fact that in a state established on parliamentary sovereignty, parliament and the laws made by parliament were supreme; the function of the courts was to interpret and apply the laws as they were stated. This is legal positivism where the court's power to declare an act invalid was confined to whether procedure had been followed in the passing of the act and not to the substantive content of the act. This is a characteristic of the Westminster system of

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<sup>47</sup> Op cit n 353 at 222 - 223.

<sup>48</sup> See *supra* n 18 & 19.

government.

However, the Constitution in Section 8(1) states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. This is constitutional sovereignty and constitutional supremacy where these organs are subject to the values and norms encapsulated in the Bill of Rights. While the legislature has the power to make laws, the High Courts and the Constitutional Court have the power of judicial review over these laws. It is therefore to be expected that a judicialisation of politics and conversely a politicisation of the judiciary must occur in the sense that the courts will test the constitutional validity of the laws made by Parliament against the norms of the Constitution and where a legislative act does not pass constitutional muster, second-guess that which the legislature ought to have done.<sup>49</sup> That a tension will continue to exist between the legislature and the judiciary can be deduced from the provision of Section 8(3) which provides that in the horizontal application of the Bill of Rights, a court must apply the common law and if necessary develop it to the extent that the legislation does not give effect to that right. However, such a tension cannot be criticized in the context of constitutionalism if the objective is to maintain democracy and to achieve social justice and the protection of human rights and freedoms where this objective is reposed upon the legislature and the judiciary. This is so whether the Bill of Rights is applied vertically or horizontally as the result will in fact ‘involve no substantial consequences.’<sup>50</sup>

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<sup>49</sup> An example of legislation that altered the common law relationship between private persons is s 11(3) of the Matrimonial Property Act 88 of 1984 as amended by s 30 of Act 132 of 1993.

<sup>50</sup> Per Mahomed DP op cit n 1 para[73] at 892.

### 3.4 Conclusion

The horizontal application of the Bill of Rights, whether applied directly or indirectly, invokes the courts to adopt a constitutional hermeneutic that would lead to a legal philosophy and a constitutional jurisprudence that is permeated by the rule of law.

Dugard <sup>51</sup>almost twenty years ago advocated a new approach to law in which he espoused the adoption of 'legal realism'<sup>52</sup> as opposed to 'legal positivism' where the application of legal realism would result in 'the rejection of positivism as a legal creed and the adoption of a realist-cum-value-oriented approach to the judicial process and civil liberty'.<sup>53</sup>

The Bill of Rights whether applied directly or indirectly, vertically or horizontally, demands the development of a 'Grundnorm' or Basic Order of Values that would inform the decisions of the courts and acts of legislation in transforming the South African social, political and legal order. What horizontality does do, however, is to provide the impetus for the accelerated development of a legal dynamic that will meet the aspirations of a heterogeneous society in a new constitutional dispensation peculiar to the South African context and in providing such an impetus, the existing common law and African customary law will inevitably come under constitutional scrutiny and possible reformulation.

To what extent, remains to be seen.

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<sup>51</sup> Op cit n 21.

<sup>52</sup> 'Legal realism ... is not so much a school of jurisprudence as a way of approaching the legal process. It aims to strip the law of its harmful myths and fictions ... and to make judges and lawyers operate more efficiently with the knowledge that comes from an appreciation of how the legal system really works in practice.' Op cit at 397-398.

<sup>53</sup> Op cit at 400.

## CHAPTER 4

### HORIZONTALITY AND A THEORY OF LIBERTY

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# THE HORIZONTAL APPLICATION OF THE SOUTH AFRICAN BILL OF RIGHTS

## CHAPTER 4

### HORIZONTALITY AND A THEORY OF LIBERTY

#### 4.1 Introduction

This chapter seeks to determine the impact and implications which the horizontal application of the Bill of Rights will have on the South African substantive law. The impact and implications will be examined in respect of the maintenance of human dignity and democracy; the status of the public/private dichotomy in the application of the Bill of Rights; the function and liability of the State and the effect on private law.

#### 4.2 Democracy and Human Dignity

The question is: what does the Constitution and the Bill of Rights in particular wish to secure for the State and its citizenry. Recourse must be had to the founding provisions of the Constitution, namely Section 1(a) which provides as follows:

The Republic of South Africa is one, sovereign, *democratic* state founded on the following values:

- (e) *Human dignity*, the achievement of equality and the advancement of human rights and freedoms.

The appeal to democracy and human dignity based on equality and freedom is reverberated throughout Chapter 2 on the Bill of Rights. Section 7(1) proclaims that the Bill of Rights is the cornerstone of democracy in South Africa and affirms the democratic values of human dignity,



equality and freedom and that in terms of Section 36(1) the rights in the Bill of Rights may be limited only if such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; further that when interpreting the Bill of Rights in terms of Section 39(1), a court, tribunal or forum must promote the values that underlie an open and *democratic society* based on *human dignity*, equality and freedom.<sup>1</sup>

The South African Constitution is not unique in its appeal to the establishment of democracy through the protection and maintenance of human dignity based on equality and freedoms. It is highly emulative of its forerunners in the international field of human rights law. Thus for example, the first and fifth preambular paragraphs as well as Article 1 of the Universal Declaration of Human Rights makes explicit reference to the inherent dignity and worth of the human person. Whereas other international instruments too are no different such as the second preambular paragraphs of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, they recognize that human rights are derived from the inherent dignity of the human person.<sup>2</sup>

Similarly, these instruments refer to democracy and to democratic societies founded on the various enunciated freedoms and rights. For example the freedom of religion, expression, and association and other rights such as the socio-economic and cultural rights reflect the interests of a democratic

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<sup>1</sup> Own emphasis.

<sup>2</sup> For easy access to these international instruments on human rights, see Essop M Patel & Chris Watters (eds) *Human Rights Fundamental Instruments and Documents* 1994.

society. Foundational to democracy is the inherent dignity of the human person and worth.

From this, it can be stated that the primary objective of the modern state is the establishment and maintenance of a democratic state through the recognition and protection of human dignity. But then, which of these objectives take precedence over the other - democracy over dignity or vice versa ?

In these human rights instruments, it is abundantly clear that reference to dignity is not made as a reference to a right. Rather the reference is to an *inherent*, innate and fundamental quality of the human condition. This is paramount. And it is from this quality and condition of dignity that the rights and freedoms of the human person flow - thus the right to respect for and protection of dignity, the right to life, equality and equal protection of the law, and the right to freedom and security of the person as well as the right to freedom of expression, religion, belief and opinion to mention just a few.

The recognition, enforcement and protection of the rights and freedoms of the human person is the quintessence of democracy - hypothetically even if the state is inhabited by a single individual or group of them. If this is the thesis, then it would be safe to conclude that the twin concepts of democracy and dignity must receive the equal protection of the law in the modern state. *A fortiori* this then would be the situation in any modern state predicated on democracy, to wit the Republic of South Africa whose Constitution sanctions the application of its Bill of Rights in the private sphere in terms of Section 8(2).

However, claims to the enforcement and protection of rights and freedoms in the name of democracy

or dignity will inevitably lead to the balancing of competing rights and clashing interests. As all rights and freedoms emanate from a human person's dignity, the state will always be engaged in legislating either to maintain democracy for the public good or preserving the inherent dignity of its subjects. That where there is a clash of rights and interests, the courts will inevitably be involved in balancing not only the interests of a democratic society vis-a-vis the individual but also between one individual vis-a-vis another. And in balancing these interests, a court must always be informed by the norms and values of openness, and democracy based on human dignity, equality and freedom.<sup>3</sup>

Andrew Clapham<sup>4</sup> furnishes an example where the protection of a right is sought to be justified in two different respects. Thus where a group of protesters wish to use a private shopping precinct (this being the only forum in town) as a platform for the dissemination of ideas in the community, a court injunction would be a violation of a constitution's claim to the protection of democracy. However, where a coven of witches demand to speak at a Christian prayer meeting, a court injunction would not be violative of their right as they would have another platform from which to do so. In both these situations the common right to freedom of expression and democratic participation are sought to be protected.<sup>5</sup> In the case of the protesters, an appeal to the protection of the right in the interest of

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<sup>3</sup> Section 36(1) of the Constitution of the Republic of South Africa, 1996, Act 108 of 1996.

<sup>4</sup> Andrew Clapham *Human Rights in the Private Sphere* 1993 at 145- 146.

<sup>5</sup> See *John J. Hurley and South Boston Allied War Veterans Council, Petitioners v Irish-American Gay, Lesbian And Bisexual Group of Boston* 115 S. CT. 2338 (1995). Here the petitioner Council which was authorized by the City of Boston to organize and conduct the St. Patrick's Day - Evacuation Day Parade refused to allow the respondent GLIB to participate in the event. The GLIB, which was an organization formed for the purpose of marching in the parade to express its members' pride in their Irish heritage as openly gay, lesbian and bisexual individuals and to demonstrate their solidarity with like individuals, filed a suit in the state court in which it was alleged that the denial to march violated a state law prohibiting discrimination on the basis of sexual orientation.

democracy is justified because there is a public element - public element being the public domain for the collective good. In the case of the witches such public element is absent, hence protection of the right is denied. However, a complete denial of the right to preach would violate their right to the freedom of expression and conscience and accordingly be unconstitutional. From this example then, in order to avoid the conflict of human rights, it must be established what is the goal of a right in any given situation - democracy or dignity. If this is determined, then the 'intractable riddle of conflicting human rights, or endless "balancing and weighing" exercises'<sup>6</sup> is avoided.

It is submitted that this is not entirely correct for in the instance where there is a clash of rights between one individual vis-a-vis another - where one's freedom or right competes with another's freedom or right, a court may well be engaged in a balancing and weighing exercise where 'a more gentle adjustment of borders than the use of the shopkeeper's scales'<sup>7</sup> is called for. Thus to take another example cited by Andrew Clapham<sup>8</sup> is where a tenant wishes to display a political poster in his window despite a clause in the tenancy agreement prohibiting this during an election campaign. If the right at issue is aimed at the protection of democracy and takes place in the public sphere, then

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The state court found for GLIB on the basis, *inter alia*, that the parade lacked any express purpose. The decision was affirmed by the Supreme Judicial Court.

However, the United States Supreme Court reversed the decision on the basis that the petitioner's protection under the First Amendment entails that a speaker has the autonomy to choose the content of his own message in the context of a parade which the Court held to be forms of expression. Thus the petitioners claim to free speech was preferred to the respondent's right not to be discriminated against.

<sup>6</sup> Clapham op cit n 4 at 146.

<sup>7</sup> Halton Cheadle and Dennis Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) *SAJHR* 44-66 at 65. Footnote omitted. See also Chapter 2 *supra* n 22 .

