

Chapter 31

Application

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Application

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

(2) 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.

(3) When applying a provision of the Bill of Rights to a natural or 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).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.¹

31.1 Introduction*

(a) A road map

There is more, much more, to 'application' than the text above might suggest. One purpose of this introduction is to offer a road map of the complex terrain this chapter will traverse.

When jurists, lawyers and academics say they wish to talk about the application of the Bill of Rights under the Final Constitution, by and large, they have a single vexed question in mind: Upon whom do the burdens of the Bill of Rights fall? That is,

¹ Constitution of the Republic of South Africa 108 of 1996 ('Final Constitution' or 'FC').

they want to know (or they want to tell us), as a general matter, which kinds of persons or parties may have the substantive provisions of the Bill of Rights enforced against them, what kinds of laws attract meaningful scrutiny and what conditions or circumstances must obtain for a substantive provision to be said to apply to a given dispute. But let's bracket this question of burdens for just a moment.

Application embraces a host of other issues that are all at least notionally associated with the benefits of the Bill of Rights. Even that characterization, however, subordinates substance to style. In § 31.3, we look at 'benefits' in their most obvious sense. The text of most of the rights that appear in FC ss 9 through 35 tell us that 'everyone' enjoys them. That said, some rights expressly constrain the universe of persons entitled to their benefit — eg, citizens or children. With respect to others rights, the extension of their benefits is unclear. In the case of juristic persons, aliens and fetuses, the question of benefits may still generate controversy.

In § 31.7, we look at benefits through the prism of 'waiver'. Many jurists, lawyers and academics like to speak as if the persons entitled to the benefit of

* I have benefited enormously from extended discussions on this subject with Frank Michelman and Danie Brand. Their very substantial contributions are recognized throughout the text. Anthony Stein's and Theunis Roux's discipline, as editors, has saved me more than once from myself. Any remaining errors in argument or infelicities in style are my responsibility alone.

a right may waive that same right. As we shall see, however, like talk of ghosts, the grammar of 'waiver-talk' creates the illusion that we are in fact referring to something that exists. Waiver is a great example of language gone on holiday. For, in truth, there is no such thing as waiver.

In § 31.8, we look at benefits from the perspective of temporal application. Temporal application encompasses two discrete questions. First, and most importantly, can the Bill of Rights benefit persons retrospectively? Secondly, which Constitution, Interim or Final, applies to matters in respect of which the cause of action arose before the Final Constitution's commencement, but after the Interim Constitution's commencement, and are being heard now, after the Final Constitution's commencement? As one might expect, issues of temporal application will recede with time.

In § 31.6, we look at a question of benefits that will certainly not recede with the passage of time. That question is whether the Bill of Rights has extraterritorial effect. This question itself generates two different, though related, queries. When, if at all, does the Bill of Rights benefit some persons — and burden others — in disputes that occur beyond South Africa's borders? To what extent, if any, does the Bill of Rights benefit South African nationals in legal proceedings adjudicated in foreign courts by foreign states under foreign law. Both questions, but especially the latter, have troubled the Constitutional Court of late.

In § 31.5, we look at benefits in terms of how courts go about reconciling substantive provisions of the Bill of Rights and other constitutional provisions that appear, at first blush, to conflict with one another. While the Bill of Rights contains a number of operational provisions that guide the courts with respect to conflicts between fundamental rights, no provision speaks directly to the resolution of tensions between Chapter 2 and non-Chapter 2 provisions. As a result, our courts have been obliged to develop doctrine designed to harmonize the demands of fundamental rights with the dictates of constitutional provisions that engage the exercise of power by various other branches or spheres of government.

By now it should be clear that talk about benefits is more than a mere throat clearing exercise. But, of course, what I really want to talk about *is* the big question: *when and against whom* can a beneficiary enforce her fundamental rights. The answer to this question appears, in various forms, in § 31.2, in § 31.4, and the appendix to this chapter.

In § 31.2, I rehearse briefly the terms and the outcome of the application debate under the Interim Constitution.² I do so because past is, quite obviously, prologue: the drafters of the Final Constitution spoke directly to concerns about the text of the Interim Constitution; the Constitutional Court accepts the invitation of the drafters of the Final Constitution's invitation to revisit — and to recast — the application doctrine developed under the Interim Constitution. In addition to an abbreviated analysis of the Court's application doctrine under the Interim Constitution, § 31.2 contains an assessment of the general jurisprudential concerns that framed the initial debate and that recur, albeit in transmogrified form, under the Final Constitution.

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This discussion retains its currency because I have chosen not to repeat these arguments within § 31.4.

In § 31.4, I take on more immediate concerns of what application doctrine is, and ought to be, under the Final Constitution. My manner of approach to application doctrine in § 31.4 warrants a few prefatory remarks.

§ 31.4 begins with the Constitutional Court's articulation of the black letter law on application in *Khumalo v Holomisa*.³ The *Khumalo* Court does not explain in any detail what the various sections of FC s 8 mean or how they are designed to work. This lack of transparency requires me to offer a good faith reconstruction — an amplification if you will — of the application doctrine articulated by the *Khumalo* Court.

This good faith reconstruction cannot be the last word on the application doctrine under the Final Constitution. Although the good faith reconstruction fleshes out the *Khumalo* Court's conclusions in a manner that coheres with the judgment's various textual and jurisprudential premises, even a reconstructed *Khumalo* is unsatisfactory and, ultimately, unredeemable.

§ 31.4 engages this good faith reconstruction in a number of different ways. § 31.4 sets out four primary doctrinal objections to the *Khumalo* Court's statement of the law. These four objections are grounded, to varying degrees, in conflicting statements by the Constitutional Court — as well as courts of more general jurisdiction — about what each of the subsections in FC s 8 and FC s 39 should be understood to mean. § 31.4 thus offers an account of a second body of black letter law: namely, what the courts have said the discrete subsections — FC ss 8(1), 8(2), 8(3) and 39(2) — denote. (For lawyers, jurists and academics who *only* want to know what the courts have said about FC ss 8(1), 8(2), 8(3) and 39(2), § 31.4 provides an exhaustive account.) This black letter law governs subjects as diverse as the meaning of the term 'all law', the binding of the judiciary, the legislature, the executive and organs of state, how the common law is to be developed and transformed, the creation of new remedies under the Bill of Rights, as well as such

2 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

3 *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) ('*Khumalo*').

doctrines as reading down, shared constitutional interpretation, *stare decisis* and objective normative value systems.

In an ideal world, the general framework articulated in *Khumalo* would be internally (logically) consistent and would be externally consistent with (map directly on to) the courts' express understanding of what the specific sections in FC s 8 and FC s 39 signify and the manifold doctrines they generate. In other words, *Khumalo* would provide the edifice, and other cases that had a bearing on our understanding of application would slot neatly into its structure. As we shall see in § 31.4, the dissonance created by the disjunction between the black letter law on the general framework for application analysis and the black letter law on the meaning of its various textual components constitutes one of the primary grounds for rejecting the Court's current application doctrine. In its stead, § 31.4 offers a *preferred reading* that meets all of the doctrinal objections to *Khumalo* and, concomitantly, gives each of the constituent parts of the text, and the related doctrines they generate, a reading that fits the general framework for application.

For those readers who wish to immerse themselves in the finer points of

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application doctrine, a detailed appendix takes stock of the most important interventions made by other commentators on this subject. These academic contributions ought not to be considered mere arcana. At their best, these arguments develop, in full, theories of application merely hinted at in judicial opinions and about which the text is, inevitably, mute.

I hope that this road map gives the general reader an initial sense of how this chapter addresses the existing law on application. To further facilitate this understanding, I have set out directly below both a brief account of the black letter law — and a digest of my preferred readings — under both the Interim Constitution and the Final Constitution. This discursive effort is followed by two decision trees that attempt to lay bare the mechanics of application analysis under the Interim Constitution after *Du Plessis* and under the Final Constitution after *Khumalo*.

(b) Application Doctrine under the Interim Constitution

The Constitutional Court answered the question of burdens under the Interim Constitution in *Du Plessis & Others v De Klerk & Another*.⁴ The facts, the holdings, and the reasoning in that case are discussed at length below in § 31.2. This thumbnail sketch of *Du Plessis* merely adumbrates the choices that the Constitutional Court had before it under the Interim Constitution and some of the arguments that the Constitutional Court once again engaged, at least tacitly, in *Khumalo* under the Final Constitution.

According to the prevailing pre-*Du Plessis* discourse, the Constitutional Court had two options. It could take a vertical approach. On such a reading of the text, the Bill of Rights' substantive provisions engaged directly only legal relationships between the state and the individual. It could take a horizontal approach. On such a reading, all legal relationships between the state and the individual *and* all legal relationships between private persons would have been subject to direct review for conformity with the specific substantive rights set out in IC Chapter 3.

4 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) ('*Du Plessis*').

Despite this basic difference in orientation, every jurist, practitioner or academic interpreting the Interim Constitution was committed to the following three propositions. Statutes, when relied upon by the state, were subject to constitutional review. Statutes, when relied upon by a private party in a private dispute, were subject to constitutional review. The common law, when relied upon by the state, was subject to constitutional review. Moreover, almost every jurist, practitioner and academic agreed that the heart of the application debate was whether the common law, when relied upon by a private party in a private dispute, was subject to constitutional review.

On this heart of the matter, the majority of the Constitutional Court in *Du Plessis v De Klerk* came firmly down on the side of verticality. The *Du Plessis* Court held that the substantive provisions of the Bill of Rights of the Interim Constitution applied only to law emanating from the legislature or the executive and to the conduct of these two branches of government. Driven by a 'traditional' view of what constitutions do, and bewitched by a text that ostensibly did not apply to all law or bind the judiciary, the *Du Plessis* Court endorsed a doctrine whose most

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notable feature was its insulation of common law disputes between private parties from direct application of the substantive provisions of the Bill of Rights.

This chapter offers several demurrals to the *Du Plessis* doctrine. As three dissenting justices in *Du Plessis* noted, the text did not settle the debate. But it did lead the *Du Plessis* Court to the jurisprudentially untenable conclusion that while rules of common law that govern disputes between private parties are not subject to direct application of the substantive provisions of the Bill of Rights, (because constitutions traditionally do not apply to relations between private parties), rules in statutes or regulations that govern disputes between private parties are subject to direct application of the substantive provisions of the Bill of Rights. So the 'fact' that a legal dispute is between private parties would appear to be a necessary *but not a sufficient* condition for the *Du Plessis* Court's conclusion. Indeed, it is hard to know whether it should be called a 'condition' at all. I call the very logic of the *Du Plessis* Court into question because whether the law governing a dispute between private parties was subject to direct application under the Interim Constitution was entirely and fortuitously contingent upon the form the law took. Embedded in the *Du Plessis* Court's differential treatment of these two bodies of law is the premise that the common law — unlike legislation — protects a private ordering of social life that is neutral between the interests of various social actors. That premise is false. Moreover, abstention from constitutional review of common-law rules functions as a defence of deeply entrenched and radically inegalitarian distributions of wealth and power by immunizing from review those rules of property, contract and delict that sustain those inegalitarian distributions. The differential treatment of the two bodies of law also rests on a traditional distinction between the public realm and the private realm. At a minimum, this distinction fails to recognize the extent to which the state structures all legal relationships. With the ineluctable erosion of the public-private divide, one of the last justifications for treating common law and legislation differently disintegrates as well. What we are left with is a doctrine that traditionally produces an incoherent body of decisions and that cannot explain why courts, perfectly capable of vindicating autonomy interests when asked to review statutory provisions governing private relationships for consistency with the Bill of Rights,

prefer not to subject common-law rules governing private relationships to the same form of scrutiny.⁵

(c) Application Doctrine under the Final Constitution

Du Plessis effectively foreclosed debate on the direct application of the substantive provisions of the Interim Constitution's Bill of Rights to rules of common law governing private disputes. The drafters of the Final Constitution, however, reconsidered the Interim Constitution's provisional position on application. Unlike the Interim Constitution, the Final Constitution's Bill of Rights points unequivocally toward a much broader conception of direct application: FC s 8(1) states that the Bill applies to 'all law' and binds 'the judiciary'; FC s 8(2) states that the provisions of the Bill will bind private persons.

In *Khumalo*, the Constitutional Court accepted the Final Constitution's invitation to broaden its conception of the law and the relationships to which the substantive provisions of the Bill of Rights apply directly. The signal difference between *Du Plessis* and *Khumalo* is that the *Khumalo* Court reads FC s 8(2) to mean that some of the specific provisions of the Bill of Rights will apply directly to some disputes between private parties some of the time.

The black letter law on application in terms of *Khumalo* takes the following form.

FC 8(1) stands for the following two propositions:

- All law governing disputes between the state and natural persons or juristic persons is subject to the direct application of the Bill of Rights.
- All state conduct that gives rise to disputes between the state and natural persons or juristic persons is likewise subject to the direct application of the Bill of Rights.

FC 8(2) stands for the following proposition:

- Disputes between natural persons and/or juristic persons *may* be subject to the direct application of the Bill of Rights, if the specific right asserted is deemed to apply.

FC 8(3) stands for the following proposition:

5 I have employed the terms verticality and horizontality above and shall continue to do so in this chapter where necessary. However, it seems fairly clear that these two terms have outlived their usefulness and that the current debate over application warrants a change in nomenclature. The post-*Khumalo* black letter law on application and the preferred reading of those same application provisions eschew any mention of verticality or horizontality. The debate over application of the Bill of Rights is now best characterized solely in terms of direct and indirect application. Direct challenges describe instances in which the prescriptive content of at least one specific substantive provision of the Bill of Rights applies to the law or to the conduct at issue. Indirect challenges describe instances in which the prescriptive content of no specific provision of the Bill of Rights applies to the law or to conduct at issue. Indirect challenges rely upon the spirit, purport and objects of the entire Bill to interpret or to develop the law in order to settle the dispute before the court. (That is not to say that a specific right might not be relevant — in some way, say as value, and not as a rule — to an indirect challenge. I only claim that there must be a distinction with a difference between the direct application of a right and the relevance of a right to a more amorphous assessment of whether a rule of law remains in step with the general spirit of our constitutional order. See *Minister of Home Affairs v National Institute for Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC)(On the difference between how constitutional norms operate as values and how they operate as rules.))

- Where direct application of the right asserted occurs in terms of FC s 8(2), and the court further finds a non-justifiable abridgment of that right, then the court must develop the law in a manner that gives adequate effect to the right infringed.⁶

For reasons the judgment does not adequately explain, the *Khumalo* Court chose to ignore FC s 8(1)'s injunction that the Bill of Rights applies to 'all law'

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and binds 'the judiciary'. One might have thought that such an explanation was warranted, given that it was precisely the absence of these phrases — 'all law' and binds 'the judiciary' — in a comparable section of the Interim Constitution that led the *Du Plessis* Court to reach the conclusion that the Interim Constitution's Bill of Rights did not apply directly to disputes between private parties governed by the common law. The *Khumalo* Court claims instead that had it given FC s 8(1) a gloss that ensured that the substantive provisions of the Bill of Rights applied to all law-governed disputes between private parties — regardless of the provenance of the law — it would have rendered FC s 8(3) meaningless. That particular assertion is unfounded — or at the very least radically under-theorized.

While it is quite easy to poke holes in the gossamer thin fabric of *Khumalo*, such victories, pyrrhic as they are, do not advance understanding. In § 31.4, I offer a good faith reconstruction of *Khumalo*. This good faith reconstruction fleshes out the *Khumalo* Court's conclusions in a manner that simultaneously coheres with its jurisprudential commitments, avoids surplusage in so far as these commitments permit, and satisfies basic considerations of textual plausibility and naturalness. The good faith reconstruction begins with a perfectly understandable and workable distinction between a constitutional norm's range of application and that same norm's prescriptive content. The 'range of application' speaks to FC s 8(1)'s commitment to ensuring that each and every genus of law is at least formally subject to the substantive provisions of the Bill of Rights. The 'prescriptive content' speaks both to FC s 8(2)'s invitation to apply the substantive provisions of the Bill of Rights to disputes between private parties and to the interpretative exercise required to determine whether a given substantive provision of the Bill is meant to engage the kind of dispute before the court. However, even this effort to put *Khumalo* on the most solid footing possible comes up short in four significant ways.