<sup>8</sup> Clapham op cit n 4 footnote 6 at 180.

the right should be protected even from purely private violations. However, the right to put up the poster would probably deserve less protection if the tenant invokes it to display the poster in a corridor which is not open to the public but accessible to the landlord. The rights at issue would be the right to freedom of expression of the tenant vis-a vis the right to dignity of the landlord. This inevitably would call for the delicate balancing of interests. It is submitted that the freedom of expression in the absence of the public sphere in this context would be trumped by the landlord's claim to dignity which must be protected.

In *Holomisa v Argus Newspapers Limited*<sup>9</sup> the High Court in examining the law of defamation liability, engaged itself in the balancing of two competing rights - the right to freedom of expression and the right to respect for dignity which encompasses the protection of one's reputation. Since the constitutional scheme gave no ready answer as to which right should predominate over the other, the Court undertook an assessment of competing values based on proportionality in terms of which the value whose protection most closely illuminated the constitutional scheme would receive appropriate protection. In determining the relative place of each right within the overall constitutional scheme, the implications for democracy of each competing right constituted an important consideration in the balancing and weighing process. The Court held that in modern democratic societies the media must be free to speak on matters of public importance as freely and openly as could be allowed but not more freely than other citizens. It concluded that a defamatory statement which related to free and fair political activity was constitutionally protected, even if false, unless it could be established by the

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<sup>9</sup> 1996 (6) BCLR 836 (W).

plaintiff that in all the circumstances it was unreasonably made.<sup>10</sup> Effectively the right to dignity was trumped by the right to freedom of speech and expression.

The task of balancing competing values between the right to freedom of expression and the right to the protection of reputation in the law of defamation liability came before the Supreme Court of Appeal of South Africa in *National Media Limited And Others v Bogoshi, Nthedi Morole*.<sup>11</sup> In this case the Supreme Court of Appeal had to examine its previous decision of strict liability in claims for defamation by the media. It acknowledged that the law of defamation required a balance to be struck between the right to reputation and the freedom of expression. In recognizing the right to the freedom of expression, it held that it was a modern democratic imperative that the press make available to the community information in respect of public, political, social, and economic activity. But however, where publication did take place even if false and defamatory, unlawfulness would not be present if it could be established that the publication thereof was reasonable in the circumstances. And in establishing such reasonableness the Court provided guidance by advocating standards of care with reference to the nature, extent and tone of the allegations as well as the reliability of their source and the steps taken to verify the information. Accordingly the doctrine of strict liability established in *Pakendorf en Andere v De Flamingh*<sup>12</sup> was rejected. The Court was cautious to state that in rejecting this doctrine it was not reformulating the common law in conformity with the values of the Interim

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<sup>10</sup> Thus the common law rule of the onus of proof in escaping defamation liability which rested on the defendant as was restated in *Neethling v Du Preez And Others* 1994 (1) SA 706 (A) and which the Court regarded as trumping the right to free expression in favor of reputation was now transferred to the plaintiff in establishing it.

<sup>11</sup> Case No: 579/96 decided on 29 September 1998 and unreported in the South African law reports as at the date of writing.

<sup>12</sup> 1982 (3) SA 146 (A).

Constitution but rather that it rejected a common law principle wrongly interpreted and applied in *Pakendorf*.

In so far as the weighing of the interests of dignity and freedom of expression was concerned the Court cited the Constitutional Court's dicta<sup>13</sup> relating to the right to life and dignity as being the most important of all human rights and the source of all other personal rights. It accordingly distanced itself from the virtually unfettered paramountcy which the Court in *Holomisa* accorded to the freedom of expression. From this it could be concluded that the Supreme Court of Appeal did not trump the right to dignity in favour of the right to freedom of expression. What it claimed to have done was to be informed by the spirit, purport and object of the Interim Constitution in applying and developing the common law in achieving a proper balance between the right to protect one's reputation ( hence dignity) and the freedom of the press.

It is respectfully submitted that the judgment of the Supreme Court of Appeal in *Bogoshi* correctly reflects the developing constitutional jurisprudence in respect of the balancing of competing rights. It should be borne in mind that dignity is a quality and condition of human worth that inheres in every human being and it is *the right to respect for that dignity* that must be weighed in the face of other competing rights rather than dignity itself. A balancing and weighing exercise does not necessarily entail engaging the limitation provisions of the Constitution which in the case of fundamentally basic rights would require the standards of limitation of such rights to be reasonable and necessary. Such balancing and weighing could well be accomplished by developing the common law within the context

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<sup>13</sup> *S v Makwanyane And Another* 1995 (6) BCLR 665 (CC).

of the spirit, purport and object of the values enunciated by the Constitution.

This then represents the paradigm in which the South African Constitution should operate - a paradigm established on an 'open democratic society based on human dignity, equality and freedom'. In such a paradigm, democracy entails tolerance, openness, pluralism and representativity among others while dignity will entail individual development and self-realization and fulfilment. These are the dimensions within which democracy representative of the public good and the common weal and dignity representative of the individual worth and human condition will operate in the modern state and tensions between these two concepts are inevitable.

### **4.3 The Public/Private Dichotomy**

It is trite that the traditional notion of a bill of rights was to address the issue of the abuse of state authority and consequently gross human rights violations. This notion spawned the public/private dichotomy which in turn led to the development of a constitutional jurisprudence which sought to bring violations by private actors in the private sphere under constitutional review.

#### **4.3.1 The 'State Action' Doctrine**

The 'state action' doctrine of the United States of America is a classic example of the type of constitutional jurisprudence which this dichotomy produced. The American Bill of Rights are incorporated in the Amendments to the Constitution but its application has been generally confined to the public sphere. The constitutional jurisprudence that evolved was always premised on the notion that the American Constitution was never intended to apply to private actors. That this is so appears



from judgments of the Supreme Court of America. In *Shelley v Kraemer*,<sup>14</sup> Chief Justice Vinson who delivered the opinion of the court stated that the XIV amendment addressed itself only to the states, and not to private persons and that private persons remained free to discriminate against others even on the grounds of race and colour. This was reiterated twice by Justice Rehnquist who, in delivering the opinion of the court, in *Jackson v Metropolitan Edison Co.*<sup>15</sup> stated that the principle that private action is immune from the restrictions of the XIV amendment was well established and easily stated. And again as chief justice in *DeShaney v Winnebago CTY. Soc. Servs. Dept.*<sup>16</sup> he stated that nothing in the language of the due process clause of the XIV amendment required the state to protect the life, liberty, and property of its citizens against invasion of private actors and that its purpose was to protect the people from the state and not to ensure that the state protect them from each other.

It was mostly within the ambit of the XIV amendment of the American Constitution which guaranteed due process and equal protection of the laws that violations of constitutionally guaranteed rights by private actors were sought to be scrutinized through the application of the 'state action' doctrine. This doctrine saw the development of state liability by way of some 'public function' or 'nexus' by the private actor in terms of which government tolerance, acquiesce, encouragement, action or inaction was deemed to be 'state action'. Thus in terms of the 'state action' doctrine an allegation of a breach of a fundamental right is sustained only if responsibility for the relevant governmental action is attached to some state actor whether private or otherwise that performs a public function

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<sup>14</sup> 334 U.S. 1 (1948).

<sup>15</sup> 419 U.S. 345 (1974).

<sup>16</sup> 489 U.S. 189 (1989).

associated with the state. However, it was in *Shelley v Kraemer*<sup>17</sup> that the most expansive and provocative interpretation and application of the ‘state action’ doctrine was announced. In this case the Supreme Court of America held that judicial enforcement of racially restrictive covenants between private persons would amount to state action for which the state must be responsible. Effectively this would result in every private arrangement between private actors being subject to the purview of the constitution which invariably would result in the encroachment of individual liberty - a function which the constitution was not intended to serve.

But such an application has indeed produced contradictions and inconsistencies that has generated an incoherent and inchoate constitutional jurisprudence. Tribe in his examination and analysis of the ‘state action’ doctrine, concludes that ‘despite the precedents, and despite the vocabulary, the Supreme Court has not succeeded in developing a body of state action “doctrine”, a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation.’<sup>18</sup> And further holds that while the Supreme Courts decisions indicate that ‘the state action requirement is plainly not an “empty formality” [w]hat is empty is the concept of state action “doctrine”. Because the Supreme Court does not currently have access to *a general theory of liberty*<sup>19</sup> allocating public and private responsibility, the Court can no longer derive doctrinal rules from any accommodation of the premises underlying the state action requirement. ... [T]he state

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<sup>17</sup> Op cit n 14.

<sup>18</sup> See Chapter 18 ‘The Problem of State Action’ in L H Tribe *American Constitutional Law* 1988 at 1690.

<sup>19</sup> Own emphasis.

action decisions fail as doctrine.<sup>20</sup>

Other writers too were of the view the 'state action' doctrine was of no value in constitutional jurisprudence. Chemerinsky in examining the 'state action' doctrine maintains that 'if the state action requirement is jettisoned, courts will directly balance the competing liberties involved in each case. Such an approach maximizes protection of liberty, replacing the current policy of always choosing to favor the rights of the private violator over those of the victim.'<sup>21</sup>

It is evident also from Gunther's<sup>22</sup> analysis of the 'state action' cases, that the Supreme Court of America had started to circumscribe the scope of the state action concept since the 1970's - a trend that was continued in the post - 1982 rulings. Gunther attributes '[t]he modern Court's curtailment of state action coverage ... to the newly recognized, very broad congressional power to deal with private discrimination ...'<sup>23</sup> It is perhaps safe to conclude that the 'state action' doctrine becomes increasingly casuistic, garbled and amorphous as ironically epitomized in *DeShaney v Winnebago Cty. Soc. Servs. Dept.*<sup>24</sup> That apart, according to Tribe the 'state action' doctrine holds that one of the primary purposes of the 'state action' doctrine is that 'by exempting private action from the reach

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<sup>20</sup> Op cit n 18 at 1698. Tribe, however, seeks to explain the anarchy of state doctrine by adopting the metaphor: *the way out of the forest is through the trees* at 1691.

<sup>21</sup> Erwin Chemerinsky 'Rethinking State Action' (1985) 80 *North Western University LR* 503 at 538-9 as cited by Stuart Woolman 'Application' in Chaskalson *et al Constitutional Law of South Africa* 1996 at 10-35.

<sup>22</sup> For an excellent synoptic analysis of the 'state action' cases, see 'Section 2 The Problem of State Action' in Gerald Gunther *Constitutional Law* 1991.

<sup>23</sup> Op cit at 915.

<sup>24</sup> Op cit n 16.

of the Constitution's prohibitions, it stops the Constitution short of pre-empting individual liberty - of denying to individuals the freedom to make certain choices, such as choices of the persons with whom they will associate. Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands.'<sup>25</sup>

But it does appear that the American courts while acknowledging that constitutional guarantees did extend to the private sector, would attempt as far as possible to bring private acts of discrimination under the ambit of the 'state action' doctrine. See the headnotes to *Edmonson v Leesville Concrete Company*<sup>26</sup> where it is stated that 'the Constitution's guarantees of individual liberties and equal protection apply in general only to action by government, and with a few exceptions ... do not apply to the action of private entities; such a fundamental limitation on the scope of constitutional guarantees an area of individual freedom by limiting the reach of the federal law and avoids imposing on the state, its agencies, or officials responsibility for conduct for which they cannot be blamed; one great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law; the courts, in order to implement these principles, must consider from time to time where the government sphere ends and where the private sphere begins; although the conduct of private parties lies beyond the Constitution's scope in most instances, *governmental authority may dominate an activity to such an extent that the participants must be deemed to act with the authority of the government and, as a result, be subject to*

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<sup>25</sup> Tribe op cit n 18 at 1691.

<sup>26</sup> 500 US 614 (1991).

*constitutional constraints*;<sup>27</sup> this is the jurisprudence of state action, which explores the essential dichotomy between the private sphere and the public sphere, with all its attendant constitutional obligations.<sup>28</sup>

By contrast, the South African Constitution demands that while not denying the existence nor the exercise of liberty in a democracy, the conduct of persons must always conform to the Constitution's demands of equality and dignity. In measuring and assessing this conformity, a balancing of interests must be inevitable.<sup>29</sup>

The South African Constitution binds the legislature, the executive, the judiciary and all organs of state, as well as natural and juristic persons depending upon the nature of the right and the duty imposed by the right.<sup>30</sup> Does it mean that the 'state action' doctrine as espoused in *Shelly v Kraemer* should now apply to South African constitutional jurisprudence by reason of the fact that the courts are now bound? It is submitted that it should not as it perpetuates the public/private dichotomy which should not be the premiss upon which the South African constitutional jurisprudence should be developed.<sup>31</sup> It is submitted further that the public/private divide should be eschewed not only for the

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<sup>27</sup> Own emphasis.

<sup>28</sup> Op cit n 26 at 663-664.

<sup>29</sup> See Erwin Chemerinsky op cit n 21.  
See also Andrew Clapham op cit n 4 para 6.1.4 at 163 where the author rejects the 'state action doctrine' as deceptive, dangerous and inconsistent.

<sup>30</sup> Act 108 of 1996, section 8(1) & (2).

<sup>31</sup> For critical conceptions of the public/private concept see Clapham op cit note 4 at 130-133.

reason that it is premised on positivistic jurisprudence but that the Constitution itself states unequivocally that it applies to all law - whether public or private.<sup>32</sup>

#### 4.3.2 Canadian Jurisprudence

Canadian jurisprudence although rejecting the American state action doctrine is in itself incoherent for the application of a bill of rights in the private sphere. The Canadian Supreme Court had unequivocally stated that the Canadian Charter of Rights and Freedoms 'like most written constitutions, was set up to regulate the relationship between the individual and the Government. It was not intended to restrain governmental action and to protect the individual. It was not intended in the absence of some governmental action to be applied in private litigation.'<sup>33</sup> Hence its significant influence on the judgment of *Du Plessis and Others v De Klerk and Another*.<sup>34</sup> But however, the Court held that the 'judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution [in respect of] private litigants whose disputes fall to be decided at common law.'<sup>35</sup> In this sense only, can Canadian constitutional jurisprudence be of value within the South African constitutional context.

From the above then American and Canadian constitutional jurisprudence premised on the antithetical

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<sup>32</sup> Op cit note 25 section 8(1).  
See paras [130] & [146] of Kriegler J's judgment in *Du Plessis And Others v De Klerk And Another* 1996 (3) SA 850 at 913 & 919 resp.

<sup>33</sup> Per McIntyre J in *Dolphin Delivery Ltd v Retail, Wholesale and Department Store Union, Local* [1986] 2 SCR 573 at 693.

<sup>34</sup> 1996 (3) SA 850 paras [38] & [56] at 873 & 882 resp.

<sup>35</sup> Ibid at 599.

public/private dichotomy must either be rejected for application where a bill of rights is to be applied within a paradigm premised on the twin concepts of democracy and dignity. Alternatively, at least where human conduct arising from the exercise of rights enshrined in the Constitution gives rise to conflicts between private persons, acting *inter se*, then the public/private divide must be de-emphasized. It is submitted that this would lead to the formulation of clearer constitutional jurisprudence in the modern state where new centres of power such as corporations and other juristic persons like medical schemes and insurance houses wield power equivalent to or greater than that of the state and where what was once state functions are being increasingly privatized.<sup>36</sup> Constitutions of the modern state would require all conduct to be adjudged according to the same standards as the constitutional provisions and constitutional jurisprudence demand.

#### 4.4 A New Doctrine

It must be borne in mind that the 'state action' doctrine (or lack of it) and the public/private dichotomy was developed out of considerations of a positivistic jurisprudence predicated on the supremacy of the state and not on constitutionalism. This is abundantly clear in the majority judgment of *Du Plessis and Others v De Klerk and Another*.<sup>37</sup>

It is argued that since any doctrine established on the public/private dichotomy would be unsuitable, it would now be necessary to propose some doctrine which would be suitable for application to a constitution which applies not only to the public sphere but to the private sphere as well. In order to

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<sup>36</sup> See Andrew Clapham op cit n 4 paras 4.3.2 - 4.3.4 at 124 - 133.

<sup>37</sup> 1996 (3) SA 850.

construct such a doctrine, an investigation into the apprehensions and limits of the horizontal application of a bill of rights is compelled.

#### 4.4.1 Limits to the Application of a Bill of Rights in the Private Sphere.

*Du Plessis and Others v De Klerk and Another* provides the source of analysis and could be instructive in mootng a doctrine for adoption. Ackermann J was particularly sensitive to the direct application of the Bill of Rights in the private sphere and to reiterate, expressed the following limitations to the direct application of the Bill of Rights in the private sphere.<sup>38</sup>

- (a) A direct application of the Bill of Rights would make the law vague and uncertain and is contrary to the concept of the constitutional state;
- (b) A direct application of the fundamental rights to private relations would severely undermine private autonomy;
- (c) A direct application of the basic rights in disputes between private individuals would place duties on them and necessitate the balancing of competing rights;
- (d) A balancing of rights would lead to conflicting decisions by the courts which would result in numerous appeals to the Constitutional Court in matters that would otherwise be of a

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<sup>38</sup>

See *supra* Ch 1 at 3.2.

See also Ch 5 Limits To the Application of Human Rights in the Private Sphere op cit n 4 at 135.



commercial nature and would cast onto the Constitutional Court the formidable task of reforming the private common law

and

- (a) A direct application of the basic rights would turn the Constitution, contrary to its historical evolution of constitutional individual rights protection, also into a code of civil obligations for private individuals with no indication as to how clashing rights and duties are to be resolved or how clashing rights are to be balanced.

While most of these concerns have been resolved by the Constitutional Court's certification that the new text of the Constitution has direct horizontal application,<sup>39</sup> there are two matters that yet have to be resolved. These are that in the absence of a doctrine, the application of the Bill of Rights would make the law vague and uncertain, and that the direct application of the fundamental rights would severely undermine private autonomy. Perhaps to condense the problem, it could be said that the law would be vague and uncertain precisely for the reason that private autonomy would be undermined and this is contrary to the concept of the constitutional state.

The formulation of a doctrine must of necessity depend on the understanding of the concepts of private autonomy, the constitutional state and a theory of law.

#### 4.4.1.1 Private autonomy

The human person in the natural state is born free and equal. This freedom and equality is the

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<sup>39</sup> See *supra* Ch 2 at 2.2.

expression of a person's inherent dignity. Dignity therefore must be understood in this context as an integral and fundamental human condition sustained on equality and freedom. Thus the human person is free to associate with any other person on an equal footing. And in this association other legal relationships may emerge giving rise not only to rights and corresponding duties but to more complex correlatives such as privilege, power and immunity.<sup>40</sup> If this privilege, power and immunity is understood as the autonomy in terms of which a person exercises his liberty to associate with whomsoever he chooses freely and equally whether capriciously or whimsically, then such a person must enjoy the respect and protection of this autonomy. The corollary must also be true, namely, where this liberty encroaches on the equality and freedoms of others and thereby infringes their dignity, *prima facie*, it ought not to be protected at all or that the protection must be limited.

It is in view of the above thesis that Kriegler J was prompted to declare that '[u]nless and until there is resort to law, private individuals are at *liberty*<sup>41</sup> to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned. [Thus] a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may black-ball Jews ...; [a]n employer is at liberty to discriminate on racial grounds in the engagement of staff; ... [but] none of them can invoke the law to enforce or protect their bigotry. [And it is] the State, as the maker of the laws, the administrator of laws and the

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<sup>40</sup> As conceived by WN Hohfeld, professor of law at Yale University.  
See WJ Hosten *et al Introduction to South African Law and Legal Theory* 1995 at 17 & 173.

<sup>41</sup> Own emphasis.

interpreter and applier of the law, is bound to stay within the four corners of [the Bill of Rights].<sup>42</sup>

Thus the question: what State and what law?

#### 4.4.1.2. The Constitutional State and State Responsibility

The Constitution dictates the creation and maintenance of a democracy founded on human dignity, equality and freedom.<sup>43</sup> The Constitution through its Bill of Rights confirms and reaffirms the basic fundamental rights of its subjects the so-called natural or first generation rights, as well as newer rights such as the socio-economic or second generation rights and environmental rights or third generation rights.<sup>44</sup> The Constitution declares itself the supreme law of the land<sup>45</sup> and commands the State to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>46</sup> And not only that, it proclaims that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and the all organs of state.<sup>47</sup> The notion of a constitutional state is the state which creates the law and through the maintenance of the law sustain a legal order.

From this it can be said that it is not only the courts but that the State too, at whatever level, is responsible for legislation that will entail the complex process of balancing clashing rights. While it

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<sup>42</sup> Op cit n 30 para [135] at 914-915.

<sup>43</sup> See *supra* Ch 4 at 4.2.

<sup>44</sup> Act 108 of 1996, Chapter 2.

<sup>45</sup> Loc cit section 2.

<sup>46</sup> Loc cit section 7(2).

<sup>47</sup> Loc cit section 8(1).

may be argued that the ultimate objective of the State is the achievement of a 'welfare state' established on the concept of meliorism, democracy demands the eradication of unfair discrimination and the protection of human dignity. But the eradication of discrimination could mean the protection of the right to equality but the denial of the right to freedom. It is argued that the denial of freedom by the courts and the State would entail the encroachment on the right to liberty and private autonomy. Thus the claim to equality and equal protection of the law may mean that a racially restrictive covenant is invalid. Similarly, a testator's testamentary disposition in terms of which only males are to be the beneficiaries is invalid and so too will a lessor's offer of lease to a particular cultural group. In all these cases and cases of a similar nature, the claim to private autonomy and liberty will be denied. The questions that arise are whether the right to freedom and hence a zone of autonomy must succumb always to the claim of equality where some form of discrimination is apparent thereby asserting that a claim to equality supercedes a competing claim of liberty. How is the constitutional impasse to be resolved?