The *Khumalo* Court quite consciously crosses over the public-private divide. The text of the Final Constitution left it little choice. But *Khumalo*'s one step forward is followed by two steps back. Whereas *all* disputes between the state and an individual are subject to the direct application of the Bill of Rights under the Final Constitution, *Khumalo* tells us that only *some* disputes between private parties will be subject to *some* of the provisions of the Bill of Rights. This revised public-private distinction in application jurisprudence creates the following anomaly.

In *Du Plessis*, the traditional view of constitutional review was used to *suppress* direct application of the Bill of Rights with respect to disputes between private

⁶ FC s 39(2), although not engaged expressly in *Khumalo*, stands, under a secondary body of black letter law, for the following three propositions:

- Where an asserted right is, under FC s 8(2), deemed not to apply directly to a dispute between private parties, the court may still develop the common law or interpret the apposite provision of legislation in light of the more general objects of the Bill of Rights.
- Even where a right is asserted directly, the court may still speak as if a finding of inconsistency or invalidity requires that a new rule of common law be developed in terms of FC s 39(2).

parties governed by the common law. In *Khumalo*, the traditional view of constitutional review is used to *defer* — and potentially suppress — direct application of the Bill of Rights with respect to disputes between private parties. Here's the rub. Direct application is deferred — and by that I simply mean turned into a question of interpretation — with respect to *all* disputes between private parties. It matters not whether the law governing disputes between private parties is grounded in statute, subordinate legislation, regulation, common law or customary law. Put slightly differently, whereas the Interim Constitution's Bill of Rights was understood to apply directly, and unequivocally, to legislation that governed private disputes, the Final Constitution's Bill of Rights does not. Less law is subject to the direct unqualified application of the Bill of Rights under the *Khumalo* Court's reading of the Final

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Constitution than it was under the *Du Plessis* Court's reading of the Interim Constitution.

Doctrinal tension generates a second objection. The Constitutional Court has constructed a powerful set of doctrines in which (1) every exercise of state power is subject to constitutional review and (2) every law is subject to the objective theory of unconstitutionality. Much is rightly made of the Constitutional Court's bold assertion in *Fedsure*,⁷ *Pharmaceutical Manufacturers*⁸ and their progeny that all law derives its force from the basic law — the Final Constitution — and that all law, and all conduct sourced in the law, must as a logical matter be consistent with the basic law. Despite the first requirement — and despite the fact that FC s 8(1) applies to all law and binds both the legislature and the executive — primary legislation or subordinate legislation that governs a dispute between private persons will not necessarily be subject to the direct application of the Bill of Rights. Those same provisions in legislation or subordinate legislation would, however, automatically be subject to the direct application of the provisions of Bill of Rights if they were invoked by an individual in a dispute with the State. The absurdity of this distinction is brought into even sharper relief by the Court's own doctrine of objective unconstitutionality. (The relative desuetude of this doctrine is offset by the fact that it has, as yet, not been repudiated by the Constitutional Court.⁹) In its most general form, the doctrine holds that the validity or the invalidity of any given law is in no way contingent upon the parties to the case. If a provision of legislation would be deemed to be unconstitutional when invoked by an individual in a dispute between the State and an individual, then it must likewise be unconstitutional when invoked by an individual in a dispute between that individual and another individual. However, the Court's differentiation between FC s 8(1) disputes that are invariably subject to the direct application of the Bill of Rights and FC s 8(2) disputes that are not invariably subject to the direct application of the Bill of Rights is logically

7 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*').

8 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*').

9 See *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe & Another* 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 20 ('This court has adopted the doctrine of objective constitutional invalidity.') See also *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) (Confirms continued validity of doctrine.)

incompatible with the doctrine of objective unconstitutionality. The *Khumalo* application doctrine relies upon the ability to distinguish constitutional cases — and thus the constitutionality of laws — upon the basis of the parties before the court. The doctrine of objective unconstitutionality denies the ability to distinguish constitutional cases — and thus the constitutionality of laws — upon the basis of the parties before the court. This contradiction is a direct consequence of the *Khumalo* Court's refusal to give the term 'all law' in FC s 8(1) its most obvious construction and the Court's preference for making FC s 8(2) the engine that drives the analysis of all disputes between private parties. Not even the good faith reconstruction of *Khumalo* can meet this second objection.

The third objection flows from the *Khumalo* Court's refusal to say anything

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about FC s 8(1)'s binding of the judiciary. Perhaps the most damning consequence of this structured silence is that it offends a canon of constitutional interpretation relied upon by Justice O'Regan in *Khumalo* itself: 'We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.'¹⁰ Not only does Justice O'Regan refuse to give the provision 'any apparent purpose', we cannot, even on the good faith reconstruction, give it any apparent purpose. The good faith reconstruction gains its traction through a distinction between a constitutional norm's range of application and that same norm's prescriptive content. That creates the interpretational space to argue that while FC s 8(1) speaks to each specific constitutional norm's range of application — and does not distinguish one genus of law from another — FC s 8(2) speaks to the prescriptive content of each specific constitutional norm and directs us to consider whether that prescriptive content ought to be understood to govern the private conduct of the private parties that constitutes the gravamen of the complaint. This good faith reconstruction does no work with respect to the phrase 'binds the judiciary' because the distinction between 'range' and 'prescriptive content' engages the relationship between constitutional norms and ordinary law. It does not speak to the provenance of a given law. The reason it cannot be recast in a manner that speaks to the differing concerns of FC s 8(1) and FC s 8(2) is that FC s 8(2) does not concern itself with our different law-making institutions — legislative, executive or judicial. What is left? A weak reading in which the judiciary is bound — not in terms of the 'law' it makes — but purely in terms of its 'conduct' (or 'non-law-making conduct'). It seems to me to defy both logic and common sense to argue that when FC s 8(1) binds the legislature and the judiciary, it means to bind the actions of legislators or judges solely in their personal capacity. When we bind the legislature, we must bind both the law it makes and the non-law-making actions it takes. The text offers no reason to treat the judiciary any differently. While we do want state actors — legislators and judges alike — to care about the manner in which they comport themselves, we care primarily about the law they make. But that is not what *Khumalo* says, nor can it be reconstructed in such a manner as to say so.

The final objection to *Khumalo*'s construction of FC s 8 turns on the style of the argument. In short, before Justice O'Regan decides whether to engage the applicant's exception to the action in defamation in terms of freedom of expression, she has already concluded: (a) that the law of defamation is in pretty good shape post-*Bogoshi*;¹¹ (b) that freedom of expression is important but not central to an

10 *Khumalo* (supra) at para 32.

11 *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA), 1999 (1) BCLR 1 (SCA) ('*Bogoshi*').

open and democratic society; and (c) that dignity — especially as viewed through the lens of reputation — is of paramount concern. Only after having reached these conclusions does Justice O'Regan decide that this matter warrants direct application of freedom of expression to the common law of defamation in a dispute between private parties. Based upon the Court's own jurisprudence and our good faith reconstruction of *Khumalo*, a court should first decide whether the

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provisions of Chapter 2 apply to the dispute before the court. If, as in *Khumalo*, the court determines that freedom of expression applies directly, then the generally accepted approach to rights analysis has us begin with a determination of the scope of freedom of expression and follows with an assessment of whether the law of defamation constitutes a prima facie infringement of that right. In *Khumalo*, it would most certainly have been found to be such. The second question is whether the law of defamation — as currently constructed — is a justifiable limitation of the right to freedom of expression. Instead, the judgment looks, in manner of delivery, much like the kind of judgment in which, under FC s 39(2), the common law is developed via indirect application of the Bill of Rights.

The style of the judgment suggests that the *Khumalo* Court considers it relatively unimportant to engage this dispute as if, in fact, direct application takes place. Or more accurately, by packaging *Khumalo* as if it were simply a common law judgment, the *Khumalo* Court intimates that the difference between direct application and indirect application of the Bill of Rights is minimal, if not non-existent. I might be inclined to accept this elision of the analytical processes required by FC s 8 and FC s 39(2) were it not for the fact that the Supreme Court of Appeal and the Constitutional Court have handed down judgments regarding constitutional jurisdiction, *stare decisis* and indirect application under FC s 39(2) that manifest a clear desire not to disturb settled bodies of common law precedent and that cannot help but immunize a substantial body of apartheid-era decisions from reconsideration by lower courts. This claim requires some amplification.

Leaving aside the problem of surplusage raised by our courts' occasional interchangeable use of FC s 8 and FC s 39(2), the Supreme Court of Appeal in *Afrox*,¹² extending the reasoning of the Constitutional Court in *Walters*,¹³ has held that there is at least one critical difference between direct application under FC s 8 and indirect application under FC s 39(2). A High Court may revisit pre-constitutional Appellate Division precedent only where a party has a colourable claim grounded in the direct application of a substantive provision of the Bill of Rights. High Courts may not alter existing common law precedent (whether pre-constitutional or post-constitutional) through indirect application of FC s 39(2). (The rest of our appellate courts' novel doctrine of constitutional *stare decisis* further constrains the High Courts' constitutional jurisdiction.) What happens when our appellate courts' marry this restrictive doctrine of *stare decisis* to an incrementalist gloss on indirect application in terms of FC s 39(2)? It spawns an application doctrine that effectively disables the High Court from undertaking meaningful constitutional review of existing common law precedent (as well as all other constructions of law) and thereby protects 'traditional' conceptions of law and existing legal hierarchies. This observation about the manner in which our existing array of application doctrines —

12 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)('Afrox').

13 *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* 2002 (4) SA 613 (CC), 2002 (2) SACR 105 (CC), 2002 (7) BCLR 663 (CC)('Walters').

as well as related doctrines of *stare decisis* and constitutional jurisdiction — conspire to blunt the transformative potential of the basic law is one of the strongest rejoinders to those jurists and commentators

who have suggested that whether one relies upon FC s 8 (1) or FC s 8 (2), or FC s 39(2), the song remains the same: namely, how should the law governing a dispute be developed, re-formulated or re-interpreted?

There is a better way. In § 31.4, I offer a preferred reading that satisfies the demands of naturalness, textual plausibility, coherence, surplusage and ideology, and, just as importantly, meets the objections lodged against both *Khumalo* and the good faith reconstruction of *Khumalo*. That preferred reading takes the following form.

FC s 8(1) covers 'all law' — regardless of provenance, form, and or the parties before the court. FC s 8(1) also covers all state conduct — by all branches of government and all organs of the state — whether that conduct takes the form of law or reflects some other manifestation or exercise of state power.¹⁴ In sum, FC s 8(1) should be understood to stand for the following proposition:

- All rules of law and every exercise of state power are subject to the direct application of the Bill of Rights.

FC s 8(2) covers dispute-generating conduct between private actors not 'adequately' governed by an express rule of law. There are two basic ways to read 'not governed adequately by an express rule of law.' First, it could contemplate the possibility of a dispute over an aspect of social life that is not currently governed by any rule of law at all. Such instances are rare. Indeed there is good reason to believe that such instances do not exist at all. The second and better reading views non-rule governed conduct in a much narrower sense. In many instances a body of extant rules — or even background norms — may be said to govern a particular set of private relationships. FC s 8(2) calls our attention to the fact that these rules of law may not give adequate effect to the specific substantive provisions of the Bill of Rights and may require the courts to develop a new rule of law that does give adequate effect to a particular provision in the Bill of Rights in so far as a dispute between private persons requires it to do so. In sum, FC s 8(2) should be understood to stand for the following proposition:

- While, on the Hohfeldian view, a body of extant legal rules — or background norms — will always govern a social relationship, those same rules will not always give adequate effect to a provision in the Bill of Rights. FC s 8(2) calls attention to the potential gap between extant rules of law and the prescriptive content of the Bill of Rights, and, where necessary, requires the courts to bridge that gap by bringing the law into line with the demands of particular constitutional norms.

14 The cosmology of common law jurisdictions is such that some lawyers express discomfort with the notion that a common law rule found inconsistent with the Final Constitution could occasion a finding of invalidity. But that locution is, in fact, endorsed by the Constitutional Court. See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (2) SACR 556 (CC), 1998 (12) BCLR 1517 (CC) at para 73 (Court declares 'common-law offence of sodomy . . . inconsistent with the 1996 Constitution and invalid.'). See also *Shabalala v Attorney General, Transvaal* 1996 (1) SA 725 (CC), 1995 (2) SACR 761 (CC), 1995 (12) BCLR 1593 (CC); *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC) (Court notes that a finding of inconsistency with respect to common law may occasion an order that goes beyond invalidity to develop a new rule of law.)

If we decide that the right invoked engages the conduct in question and that the right has been unjustifiably infringed, then we move on to FC s 8(3). FC ss 8(3)(a) and (b) enjoin the court to develop new rules of law and remedies designed to give effect to the right infringed. Thus, where FC s 8(2) acknowledges gaps in existing legal doctrine, FC s 8(3) aims to fill those gaps. In sum, FC s 8(3) should be understood to stand for the following proposition:

- If the court finds that the right relied upon warrants direct application to the conduct that has given rise to the dispute, and further finds a non-justifiable abridgment of the right, then the mechanisms in FC ss 8(3)(a) and (b) must be used to develop the law in a manner that gives adequate effect to the right infringed.

It may be, however, that the prescriptive content of the substantive provisions of the Bill of Rights does not engage the rule of law or conduct at issue. Two things can happen. A court can decide that the Bill of Rights has nothing at all to say about the dispute in question. A court can decide that although no specific provision of the Bill of Rights is offended by the law or the conduct in question, the Bill of Rights warrants the development of the law in a manner that coheres with its general spirit, purport and objects. In sum, FC s 39(2) should be understood to stand for the following proposition:

- Where no specific right can be relied upon by a party challenging a given rule of law or the extant construction of a rule of law, the courts are obliged to interpret legislation or to develop the law in light of the general objects of the Bill of Rights.

The preferred reading, unlike the good faith reconstruction of *Khumalo*, is untroubled by fortuitous differences between forms of law. It does not suppress or defer application of the Bill of Rights to disputes between private persons governed by either legislation or common law. The preferred reading, unlike the good faith reconstruction of *Khumalo*, generates no tension between the legality principle and the doctrine of objective unconstitutionality. It recognises all forms of law as exercises in state power and makes each and every exercise of state power subject to constitutional review. It does not rest on a distinction between the parties before the court and thus does not offend the doctrine of objective unconstitutionality. The preferred reading, unlike the good faith reconstruction of *Khumalo*, does not offend the surplusage canon of constitutional interpretation. It alone gives the phrase 'binds the judiciary' meaningful content by recognising that the phrase engages all emanations of law from the courts. The preferred reading, unlike the good faith reconstruction of *Khumalo*, is not plagued by a host of conflicting doctrinal commitments that blunt the transformative potential of the Bill of Rights. Proper apportionment of analytical responsibilities between FC s 8(1), FC s 8(2), FC s 8(3) and FC s 39(2) finesses the many difficulties created by a hide-bound doctrine of *stare decisis* that

permits little, if any, development of the common law in light of FC s 39(2). The arguments that support the preferred reading of Chapter 2's application provisions are explored at length in § 31.4 below.¹⁵

15 A caveat and a codicil are in order.

(d) Decision Tree 1: *Du Plessis v De Klerk*

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(e) Decision Tree 2: *Khumalo v Holomisa*

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31.2 Application under the Interim Constitution

(a) Application doctrine enunciated in *Du Plessis v De Klerk*¹⁶

(i) Facts

In 1993 the *Pretoria News* published a series of articles dealing with the supply of arms by South Africa to UNITA in Angola. The articles suggested that private air

The caveat is that there is no unassailable answer to the question of burdens raised by FC s 8. Shoddy drafting left us with a text — FC s 8 — that generates multiple possible readings and that resists a simple mechanical explanation because its component parts are difficult to reconcile. That does not mean that no grounds exist for preferring one reading over another. Indeed, the appropriate response to that standard academic trope — 'so what' — is to construct an analytical framework for direct application under FC s 8 that coheres with the manifold doctrinal demands of indirect application, *stare decisis*, the rule of law, constitutional jurisdiction, objective unconstitutionality, textual plausibility and naturalness. This chapter constitutes one such answer.