#### 4.4.1.3. A Theory of Liberty and a Doctrine of Law

A resort to the Constitution and what it provides for is yet again compelled. It has been stated above<sup>48</sup> that the Constitution appeals to democracy and human dignity based on equality and freedom. In doing so it provides for the protection, promotion and fulfilment of the fundamental rights in its Bill of Rights. But the Constitution also provides for the limitation of these rights according to the standard set out in the Bill.<sup>49</sup> It can therefore be envisaged that where there is a clash of rights, as

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<sup>48</sup> See *supra* Ch 4 at 4.2.

<sup>49</sup> *Op cit* n 3.

there must be, the legislature or the courts may be required to prefer one right over another. Thus in competing claims to equality and liberty, it is possible that the one may be limited in preference to the other. But the crux of the matter is whether a claim to the right of liberty and private autonomy can be preferred to a competing claim to the right of equality. If the attainment of equality implies the eradication of forms of discrimination then the preference of the right to liberty and private autonomy implies the recognition of certain forms of discrimination. It is submitted that a theory of liberty exists which recognizes that there are inviolable spheres of private autonomy and the right to privacy and that if accepted would resolve the constitutional impasse between the competing claims to equality and liberty.<sup>50</sup>

That the theory of liberty and the sphere of private autonomy is implicit in and integral to the right of privacy has been recognized by the majority in *Bernstein And Others v Bester NO And Others*.<sup>51</sup> Here Ackermann J writing for the Court considered the content of the right to privacy with reference to section 13 of the Interim Constitution which accords substantially with Section 14 of the Constitution.<sup>52</sup>

With reference to international debates and constitutional jurisprudence the learned justice holds that while it is a truism that no right is to be considered absolute since every right is always already limited by every other right accruing to other citizens, it would mean that within the context of privacy it is

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<sup>50</sup> See Louis Henkin 'Shelley v Kraemer: Notes For A Revised Opinion' 110 (1962) *University of Pennsylvania Law Review* 473 at 496 *et seq.*

<sup>51</sup> 1996 (4) BCLR 449 (CC).

<sup>52</sup> Op cit paras [56 - 92] at 480-494.

only the inner sanctum of a person that would be shielded from erosion by the conflicting rights of the community. This inner sanctum relates to a person's family life, sexual preference and home environment.<sup>53</sup>

The learned justice's observations of German constitutional jurisprudence is particularly instructive. It has been held by the Federal Constitutional Court that there is a constitutional obligation to respect the sphere of intimacy of individuals. This is based on the right to the unfettered development of personality and in determining the content and ambit of this fundamental right, regard must be had to the inviolability of dignity which must be respected and protected by the judiciary. The judgment notes also that a very high level of protection is given to an individual's intimate personal sphere of life which includes an untouchable sphere of human freedom that is beyond any interference from any public authority. This implies a most intimate core of privacy in respect of which no justifiable limitation can take place.<sup>54</sup>

A theory of liberty envisages those very intimate fundamental rights to privacy and private autonomy which inhere in the human dignity. It includes those that are traditional and fundamental even if motivated by caprice or whim. Such a theory of liberty justifies the recognition of the right to fair discrimination in exercising the freedom to associate or not to associate, the freedom to the exclusive use and enjoyment of private property and the freedom to testate as well as all other freedoms that invoke rights of an intimate and personal nature. Thus the choice of one's marriage partner, one's

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<sup>53</sup> Op cit para [67] at 484.

<sup>54</sup> Op cit para [77] at 488-489.

neighbourhood or neighbour, one's choice of a sperm with reference to ethnic origin from a sperm bank, a testator's choice of a testamentary disposition preferring male beneficiaries - all are resolved by a doctrine of law that recognizes the right to privacy and private autonomy premised on a theory of liberty.

In as much as the limitation clause unequivocally implies that the Constitution does not require the State to outlaw all forms of discrimination nor to ensure total equality, it is submitted that such a theory of liberty is tolerant of discrimination even where the victim 'suffers a minor limitation and a limited unpublic indignity'<sup>55</sup> and is consonant with the assertion that the State cannot be responsible for a discrimination that itself cannot prevent.<sup>56</sup> Equally, a theory of liberty would be intolerant of unfair discrimination therefore providing no recognition and constitutional protection such as where the discrimination is 'public, blatant, and widespread; the inequality and indignity therefore notorious and extensive, with important communal consequences.'<sup>57</sup> Thus a landlord or a white bigot who do not deal with persons of colour equally as much as a hotelier or a restaurateur whose right of admission is invoked to serve blacks only cannot seek constitutional protection by asserting a claim to privacy and private autonomy and property rights. Rights in this sense are not co-extensive with those of a homeowner who may regulate the admission of guests. Claims to absolute immunity or inviolability can be denied and is consonant with the remarks of Justice Black when he asserted that '[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens

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<sup>55</sup> Henkin op cit n 50 at 498.

<sup>56</sup> Loc cit.

<sup>57</sup> Op cit at 499.

up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and *since their operation is essentially a public function*,<sup>58</sup> it is subject to state regulation.<sup>59</sup> From this it can be concluded that the more a private act by a private actor assumes the character of a public function and the more he lays claim to privacy and private autonomy and rights to property, the more they are attenuated and eroded. This is clearly enunciated in *Bernstein* where Ackermann J states that once a person moves into communal relations and activities not only does the scope of his personal space shrink but that the inviolable intimate core of privacy is left behind.<sup>60</sup>

What is posited here is a public function doctrine that is not equated to but is also not entirely dissimilar from the state action, government action or government function doctrine. The idea is to avoid the strict dichotomy of the public/private divide and the 'state action' doctrine. This inevitably would entail huge multi-nationals, national corporations and other private institutions such as trade unions, churches, pressure groups and the like which are perceived as new centres of power<sup>61</sup> and which pose significant threats to private autonomy in the horizontal plane and in respect of socio-economic power, being subject to the same or nearly the same degree of intrusive standards for

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<sup>58</sup> Own emphasis.

<sup>59</sup> *Marsh v Alabama*, 326 U.S. 501, 506 (1946).

<sup>60</sup> Op cit n 51 paras [67 & 77] at 484 & 489 resp.

<sup>61</sup> See Andrew Clapham op cit n 4 at 137.



constitutional liability as required by the Constitution in respect of state institutions. However, Johan van der Vyfer maintains that ‘autonomy is a juristic person’s right to privacy and is to such social entities what the right to life is to a natural person’<sup>62</sup> and therefore non-state institutions should not be subject to the same intrusive standards of constitutional scrutiny as state institutions.

However, it is not inconceivable that a claim to private autonomy and hence discrimination by institutions such as social clubs entertaining only Jews, males only or females only sporting clubs, religious societies and cultural groups as well as gay societies would receive constitutional protection. Perhaps critical factors as the number of members, the objectives, purpose and function and the degree of intimacy and historical context and a national philosophy may all be criteria for the determination of immunization from constitutional attack. In this regard Kriegler J’s assertions<sup>63</sup> may be a half-truth in that a white bigot or a racially restrictive social club may seek and obtain constitutional protection. And those of Ackermann J<sup>64</sup> may be less so for a theory of liberty would permit intrusion into spheres of private autonomy hitherto insulated against constitutional scrutiny.

#### 4.4.2 A Theory of Liberty and the South African Constitution

Whether a theory of liberty, if accepted, can be applied within the South African context can be gleaned from the Constitution itself. It is submitted that the Constitution does have the breadth and reach for the accommodation of such a theory and that there are *indicia* which prove its compatibility

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<sup>62</sup> Johan van der Vyfer ‘The Private Sphere in Constitutional Litigation’ (1994) 57 *THRHR* 378 at 392.

<sup>63</sup> See *supra* Ch 4 at 4.4.1.1.

<sup>64</sup> See *supra* Ch 4 at 4.4.1.

and consonance with the Constitution.

The equality provision of the Constitution<sup>65</sup> spells out the ambit of the right of equality and equal protection of the law. It makes provision for legislation that will protect or advance persons disadvantaged by unfair discrimination.<sup>66</sup> It makes provision that the State may not unfairly discriminate on a number of grounds including but not limited to race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>67</sup> And similarly but separately provides that no person may unfairly discriminate and that legislation *must be enacted*<sup>68</sup> to prevent or prohibit unfair discrimination.<sup>69</sup> It concludes that discrimination on the grounds so listed is unfair unless established that it is fair.<sup>70</sup>

Equality jurisprudence and doctrine has been the subject of development by the Constitutional Courts in a series of judgments. In *Brink v Kitshoff NO*<sup>71</sup>, it was cautioned that, while most constitutional instruments were aspirational towards total equality, national jurisprudential and philosophical considerations of equality had to be construed within the South African context.<sup>72</sup> This would entail

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<sup>65</sup> Act 108 of 1996, section 9.

<sup>66</sup> Loc cit , 9(2).

<sup>67</sup> Loc cit, 9(3).

<sup>68</sup> Own emphasis.

<sup>69</sup> Loc cit, 9(4).

<sup>70</sup> Loc cit, 9(5).

<sup>71</sup> 1996 (6) BCLR 752 (CC).

<sup>72</sup> Op cit para [39] at 768.

developing an equality jurisprudence in terms not only of the context of the Constitution but also with reference to the historical background of South Africa. Karthy Govender maintains that '[t]he new constitutional order has, at its core, a commitment to substantive equality and seeks to map out a vision for the nation based on this commitment. This vision reflects the need to remedy the ills of the past and to establish a less divided society in which a constitutional democracy can survive and flourish.'<sup>73</sup>

In *President of the Republic of South Africa And Another v Hugo*<sup>74</sup>, the Court in examining the equality provision stated in particular that since unfair discrimination was expressly prohibited, there was a need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom that goal could not be achieved by insisting upon identical treatment in all circumstances.<sup>75</sup>

But it was in *Prinsloo v Van Der Linde And Another*<sup>76</sup> that the Court applied itself more cogently to the development of the equality doctrine which was then succinctly elucidated and enunciated in

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<sup>73</sup> For a synoptic and comparative analysis of the development of equality jurisprudence, see Karthy Govender 'Achieving Substantive Equality in a Society Founded Upon Inequality: The South African Constitutional Experience' unpublished paper, University of Natal, Durban.

See also Karthy Govender 'The Equality Provision, Unfair Discrimination, And Affirmative Action' *Indicator South Africa* Vol.15 No. 1 Autumn 1998 79-84.

<sup>74</sup> 1997 (6) BCLR 708 (CC).

<sup>75</sup> Op cit para [41] at 728-729.

<sup>76</sup> 1997 (6) BCLR 759 (CC).

*Harksen v Lane NO And Others*.<sup>77</sup> Although these judgments related to the constitutionality of statutory provisions, the Court's decision are apposite to the conduct of private parties.