The codicil reflects the recognition that questions of application in terms of FC s 8 are, at bottom, questions of interpretation. This proposition has two dimensions: one logical, one historical. As a logical matter, we could function perfectly well without a provision on application. Whether the provenance of the law at issue or nature of the parties before the court have some bearing on the disposition of a matter could well be accommodated as part of the interpretation of a right. The presence of FC s 8 reflects the judgment of the drafters that our Final Constitution must speak to the application of the Bill to the exercise of both public and private power, and that constitutional texts have always done so (even where those texts have operated to protect existing hierarchies of private power.) Because the drafters of the Final Constitution set their face against the traditional immunization of certain kinds of private dispute from constitutional review, all legal disputes are now notionally subject to the strictures of the Bill of Rights. As a result, the line drawing exercise that animated the debate around the Interim Constitution's application provisions ought to have proved of diminished import by now. That the application debate has not withered away cannot be explained by the logic of the text alone. The text points towards such a withering away. The continued debate over application reflects the extent to which the meaning of our basic law is determined by extant historical conditions: the echo of the Interim Constitution, the limited jurisdiction of the Constitutional Court versus the plenary jurisdiction of the Supreme Court of Appeal and, perhaps most importantly, the felt need to chart a careful course between the Scylla of transformation and the Charybdis of tradition.

16 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC). The leading judgment and the court's order in *Du Plessis* was written by Kentridge AJ and concurred in by Chaskalson P, Langa, O'Regan, and Ackermann JJ. While Ackermann J concurred with both the judgment and the order of Kentridge AJ, he authored a separate judgment designed to amplify points made in Kentridge AJ's decision. Sachs J also concurred with the judgment and order of Kentridge AJ, but suggested that there were alternative grounds for the judgment. Mahomed DP penned a separate judgment, but agreed with the order as formulated by Kentridge AJ. Langa J and O'Regan J concurred with Mohamed J's judgment. Mokgoro J concurred with the judgment and order proposed by Kentridge AJ, agreed with Mahomed DP and added an opinion of her own. Kriegler J dissented from the majority's judgments and order regarding application under the Interim Constitution. He was joined in his dissent by Didcott J. Madala J agreed with the majority's order regarding retrospectivity, but dissented from the majority's order regarding application.

operators and airstrip owners — the plaintiffs — were aiding the Department of Foreign Affairs in fuelling the Angolan war.

The plaintiffs instituted a defamation action in May 1993. The defendants filed pleas denying that the articles suggested wrongful conduct by the plaintiffs or defamed the plaintiffs. The defendants argued, in the alternative, that even if the articles were defamatory, they were published in the public interest. In October 1994 — after the Interim Constitution came into effect — the defendants asked to amend their plea in order to claim that the right of freedom of expression, IC s 15, afforded them a new defence.¹⁷

(ii) Holding

The court held that the substantive provisions of Bill of Rights of the Interim Constitution were not, in general, capable of application to any legal relationship other than that between legislative or executive organs of state at all levels of government and natural or juristic persons. In particular, IC s 15, freedom of expression, was not capable of application to any legal relationship other than that between persons and legislative or executive organs of the state at all levels of government and natural or juristic persons.

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Kentridge AJ did not limit his plurality judgment to these two propositions. A necessary consequence of these two general propositions was that while the constitutional guarantees of IC Chapter 3 could be invoked in private disputes where a litigant contended that a statutory provision relied upon by the other party impaired the exercise of a specific fundamental right enshrined in IC Chapter 3, the same guarantee could not be invoked in private disputes where a litigant contended that a rule of the common law relied upon by the other party was invalid. Not all rules of the common law were immunized from constitutional challenge. The majority held that governmental acts or omissions in reliance on the common law *may* have their consistency with specific substantive provisions of IC Chapter 3 challenged by a litigant in a dispute with the state.¹⁸ This exception had a rider attached. Kentridge AJ was willing to find that common-law rules relied upon by government in its classically public activities — ie, the administration of criminal justice — could be attacked directly. He seemed far less inclined to allow common-law rules governing state activities in the commercial or contractual sphere to be

17 See *De Klerk & Another v Du Plessis & Others* 1995 (2) SA 40 (T), 46–47, 1994 (6) BCLR 124, 130–131 (T). Van Dijkhorst J refused the defendant's application to amend on two grounds: IC s 241(8) precluded retrospective application of the Constitution, IC s 15 did not apply horizontally and thus could not be invoked as a defence in a civil action for defamation. He wrote: 'Traditionally bills of rights have been inserted in constitutions to strike a balance between governmental power and individual liberty . . . It would . . . be correct . . . to take the view that our Constitution is a conventional constitution unless there are clear indications to the contrary.' The Constitutional Court requested argument on both points. With respect to the question of retrospectivity, the Constitutional Court held that the defendants were not entitled to invoke the provisions of the Interim Constitution. For a further discussion of retrospectivity, generally, and the holding on retrospectivity in *Du Plessis*, see § 31.8(a) *infra*. See also Cheryl Loots & Gilbert Marcus 'Jurisdiction and Procedures of the Court' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 6. Both Kentridge AJ and Mohamed DP wrote that IC s 98(6) might permit retrospective application 'in the interests of justice and good government.' See *Du Plessis* (*supra*) at paras 14 and 69. Retrospective application has, for obvious reasons, receded in importance over time.

18 See *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)(Common-law docket privilege relied upon by the state found unconstitutional.)

similarly subject to direct attack. As if these various caveats and codicils were not enough, Kentridge AJ concluded that while the rights and freedoms in IC Chapter 3 did not *generally* have direct application to common-law rules governing legal relationships between individuals, it remained possible that a litigant in some future case could assert, successfully, that a particular provision of IC Chapter 3 must have direct application to such relationships. Barring such an eventuality, potential litigants could take solace in IC s 35(3). This section provided for the development of common-law rules in light of the 'spirit, purport and objects' of the Bill of Rights. But even this sop to those who wished to see the common law transformed had a disclaimer. Kentridge AJ wrote that the initial development of the common law was 'not a matter which falls within the jurisdiction of the Constitutional Court under s 98.'¹⁹ Such initial development lay within the purview of Supreme Courts (now High Courts) and the Appellate Division (now the Supreme Court of Appeal).²⁰

(b) Analysis of *Du Plessis*

(i) Court's approach to the text

For the Constitutional Court in *Du Plessis*, the provisions in IC Chapter 3 that had a bearing on application looked ineluctably vertical. The primary textual support for this reading flowed from IC ss 7(1), 7(2), 33(4) and 35(3).

IC s 7(1) appears to narrow IC Chapter 3's applicability to legislative and executive law-making and conduct. IC s 7(1) read: 'This Chapter shall bind all legislative and executive organs of state at all levels of government.' The clause was silent about the Chapter's extension to the judiciary and judicial decisions. The vertical reading of this structured silence is that the drafters meant to insulate judicial enforcement of the common law that governs private relations from constitutional review.²¹

19 *Du Plessis* (supra) at para 63.

20 Kentridge AJ qualified this remark by writing that the Constitutional Court retains 'jurisdiction to determine what the spirit, purport and objects of Chapter 3 are and to ensure that, in developing the common law, the other courts have had due regard thereto.' *Ibid.* The exact boundaries of such limited appellate jurisdiction were left open to future cases. For a discussion of the effect of this decision on the assertion of constitutional jurisdiction by the AD and the SCA, as well as constraints that imposed on High Court constitutional jurisdiction, see Stu Woolman & Danie Brand 'Is There A Constitution in This Courtroom: Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Public Law* 38. The Constitutional Court has, under the Final Constitution, asserted its jurisdiction with respect to all constitutional matters means that 'all law' and every exercise of public power is potentially subject to review for compliance with the basic law. See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC); *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC). See, generally, Frank Michelman 'The Rule of Law, Legality and Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11. See also § 31.4(e)(x) *infra* (On the relationship between jurisdiction, *stare decisis* and the transformation of the common law.)

21 See Technical Committee on Fundamental Rights *Tenth Report* 4, 31 (5 October 1993). See also Lourens M du Plessis & Jacques de Ville 'Bill of Rights Interpretation in the South African Context (3): Comparative Perspectives and Future Prospects' (1993) 4 *Stellenbosch LR* 356, 390; Hugh Corder 'Towards a South African Constitution' (1994) 57 *Modern LR* 491, 511. The argument that the textual silence reflects an intentional omission of the judiciary is that much more compelling when IC s 7(1) is compared with IC s 4(2) and when one consults the full set of technical

Kentridge AJ read IC s 7(1) together with IC s 7(2). On this account, IC s 7(1) modified IC s 7(2)'s injunction that 'this Chapter shall apply to all law'. Rather than reading IC s 7(2) literally, so that all provisions at least notionally apply to all legal relationships, reading IC s 7(2) in light of the strictures of IC s 7(1) yields the traditional, vertical view. Statutes, subordinate legislation, regulation, executive conduct or legislative conduct, when relied upon by the state, or which give rise to a dispute between the state and an individual, are subject to direct Bill of Rights review. Statutes, subordinate legislation, or regulations, when relied upon by a private party in a private dispute, are subject to direct Bill of Rights review. The common law, when relied upon by the state, is (sometimes) subject to direct Bill of Rights review. Private disputes governed by the common law are *not* subject to the direct application of the substantive provisions of the Bill of Rights.

Kentridge AJ's gloss on IC s 35(3) provides further support for this thesis. IC s 35(3) read:

In the interpretation of any law *and the application and development of common law* and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter. (Emphasis added).

The phrase 'the application and development of the common law' was said to reflect the intent of the drafters of the Interim Constitution not to extend the Bill of Rights' application directly to the common law and, particularly, the private relations governed by the common law. If the drafters had intended unqualified,

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direct application, so the argument went, this provision would have been unnecessary. At the same time, the drafters were said to have wished the rights enshrined in IC Chapter 3 to permeate the entire legal culture.²² They made provision, through IC s 35(3), for the Bill of Rights to influence the interpretation of law produced by non-legislative and non-executive branches or organs of the state.

(ii) An alternative approach to the text

That was not the only way to read IC ss 7(1), 7 (2) and 35 (3). Several disabling strategies were available.²³ First, IC ss 7(1) and (2) could have been read sequentially — not cumulatively. IC s 7(2)'s broad injunction that IC Chapter 3 applies to 'all law' might have meant that 'all law' was subject to the direct

committee notes. Unlike IC s 7(1), IC s 4(2) states that the Interim Constitution 'shall bind all legislative, executive and judicial organs of state at all levels of government'. The notes of the Technical Committee on Fundamental Rights demonstrate that the committee flirted repeatedly with the inclusion of the judiciary in the application clause. It then decided against inclusion.

22 See Lourens M du Plessis 'A Note on the Application, Interpretation, Limitation and Suspension Clauses in South Africa's Transitional Bill of Rights' (1994) 5 *Stellenbosch LR* 86, 88 (A member of the Technical Committee on Fundamental Rights which drafted the section, Du Plessis writes: 'Section 35(3) is the provision allowing for a seepage of the provisions of Chapter 3 to horizontal relationships by requiring a court interpreting any law and applying and developing the common law and customary law, to have due regard to the spirit, purport and objects of the chapter.'). See also Lourens Du Plessis 'The Genesis of the Provisions concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa's Transitional Constitution' (1994) 4 *TSAR* 706, 711 ('There were . . . quid pro quos for the deletion (in s 7) of explicit reference to the (possible) horizontal operation of Chapter 3. The first one is reflected in the present s 35(3)'); Martin Brassey 'Labour Relations under the New Constitution' (1994) 10 *SAJHR* 179, 187 ('[Section] 35(3) . . . is an enemy, not a friend, of those who say private action is reviewable [directly] under the Chapter.')

application of the substantive provisions of the Bill of Rights. ²⁴ Second, IC s 7(1) continues to do work even after one concludes that it need not modify IC s 7(2). IC s 7(1) rejects the age-old principle that Parliament and the executive were neither bound by their own acts nor subject to substantive review of the content of the laws they promulgated. ²⁵ Third, while it may have been accurate to claim that IC s 35(3) appears in Chapter 3 as a sop to those who would have preferred unqualified direct application and to ensure some seepage of fundamental rights into common law disputes between private parties, it was not necessary to read the section as Kentridge AJ did. The section could just as well have meant that, in the

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'interpretation of *any* law and the application and the development of common law and customary law' in a context where *no* specific constitutional right is asserted, a court should infuse its interpretation of the law with the general values of the Chapter. ²⁶ Such an interpretation treats, statute, subordinate legislation, regulation, common law and customary law as equally appropriate objects for constitutional infusion. When so read, IC s 35(3) is neutral on the issue as to whether the rights in

23 More detailed critiques of Kentridge AJ's textual arguments appear in the first edition of this work. See Stu Woolman 'Application' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) §§ 10.3(a)(i), 10.3(a)(v), and 10(3)(b). The entire first edition is housed at www.chr.up.ac.za. See also Stu Woolman & Dennis Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and Application under the Interim and the Final Constitutions' (1996) 12 *SAJHR* 361.

24 See *Du Plessis* (supra) at para 129 (Kriegler J, in dissent, maintained just that.)

25 See *Motala & Another v University of Natal* 1995 (3) BCLR 374, 381 - 382 (D) ('It seems to me that the reason for the presence of s 7(1) is to stress that the State and its minions are to honour the entrenched rights both in legislation and administration.') The new principle — that the legislative and executive branches of government have a duty to make good the promise of the rights enshrined in Chapter 3 — which was implicit in both readings of IC 7(1) was made explicit in FC s 1(c), FC s 7(1) and FC s 7(2). FC s 7(2) reads: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' FC s 7(1) reads: 'This Bill of Rights is a cornerstone of democracy in South Africa.' FC s 1(c) reads, in relevant part: 'The Republic of South Africa is one, sovereign, democratic state founded on . . . (c) Supremacy of the constitution.' Indeed, it is worth considering whether such a reading was the only way to make sense of the socio-economic rights enshrined in IC ss 29, 30(1)(c) and 32. See, eg, Sandy Liebenberg 'Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33.

26 The Constitutional Court places exactly this spin on FC s 39 (2). See § 31.4(e) *infra*.

IC Chapter 3 apply vertically or horizontally, directly or indirectly.²⁷ It certainly would not have been, as Kentridge AJ contended,

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superfluous.²⁸

(c) Jurisprudence of *Du Plessis*

The *Du Plessis* Court, and other advocates of a vertical approach to application, offered a concatenation of history lessons, liberal politics and democratic theory

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in support of their claim that the application provisions of the Interim Constitution's Bill of Rights ought to be restrictively interpreted.

27 Kentridge AJ's judgment inadvertently advertises several other disabling strategies. First, he argues that although the limitation clause, IC s 33(1), applies to all law of general application, including common law, 'applying 33(1) to private relationships governed by the common law seems almost insurmountable.' *Du Plessis* (supra) at para 55. Why? According to Kentridge AJ:

The common law addresses problems of conflicting rights and interests through a system of balancing. Many of these rights and interests are now recorded in the Constitution and on any view that means that as a result of the terms of the Constitution the balancing process previously undertaken may have to be reconsidered. A claim for defamation, for instance, raises a tension between the right to freedom of expression and the right to dignity. The common-law compromise has been to limit both rights to a certain extent, allowing damages to be recovered for what is regarded as 'unlawful expression' but allowing 'dignity' to be infringed in circumstances considered to be privileged. Section 33(1) could hardly be applied to such a situation.