The Court in *Prinsloo v Van Der linde And Another* took as its point of departure the adoption of the 'idea of differentiation' as the factor that lies at the heart of equality jurisprudence<sup>78</sup> rather than 'discrimination', the latter having acquired a pejorative meaning within the context of the history of South Africa.<sup>79</sup> The Court's interpretation and application of the right to equality and equal protection of the law may be summarized thus:<sup>80</sup>

- (a) Does the provision (conduct) differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of the right to equality. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
  - (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a seriously comparable manner.
  - (ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness

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<sup>77</sup> 1997 (11) BCLR 1489 (CC).

<sup>78</sup> Op cit n 71 para [23] at 771.

<sup>79</sup> Op cit para [31] at 773.

<sup>80</sup> Op cit n 77 para [53] at 1511-1512.

will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of the right to equality.

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision (conduct) can be justified under the limitations clause.

While it must be accepted that the right to equality free of discrimination is of cardinal interest to the Constitution, it does allow for fair discrimination either at the instance of the State or a person. What is particularly striking is that the Constitution specifically mandates the State to promulgate legislation as far as persons are concerned to prevent or prohibit unfair discrimination. This establishes that the Constitution recognizes the common law right to discriminate emanating from the fundamental rights of liberty, property and association but that legislation is required to limit the unfettered exercise of this right. This envisages that the State would legislate generally against modern centres of power such as multi-nationals and the like. But that the Constitution recognizes a theory of liberty and those intimate zones of autonomy from where even the State is precluded entry, is captured in section 9(5) which declares all discrimination as unfair unless it can be established that it is fair.

What section 9(5) indicates is that the liberty to discriminate exists provided that if resort to law is sought for protection, it must be established that it is fair. It is submitted that such a provision has implications vastly different from the situation where the Constitution would have required the party seeking protection to have relied upon the limitation clause to trump the other party's claim to

equality and equal protection and benefit of the law. The implication also is that the Constitution recognizes those very intimate zones where the right to liberty substantiated by a claim to fairness is preferred over a competing claim to equality without limiting it. It shows too that where discrimination is involved equality ranks before freedom unless otherwise established. However, where a party's right to discriminate is prevented or prohibited by legislation, such a party may yet seek constitutional protection by reliance on the justification of fairness in terms of section 9(5) together or alternatively with reliance on the limitation clause of section 36 - a two pronged attack therefore.

The Constitution is cognizant too of those deeply personal areas of private autonomy established by tradition or a system of common law. Section 15(3) with reference to freedom of religion, belief and opinion reads:

- (i) This section does not prevent legislation recognizing -
  - (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
  - (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.
- (ii) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

These provisions are clear indications that the Constitution recognizes those systems of personal and family law that have evolved out of traditions as old as man himself or have been sanctified by religious beliefs. In short, they represent relationships that are deeply personal and intimate, the

quintessence of which is liberty.

That the Constitution does not wish to constitutionalize all of the common law and customary law in terms of which fundamental rights and freedoms are recognized is evident from section 39(3) which states that:

The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by the common law, customary law or legislation, to the extent that they are consistent with the Bill.

#### 4.4.3 Constitutional Damages

The Constitution through its covenant of rights imposes upon the State the duty to administer its system of laws not only for the public or collective good and democracy but for the individual and human dignity. The traditional application of a bill of rights imposed liabilities on the state for violations of human rights where the state was the perpetrator. This was endorsed in *Du Plessis and Another v De Klerk and Others*.<sup>81</sup> The question therefore is whether the State can be held liable for its omissions or failure to act with regard to violations in the private sphere between private individuals where the State is not the actor.

State liability for violations of human rights in the horizontal sphere has been recognized. In Andrew Clapham this doctrine of liability is referred to as the 'ecological liability' of the state. This 'ecological liability' of the state is established on the basis that there is a changing attitude in legal and social

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<sup>81</sup> Op cit n 34 para [49] at 878-879.

thinking arising from the complexity of a changing social fabric. The changes in the legal-political and socio-economic spheres requires the state to protect rights and freedoms in the private sector and not only from interference by public authorities as is the traditional view. This implies that a state would have both negative and positive obligations in this regard.<sup>82</sup>

‘Ecological liability’ of the State for failure to protect human rights in the private sphere is recognized in the case-law of the European Commission on Human Rights and the European Court of Human Rights.<sup>83</sup> The state of Ireland<sup>84</sup> was held liable for failure to protect a woman from physical abuse by her alcoholic husband by denying her access to justice and the Netherlands<sup>85</sup> for failure to protect a 16-year-old mentally handicapped girl from sexual abuse in that there was a gap in Dutch law that did not allow the father or his daughter to bring a criminal prosecution against the perpetrator. This liability was established on the provisions of Article 8(1) of the European Convention of Human Rights which accords substantially with the freedom and security of the person in terms of section 12(1)(c) of the South African Constitution.

The question of constitutional damages which is unknown in South African jurisprudence was considered in *Fose v Minister of Safety And Security*<sup>86</sup> where the applicant , in addition to common

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<sup>82</sup> See Andrew Clapham op cit note 4 at 183-183.

<sup>83</sup> Op cit at 212-213.

<sup>84</sup> *Airey v Ireland* Series A, vol. 32.

<sup>85</sup> *X & Y v Netherlands* Series A, vol. 91.

<sup>86</sup> 1997 (7) BCLR 851 (CC).



law delictual damages, claimed for constitutional damages which would include an amount for the vindication of the infringed right in question and for punitive damages. The claim for constitutional damages was rooted in the ‘appropriate relief’ contemplated in section 7 (4) of the Interim Constitution for the infringement or threatened infringement of a right.<sup>87</sup> While the Court recognized that the relief contemplated was essentially relief which was required to protect and enforce the Constitution,<sup>88</sup> great dubiety was expressed in respect of ‘punitive or exemplary damages’. All the members of the Court agreed that punitive damages should not in the particular case be awarded as the common law damages claimed would be an adequate vindication of the applicant’s constitutional right if he succeeded.

However, while the Court accepted that it had the responsibility to “forge new tools” and shape innovate remedies,<sup>89</sup> ‘[c]laims for damages not purporting to provide a cent for compensation, but with the different object of producing some punitive or exemplary result, have never ... been authoritatively recognized in modern South African law.’<sup>90</sup> While this may be so, the question of punitive damages in the absence of any other remedy including common law and statutory has not been entirely ruled out. Didcott J himself observes that since the Bill of Rights is of horizontal application, sources of power other than the State such as multi-nationals would be targets for heavy delictual damages but that where ‘awards of punitive or exemplary damages against others are

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<sup>87</sup> Section 38 of the Constitution, Act 108 of 1996, provides similarly.

<sup>88</sup> Op cit n 86] para [69] at 888.

<sup>89</sup> Op cit per Ackermann J para [69] at 889.

<sup>90</sup> Op cit per Didcott J para [80] at 892.

thought appropriate at some future time, their introduction into our law must ... be not of judicial innovation but of legislative action.<sup>91</sup> Kriegler J too recognizes that punitive damages may constitute appropriate relief '[p]rovided the remedy serves to vindicate the Constitution and deter its further infringement.'<sup>92</sup>

It is submitted that while the courts being sensitive to the scarce resources of the State would for the time-being be reluctant to award damages against it,<sup>93</sup> the South African Constitution admits of such state liability especially in regard to those rights where the Constitution expressly provides for national legislation to regulate and to give effect to those rights such as equality and prevention of and protection from unfair discrimination,<sup>94</sup> access to information<sup>95</sup> and just administrative action<sup>96</sup> and perhaps where legislation is required to recognize certain traditional rights.<sup>97</sup>

The extent of state liability it is submitted cannot be unlimited. While the State is responsible for the creation and maintenance of a legal order, it cannot be held liable for every violation of a human right in the private sphere. It is suggested that the where there is a positive obligation on the State to prevent or protect an individual or individuals from violations and it fails to do so, then liability for

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<sup>91</sup> Op cit para [87] at 894.

<sup>92</sup> Op cit para [100] & [103] at 899-900.

<sup>93</sup> Op cit para [72] & [84] at 890 & 893 resp.

<sup>94</sup> Op cit n 44, section 9(4).

<sup>95</sup> Loc cit, section 32(2).

<sup>96</sup> Loc cit, section 33(3).

<sup>97</sup> Loc cit, section 15(3).

compensation may be imputed to it. The degree of liability can be assessed with reference to the current philosophy of the State at any given time with regard to balancing the individual's interest vis-a-vis with those of the interests of the community as a whole and what the State wishes to accomplish at that time with regard to the socio-political or socio-economic needs of the State for the Constitution would have as little or as much weight as the prevailing political culture would afford it.<sup>98</sup>

#### 4.5 Conclusion

A theory of liberty does not mean that equality would be trumped. What it means is that while the State's function, given its historical philosophy of repression by discrimination, is to attain towards nearly total equality, there will be instances where a zone of autonomy should be preferred to equality.

The notion of liberty endorses the view that there are areas where the Constitution cannot go without claiming at the same time that there areas or zones of autonomy and privacy beyond constitutional review. It supports the view that the Constitution is the supreme law of the land and that no right is not subject to it.

A theory of liberty does not mean that a claim to liberty will enjoy equal protection and equal merit in all situations. 'Differences in circumstances beget differences in law.'<sup>99</sup> A theory of liberty is as old

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<sup>98</sup> Op cit n 86 para [96] at 898.

<sup>99</sup> Per Justice Clark in *Burton v Wilmington Parking Authority* 365 U.S. 715 (1961).

as man himself and the law. It has always engaged the courts in balancing of rights when there has been a clash of interests. This is well known more particularly in the law of delict where matters such as the *boni mores* and public policy have always preoccupied the courts in their adjudication.

‘In the end, whether the freedom to discriminate may surpass the claim to equality and how “neutral” the forces of law may be in that conflict can only be decided in the light of a complex of considerations of varying import and relevance. The balance may be struck differently at different times, reflecting differences in prevailing philosophies and the continuing movement from *laissez-faire* government toward welfare and meliorism. The changes in prevailing philosophy themselves may sum up the judgment of judges as to how the conscience of our society weighs the competing needs and claims of liberty and equality in time and context ...’<sup>100</sup>

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Louis Henkin op cit n 50 at 494.

# THE HORIZONTAL APPLICATION OF THE SOUTH AFRICAN BILL OF RIGHTS

## CHAPTER 5

### AFRICAN CUSTOMARY LAW AND THE BILL OF RIGHTS

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# THE HORIZONTAL APPLICATION OF THE SOUTH AFRICAN BILL OF RIGHTS

## CHAPTER 5

### AFRICAN CUSTOMARY LAW AND THE BILL OF RIGHTS

#### 5.1 Introduction

Although regarded as a ‘Cinderella subject [which was] more likely to have been a deliberate policy to exclude Africans and their institutions from the mainstream of South African law’<sup>1</sup> and although whatever was recognized was ‘marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community’<sup>2</sup>, by recognizing customary law the new constitutional order in South Africa indeed takes cognizance of legal and cultural pluralism.

Whether incorporated by reason of political rhetoric or expediency or both, the truth of the matter is that customary law will come under constitutional scrutiny. With reference to the horizontal application of the Bill of Rights, this chapter will seek to establish that aspect of customary law which is sensitive and responsive to such an application and will consider proposed legislation impacting on such a sensitivity and responsiveness.

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<sup>1</sup> T W Bennett ‘The Compatibility of African Customary Law and Human Rights’ in Bennett *et al* (eds) *African Customary Law* 1991.

<sup>2</sup> Per Mokgoro J in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 para [172] at 192. See also Ch 1 *supra* at 3.3 and I Currie ‘Indigenous Law’ in Chaskalson *et al* (eds) *Constitutional Law of South Africa* 1996 36.1 at 36-1.

## 5.2 Provisions of the Constitution and Customary Law

### 5.2.1 Indigenous Law, Customary Law and Custom Distinguished

The Interim Constitution made references to indigenous law and customary law.<sup>3</sup> But however, the new text of the Constitution of South Africa makes reference to customary law only and not to indigenous law either for the reason that they are synonymous<sup>4</sup> or alternatively to avoid the enormous enterprise ‘ of deciding which rules of the customary law of Africans reside in legislation and which remain partly or wholly unwritten’.<sup>5</sup>

With reference to the text, the Constitution<sup>6</sup> specifically recognizes the existence and observance of customary law within the context of the institution, status and role of traditional leaders<sup>7</sup> but that a traditional authority which observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.<sup>8</sup> Further there is an imperative that the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.<sup>9</sup> It is evident from these provisions that the Constitution consciously distinguishes between customary law and customs. It can be concluded that customary law are those customs that have crystallized into

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<sup>3</sup> Sections 33 (2) & (3), 35 (3) and 181 (1) & (2) of Act 200 of 1993.

<sup>4</sup> A J Kerr ‘ Customary Law, Fundamental Rights, and the Constitution’ (1994) *SALJ* 720 at 722.

<sup>5</sup> June Sinclair ‘Family Rights’ in Van Wyk *et al* (eds) *Rights And Constitutionalism The New South African Legal Order* 1994 at 523.

<sup>6</sup> Act 108 of 1996, Section 211.

<sup>7</sup> *Op cit* s 211 (1).

<sup>8</sup> *Op cit* s 211 (2).

<sup>9</sup> *Op cit* s 211 (3).

and have been elevated to the status of the law by way of legislation and judicial precedent. It is suggested therefore that all that is autochthonous or indigenous in practice is not necessarily customary law.<sup>10</sup>

### 5.2.2 Application

The Constitution is quite clear that the application of customary law lies within the institution of those traditional authorities who observe a system of customary law<sup>11</sup> subject to any legislation. As far as legislation is concerned, the national legislature shares concurrent competence with the provincial legislature in respect of legislating, amending or repealing customary law and customs.<sup>12</sup> Essentially then, the application and jurisdiction of customary law is vested in state recognized traditional authorities at local government level.<sup>13</sup>

The judgment in *Bangindawo And Others v Head of the Nyanda Regional Authority And Another*<sup>14</sup> is particularly instructive in this regard. It held that the system of African customary law knew no distinction between the executive, the judicial and the legislative arms of government. The judicial, executive and law-making powers vested in kings and chiefs. The Court further stated that the notion that impartiality could only be guaranteed if the judicial, executive and legislative functions were

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<sup>10</sup> See J Church & A B Edwards 'Introduction to Indigenous Law and the Comparative Method' in Hosten *et al* (eds) *Introduction to South African Law and Legal Theory* 1995 1.1 at 1250.

<sup>11</sup> *Op cit* n 3, Chapter 12.

<sup>12</sup> *Op cit* Schedule 4 Part A.

<sup>13</sup> *Op cit*, section 212 (1) & (2).

<sup>14</sup> 1998 (3) BCLR 314 (Tk).



separated was not only alien to the social and political organization underlying African customary law but also to the values underlying it. Therefore to impose on it the requirement of independence based on the Western view would be at variance with the constitutional endeavour to retain African customary law and not debase it, as well as the constitutional endeavour to retain traditional authorities and not undermine them.<sup>15</sup>

It can be construed that the application of customary law is essentially a state function in the nature of administrative or executive acts executed through the houses of traditional leaders or through the council of traditional leaders coming under constitutional scrutiny when a right of an individual is violated or threatened with violation.<sup>16</sup> This implies the vertical application i.e. between the state and subject of the state.

Although the Constitution enjoins the courts to apply customary law when that law is applicable,<sup>17</sup> in applying the Bill of Rights to natural persons, *inter se*, the courts are enjoined to apply the common law in the absence of legislation - such application being in respect of giving effect to the right or limiting the right.<sup>18</sup> No reference is made to customary law except that when developing the customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of rights.<sup>19</sup> This omission from Section 8 (3) of the Constitution motivates two arguments.

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<sup>15</sup> Op cit pp 326-327 of the judgment.

<sup>16</sup> Op cit n 3 , section 8 (1).

<sup>17</sup> Op cit, section 211 (3).

<sup>18</sup> Op cit, section 8 (3).

<sup>19</sup> Op cit, section 39 (2).

First but somewhat tenuously, it would matter not whether the omission is deliberate or not as there is no substantial difference in the application of customary law and the common law as between private persons. The application of either will be informed by the same values underlying the Bill of Rights irrespective of considerations of cultural and legal pluralism. The result will be that principles of customary law will inevitably be integrated with those of the common law where they affect private relationships.<sup>20</sup>

Second but perhaps more cogently, if considerations of cultural and legal pluralism are indeed significant then the omission is deliberate and calculated. African customary law has been the subject of neglect during colonial and post-colonial times either for the reason that it was not understood or that it did not comport with the values as conceived within the context of European jurisprudence or both. But whatever was recognized was done so through the medium of the Black Administration Act<sup>21</sup> for the purposes of political expediency and that which was considered offensive either by reason of public policy or natural justice was expunged by the courts through the application of the 'repugnancy proviso'.<sup>22</sup> The deleterious effect of this was that customary law was removed from its social matrix and failed to be developed by the courts within the context of an African jurisprudence.

But more importantly, the very nature and character of African customary law must be considered in order to determine whether it is capable of direct or an indirect application. The woof and warp

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<sup>20</sup> See Bennett *op cit* n 1 fn 87 at 29 where such an integration has been achieved in Ghana and Nigeria.

<sup>21</sup> Act 38 of 1927.

<sup>22</sup> Section 1 (1) of the Law of Evidence Act 45 of 1988.

of African customary law is predicated on a communitarian ethic conceptualized within '[t]he context of the family, clan, ethnic solidarity or the kinship network'<sup>23</sup> rather than on the human person as individuals.<sup>24</sup> As such it primarily promotes and protects group interests, cultural and traditional rights rather than individual human rights as is contemplated by the horizontal application of the Bill of Rights between private persons. The result would be an internal conflict of laws<sup>25</sup> - group rights versus individual rights both of which the Constitution asserts and protects.

Given the fact that the courts lack an African jurisprudence,<sup>26</sup> that African customary law is socialist in nature and is best applied by traditional chiefs and headmen who have the competence<sup>27</sup> and within whose jurisdiction it is primarily reposed supports the interpretation that it is not of direct horizontal application but that the Constitution provides for the indirect incremental development of it. That where the application of a custom or customary law is violative of a private law right, it would be the ardent and urgent task of the legislature in the first instance to redress the wrong.<sup>28</sup> It is suggested therefore that an indirect horizontal application ( *mittlebare drittwirkung* ) of the Bill of Rights in

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<sup>23</sup> C R M Dlamini 'The Role of Customary Law in Meeting Social Needs' op cit n 1 at 73. See also JC Bekker 'How Compatible is African Customary Law with Human Rights? Some Preliminary Observations' 1994 (57) *THRHR* 440-447 at 441.

<sup>24</sup> See TW Bennett *African Customary Law* 1995 at 23.

<sup>25</sup> See AB Edwards 'Public And Private International Law' op cit n 10 at 1360-1361.

<sup>26</sup> See Ch 3 *supra* 3.5 at 17.

<sup>27</sup> Bennett op cit n 1 at 34.  
See also section 12 (1) Black Administration Act 38 of 1927.

<sup>28</sup> See the judgments of Sachs J in *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 para [189] at 935 and in *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) paras [365 & 366] at 785.

respect of the customary law is intended.<sup>29</sup>

### 5.3 African Customary Law in the Private Sphere

#### 5.3.1 African Customary Law and Family Law

African customary law is essentially a social system of rules ensuring the perpetuation of the family unit and clan within the kinship network and does not disregard the context of cultural and legal pluralism. It is communitarian rather than individualistic.<sup>30</sup> In this respect it is generally consonant with the second generation rights i.e. the socio-economic rights relating to social security and cultural, religious and linguistic freedoms.<sup>31</sup> It also substantially accords with international human rights norms relating to the recognition and protection of the family as the unit of society.<sup>32</sup>

Although African customary law is generally compatible with the notion of human rights, there are recognized areas that offend against fundamentally protected human rights. Nhlapo has identified a 'hit list' of certain practices in African customary law that would be violative of constitutionally protected human rights. These practices stem from the African concept of the customary marriage and have been identified as: polygyny, *lobolo*, the levirate, the sororate, child betrothal and mourning taboos.<sup>33</sup> Although there is proposed legislation to deal with these practices, it is expedient to discuss

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<sup>29</sup> See Bennett op cit n 24 at 38-39.

<sup>30</sup> Op cit n 23 & 24.

<sup>31</sup> Op cit n 6, sections 27 & 31 respectively.

<sup>32</sup> *Article 16* of the Universal Declaration of Human Rights and *Article 18* of the African Charter on Human and Peoples' Rights.

<sup>33</sup> TR Nhlapo 'The African Family and Women's Rights: Friends or Foes?' op cit n 24 at 135.

the nature and consequences of the African customary marriage as it at present exists in order to appreciate the effects of any proposed legislation.

### 5.3.2. The Nature and Characteristics of African Customary Marriages

It is generally recognized that it is those fundamental characteristics of the African customary marriage which limit the rights of women that will come into conflict with the fundamental provisions of the Bill of Rights - primarily the equality provisions relating to sex and gender discrimination.<sup>34</sup>

#### 2 5.3.1 Patriarchy

The African customary marriage was conceived within the context of an agrarian society whose survival was determined by the size of the clan which in turn depended on the family unit. A characteristic of the extended family unit unlike that of the nuclear family system of European societies,<sup>35</sup> is that the interests of the individual was subordinated in favour of the group in which the interests of males predominate. Essential elements of the family unit were patriarchy, patrilineage and primogeniture of males through males. The perpetuation of the clan within the kinship network was secured through the practice of the sororate and the levirate where the former required a younger sister to fulfil the need to procreate in the event of the death or barrenness of her sister and the latter which required a relative of a deceased husband to exploit the procreative capacities of the widow.