Ibid. But Kentridge AJ contradicts both himself and the existing precedent of the Court. He had already agreed that IC s 33(1) applied to rules of common law. See *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 736, 1995 (12) BCLR 1593, 1604 (CC) (Common-law docket privilege held unjustifiable under IC s 33(1) — 'law of general application within the meaning of s 33(1) would ordinarily include a rule of the common law.') Second, the fact that the common law as it currently exists tries to balance these competing rights does not mean that the existing body of defamation law has struck the balance correctly. The common law, like any other body of law, may have struck that 'balance' incorrectly. The Interim Constitution and the Final Constitution both require that we revisit these issues, and both clearly state that the limitations clause is one of the mechanisms by which such issues will be re-analysed. As we shall see below, the *Khumalo* Court expressly rejects Kentridge AJ's reasoning. The common law is just as susceptible to constitutional 'balancing' as any other form of law. Third, Kentridge AJ states that IC s 4 supports the proposition that the rights in IC Chapter 3 do not apply directly to common law rules that govern private disputes. He notes that while IC s 4 states that any law inconsistent with the Interim Constitution must be nullified and that the Interim Constitution binds the legislature, the executive and the judiciary, it contains the proviso 'unless otherwise provided expressly or by necessary implication in this Constitution.' He then concludes that 'if on a proper construction of Chapter 3, [the Bill of Rights] . . . operation is intended to be vertical only, the [horizontal] argument based on s 4 loses any force which it may have had.' *Du Plessis* (supra) at para 48. But this conclusion simply begs the central question. Do the provisions of Chapter 3 — and provisions found elsewhere in the Interim Constitution — 'necessarily imply' that acts of the judiciary and common law disputes between private parties are not directly subject to the rights and freedoms enshrined in the Chapter? On its own, IC s 4(1)'s proviso does no work in favour of Kentridge AJ's position. Finally, Kentridge AJ argues that direct unqualified application cannot be squared with the Constitutional Court's limited jurisdiction:

If . . . [IC] s 15 had a direct horizontal application the task of formulating an appropriate law of defamation would fall to this Court on appeal. But that could not be reconciled with our limited jurisdiction under IC s 98(2). Our jurisdiction, which is to interpret, protect and enforce the provisions of the Constitution, cannot empower us to choose one among a number of possible rules of common law all of which may be consistent with the Constitution. It would be equally impossible, for reasons which I have already explained, for this Court simply to declare that a particular rule of the law of defamation is invalid, leaving a lacuna in the law.

Proponents of this approach began with the unassailable truism that the traditional function of most constitutions is to protect individuals from abuses of state power. They argued that we should not depart from this widely accepted model unless the text indicated clearly that another was intended.²⁹ This emphasis on the need to control state power is then used to explain why IC s 7(1), by not mentioning the judiciary, should be understood to place private disputes governed by the common law beyond the reach of the Bill of Rights.

Liberal theory places the following gloss on this public-private distinction. Because individuals and groups pursue the ends that give their lives meaning primarily within the private domain, we should be loath to endorse a mode of

Ibid at para 59. This reasoning suffers from several flaws. First, IC s 98(2) did not expressly or implicitly preclude the Constitutional Court from exercising the inherent power to craft new rules of law and to create new remedies. IC s 98(2) simply defined the exclusive jurisdiction of the Constitutional Court. Kentridge AJ then contends that that 'the Constitution allows for the development of the common law and customary law by the Supreme Court in accordance with the objects of Chapter 3' in terms of IC s 35(3). Ibid. But IC s 35(3) said absolutely nothing about the Supreme Court having exclusive jurisdiction over the development of the common law' and nothing in the text supports the Justice's inference that 'the requisite development of the common law and customary law is not to be pursued through the exercise of the powers of this Court under section 98 of the Constitution.' Ibid at para 60. (Under FC s 39(2), the Constitutional Court has asserted the power to ensure that all courts have developed the common law — or interpreted legislation — as the 'objective normative value system' manifest in the Bill of Rights requires. See §§ 31.4(e)(viii) *infra*.) Finally, according to Justice Kentridge, IC s 33(4) would also have been unnecessary if the Chapter's rights were meant to have direct horizontal application. IC s 33(4) read: 'This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).' Proponents of this position argued that unless the Chapter's extension was limited to the bodies bound by IC s 7(1) — unless the vertical reading was assumed — the drafters would not have needed to ensure that some other line of attack on private discrimination was possible. See Lourens Du Plessis 'The Genesis of the Provisions Concerned with the Application and Interpretation of the Chapter on Fundamental Rights' (*supra*) at 712 (IC s 33(4) — 'the second quid pro quo [for deleting from s 7 explicit reference to the possible horizontal operation of Chapter 3] — was included at the insistence of the ANC as part of the limitation clause.') This conclusion is hardly inevitable. Whether IC s 33(4) was present or not, the legislature could pass legislation banning various kinds of private discrimination. IC s 33(4) does no more than attempt to immunize civil rights legislation affecting non-governmental bodies from such constitutional attacks. While IC s 33(4) may have been a quid pro quo for deleting references to horizontal application from IC s 7(1), such horse-trading does not alter the words of IC s 33(4). The words support neither a vertical reading nor a horizontal reading of IC Chapter 3. See Stu Woolman 'Limitations' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) §§ 12.11, for more on IC s 33(4) and the extent of its success in immunizing civil rights legislation from review.

28 Kriegler J offered similar textual arguments in his dissenting opinion. *Du Plessis* (*supra*) at para 128. One argument, not discussed above, is that IC ss 4(1) and (2) were meant to support the proposition that all three branches of government — the judiciary expressly included — were subject to the dictates of the Interim Constitution. IC Section 4(2) reads: 'This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.' In short, all decisions by all branches of government are to be subject to and subordinate to the Constitution. Judicial decisions applying, interpreting or developing the common law should therefore be subject to constitutional review. On the other hand, the presence of the term 'judiciary' in IC s 4 makes its absence palpable in IC s 7. The drafting history also makes clear that the committee charged with responsibility for crafting this section was quite familiar with the word and repeatedly toyed with its inclusion in the text. See, eg, Technical Committee on Fundamental Rights *Fifth Report* (11 June 1993)(Judiciary included); *Sixth Report* (15 July 1993)(Judiciary dropped); *Seventh Report* (29 July 1993)(Judiciary included); *Tenth Report* (21 August 1993)(Judiciary dropped). Martin Brassey contends that 'the cumulative effect of . . . these interpretive materials is simply too overwhelming to justify an argument based upon inadvertence.' Brassey 'Labour Relations' (*supra*) at 185. But the drafting history does not, in fact, close the book on a direct, unqualified approach to application. The pace of the drafting — and the political pressure on all parties to generate an 'acceptable' rather than an optimal product — suggests a somewhat unusual canon of interpretation: 'incompleteness'. See *Motala v University of Natal* 1995 (3) BCLR 374, 381-382 (D) ('Given the high-powered, perhaps almost frantic milieu in which the Constitution was forged . . . it

constitutional analysis that permits greater state interference in those relationships and practices we deem to be constitutive of our being.³⁰ There is, on the liberal account, no good reason to allow a judge to supplant the beliefs of individual citizens about the nature of the good life with her own idiosyncratic vision.

Democrats are likewise sceptical of any claims that judges possess such privileged access. However, democrats believe that state intervention in the private domain — and thus interference with individual conceptions of the good life — can be justified by reference to a more representative and legitimate decision-making body: the legislature. Democrats also insist that the legislature is better equipped institutionally than are the courts to tackle polycentric social problems.³¹

Textual arguments, supplemented by prudential concerns and comparative jurisprudence, largely exhaust Kentridge AJ's rhetorical strategies in *Du Plessis*. What is missing from the judgment is a principled engagement with the real issues underlying the application debate.³²

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would be a mistake . . . to attribute too much significance to the presumption against redundancy and some of the other highly clinical tenets of interpretation at the risk of attributing too little to the professed spirit and objectives of the enactment.'

- 29 See *De Klerk & Another v Du Plessis & Others* 1995 (2) SA 40 (T), 46–47, 1994 (6) BCLR 124, 130–131 (T)(Van Dijkhorst J)('Traditionally bills of rights have been inserted in constitutions to strike a balance between governmental power and individual liberty . . . It would . . . be correct . . . to take the view that our Constitution is a conventional constitution unless there are clear indications to the contrary.') See also Brassey 'Labour Relations' (supra) at 191 ('The normal role of a constitution is rather to establish and regulate the institutions of government than to . . . impose duties on private citizens. If the mandate had been to draw up the Final Constitution, the drafters might have been more adventurous; but in framing an Interim Constitution, designed to exist for a mere two years, they can be forgiven for preferring to progress gradually'); Peter Hogg *Constitutional Law of Canada* (3rd Edition 1992) § 34.2(g)('In deciding that the Charter does not extend to private action, the Supreme Court of Canada has affirmed the normal role of a constitution. A constitution establishes and regulates the institutions of government, and it leaves to those institutions the task of ordering the private affairs of the people.')
- 30 See, eg, Johan Van der Vyfer 'The Private Sphere in Constitutional Litigation' (1994) 57 *THRHR* 378, 388 ('As a matter of political freedom, excessive control by the state of purely private matters would result in a totalitarian regime.')
- 31 One additional argument, which may have informed Kentridge AJ's jurisdictional concerns, was that if we extend the application of constitutional rights to private relationships, we risk diluting the effectiveness of fundamental rights as a brake on state power. See William Marshall 'Diluting Constitutional Rights: Rethinking "Rethinking State Action"' (1985) 80 *Northwestern University LR* 558, 569 ('Characterizing every shouting match or every decision with whom to associate as actions that may lead to constitutional liability is to trivialize the meaning of constitutional protection and thereby to weaken the force of a claim of 'true' constitutional violation by overexposure.')
- 32 Kentridge AJ pauses to remark that 'difficulties and anomalies arise on the vertical as well as horizontal approaches . . . [but] that the supposed irrationalities of the vertical interpretation are exaggerated.' *Du Plessis* (supra) at para 51. 'Such as there may be,' he writes 'flow from the structure and wording of the Constitution.' Justice Kentridge may have been correct in arguing that the text of the Interim Constitution pointed toward verticality. But a vertical approach's irrationalities, difficulties and anomalies were, and still are, issues entirely independent of the text. Kentridge AJ simply chose not to engage these broader jurisprudential problems. See, further, Stu Woolman & Dennis Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and Application under the Interim and the Final Constitutions' (1996) 12 *SAJHR* 361.

(d) Critique of the Jurisprudence of *Du Plessis v De Klerk*

Critiques of the jurisprudence of *Du Plessis v De Klerk* fall into six basic categories: the fortuity of legal form; the inevitable arbitrariness in judicial application of the Bill of Rights; the artificial defence of the *status quo*; the untenability of the public-private distinction; judicial boundedness; and the specific pressures that South Africa's radically inegalitarian distributions of wealth and power places on the interpretation of the text of our basic law.

(i) Fortuity of form

On the *Du Plessis* Court's reading of IC s 7(1), whether or not law governing private relations was subject to the direct application of the substantive provisions in IC Chapter 3 was entirely contingent upon the form the law took. If a party to a dispute challenged legislation, then IC Chapter 3 applied to that law and the private relations that the law governed. If, on the other hand, the party challenged common-law rules governing a dispute (or challenged the conduct sanctioned by those common-law rules in a dispute) between private parties, then the substantive provisions of IC Chapter 3 did not apply directly. Laws governing private disputes were not, therefore, immunized entirely from direct application of the substantive provisions of the Bill of Rights.

(ii) Arbitrariness of application

Foreign experience supports the thesis that such distinctions invite arbitrary enforcement. While application doctrines vary from jurisdiction to jurisdiction, the basic plot remains the same. Some decisions expand the parameters of state action to include behaviour and relationships heretofore thought of as private, while others strive to give content to the state/non-state action distinction in order to restrict the application of constitutional rights.³³

In one case, a court might hold that since a company town possesses all the indicia of a regular municipality and provides all the services of a local government, it is legitimately subject to the same constitutional constraints that limit the

33 For basic statements of application doctrine in foreign jurisdictions, see *Retail, Wholesale and Department Store Union v Dolphin Delivery* (1987) 33 DLR (4th) 174, [1986] 2 SCR 573 (Canadian Charter applies to acts of the legislature and the executive, not courts, and thus not to common law governing private disputes); *Luth* 7 BVerfGE 198 (1958) (Although German Basic Law was primarily intended to protect individual liberty against state encroachment, the Bill also embodies an objective order of values that necessarily determines the broad outline of private law and public law); *Civil Rights Cases* 109 US 3 (1883) (State action consists of: (a) statutes or regulations enacted by national, state and local bodies; (b) the official actions of all government officers. The expansive understanding, reflected in Harlan J's dissent, asks whether a private actor is performing a government function or is sufficiently 'involved with' or 'encouraged by' the state to warrant being held to the state's constitutional obligations.) Even defenders of the vertical position tend to admit that current bodies of application or state action jurisprudence 'cannot be defended without resort to intellectual dishonesty.' See Marshall (*supra*) at 570. For a similar broadside by a long-time critic of the doctrine, see Lawrence Tribe 'Refocusing the 'State Action' Inquiry: Separating State Acts from State Actors' *Constitutional Choices* (1985) 246.

exercise of state power.³⁴ In another case, it might hold that despite the fact that modern shopping complexes tend to possess all the indicia of public forums and may acquire a monopoly on places suitable for effective political communication, their suppression of expressive conduct does not engage the constitution.³⁵ A court might hold that statutory authority for an arbitrator to make binding orders against an employer implicates the state and subjects the actions in question to constitutional scrutiny; in a subsequent matter, it may find that collective bargaining agreements governed by statute do not implicate the state.³⁶

South African case law throws up similar anomalies. In one case, a creature of statute, the Health Professions Council — which fulfils the important public function of regulating medical practitioners — was deemed not to be an organ of state because it was not under the direct control of the state.³⁷ In another case, a creature of statute, the Truth and Reconciliation Commission — which fulfilled

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the important public function of composing an initial record of apartheid — was deemed to be an organ of state despite the fact that it was not under the direct control of the state.³⁸

34 See *Marsh v Alabama* 326 US 501 (1946)(Circumscribes the right of private property owners to engage in unconstitutional forms of discrimination by finding that a company town's refusal to allow a woman to distribute literature on behalf of the Jehovah's Witnesses was a violation of her free speech rights.)

35 See *Hudgens v NLRB* 424 US 507 (1976)(No state action in judicial enforcement of common law of trespass — thus foreclosing possibility of a hearing on the merits of the freedom of speech challenge — and allows union to be barred from picketing a store in a shopping centre). Compare *Burton v Wilmington Parking Authority* 365 US 715 (1961)(US Supreme Court found that the refusal of the Eagle Coffee Shoppe — a private establishment located in a building owned and operated by an agency of the state of Delaware — to serve Mr Burton because he was African-American constituted a denial of Mr Burton's right to the equal protection of the laws under the Fourteenth Amendment) with *Moose Lodge No 107 v Irvis* 407 US 163 (1972)(US Supreme Court found that the refusal of the Moose Lodge — a privately owned club licensed by the Pennsylvania liquor board — to serve Mr Irvis, an African-American, because of his race did not constitute state action denying him equal protection of the law.) What does the variable nature of the court's intervention mean? Some commentators argue that the courts are willing to intervene in so-called private disputes where they believe that the most fundamental of fundamental rights are being violated. See Sue Davis 'The Supreme Court: Finding State Action . . . Sometimes' (1983) 26 *Howard LR* 1395, 1406 ('An examination of state action cases reveals that whether the nature and extent of the state involvement in a given case will be sufficient to constitute state action depends upon the importance of the interest sought to be vindicated by the party claiming discrimination, when weighed against the interests of the person said to discriminate.') Others argue that the courts' refusal to intervene in private disputes reflects the belief — however misguided — that the existing common law is neutral between the competing parties and that the courts ought not to disturb the private consensual ordering of social life. See Charles Black Jr 'Foreword: State Action, Equal Protection and California's Proposition 14' (1967) 81 *Harvard LR* 69; Cass Sunstein 'Lochner's Legacy' (1987) 87 *Columbia LR* 873.

36 Compare *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, (1989) 59 DLR (4th) 416 (Adjudicator empowered under Canada Labour Code to make orders against employer held to be 'statutory creature' deriving all coercive powers from statute and state, and therefore subject to Charter) with *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211, (1991) 81 DLR (4th) 545 (Closed-shop provision in collective bargaining agreement authorized by labour legislation found to be private agreement beyond reach of Charter.)

37 *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T).

Perhaps, as Mark Tushnet has suggested, the central purpose of the Final Constitution — to subject private parties, as well as state parties, to the basic law's provisions — makes these fine distinctions between state and non-state entities less pressing than they might otherwise be.³⁹ But several points are worth keeping in mind. Our courts often use the permissive wording of both FC s 8(2) and FC s 39(2) in order to decline Chapter 2's invitation to constitutionalize 'private law' disputes.⁴⁰ Even in socio-economic rights cases, where the state is almost always going to be a party to litigation in matters traditionally or historically placed within the private domain, a version of the state action doctrine has established a beachhead.⁴¹ This 'legitimate expectations' doctrine, as a species in the genus of state action doctrines, enables the court to suppress a finding on the merits of a claim for specific relief.

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(iii) An artificial defence of the status quo

Does it make sense to hold — as the *Du Plessis* Court effectively did — that the state is acting when the legislature passes legislation and the executive enforces legislation that applies to relations between private parties, but that the state is not acting when the courts make laws, apply them to private parties, and have their decisions enforced by the executive? According to Cass Sunstein, this disjunction reflects the 'traditional' view that legislation interferes with the existing nexus of private relationships while the common law simply provides a neutral backdrop for the private, consensual ordering of individual preferences.⁴² Given that this distinction is incorrect as a descriptive matter — no body of law can be neutral with respect to existing distributions of wealth and power, and the state backs up each and every legal regime with the threat of force — it makes no sense to treat the autonomy interests at stake in a dispute governed by legislation any differently than the autonomy interests at stake in a dispute governed by common law. The real point of the basic law, as Justice Kreigler points out in his dissent in *Du Plessis*, is to transform all legal regimes that offend current constitutional commitments. As it so happens, the Justice notes, the common law of property, contract and delict are amongst those regimes in need of the greatest reform.⁴³

38 *Inkatha Freedom Party v TRC* 2000 (3) SA 119 (C), 2000 (5) BCLR 534 (C).

39 See Mark Tushnet 'The Issue of State Action/Horizontal Effect on Comparative Constitutional Law' (2003) 1 *Journal of International Constitutional Law* 79. Tushnet identifies two factors — with respect to South Africa — that may influence the extent to which any given set of application provisions will be more or less likely to result in the constitutional transformation of existing bodies of private law: (1) a specialized Constitutional Court that lacks powers of general jurisdiction has a limited capacity to change non-constitutional bodies of law and concomitantly less control over courts of general jurisdiction; and (2) a commitment to strong social democracy — through either socio-economic rights or state policy or both — diminishes the impact of public-private distinctions in constitutional law because the ends of social transformation are likely to be secured through either socio-economic rights or government programmes. See also Steven Ellmann 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444 (Arguing that a broad understanding of FC s 8(1)'s application of the Bill to organs of state, FC s 8(2)'s invitation to apply the Bill of Rights to private disputes, and the presence of socio-economic rights narrows the gap between constitutional and non-constitutional bodies of law.) For more on Professor Ellmann's account see § 31, Appendix, 4(c).

40 See §§ 31.4(c)–(e) *infra*.

(iv) Untenability of the public-private distinction

Each of the previous three critiques of *Du Plessis* is a variation on a single theme: the untenability of the public-private distinction with respect to the application of constitutional rights. As a general philosophical matter, the public-private divide is largely a product of natural law jurisprudence.⁴⁴ Natural law jurisprudence, as elaborated in the seventeenth and eighteenth centuries, portrayed individuals as the possessors of inalienable rights. Constitutions were intended, on this account, to enable individuals and groups to exercise rights of expression, conscience, religious practice, association and property free from interference by both state and non-state actors. They were not originally conceived as tools to eradicate private discrimination and redistribute wealth.⁴⁵

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This natural law understanding of the relationship between the state and individuals, and between the law and private affairs, is not the only available understanding. Positivist jurisprudence tends to view all law and all rights as emanating from the state.⁴⁶ Moreover, on the positivist account, the law mediates all social relations. There is nothing beyond it. As a consequence, the positivist

41 In these cases, individuals who have already received a particular government benefit are distinguished from those individuals who have not. The former class may ask the court to order the state to continue provision of the benefit. See *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) ('*Kyalami*') at paras 34, 48, 51 (Constitutional Court concludes that the state, having already committed itself to housing persons on state land, a prison, incurred an obligation to find other suitable land for housing in the event that such persons had to be moved.) The latter class of litigant may only request an order that requires the government to take those steps necessary to ensure the reasonable and progressive realization of the right for all of the right's intended beneficiaries. The second class of litigants are, generally speaking, never entitled to specific relief. See, eg, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*'). By finding no pre-existing benefit or entitlement, the courts avoid requiring the government to alter radically its budgetary priorities and to commit significant amounts of funds to particular individuals or communities. See, eg, *Van Biljon v Minister of Correctional Services (B & Others v Minister of Correctional Services & Others)* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C). Four prisoners diagnosed as HIV positive sought orders declaring that, under FC s 35(2)(e), they had the 'the right . . . to . . . the provision, at State expense, of adequate . . . medical treatment.' All four had CD4 counts of less than 400/ml and presented with symptoms of HIV. All four therefore satisfied generally accepted criteria for anti-retroviral treatment. Two of the prisoners had already been prescribed appropriate anti-retrovirals by medical practitioners. The other two prisoners had not had any anti-retroviral treatment prescribed by the state. The court held that the two prisoners who had been prescribed a combination of AZT and ddI by medical practitioners were entitled to provision of that cocktail at state expense, but that the two prisoners who had not as yet been prescribed either anti-viral mono-therapy or anti-viral combination therapy were not entitled to provision of any treatment at state expense. Only *de minimus* state action — namely that someone, somewhere in the state apparatus has seen a prescription — enables the first two applicants to secure the protection of FC s 35(2). See also D Brand 'Food' in S Woolman, T Roux, J Klaaren, A Stein & M Chakalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 56C; Chemerinsky (supra) at 537 (State action doctrine 'is no more than a disguised abstention doctrine: courts utilize it to avoid the fundamental issues presented by the cases.')

42 Cass Sunstein *The Partial Constitution* (1993) 66-9 and 171-3.

43 *Du Plessis* (supra) at para 146.

44 See Paul Brest 'State Action and Liberal Theory: A Casenote on *Flagg Brothers v Brooks*' (1982) 130 *University of Pennsylvania LR* 1296, 1300 (While '[t]he connection between natural rights and state action is not one of logical necessity . . . the doctrines are mutually sympathetic.')

believes that every social transaction is governed by law, or at a minimum, underwritten by the power of the state. Put another way, all 'private actions' are acquiesced in by the state and the state is free to withdraw its authorization for these actions — and for the law that permits them — at will.⁴⁷

The implications of positivism for application doctrine are relatively clear.⁴⁸ A positivist must object to *Du Plessis'* ample cleavage: a public domain determined by the state and a private domain unencumbered by the state. That does not mean that a positivist cannot, in good faith, articulate a normative theory of rights committed to some form of a public-private distinction. I have elsewhere vigorously defended zones of so-called 'autonomy' that enable individuals and groups to pursue ways of being in the world largely free from state interference. I do not, however, claim that the state would not be implicated in sustaining such 'private'

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45 Natural rights theory does not logically require one to take a vertical view of constitutional application. Natural law is not only concerned with the relationship between state and citizen. Natural rights protect each citizen against undue interference by his fellow citizens and require state intervention where an individual's inviolable sphere of liberty is breached by his compatriots. On this account some rights – if not all rights – ought to have horizontal applicability. See Frank Goodman 'Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone' (1982) 130 *University of Pennsylvania LR* 1331, 1335; Erwin Chemerinsky 'Rethinking State Action' (1985) 80 *Northwestern LR* 503, 529 ('[T]he concept of state action makes no sense under a regime of natural law. . . [P]rivate invasions of liberty are just as intolerable as governmental violations because both deprive a person of inherent rights.') Natural rights were deemed compatible with verticality because it was assumed that the common law would provide sufficient protection for individuals in private disputes. It is, perhaps, worth offering two additional observations. First, placed in its proper historical context, natural law was a progressive doctrine that helped carve out a space for individual autonomy and subjectivity to develop free of the overweening control of public authority. Second, natural rights are not adequate to the task of reorganizing democratic societies along more open, participatory and egalitarian lines.

46 See Thomas Hobbes *Leviathan* (1651)('Where there is no state, there is no law.')

47 Commentators in civil-law jurisdictions are more inclined towards such a view because judge-made common law does not play the same obfuscatory role. Hans Kelsen argued that the 'logically, entirely untenable' distinction between public law and private law

has no theoretical, but only an ideological character. Developed by constitutional doctrine, it is designed to secure for the government and its administrative machinery . . . a freedom not from law, which . . . is impossible, but from statutes, from the general legal norms created by the Parliament as the representation of the people . . . The differentiation in principle between a public (or political) and private (or unpolitical) legal sphere is designed to prevent the recognition that the private right created by the legal transaction of a contract is just as much the theater of the political dominion as the public law created by legislation and administration. But the so-called private law, the complex of norms whose core is the legal institution of private property, is a method of creating individual norms characteristic of the capitalistic system.

Hans Kelsen *Theory of Pure Law* (1960) 283–4. See also Hans Kelsen *General Theory of Law and State* (1945) 207 ('The distinction between public law and private law is useless as a common foundation for a general systemization of law.') See, further, Chemerinsky (supra) at 526 ('The critical point here is that under a positivist analysis . . . the common law is state law and court enforcement is state action. Under positivism, the concept of state action makes no sense because state action is always present.')

48 Let me not be misunderstood. I do not assert that positivism — in any form — by logical necessity leads to the application doctrine preferred in these pages.

arrangements. Quite the opposite. I argue that the state should acknowledge its complicity in sustaining associations from which we derive the better part of life's meaning.⁴⁹

While most contemporary legal theorists' sympathies lie with the positivist rendering of the relationship between the state and the individual, these theorists are more accurately described as constructivists. Constructivists argue that all natural rights theories may be manipulated to make any set of private social circumstances appear 'natural' and that these circumstances have, more often than not, been used to turn race or sex or age or disability into an unfortunate destiny under law.

Constructivists suggest that we should stop conceiving of the state as something separate and apart from the individuals who live within it. It is not a thing that occasionally crosses the chasm between the public and the private to act on individuals. The state is, rather, a locus of relationships, rules, norms and ideas that determine the way we understand ourselves.⁵⁰ The recognition of this influence does not mean that our political life exhausts our self-understanding. But it does mean that we can never look at people and events as being pre-political. Whether they know it or not, their identities have been shaped by political institutions and legal doctrines. A vertical or quasi-vertical approach to application is, on the constructivist account, difficult to justify. If a state's laws and conduct so profoundly determine our public and private lives, then it seems hard to understand why we should subject only those acts immediately traceable to two specific arms of the state to constitutional scrutiny and immunize from constitutional attack those acts backed by the power of the state but traditionally described as private.

(v) Judicial Boundedness

The fiction of the public-private divide also played out in the notion that the judiciary could not be bound by the Bill of Rights. The judiciary could not be bound because it was simply responsible for discovering and then applying common-law rules — common-law rules that ostensibly did not emanate from the state.

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But even on the vertical approach endorsed by *Du Plessis*, the courts were bound by some of the provisions of IC Chapter 3. IC s 25's rights to silence,⁵¹ against self-

49 See Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

50 See Laurence Tribe 'The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics' (1989) 103 *Harvard LR* 1, 7-8 and 20 ('Just as space cannot extract itself from the unfolding story of physical reality, so also the law cannot step back, establish an Archimedean point of detached neutrality, and selectively reach in, as from the outside, to make fine-tuned adjustments to highly particularized conflicts. Each legal decision restructures the law itself, as well as the social setting within which the law operates, because, like all human activity, the law is inevitably embroiled in the dialectical process whereby society is constantly recreating itself. . . . A court cannot behave as if all that mattered is rendering a result on the case concerning the parties before it. It must realize that the very process of legal observation (judging) shapes both the judges themselves and the material being judged. The results the courts announce . . . will . . . have continuing effects that reshape the nature of what the courts initially undertook to review, even beyond anything they directly order anyone to do or refrain from doing. The law is thus not simply a backdrop against which the action may be viewed . . . but is itself an integral part of that action.')

51 See, eg, *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC).

incrimination,⁵² of the accused being presumed innocent,⁵³ to a trial within a reasonable time,⁵⁴ to reasonable bail,⁵⁵ to a fair trial,⁵⁶ to speedy sentencing,⁵⁷ and not to be subject to cruel, inhuman and degrading punishment⁵⁸ apply to the judiciary.⁵⁹ A court order for scandalizing the court is subject to review as an abridgement of the freedom of expression.⁶⁰

The text of the Final Constitution should have resolved this problem. After all, FC s 8(1) binds the judiciary. But the *Khumalo* Court rebuffed counsel's request to give the phrase 'binds the judiciary' content. According to *Khumalo*'s black letter law on application, FC s 8(1)'s 'binds the judiciary' does not mean that the common law — as the legal product of the courts — is invariably subject to the direct application of the Bill of Rights. And yet, despite this holding in *Khumalo*, the Constitutional Court has, in other judgments, interpreted FC s 8(1)'s binding of the judiciary in such a manner as to ensure that the Constitutional Court always retains the authority to decide whether any gloss placed by any tribunal on any rule of common law or provision of statute comports with constitutional dictates.⁶¹ Those two positions are logically incompatible.

(vi) History and power

Three opinions in *Du Plessis* demur from the application doctrine proffered by the majority. What all three opinions share is a common belief that the majority failed to come to grips with how issues of history and power ought to shape our interpretation of the Interim Constitution and the Final Constitution.

52 See, eg, *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC); *Park-Ross v Director for Serious Economic Offences* 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).

53 See, eg, *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC).

54 See, eg, *Bate v Regional Magistrate, Randburg* 1996 (7) BCLR 974 (W).

55 See, eg, *S v Dhlamini* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC).

56 See, eg, *Scagell v Attorney-General of the Western Cape* 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC).

57 See, eg, *Wild v Hoffert* 1998 (3) SA 695 (CC), 1998 (6) BCLR 656 (CC).

58 See, eg, *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC).

59 See, eg, *R v Rahey* [1987] 1 SCR 588, 39 DLR (4th) 481 (Supreme Court of Canada held that a criminal court's delay in ruling on an application for directed verdict was a breach of s 11(b) of the Canadian Charter.)

60 See, eg, *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC)(Citation for contempt for scandalizing court will attract review under FC s 16.)