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<sup>34</sup> See the materials cited in this Chapter.

<sup>35</sup> See JC Bekker 'Interaction Between Constitutional Reform and Family Law' op cit n 24 at 2.

### 5.3.2.2 Polygamy, Polygyny and Polyandry

Compatible with the notion of the extended family system and the size of the clan within the kinship network is the practice of polygyny and polyandry<sup>36</sup> thus making African customary marriages polygamous in nature. Although not essentially discriminatory, the fact that polyandry is seldom ever practised, polygyny is alive and thriving and would be regarded by ardent feminists whether African or otherwise as blatantly discriminatory. Perhaps, the greatest disadvantage to the African female spouse is that because of its polygamous nature which is deemed to be offensive to Christian values of marriage and the family, the African customary marriage has failed to attain the status of a civil marriage. However, it is generally acknowledged that African women do not regard the practice of polygyny and the levirate as obnoxious.<sup>37</sup>

### 5.3.2.3 Bridewealth

Another institution of African customary marriage that would in terms of constitutional norms offend against feminists' rights is the payment of bridewealth commonly known as *lobolo*<sup>38</sup> which is a contractual undertaking by a prospective husband or the head of his family to deliver property either in cash or kind usually cattle, to the head of the prospective wife's family in consideration of a customary marriage and which would provide security and maintenance for the bride and her children whose custody rests with her upon her return in the event of the failure of the marriage through no fault of hers. Although regarded by feminists as derogating from the woman her right to dignity in

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<sup>36</sup> Polygyny relates to the practice of a husband having more than one wife, and polyandry the practice of a wife having more than one husband, at the same time.

<sup>37</sup> See June Sinclair op cit n 5 fn 224 at 560.

<sup>38</sup> Also known as *ilobolo*, *lobola*, and *bohadi*.

that her person is equated to commercialized property,<sup>39</sup> the practice of *lobolo* is entrenched as a practice within African communities as it still constitutes a family's or clan's economic status as well as social and cultural standing within the kinship.<sup>40</sup>

#### 5.3.2.4 Other Discriminatory Practices

African custom established on the patrilineal extended family system, does not recognize proprietary rights of women as all property acquired during the subsistence of a customary marriage accrued to the male family head and upon his death would devolve in terms of African customary law of succession on the eldest male descendant. However, the capacity of Black women<sup>41</sup> was improved when Section 11A of the Black Administration Act conferred limited proprietary rights and obligations on them in respect of the acquisition of leasehold, sectional title and ownership of immovable property. This provision attempts to reduce the stifling effects of customary marriages on African women in respect of proprietary rights in that they can sue and be sued but neglects non-proprietary rights.<sup>42</sup>

#### 5.3.2.5 The Current Status of African Women in Customary Marriages

In contrast to women whether African or otherwise whose marriages have been celebrated in terms

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<sup>39</sup> See June Sinclair op cit n 5 at 565.

<sup>40</sup> See CRM Dlamini op cit n 23 at 78-79.

<sup>41</sup> African and Black are used synonymously.

<sup>42</sup> See Kim Robinson 'The Minority and Subordinate Status of African Women Under Customary Law' (1995) *SAJHR* 457-476 at 462.

of the Marriage Act of 1961<sup>43</sup>, African women married according to custom remain shackled to the marital power of their husbands. In civil marriages as recognized in terms of the Marriage Act, married women now enjoy equality with their husbands irrespective of the marital regime by which they may be bound. This is so because the marital power of their husbands has been removed by statute thereby conferring upon them legal capacity as well as *locus standi in judicio* equivalent to that of their spouse.<sup>44</sup>

The position of African women in customary marriages remains invidious to the fundamental right to equality and freedom from discrimination by reason of gender or sex.<sup>45</sup> Perpetual tutelage under the guardianship or marital power of the husband is sustained by statute. Section 11 (3)(b) of the Black Administration Act<sup>46</sup> expressly declares all Black women except those permanently residing in KwaZulu-Natal to be minors under the guardianship of their husbands whereas those women residing in KwaZulu-Natal though not considered minors are in terms of section 27(3) of both the KwaZulu Act on the Code of Zulu Law<sup>47</sup> and the Natal Code of Zulu Law<sup>48</sup> to be subject to the marital power of their husbands. As regards the previous independent states i.e. the TBVC states the

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<sup>43</sup> Act 25 of 1961.

<sup>44</sup> See the relevant provisions of the Matrimonial Property Act 88 of 1984 which applied only to marriages celebrated after the commencement of the Act i.e. 1 November 1984, and the General Law Fourth Amendment Act 132 of 1993 which abolished the marital power of the husband in all marriages even those African civil marriages registered in terms of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. See also June Sinclair op cit note 5 541-542 together with relevant footnotes.

<sup>45</sup> There appears not to be any distinction between sex and gender in the Constitution. See AJ Kerr op cit n 4 fn 14 at 723.

<sup>46</sup> Act 38 of 1927.

<sup>47</sup> Act 16 of 1985.

<sup>48</sup> Proc R151 of 1987.



status of African women is more complex. Section 3 of the Transkei Marriage Act<sup>49</sup> equates the status of customary marriages with those of civil marriages and recognizes the simultaneous subsistence of these. This notwithstanding, section 37 provides that in both civil and customary marriages the wife shall be under the guardianship of the husband and that in terms of section 39 his marital power cannot be affected in any way.

All of these provisions in terms of the values underpinning the notion of human rights in the Constitution are noxious to the emancipation of African women married by customary law. They are not only violative of the right to equality and freedom from discrimination but also of other rights such as the right to dignity, freedom and security of the person as well as the right to be free from all forms of violence from either public or private sources, and the right to bodily and psychological integrity.<sup>50</sup>

#### 5.3.2.6 The Current Status of African Customary Marriages

African customary marriages in terms of existing legislation do not enjoy equal status with those of civil marriages registered under the Marriage Act except in the Transkei. Section 22 (1) of the Black Administration Act 38 of 1927, however, allows a man and a woman between whom a customary union subsists to contract a civil marriage provided that the man is not already a partner to a subsisting customary union with another woman. In terms of Section 22 (2) but subject to subsection

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<sup>49</sup> Act 21 of 1978.

<sup>50</sup> See Kim Robinson *op cit* n 42 for an exhaustive analysis of the effects of Section 11 (A) of the Black Administration Act 38 of 1927 and Section 27 (3) of the KwaZulu Act on the Code of Zulu Law, Act 16 of 1985.

1, no person who is a partner in a customary union shall be competent to contract a civil marriage during the subsistence of that union.<sup>51</sup> In other words, there cannot be a customary marriage and a civil marriage subsisting simultaneously. In effect the existence of a customary union is an impediment to a civil marriage except between the partners to an existing customary union.

Although customary unions could be registered<sup>52</sup> and although they could be solemnized as a civil marriage, if reference is had to the definition of a customary union and marriage in terms of the Black Administration Act, the position of a customary marriage is nebulous. In terms of the Act, a 'customary union' means the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is a party to a subsisting marriage. And a 'marriage' is described as a union of *one man with one woman*<sup>53</sup> in accordance with any law for the time being in force in any Province governing marriages, but does not include any union contracted under Black law or custom.<sup>54</sup>

What then is urgently required to alleviate the inequalities relating to African women in customary unions is legislation to recognize customary marriages in conformity with civil marriages so that married women would enjoy equal status with their husbands while also appealing the fundamental rights asserted by the Constitution.

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<sup>51</sup> Section 22 (1) & (2) of the Black Administration Act 38 of 1927 was amended by Section 1 (a) & (b) of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

<sup>52</sup> Section 22 (*bis*) of the Black Administration Act 38 of 1927.

<sup>53</sup> Own emphasis.

<sup>54</sup> *Ibid* section 35.

### 5.3.3 Proposed Legislation

Two bills which have been proposed to resolve the inequities resulting from customary marriages and customary succession have been tabled before the National Assembly for debate and assent. These are the Recognition of Customary Marriages Bill and the Amendment of Customary Law of Succession Bill.<sup>55</sup>

#### 5.3.3.1 Recognition of Customary Marriages Bill

The principal object of this Bill is to recognize and give full legal status to marriages entered into in accordance with indigenous law or traditional rites thereby improving the position of women and children that will be consistent with the provisions of the Constitution. With reference to the definitions in clause 1, 'customary law' means the customs and usages traditionally observed among the indigenous African peoples of South African and which form part of the culture of those peoples. The Bill therefore does not relate to any other forms of customary marriages celebrated under any other system of family law.

##### 5.3.3.1.1 Recognition, Requirements and Registration of Customary Marriages.

The Bill recognizes both existing and future customary marriages whether monogamous or polygamous save that those marriages yet to be celebrated will have to conform with certain requirements of the Bill.<sup>56</sup> Primarily these are that the prospective spouses must be above 18 years

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<sup>55</sup> Bill No. B110-98 tabled on 25 August 1998 & Bill No. 109-98 tabled on 23 July 1998 and are being debated contemporaneously with the writing of this chapter.

<sup>56</sup> Bill No. 110-98 clause 2.

of age and must have given their consent to such a marriage which must be celebrated in accordance with customary law.<sup>57</sup> Clause 4 provides for the formalities of registration of existing and future customary marriages but failure to do so does not affect its validity nor does it attract a penalty. This is salutary in the sense that to import a declaration of invalidity would perpetrate hardship on the female spouse in communities that are largely rural and illiterate. But there are obvious disadvantages in that proof of the marriage with consent as well as agreements relating to the patrimonial consequences will be difficult to establish in the event of a dispute. It is suggested that the traditional authorities could do much in enforcing compliance by embarking on massive and effective education programmes failing which iniquities would perpetuate.

#### 5.3.3.1.2 Status of and Patrimonial Consequences for Spouses in Customary Marriages

Although the Bill proposes equal status in all respects for both spouses in a customary marriage,<sup>58</sup> clause 7 proposes important consequences for existing and future customary marriages.

As far as existing marriages are concerned customary law determines the proprietary consequences of the marriage which means that there is no improvement in the position of the female spouse and her children. Any interference there could result in an odd dysfunction to any existing arrangements and could result in family dislocation and social conflict. Nonetheless, the Bill allows a person who is a spouse to an existing marriage to apply jointly with that person's spouse or spouses to a court,

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<sup>57</sup> Ibid clause 3.