61 See § 31.4(b)(i)–(ii) *infra*.

The majority opinion[s], Justice Kriegler writes:

reflect pervading misconception[s] held by some and . . . egregious caricature[s] propagated by others . . . That is that so-called direct horizontality will result in an Orwellian society in which the all-powerful state will control all private relationships. The tentacles of government will, so it is said, reach into the marketplace, the home, the very bedroom. The minions of the state will tell me where to do my shopping, to whom to offer my services or merchandise, whom to employ and whom to invite to my bridge club. That is nonsense. What is more, it is

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malicious nonsense preying on the fears of privileged whites, cosseted in the past by laissez faire capitalism thriving in an environment where the black underclass had limited opportunity to share in the bounty. I use strong language designedly. The caricature is pernicious, it is calculated to inflame public sentiments and to cloud people's perceptions of our fledgling constitutional democracy. 'Direct horizontality' is a bogeyman.⁶²

Justice Madala's dissent is a far more polite affair. Madala J takes the majority to task for their failure to read Chapter 3 in light of the remedial purposes of the Interim Constitution. To this end he quotes the coda of the Interim Constitution:

The postamble reminds us that the Constitution is a '. . . historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.'⁶³

He then reminds the majority that the Court functions in South Africa — not in an advanced Western liberal democracy — and that every provision of the Interim Constitution should be construed with South Africa's particularly troubled history and present in mind.⁶⁴ He writes:

Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society.⁶⁵

62 *Du Plessis* (supra) at para 120. Kriegler J adds that despite the learning reflected in the other judgments, he cannot 'see the dire consequences' of the unqualifiedly direct approach to application. 'Indeed', he says, 'as I see it, it makes no fundamental difference with regard to such consequences whether the horizontal application of Chapter 3 is direct or indirect. It has little, if any, effect jurisprudentially or socially whether the Chapter 3 rights are enforced directly or whether they 'irradiate' private legal relationships. I stress this point not only because of the impending doom Ackermann J perceives in the direct horizontal application of Chapter 3. I do so also because it would be foolish to ignore the public utterances of political and legal commentators in a similar vein.' *Ibid*.

63 *Ibid* at para 157.

64 *Ibid* at para 162.

65 *Ibid* at para 163.

Most significantly, Justice Madala warns his fellow justices that they must come to terms with the abuse of power *simpliciter* — whether it is privately or publicly sourced — or risk blunting the transformative powers of the law:

Those who widen the scope of the operation of the Bill of Rights hold the view that the verticality approach is unmindful of modern day reality — that in many instances the abuse of power is perpetuated less by the State and more by private individuals against other private individuals.⁶⁶

The late Chief Justice Mahomed's concurrence largely tracks the textual analysis of Kentridge AJ. It is imbued, however, with an entirely different spirit. This

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difference is captured in two statements: one on the nature of law; one on the relationship between the basic law and the harsh realities of South African life. On the untenability of the public-private divide in law, Mahomed CJ, then DP, writes:

I am not persuaded that there is, in the modern State, any right which exists which is not ultimately sourced in some law, even if it be no more than an unarticulated premise of the common law and even if that common law is constitutionally immunized from legislative invasion. Whatever be the historical origins of the common law and the evolutionary path it has taken, its continued efficacy in the modern State depends, in the last instance, on the power of the State to enforce its sanction and its duty to do so when its protection is invoked by the citizen seeking to rely on it. It is, I believe, erroneous to conclude that the law operates for the first time only when that sanction is invoked. The truth is that it precedes it and is indeed the ultimate source for the legitimization of any conduct. Freedom is the fundamental ingredient of a defensible and durable civilization, but it is ultimately secured in modern times, only through power, the sovereignty and the majesty of the law activated by the State's instruments of authority in the protection of those prejudiced through its invasion by others. Inherently, there can be no 'right' governing relations between individuals *inter se* or between individuals and the State the protection of which is not legally enforceable, and if it is legally enforceable it must be part of law.⁶⁷

The preceding paragraph suggests the late Chief Justice's ambivalence about the majority's order. Mahomed DP writes that although the text constrains him to agree with many of Kentridge AJ's conclusions, he remains concerned that the majority's construction of the provisions on application

could in practice [mean] that the Constitution was impotent to protect those who have so manifestly and brutally been victimized by the private and institutionalized desecration of the values now so eloquently articulated in the Constitution. Black persons were previously denied the right to own land in 87% of the country. An interpretation of the Constitution which continued to protect the right of private persons substantially to perpetuate such unfairness by entering into contracts or making dispositions subject to the condition that such land is not sold to or occupied by Blacks would have been for me a very distressing conclusion.⁶⁸

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(e) The jurisprudence of unqualified direct application

Unqualified direct application of the substantive provisions of the Bill of Rights is derived from the interaction of two simple axioms. The state constructs and enforces

66 Ibid at para 154.

67 *Du Plessis* (supra) at para 79.

all law no matter what form the law takes.⁶⁹ Legislation, subordinate legislation, common law and customary law shape both relationships between the state and its citizens and relationships between individuals.

Two conclusions follow. Coherence dictates that since the state constructs and enforces all law, all law should be measured against constitutional standards. Candour demands that an assessment of the constitutionality of a particular law should not be artificially suppressed because of the form the law takes.⁷⁰

These two conclusions come with three closely related caveats. First, not all action is state action subject to constitutional scrutiny. As Cass Sunstein notes,

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'[w]hen one person excludes another from his own home, there is no state action; the state action consists only in the availability or actual use of the trespass laws.'⁷¹ Second, challenges to existing rules of common law do not entail the subversion of the common law. In some cases, a rule of common law being relied upon by one party in defence of their property interests will trump another party's claim to equal treatment. In another contest between such rights and interests, a rule of common law may fall. In all cases, the court will be forced candidly to determine the priority of rules, and not hide behind the artifice of government action or inaction. Third, the

68 Ibid at para 84. Rather than dissent, Mahomed DP sought solace in the promise of indirect application under IC s 35(3). Justice Mohamed wrote: '[IC] s 35(3) can, in appropriate circumstances, accommodate much of the concern felt by those like me who are anxious to avoid giving to s 7 of the [Interim] Constitution an interpretation which would leave the courts substantially impotent in affording the proper protection of constitutional values to those victimized by their denial to them in the past.' Ibid at para 87. It is through IC s 35(3), he continues, that the courts could avoid being 'trapped within the limitations of the past.' Ibid. Exactly how IC s 35(3) would enable the courts to escape that trap was not — and is still not under FC s 39(2) — entirely clear. For example, in *Du Plessis*, Kentridge AJ said that he agreed with the view articulated by Cameron J in *Holomisa v Argus Newspapers* that IC s 35(3) made much of the vertical/horizontal debate irrelevant. 1996 (2) SA 588 (W). But Cameron J in *Holomisa v Argus Newspapers* operates as if the method of constitutional analysis for common law rules under IC s 35(3) is identical to the method employed by the Constitutional Court when it analyses legislation, subordinate legislation or state conduct. He holds expressly that IC 's 35(3) requires the fundamental reconsideration of any common law rule that trenches on a fundamental rights guarantee and that in reviewing the common law for consistency with the Bill of Rights, one ought to adopt the Constitutional Court's two-stage approach to rights analysis. Unlike Cameron J, Kentridge AJ argues that by choosing words such as 'due regard' 'the lawgiver [could not have meant] that courts should invalidate rules of common law inconsistent with Chapter 3 or declare them unconstitutional.' *Du Plessis* (supra) at para 60. He suggests that when reviewing or developing the common law in light of constitutional values the 'judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.' Ibid at para 61 citing *R v Salituro* [1991] 3 SCR 654, (1992) 8 CRR (2d) 173, 189. Cameron J's position presages radical transformation, Kentridge's approach accords with the nothing new or unusual position reflected in *R v Salituro*. See also *Lappeman Diamond Cutting Works v MIB Group Ltd* 1997 (4) SA 908 (W)(Joffe J)('The manner in which statutory discretion is to be exercised must likewise not be trapped in the past. Should . . . discretion be exercised in a manner inimical to the spirit, purport and objects [of] the [Interim] Constitution, such binding authority need not be followed.') But see *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA)('Afrox'). The Constitutional Court and the Supreme Court of Appeal have not warmed to the notion of a radical transformation of the common law under FC s 39(2). See the discussions of the transformative role of FC s 39(2), at § 31.4(e)(iii)–(iv) infra, and the relationship between application and *stare decisis*, at § 31.4(e)(ix). Nor are they particularly moved by the alleged need for doctrinal harmony. See, eg, *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA) at para 35 (Supreme Court of Appeal notes that the Constitutional Court in *Carmichele* had 'quoted with approval a passage to the effect that the Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.') See also *Metcash Trading Ltd v Commissioner, South African Revenue Service, & Another* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC)(Rule of law does not require identical outcomes in cases based upon the same factual and legal substratum.)

commitment to direct application does not mean that 'there is no line between public and private action.'⁷² Where laws intended to protect a particular comprehensive — or even partial — conception of the good life can meet the requirements of constitutional justification, that 'private' understanding of 'the good' will be protected and the line between the public and the private will be maintained.⁷³ Where a rule of common law meant to protect a 'traditional' legal arrangement fails to secure the necessary level of judicial solicitude, a new line between the public and the private will be drawn.⁷⁴

31.3 Application under the Final Constitution: Benefits of the Bill of Rights

There were few express changes from the language of the Interim Constitution to the Final Constitution with respect to the intended beneficiaries of the Bill of Rights. One change is that 'every person' has become 'everyone'. This change was motivated by a desire to simplify the language of the text. Another change is that the right to freedom of trade, occupation and profession — formerly freedom of economic activity — no longer extends to 'every person' or 'everyone'. Its protection is limited to every 'citizen'. The obvious rationale for the change is that non-citizens are now permitted to ply a trade or work in this country only at the

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- 69 See Morton Horowitz & Kenneth Karst 'The Proposition 14 Cases: Justice in Search of a Justification' (1966) 14 *UCLA LR* 37, 41-45 ('[T]here always exists some state law (statutory, decisional or declarable in a court of first instance) determining the legal characteristics of any private discriminatory conduct . . . State action, in the form of state law, is present in all legal relationships among private persons.') See also *New York Times v Sullivan* 376 US 254, 265 (1964) ('We may dispose at the outset of . . . the proposition relied on by the State Supreme Court — that "the Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil law suit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedom . . . It matters not that the law has been applied in a civil action and that it is common law only. . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.')
- 70 See Erwin Chemerinsky 'Rethinking State Action' (1985) 80 *Northwestern LR* 503, 536 ('[W]e must remember . . . [i]n each case when a question of state action arises, both the freedom of the violator and the freedom of the victim are at stake. No matter how a court decides, someone's liberty will be expanded and someone's liberty restricted. To assert that the state action doctrine is desirable because it preserves autonomy and liberty is to look at only one side of the equation.')
- 71 See Sunstein (supra) at 159-160 (The lesson 'is that the law of contract, tort, and property is just that — law. It should be assessed in the same way in which other law is assessed. When the trespass law is used to evict someone from private property, the state is involved. The real issue is whether that action offends the Constitution.')
- See also Mark Tushnet 'The Issue of State Action/Horizontal Effect on Comparative Constitutional Law' (2003) 1 *Journal of International Constitutional Law* 79.
- 72 Sunstein (supra) at 159.
- 73 Supplementing vertical application with horizontal application — to yield a doctrine of unqualified direct application — does not mean that private actors will be subject to the same standards as state actors. There may well be justifications for private behaviour that would not underwrite similar governmental conduct. See Chemerinsky (supra) at 506.

discretion of the national government.⁷⁵ Juristic persons are treated under the Final Constitution much as they were under the Interim Constitution. Where a particular right is deemed to apply to a particular kind of juristic person, the right applies. The issue is thus less one of application than it is of interpretation.⁷⁶

The Bill of Rights identifies six kinds of entity entitled to the protection of the rights enshrined therein: natural persons, citizens, children, juristic persons, workers, and employers. It goes without saying that not all members of the aforementioned six classes are entitled to the benefit of every right. The object of this section is to show *what* kinds of entities are entitled to *which* Chapter 2 rights.

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(a) Everyone

With a few minor exceptions, Chapter 2 speaks about benefits almost exclusively in terms of 'everyone'.⁷⁷ Despite the fuzzy extension of the term 'everyone', the case law enables us to draw several conclusions about the persons who might legitimately expect protection from abridgements of various fundamental rights.

(i) Aliens

Where the text employs 'everyone' instead of the more restrictive 'citizen', we can assume that the right in question protects both citizen and alien alike. In particular, the text gives us no reason to assume that resident aliens — who have legally entered the country and who remain in good legal standing — will receive anything less than the levels of constitutional protection required for personhood.⁷⁸ That does not mean that every right extended to persons will afford equal levels of protection to all classes of alien. That illegal or undocumented aliens may receive diminished levels of procedural or substantive protection in specific situations — such as prior to making entry into the country — does not, as the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs* correctly reasoned, extinguish their rights entirely.⁷⁹ Moreover, as the Supreme

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74 A comparison of Canadian and Irish jurisprudence shows up the difference between a basic law that endorses direct application of a Bill of Rights to common law disputes between private parties and a basic law that bars such direct application. As recently as 1991, five of Canada's ten provinces maintained and enforced the rule of dependent domicile. Because the Charter has been deemed inapplicable to litigation between private parties, it was impossible — in the absence of government action — to challenge a facially inequitable rule. See Annalise Acorn 'Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms' (1991) 29 *Osgoode Hall LJ* 419, 438-443. In Ireland, such an inequitable rule has been successfully challenged because the courts recognize that the common law is created and maintained by the state, the court is an organ of state, and that the Irish Constitution — the *Bunreacht* — 'lays down standards relevant to the conduct of interpersonal relations.' Andrew Butler 'Constitutional Rights in Private Litigation: A Critique and Comparative Analysis' (1993) 22 *Anglo-American LR* 1, 23. See, eg, *CM v TM* [1988] ILRM 456, 470 (Irish High Court held that the dependent domicile rule infringed a woman's right to equality and declared the law 'patently unconstitutional.')

75 But see *Booyesen v Minister of Home Affairs* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC) (Requirement that alien spouse be required to be outside South Africa in order to secure work permit violates right to dignity in terms of FC 10 of South Africans and their alien spouses. However, the status and the dignity rights of aliens without spousal attachment was not addressed.)

Court of Appeal noted recently in *Watchenuka*, our immigration laws cannot be used to visit extra-judicial penalties on persons seeking asylum in order to advance policies designed to create disincentives for illegal immigration.⁸⁰ The courts will err in favour of extending non-citizens the full panoply of guarantees whilst they reside in South Africa.⁸¹ Non-citizens outside South Africa's borders are not, generally speaking, entitled to the benefits of the Bill of Rights.⁸²

(ii) Individuals

That the text employs primarily the term 'everyone', and does not use 'individuals', means that the interpretive space exists for juristic persons to benefit from many, if not all, of Chapter 2's provisions. FC s 8(4) makes explicit this commitment. The

76 See *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service & Another, First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 45 (After noting the invitation of FC s 8(4) to analyze the applicability of a right to juristic persons, the Court wrote that '[e]ven more so than in relation to the right to privacy, denying companies entitlement to property rights would . . . lead to grave disruptions and would undermine the very fabric of our democratic State. It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies. The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons'); *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at paras 18 ('Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic State. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons'); *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 57-58 (The Court held that FC s 8(4) was not in conflict with Constitutional Principle II. It reasoned that many 'universally accepted fundamental rights' would be fully recognised only if afforded to juristic persons as well as natural persons, and it was furthermore wrong to equate juristic persons with powerful and wealthy corporations as there were countless small companies and close corporations that needed and deserved protection no less than natural persons did); *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) (Juristic person, a newspaper, allowed to assert defense under FC s 16.) See also *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T). A local authority contended that its right to associate had been violated by its statutory obligation to contribute to a municipal pension fund that serviced employees throughout the province. Cameron J concluded that there is no reason, in principle, why an organ of government cannot enforce a right against another person or organ of state. Although it may seem odd — if not wrong — to claim that the state could enforce a fundamental right *qua* beneficiary, the courts have acknowledged that an organ of state or a state official has standing to represent the interests of others under FC s 38. See *Minister of Health and Welfare v Woodcarb* 1996 (3) SA 155 (N). In the instant case Cameron J decided that the right in question — association — could not be meaningfully stretched to cover the purely fiscal relationship between a local authority and a municipal pension fund. Cf Stu Woolman, Theunis Roux & Bernard Bekink 'Co-operative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS June 2004) Chapter 14 (In the event of a conflict between state actors, FC Chapter sets the framework for resolution of the dispute.).

77 The replacement of 'every person' with 'everyone' reflects the move towards more natural locutions in the Final Constitution and the apparent linguistic requirement of Constitutional Principle II that "'everyone" shall enjoy all universally accepted fundamental rights, freedoms and civil liberties.'

78 The position of aliens under the Final Constitution has shown marked improvement. See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) (Court holds that refusal of

benefits afforded corporations and other juristic persons by the rights and freedom found in Chapter 2 are dealt with below.⁸³

(iii) Foetus

Both recent case law and statute suggest that the term 'everyone' does not include a foetus.⁸⁴ In *Christian Lawyers Association of SA v Minister of Health*, the court held that because FC s 11 — the right to life — does not apply to a foetus, it could not be used as a grounds for attacking the Choice on Termination of Pregnancy Act.⁸⁵ In support of this conclusion, McGreath J held that because FC s 12 safeguards a women's right to control her body and, in particular, her right to reproduction, the

temporary residence permit to alien spouse violated dignity rights of both the South African spouse and the alien in terms of FC s 10); *Booyesen v Minister of Home Affairs* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)(Requirement that alien spouse be required to be outside South Africa in order to secure work permit violates right to dignity in terms of FC 10 of South Africans and their alien spouses); *Patel v Minister of Home Affairs* 2000 (2) SA 343 (D)(Aliens possess same rights under Final Constitution — FC ss 9, 10, 12, 21 and 33 in particular — unless contrary position expressly required by the Final Constitution.) For a cautionary note on the current status of aliens, see Jonathan Klaaren 'South African Human Rights Commission Report on Treatment of Person Arrested and Detained under the Aliens Control Act' (1999) 15 *SAJHR* 132. For a discussion of the rather parlous state of alienage under the Interim Constitution, see Jonathan Klaaren 'So Far Not So Good. An Analysis of Immigration Decisions under the Interim Constitution' (1996) 12 *SAJHR* 605. See also *Xu v Minister van Binnelandse Sake* 1995 (1) SA 185 (T), 1995 (1) BCLR 62 (T)(IC s 20 applies only to citizens and not to every person, and thus not to aliens); *Parekh v Minister of Home Affairs* 1996 (2) SA 710 (D)(Dismisses alien's request for reasons from Home Affairs under IC ss 23 and 24); *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T)(Dismisses request for reasons for rejection of political asylum claim made in terms of ss IC 23 and 24). But see *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B), 1995 (8) BCLR 1018 (B)(Aliens are persons in terms of IC s 8 and are entitled to that section's protections.) For the position in the US, see *Plyler v Doe* 475 US 202, 210 (1982) ('[A]n alien is surely a 'person' in any ordinary sense of the term' and therefore entitled to protection afforded persons under both the due process and equal protection clauses.')

79 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC)('Lawyers for Human Rights'). The Constitutional Court construed several provisions of the Immigration Act in a manner that expands the level of due process to which undocumented persons on board ships are entitled. The *Lawyers for Human Rights* Court described the basis for this expansion as follows:

[We are] concerned with a delicate issue that has implications for the circumstances in and the extent to which we restrict the liberty of human beings who may be said to be illegal foreigners. The determination of this question could adversely affect not only the freedom of the people concerned but also their dignity as human beings. The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.

Ibid at para 20.

80 The Supreme Court of Appeal, in *Minister of Home Affairs v Watchenuka*, found unconstitutional regulations issued by the Minister and rules emanating from the Standing Committee for Refugee Affairs that visited blanket prohibitions, with respect to employment and study, on asylum seekers. 2004 (4) SA 326 (SCA), 2004 (2) BCLR 120 (SCA)('Watchenuka'). The *Watchenuka* Court held that such prohibitions constituted a violation of the right to dignity because the state refused to offer support to asylum seekers and left persons exercising their right to apply for asylum no alternative but to turn to crime, begging or foraging. The Court also held that such prohibitions constituted a violation of the right to education because children lawfully in country to seek asylum may not be deprived of such resources at a critical period of their development. The *Watchenuka* Court recognizes that a right to asylum only becomes meaningful if immigration laws actually permit a person to seek asylum. Read together, *Lawyers for Human Rights* and *Watchenuka* support the dual proposition that our immigration laws must be construed in a manner that permits the actual, and not merely theoretical, exercise of every person's fundamental rights.

drafters of the Final Constitution could not have possibly intended FC s 11 to protect a foetus.⁸⁶ Similarly, he opined that because FC s 28 protected children and children were defined as persons under the age of 18, the foetus was not protected by FC s 28 since it did not possess an 'age'.⁸⁷ The judge then concludes that since FC s 28 does not protect a foetus, no other right in the Bill of Rights could.⁸⁸

The last three arguments are tendentious at best. First, constitutional rights conflict. Drafters of constitutions and statutes alike often refuse to address contentious issues and leave them for courts to decide. FC s 12(2) in no way forecloses attribution of personhood to a foetus in terms of FC s 11. Secondly, the argument from FC s 28 does no work. Only if you define age as beginning at birth

81 See *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) (Person who entered country illegally still entitled to protection of Bill of Rights. Collusion of state officials with US authorities seeking Mr Mohamed's extradition for trial constituted a clear violation of Mr Mohamed's South African constitutional rights.) Canadian cases are similarly expansive when it comes to according aliens within Canada rights under the Charter. See *Singh v Minister of Employment and Immigration* [1985] 1 SCR 177, 202, 17 DLR (4th) 422 (Section 7, fundamental justice, could be asserted by 'every human being who is physically present in Canada.'). See also Peter Hogg 'Application' *Constitutional Law of Canada* (4th Edition 2002) 34-5 (Even persons inside Canada illegally entitled to most Charter rights.)

The South African record on the fundamental rights of aliens prior to the Interim Constitution was execrable. See *Cabinet for the Territory of South West Africa v Chikane & another* 1989 (1) SA 349 (A) (Fundamental rights often restricted to nationals of states with charters of human rights and therefore restrictions on an alien's to rights to enter and to move did not contravene rights to equality or due process); *Lewis v Minister of Internal Affairs & another* 1991 (3) SA 628 (B) (Since it was never the intention of the legislature to allow individual rights to prevail over the interests of the state or public safety, an alien may not contest a Minister's decision on the grounds that he was denied a hearing, reasons for his deportation, or treated unequally.)

82 *Kaunda & Others v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Amicus Curiae)* 2005 (1) SACR 111 (CC), 2004 (10) BCLR 1009 (CC) (Non-citizens not entitled to benefit of South African Constitution beyond South Africa's borders.) See § 31.6 *infra* (On extra territorial effect of Bill of Rights.) See also *Nishimura Ekiu v US* 142 US 651, 659 (1892) (Constitutional protections afforded aliens limited by generally recognized power of Congress to 'forbid the entrance of foreigners within its dominions, or to admit them in only such cases and such conditions as it may see fit to prescribe.'). While aliens in the United States are entitled to basic constitutional protections, aliens outside the US are entitled to little or none. See *United States ex rel Knauf v Shaughnessey* 338 US 537, 544 (1950) ('Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.')

83 See § 31.3(d) *infra* (Discussion of protection afforded juristic persons under the Bill of Rights.)

84 *Christian Lawyers Association of SA v Minister of Health* 1998 (4) SA 1113 (T), 1998 (11) BCLR 1434 (T) ('*Christian Lawyers I*'). See also *Christian Lawyers Association v National Minister of Health & Others* 2005 (1) SA 509 (T), 526, 2004 (10) BCLR 1086, 1103 (T) ('*Christian Lawyers II*'). A foetus is not entitled to any rights under the Canadian Charter. See Peter W Hogg *Constitutional Law of Canada* (4th Edition 1999) § 34.1(b). See also *Borowski v Attorney General of Canada* (1987) 39 DLR (4th) 731 (Sask CA) (Foetus not included within s 7's 'everyone' or s 15's 'individual'); *R v Morgentaler* (1988) 44 DLR (4th) 385, [1988] 1 SCR 30 (Abortion provisions of Criminal Code declared unconstitutional impairment of mother's s 7 right to fundamental justice — without ruling on foetus' s 7 right to life.) A foetus is entitled to some rights under the US Constitution. See *Roe v Wade* 410 US 113 (1973) (State claims a sufficiently compelling interest in the foetus to prevent abortion only when it may survive outside the womb.) The German Federal Constitutional Court has held that the human dignity and the right to life of the foetus take precedence over woman's right to self-determination. However, it is important to note that quite a number of circumstances exist in which a woman's rights will trump those of the foetus, and the FCC has declined to equate its refusal to sanction abortion with efforts to criminalize the procedure. See 88 *BVerfGE* 203 (1993); 39 *BVerfGE* 1 (1975) (Striking down federal abortion legislation.)

does a foetus not possess an age. Thirdly, as we have just noted, the claim that if one right is understood not to include a foetus, then all other rights do not protect a foetus is simply fallacious. It does not follow that because a foetus is not entitled to the protection afforded by FC s 28, that it possesses no rights at all. These critiques should not be understood as a rejection of the outcome in *Christian Lawyers I*.⁸⁹ The court, and the public, would have been better served if the court had addressed the issues of conflicting imperatives openly rather than engaging in an aridly textual, and ultimately casuistic, exercise.⁹⁰

(b) Citizens

The term 'citizen' is used to qualify the entitlement to four of FC Chapter 2's rights: citizenship rights,⁹¹ political rights,⁹² some of the rights to freedom of residence and movement,⁹³ and the freedom of trade, occupation and profession.⁹⁴ The Constitutional Court's equality and dignity jurisprudence does, however, extend

85 Act 92 of 1996.

86 *Christian Lawyers I* (supra) at 1441-1444.

87 Ibid.

88 Ibid.

89 See Michelle O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 37; Tjaki Naude 'The Value of Life: *Christian Lawyers Association of SA v Minister of Health*' (1999) 15 *SAJHR* 542.

90 The structure of analysis under the Interim Constitution — in particular the proscription of limitations that negated the essential content of the right — might have complicated the outcome of a challenge to pro-choice legislation. An abortion case brought under the Final Constitution will not be subject to the same structural impediments. With the elimination of the essential content of the right requirement in the limitation clause, it is now possible to find that a foetus is a person under FC s 11 — the right to life — and still hold that pro-choice legislation is reasonable and justifiable under FC s 36(1). The structure of analysis required by IC Chapter 3 dictated that if the court was to uphold a pro-choice statute, it would either have to find that a foetus was not a person or have to finesse, somehow, the issue of whether an abortion negated the essential content of the foetus' right to life. See *Van Heerden & Another v Joubert NO & Others* 1994 (4) SA 793 (A) (Appellate Division showed that it was conscious of the constitutional implications of its decisions regarding the standing of a foetus by holding that a stillborn baby is not a 'person' as envisaged by provisions of Inquests Act 58 of 1959.)

91 See Jonathan Klaaren 'Citizenship' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, November 2005) Chapter 66.

92 See Anthony Stein 'Political Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 45.

93 See Jonathan Klaaren 'Residence and Movement' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, August 2005) Chapter 67.

certain kinds of trade, occupation, profession and residence entitlements to permanent residents.⁹⁵

Citizens are, by logical implication of the other qualifiers (persons, children, workers), entitled to the benefit of all of Chapter 2's rights. But not all citizens are entitled to exercise all of Chapter 2's rights at any given moment. For example, not all citizens are entitled to the protection of children's rights. Only persons under the age of 18 are entitled to the rights enumerated in FC s 28.

(c) Children

Rights that do not benefit children are the exception. The courts have already used many of the other rights in Chapter 2 to buttress the children-specific rights found in FC s 28.⁹⁶

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One could argue that children are not entitled to the political rights identified in FC s 19. Children are not entitled to vote. Only adult citizens have such a constitutional entitlement. Of course, that is the wrong way round this particular benefit question. Children could have the ability to vote extended to them under new legislation. The legislation — say, dropping the voting age below 18 — might then be subject to constitutional scrutiny. The constitutional text does not provide a clear and unequivocal answer to the question of whether children may possess the franchise. To the extent that it says anything at all, FC s 9 states that no one may be discriminated against on the basis of age.⁹⁷

94 See Dennis Davis 'Freedom of Trade, Occupation and Profession' in S Woolman, T Roux, J Klaaren & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 54.

95 Such claims on behalf of permanent residents must be grounded in those rights — dignity and equality — whose extension embraces non-citizens. See, eg, see *Booyesen v Minister of Home Affairs* 2001 (4) SA 485 (CC), 2001 (7) BCLR 645 (CC)(While requirement that alien spouse be outside South Africa in order to secure work permit found to violate right to dignity of South Africans and their alien spouses, the failure to recognize similar rights of aliens without South African spouses suggests the outer limits of economic activity related claims.)

96 See Adrian Friedman & Angelo Pantazis 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 47. The courts' assessment of the child's best interests is informed by a slew of other rights: equality, dignity, freedom and security of the person, housing, health, social security, education. See, eg, *Fraser v Children's Court, Pretoria North, & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) (Court found s 18(4)(d) of the Child Care Act 74 of 1983 to be unconstitutional as a violation of the right to equality); *Petersen v Maintenance Officer & Others* 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C), [2004] 1 All SA 117 (C)(Common-law rule that did not allow an extra-marital child to claim maintenance from its paternal grandparents, while legitimate children could so claim, found to constitute unfair discrimination and to violate of the right to dignity); *S v Williams & Others* 1995 (3) SA 632 (CC), 1995 (7) BCLR 861 (CC)(Children have the right not to be subject to cruel and degrading punishment.); *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)(Children have right to be free from physical violence.) The US Supreme Court has held that 'whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.' *In re Gault* 387 US 1, 13 (1967). See also *Planned Parenthood of Cent Missouri v Danforth* 428 US 52 (1976)(Minor possesses right to privacy and, therefore, abortion); *Tinker v Des Moines Independant Community School District* 393 US 503 (1969)(Minor possesses right to freedom of expression.) But see *Carey v Population Services International* 431 US 678, 693 (1977)(Restrictions on the exercise of fundamental rights by children will be subject to less rigorous scrutiny than similar restrictions on adults.)

One good reason for the absence of a clear and unequivocal answer to the voting rights question is that notions of adulthood and childhood are reasonably flexible — which is another way of saying that childhood as a category is often over-inclusive, and sometimes under-inclusive.⁹⁸ Adulthood can begin later (and capture fewer young persons) or start earlier (and capture more children). Moreover, the bright line drawn at age 18 by FC 28 applies only to the rights guaranteed to young persons by that right. The benefits of other rights are not made age contingent.

(d) Juristic persons

FC s 8(4) reads:

Juristic persons are entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of the juristic persons.⁹⁹

Whether a juristic person may benefit from a right in the Final Constitution is *not* an issue of application, but an issue of interpretation.¹⁰⁰ While FC s 8(4) holds out the promise of constitutional solicitude for juristic persons, the courts were left to decide whether they possess rights to property, privacy or expression. As it turns out, they do.

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The courts have repeatedly noted that the failure to accord juristic persons the protection of fundamental rights would 'undermine the very fabric of our democratic state.' Implicit in this view is the recognition that the resources of juristic persons — and in particular corporations — will ensure that the courts have an opportunity to hear constitutional challenges that natural persons might not be able to afford to bring.¹⁰¹

97 *Minister of Education v Harris* 2001 (4) SA 1297 (CC), 2001 (11) BCLR 1157 (CC); *Harris v Minister of Education* 2001 (8) BCLR 796 (T).

98 See Laurence Tribe 'Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles' (1975) 39 *Law & Contemporary Problems* 8.

99 IC Section 7(3) provided that 'all juristic persons are entitled to the rights entrenched in Chapter 3 where, and to the extent that, the nature of the right permits.' That position has changed under the Final Constitution. The court now must take account of the nature of both the right asserted and the juristic person claiming its benefits. See Lourens du Plessis 'The Genesis of the Provisions Concerned with the Application and Interpretation of the Chapter on Fundamental Rights in South Africa's Transitional Constitution' (1994) 4 *TSAR* 706, 714 (Noting the striking similarity between IC s 7(3) and s 19(3) of the German Basic Law, and arguing that IC s 7(3) linked the application of the right to the nature of the right, and not the nature of the juristic person, so as to more readily restrict the entitlement of juristic persons to fundamental rights.)