<sup>58</sup> Ibid clause 6.

i.e. the High Court<sup>59</sup> for an order to change the existing matrimonial property system and authorize the parties to such a marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages would be regulated on the conditions determined by the court.<sup>60</sup> By the application of this mechanism many of the iniquities that are attendant upon the patrimonial consequences governed by customary law could be avoided. It may be added that the potential for breach of contract is enormous given the existing subordinate position of the female spouse. Another point of observation is that where no contract is entered into and where the proprietary consequences are determined by customary law, any conflict that may arise in respect thereof will have to be resolved by the courts in terms of customary law save that in doing so a court will have to be informed by the spirit, purport and objects of the Bill of Rights - the indirect application therefore.

Clause 7 (5) allows a spouse to an existing marriage to enter into a further marriage or marriages. Such a spouse must make an application in a prescribed manner and the application must be brought jointly with all interested parties so as to enable a court to grant an order that will allow for the equitable distribution of property. This provision perpetuates the practice of customary marriages and legitimizes the institutions of polygyny and the levirate as well as polyandry and the sororate.

As far as future customary marriages are concerned in which a spouse is not also a spouse to any other existing customary marriage or marriages, such a marriage will be deemed to be a marriage in

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<sup>59</sup> Ibid clause 1.

<sup>60</sup> Ibid clause 7 (4).

community of property and of profit and loss unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial system of their marriage.<sup>61</sup> Where the marriage is deemed to be in community of property, Chapter III and sections 18,19 and 20 of Chapter IV of the Matrimonial Property Act<sup>62</sup> shall apply.

#### 5.3.3.1.3 Change of Marriage System and Divorce

While the Bill legitimizes existing customary marriages the patrimonial consequences of which are to be governed by customary law, it also allows for partners to such an existing marriage to solemnize their marriage in accordance with the Marriage Act, 25 of 1961 provided that they are not partners to any other subsisting customary marriage. Once so registered the customary marriage is deemed to be dissolved and the matrimonial property of the civil marriage is deemed to be governed by the relevant provisions of the of the Matrimonial Property Act<sup>63</sup> unless superceded by a notarially attested contract. Once a civil marriage has been contracted all other marriages are prohibited during the subsistence of the marriage.<sup>64</sup>

Another provision in the Bill that can be construed as attenuating any iniquities arising from existing customary marriages is that such marriages can now only be dissolved by an order of the court based

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<sup>61</sup> Ibid clause 7 (2).

<sup>62</sup> Act 88 of 1984. Chapter III allows for equal and concurrent administration of the joint estate and the relevant provisions of Chapter IV deal with several liability or entitlement of the spouses in respect of non-patrimonial damages.

<sup>63</sup> Act 88 of 1984, Chapter III and Sections 18,19 & 20 of Chapter IV.  
See also n 58.

<sup>64</sup> Op cit n 55 Clause 10.

on the ground of irretrievable breakdown.<sup>65</sup> Where this happens then the relevant provisions of the Divorce Act, 1979 (Act No. 70 of 1979) and the Mediation in Certain Divorce Matters Act, 1987 (Act 24 of 1987) come into play.<sup>66</sup> The courts are empowered to make orders relating to custody or guardianship of any minor child of the marriage as well as orders for the payment of maintenance which would take into account any payment made in accordance with customary law.<sup>67</sup>

### 5.3.3.2 Amendment of Customary Law of Succession Bill

The existing customary law of succession which sustains the practice of primogeniture of males through males and universal succession is offensive not only to gender equality but substantive equality of women and children irrespective of gender. This practice is legislated in terms of section 23 of the Black Administration Act.<sup>68</sup>

The Amendment of Customary Law Succession Bill<sup>69</sup> proposes to extend the South African law of testate and intestate succession to all persons so as to bring it into conformity with the Constitution. Clause 2 (2) in particular makes the Intestate Succession Act applicable to the estate of a person who was a party to a valid customary marriage that subsisted at the time of that person's death. Clause 3 makes the Administration of Estates Act, 1965 ( Act 66 of 1965) applicable to the administration of all estates.

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<sup>65</sup> Ibid Clause 8 (1) & (2).

<sup>66</sup> Ibid Clauses 8 (3) & (5) resp.

<sup>67</sup> Ibid Clause 8 (7).

<sup>68</sup> Op cit n 46

<sup>69</sup> Bill No. B109-98.

## 5.4 Conclusion

It is apparent from the texts of both Bills that the legislature is attempting to improve the position of women and children who suffer under the unequal discriminatory practices of customary law.

The Bill on the recognition of customary marriages undoubtedly lays the foundation for a uniform code of marriage and provides a structure for the future recognition of marriages concluded under any tradition, or a system of religious, personal or family law.<sup>70</sup> This is essential to avoid conflicting judgments in the case of the recognition of other forms of customary marriages, particularly marriages concluded under the system of Islamic law. The following cases illustrate this.

In *Ryland v Edros*<sup>71</sup> the court in determining the validity of a contractual agreement between the spouses to a Muslim marriage, took the view that potentially but not actually polygamous unions entered in under the tenets of the Muslim faith and Islamic law were not *per se* contrary to public policy. Such public policy was to be informed by the principles of equality and tolerance of diversity in a plural society and that it was inimical to all the values underlying the Interim Constitution (thus also the Constitution) for one group to impose its sense of values on another. In a show of judicial activism and revisionism in applying and developing the common law, the Court effectively set aside the judgment in *Ismail v Ismail*<sup>72</sup> where the Appellate Division of the Supreme Court declared Islamic marriages as invalid for being contrary to public policy.

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<sup>70</sup> See Section 15 (3) (a) (i) of the Constitution, Act 108 of 1996.

<sup>71</sup> 1997 (1) BCLR 77 (C).

<sup>72</sup> 1983 (1) SA 1006 (A).



However, in *Amod v Multilateral Motor Vehicle Accident Fund*<sup>73</sup> the Court in applying and developing the common law, took a conservative and executive-minded approach in determining the validity of Islamic marriages. Distinguishing itself from *Ryland v Edros*<sup>74</sup>, the Court held that developing the common law did not mean that a court could eliminate or alter the common law. This was a function of the legislature<sup>75</sup> for to do so it would be arrogating to itself legislative power which it did not have.<sup>76</sup> Accordingly, it held that it could not alter the established law by importing into it a principle that a duty to support not founded in a lawful marriage is sufficient to ground the liability which the plaintiff *in casu* sought to enforce against the defendant.

It is submitted, however, that the High Courts as well as the Constitutional Court have the inherent power to develop the common law and to give effect to a right where the legislature does not do so and could therefore eliminate or alter the common law if it is in the interest of justice. It is suggested that that would be the case where women married in accordance with Islamic law would no longer suffer the discrimination of a law that did not recognize the systems of marriages that are typical of plural societies apart from considerations of the constitutional guarantees of equality, freedom, dignity and cultural diversity.

The Recognition of Customary Marriages Bill which proposes the repeal of existing legislation that perpetuates the discrimination of married women under customary law must be seen to be a victory

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<sup>73</sup> 1997 (12) BCLR 1716 (D).

<sup>74</sup> Op cit n 71.

<sup>75</sup> Op cit n 73 at 1723 H-I.

<sup>76</sup> Op cit at 1725 C.

for both feminist scholarship<sup>77</sup> and male chauvinism.<sup>78</sup> It appeals to those ‘academic devotees’<sup>79</sup> who clamour for the preservation of customary law seen in its true context and attempts not to throw out the baby with the bath water but ‘to salvage a “usable residue” of Africanness which will enhance rather than diminish the human rights ideal in family law.’<sup>80</sup>

The Bill bridges the gap between the ‘old’ and the ‘new’. It not only gives expression to cultural pluralism as envisaged in the Constitution<sup>81</sup> but also acknowledges the duality of legal systems and legal pluralism which envisages the appearance and development of an African jurisprudence Afro-centric in nature. And in striving to preserve African cultural traditions it attempts to reconcile these values with those espoused by the Constitution. It comports with and is consonant with the theory of liberty<sup>82</sup> for it allows African spouses the freedom of choice between a customary marriage and a civil one but not both - it does not interfere with the ordering of private lives. But above all, it sustains and entrenches the notion of a democracy founded on human dignity, equality and freedom.

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<sup>77</sup> June Sinclair op cit n 5 and Kim Robinson op cit n 42.

<sup>78</sup> CRM Dlamini op cit n 23.  
It appears that a major criticism by the IFP is that the Bill ‘westernizes’ African customary marriages. See the editorial comment ‘Legal Tangles’ in the *Daily News* Wednesday, November 4, 1998 at 8.

<sup>79</sup> See the materials cited in this Chapter.

<sup>80</sup> TR Nhlapo op cit n 33 at 141.

<sup>81</sup> Op cit n 70 Sections 30 & 31.

<sup>82</sup> See *supra* Ch 4 at para 4.1.3 at 16.

## CONCLUSIONS

The new text of the Constitution of the Republic of South Africa, 1996, unequivocally and unambiguously asserts that a provision of the Bill of Rights binds a natural or juristic person. The horizontal application of the bill is therefore entrenched in that violations of the rights of victims by private actors in the private sphere henceforth comes under constitutional scrutiny. But the text does not answer away all the apprehensions expressed by the majority in *Du Plessis v De Klerk*.

This study which analyzes the text with reference to those apprehensions produces certain conclusions.

The horizontal application of the Bill of Rights envisages and augurs the innovation and development of a constitutional jurisprudence peculiar to the South African historical, social and political context. This as a consequence can only be attributed to a judiciary inspired by a judicial activism committed to judicial revisionism. The study reveals that such a consequence may also be attributed to the fact that the constitutional jurisprudence of foreign international law may not always be apposite such as the 'state action' doctrine of the United States of America. A constitutional jurisprudence premised on constitutional supremacy that scrutinizes private action heralds the demise of the public/private dichotomy predicated on parliamentary sovereignty and legal positivism; if not its demise, then at least its de-emphasis.

The application of the Bill of Rights in terms of the text of the Constitution does not allow for an unqualified application in the private sphere since reference must be had to the nature of the right and the duty imposed by the right. This task is reposed on the judiciary which will have to develop a jurisprudence on a case by case basis. The 'egregious caricature' of interference in the private sphere that was so vehemently portrayed in *Du Plessis v De Klerk* is exorcized if a doctrine of law established on a theory of liberty is accepted and recognized. Such a theory confirms the existence of spheres of private autonomy that is inviolate and beyond constitutional scrutiny. But the sacrosanctity of such spheres of private autonomy is not absolute. They indeed lose their innermost

cores of intimacy once the private action assumes a public character.

The study also reveals that areas of the law that were almost entirely neglected before the advent of constitutionalism is now coming under the immediate scrutiny and attention of the legislature. The proposed bills relating to the recognition of African customary marriages and the repeal of the laws of African succession are attempts to constitutionalize these practices in accordance with the values and norms enshrined in the Constitution and within the context of equality jurisprudence.

It reveals too that foundations are being laid for the development of a constitutional jurisprudence and dynamic that is seriously committed to a democracy predicated on human dignity, equality and freedom.

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