100 See *First National Bank of SA Ltd T/A Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd T/A Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) ('FNB') at para 45 (Noting the invitation of FC s 8(4) to analyze the applicability of a right to juristic persons.)

101 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) ('FNB'). Concerns that corporations would skew rights analysis are, as yet, not reflected in the case law. For example, only 3 of the 26 Constitutional Court judgments reported in the 2002 South Africa Law Reports involved juristic persons relying on provisions in the Bill of Rights.

Of course, some rights are clearly not designed to benefit corporations. Corporations have neither conscience nor religious belief within the meaning of FC s 15. They are neither citizens for the purposes of FC s 19 or FC s 20, nor children for the purposes of FC s 28. They have neither life in terms of FC s 11, nor human dignity in terms of FC s 10.¹⁰² They can associate (FC s 18). But they would be hard pressed to assemble (FC s 17). Other rights must apply to corporations if their presence in the text is to be even partially vindicated.¹⁰³

Newspapers, radio stations and television networks must be able to benefit from the freedom of expression.¹⁰⁴ Only such entities are capable of exercising the right in its robust and intended sense.¹⁰⁵

Similarly, it is difficult to imagine the rights to property and economic activity belonging to natural persons and not to juristic persons. Even in a regulated

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market economy, corporations must be able to form some strong expectations about what kind of property they can hold and transfer.¹⁰⁶

Privacy might be a right normally associated with intimacy, and intimacy with personhood. But commercial concerns have an interest in not being subject to unwarranted searches and seizures.¹⁰⁷

Extending the equality right to juristic persons met with initial resistance. A number of courts and commentators argued that expanding the ambit of IC s 8 or FC s 9 so as to serve the interests of corporations threatened the primary purpose of

102 See *Investigating Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd & Others: In re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) ('Hyundai') (Juristic persons are not the bearers of rights to human dignity.) Cf JR Midgley 'An Artificial Situation' (1988) 105 *SALJ* 415 (Juristic persons should possess personality rights in appropriate circumstances, citing supportive obiter from *Universiteit van Pretoria v Tommie Meyers Films (Edms) Bpk* 1979 (1) SA 441 (A).) See also *Sage Holdings v Financial Mail* 1993 (2) SA 451 (A) (Juristic persons have right to privacy.)

103 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 57-58 (Court held that FC s 8(4) was not in conflict with Constitutional Principle II. It reasoned that many 'universally accepted fundamental rights' would be fully recognised only if afforded to juristic persons as well as natural persons, and it was, furthermore, wrong to equate juristic persons with powerful and wealthy corporations as there were countless small companies and close corporations that needed and deserved protection no less than natural persons did.) See also *AK Entertainment CC v Minister of Safety and Security & Others* 1994 (4) BCLR 31, 38 (E) (Bill of Rights must protect juristic persons to be effective.)

104 *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) (Media plays an indispensable role in creating conditions for an open and democratic society); *Sayed v Editor, Cape Times* 2004 (1) SA 58, 62-63 (C) (High Court suggests that given democracy's place as an animating value of the Final Constitution, when the media publishes political speech the bar to defamatory action needs to be somewhat higher.) See also Dario Milo & Anthony Stein 'Freedom of Expression' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS September 2005) Chapter 42.

105 See *Laugh It Off Promotions CC v SAB International (Finances)* Case 42/04 CT (27 May 2005) (Closed corporation entitled to rely on FC s 16 in defense of claim of trademark infringement); *Government of the Republic of South Africa v Sunday Times Newspaper & Another* 1995 (2) SA 221 (T) (Press and other media afforded protection of IC s 15 because of role juristic persons play in vindicating the values which animate the right.) See also *Edmonton Journal v Alberta (AG)* [1989] 2 SCR 1326, 64 DLR (4th) 577.

the equality clause: the amelioration of the discriminatory effects of apartheid and the creation of a more egalitarian society.¹⁰⁸

The Constitutional Court rejected this restrictive approach because it artificially suppresses questions worth asking. While FC s 9(3) relies on various indicia of human personhood for a finding of unfair discrimination, FC s 9(1) — the right to equality before the law and to equal protection of the law — asks whether the law reflects irrational distinctions or naked preferences. As Justice O'Regan wrote in *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others*:

The first question to be answered in any equality challenge, therefore, is whether the governmental action or regulation under consideration is rational. The question is not

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- 106 See *FNB* (supra) at para 45 (After noting the invitation by FC s 8(4) to apply the right to property to juristic persons, the Court wrote that '[e]ven more so than in relation to the right to privacy, denying companies entitlement to property rights would . . . lead to grave disruptions and would undermine the very fabric of our democratic State. It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies. The property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons.') Where the US Constitution affects property, corporations are generally permitted to seek vindication of their rights. The 'takings' and 'contract' clauses offer corporations benefits equal to those extended to natural persons. See *United States Trust Company of New York, Trustee v New Jersey* 431 US 1 (1977)(State's impairment of its contractual obligations with either corporations or individuals will be constitutional only if the impairment is 'reasonable and necessary to support an important public purpose.') The 'equal protection' clause offers corporations less protection than many so-called 'suspect' classes of natural person. Compare *Lindsey v Natural Carbonic Gas Company* 220 US 61 (1911)(Economic regulation will not be struck down if the means employed bear some rational relation to a legitimate government objective) with *Strauder v West Virginia* 100 US 303 (1880) (Racial classifications will only be upheld if they are necessary and narrowly tailored to promote a compelling state interest).
- 107 See *Hyundai* (supra) at para 18 ('Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The State might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic State. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons.')
- 108 Giving corporations equality rights in order to pursue commercial ends, it was said, would diminish the symbolic purpose of the clause and weaken the standards employed by the judiciary. (That is, the judicial deference paid to legislative restrictions on commercial concerns would result in similar forms of deference in non-commercial cases.) Corporations, so the argument went, are perfectly capable of taking care of themselves in the democratic process and do not need the solicitude FC s 9 affords. See Azhar Cachalia, Halton Cheadle, Dennis Davis, Nicholas Haysom, Penuell Maduna & Gilbert Marcus 'Application' in *Fundamental Rights in the New Constitution* (1994) 21-3 (Arguing that IC s 8 ought not to be extended to corporations). But see Cathi Albertyn & Janet Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149, 167-72 (While calling for a restrictive approach to IC s 8(2) that would largely track the reasoning of the Canadian Supreme Court in *Andrews*, the authors suggest that corporations might successfully seek solace under the more general provisions of IC s 8(1). IC s 8(1) is now FC s 9(1).) See also *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at 174, (1989) 56 DLR (4th) 1 (Protection of Charter s 15 flows only to those individuals or groups who can establish discrimination based upon a personal characteristic either enumerated in s 15 or shown to be analogous to one of those grounds); Cathi Albertyn 'Equality' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 51.

whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purposes. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose.¹⁰⁹

Such a relatively deferential test is well-suited to corporations. By extending equality rights to juristic persons, the Court gives corporations the opportunity to reveal manifestations of irrationality and corruption in the law-making process.¹¹⁰ By limiting such equality enquiries to the kind of irrationality unlikely to correct itself through democratic political processes, the Court has answered the objection that the extension of equality rights to corporations will undermine the more important remedial ends of FC s 9.

31.4 Application under the Final Constitution: Burdens of the Bill of Rights

(a) Application doctrine enunciated in *Khumalo v Holomisa*¹¹¹

(i) Facts

Bantu Holomisa, the leader of the United Democratic Movement, sued the *Sunday World* over an article that alleged that Mr Holomisa was involved with a gang of bank robbers and under police investigation for his involvement. In the High Court, the *Sunday World* averred, by way of exception, that because the contents of the article 'were matters in the public interest' and that the respondent had failed 'to allege in his particulars of claim that the article was' false, Mr Holomisa had failed to satisfy the requirements for a cause of action in defamation. The High Court dismissed the

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applicant's exception.¹¹² The High Court did so on the grounds that it was bound by the Supreme Court of Appeal's decision in *National Media Ltd v Bogoshi*.¹¹³

(ii) Holding

109 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 24. See also *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25 ('It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.')

110 See *AK Entertainment CC v Minister of Safety and Security & Others* 1994 (4) BCLR 31, 38 (E) '[I]t is difficult to appreciate why a corporation should not be entitled to enforce [IC] s 8 where an executive or administrative functionary blatantly treats it unequally from all other persons.'

111 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC).

112 *Holomisa v Khumalo & Others* 2002 (3) SA 38 (T).

113 1998 (4) SA 1196 (SCA), 1999 (1) BCLR 1 (SCA) ('*Bogoshi*').

Given that there could be no appeal to the Supreme Court of Appeal in terms of a dismissal of an exception, the applicants had no choice but to seek leave to appeal to the Constitutional Court. To succeed the applicants had to show that the common-law rules of defamation as they stood post-*Bogoshi* violated the Final Constitution.

The applicants relied primarily on FC s 16. In the alternative, the applicants relied upon FC s 39(2). Either way, asserted the applicants, the role of the mass media in an open and democratic society vindicated their position that the current law of defamation had to be altered.

The Constitutional Court rejected the applicants' claims. While noting the value of a robust exchange of ideas in any democracy, the Court found that the Final Constitution's commitment to human dignity — and thus to self-worth and reputation — was of greater import. The *Khumalo* Court held that the defense of reasonableness developed in *Bogoshi*, rather than a requirement that the plaintiffs prove an allegedly defamatory statement false, better struck the desired balance between these competing interests.

More importantly for the purposes of this chapter, the *Khumalo* Court addressed the question of whether the common law of defamation was subject to the direct application of the substantive provisions of the Bill of Rights. The *Khumalo* Court held that, contrary to the applicants' contention, FC s 8(1) did not subject the law that governed disputes between private parties to the direct application of the substantive provisions of the Bill of Rights. It held instead that FC s 8(2) determined the conditions under which direct application of the substantive provisions of the Bill of Rights to disputes between private parties would occur. Under FC s 8(2), the substantive provisions of the Bill of Rights apply directly to disputes between private parties where a specific provision is interpreted by a court to bind the party against whom the right is asserted. In the instant case, the *Khumalo* Court found that FC s 16 bound the private party relying upon the existing common-law rules of defamation.

(iii) Court's reasoning

The *Khumalo* Court's application analysis begins at paragraph 29 of the judgment. It reads, in pertinent part:

The applicants' exception relies directly on section 16 of the Constitution, despite the fact that none of the parties to the defamation action is the state, or any organ of state.¹¹⁴

The *Khumalo* Court then goes on to rehearse the language of FC s 8. Note, for now, that the provisions of the Chapter apply to 'all law' and 'bind . . . the

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judiciary'. Recall that Justice Kentridge's argument in *Du Plessis v De Klerk* for indirect application relied heavily on the absence of the 'judiciary' in IC s 7(1) and the notion that 'all law' in s IC 7(2) was modified by 'legislative and executive' in IC s 7(1). Together IC s 7(1) and IC s 7(2) were read to exclude emanations of law from the judiciary — in particular, the common law — and disputes between private persons — since no state actor was present — from the direct application of the Bill of Rights.

114 *Khumalo* (supra) at para 29.

In paragraph 30, Justice O'Regan, for a unanimous *Khumalo* Court, notes that applicants' counsel made the comparison between the texts of the Interim Constitution and the Final Constitution the basis for their contention that the Final Constitution must be read to apply to all law and to bind private parties no matter what kind of law governs a dispute. Counsel placed great emphasis on the inclusion of those phrases — 'all law' and 'binds . . . the judiciary' in FC s 8(1) — that were absent from IC s 7(1).

In paragraph 31, the *Khumalo* Court says that this argument cannot succeed. Why? Because the Final Constitution ostensibly distinguishes between two kinds of parties burdened: state actors in FC s 8(1) and private actors, potentially, in FC s 8(2). But look closer at what the *Khumalo* Court does — or doesn't do. It forgets to analyze the phrase 'applies to all law'. Justice O'Regan writes: 'Section 8(1) binds the legislature, executive, judiciary and all organs of state without qualification to the terms of the Bill of Rights.' Despite argument from counsel, the *Khumalo* Court ignores the phrase 'all law' entirely. The *Khumalo* Court then fails to take cognizance of the phrase 'binds . . . the judiciary.' The *Khumalo* Court never actually engages the applicants' arguments: the Court's cursory conclusions in this regard are all the more surprising given that it framed the application debate in these very terms in *Du Plessis*.

In paragraph 32, Justice O'Regan writes:

Were the applicants' argument to be correct, it would be hard to give a purpose to section 8(3) of the Constitution. For if the effect of sections 8(1) and (2) read together were to be that the common law in all circumstances would fall within the direct application of the Constitution, section 8(3) would have no apparent purpose. We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.¹¹⁵

For starters, the *Khumalo* Court's textual argument is wrong on several crucial counts. First, FC s 8(1) alone makes 'all law' subject to the direct application of the Bill of Rights. One does not need FC s 8(2) for that particular purpose. Second, the applicants' argument does not render FC s 8(3) meaningless.¹¹⁶ The notion that FC s 8(3) would be meaningless if FC s 8(1) really applies to 'all law' is completely inconsistent with the Court's own jurisprudence — before and after *Khumalo* — on the many uses of FC s 8(3).¹¹⁷ The Court's own (non-*Khumalo*) jurisprudence supports an alternative account — my preferred reading — that gives every provision in FC s 8 a purpose and still makes good the drafter's intent to apply the Bill of Rights directly to disputes between private parties governed by the common law.

(iv) The black letter law and the preferred reading

The black letter law on application in terms of *Khumalo* takes the following form.

FC s 8(1) stands for the following two propositions:

115 *Khumalo* (supra) at para 32.

116 See § 31.1(c)(Precis of the preferred reading of FC s 8).

117 See § 31.4(d)(i) infra (On the meaning of FC s 8(3)).

- All law governing disputes between the state and a natural or juristic person is subject to the direct application of the Bill of Rights.
- All state conduct that gives rise to a dispute between the state and a natural or juristic person is subject to the direct application of the Bill of Rights.

FC s 8(2) stands for the following proposition:

- Disputes between natural and/or juristic persons *may* be subject to the direct application of the Bill of Rights if the specific right asserted is deemed to apply.

FC s 8(3) stands for the following proposition:

- Where direct application of the right asserted occurs in terms of FC s 8(2), and the court further finds a non-justifiable abridgment of that right, then the court must develop the law in a manner that gives adequate effect to the right infringed.¹¹⁸

The preferred reading on application takes the following form.

FC s 8(1) covers 'all law' — regardless of provenance, form, and or the parties before the court. FC s 8(1) also covers all government conduct — by all branches of government and all organs of state — whether that conduct takes the form of law or reflects some other manifestation or exercise of state power.¹¹⁹ In sum, FC s 8(1) should be understood to stand for the following proposition:

- *All* rules of law and every exercise of state power are subject to the direct application of the Bill of Rights.

FC s 8(2) covers dispute-generating conduct between private actors not 'adequately' governed by an express rule of law. There are two basic ways to read 'not governed adequately by an express rule of law.' First, it could contemplate the possibility of a dispute over an aspect of social life that is not currently governed by any rule of law at all. Such instances will be rare. Indeed, there is good reason to believe that such instances do not exist at all. The second and better reading views non-rule governed conduct in a much narrower sense. In many instances a

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body of extant rules — or even background norms — may be said to govern a particular set of private relationships. FC s 8(2) calls our attention to the fact that

118 FC s 39(2), although not engaged expressly in *Khumalo*, stands, under a secondary body of black letter law, for the following three propositions:

- Where an asserted right is, under FC s 8(2), deemed not to apply directly to a dispute between private parties, the court may still develop the common law or interpret the apposite provision of legislation in light of the more general objects of the Bill of Rights.
- Even where a right is asserted directly, the court may still speak as if a finding of inconsistency or invalidity requires that a new rule of common law be developed in terms of FC s 39(2).

119 The cosmology of common law jurisdictions is such that some lawyers express discomfort with the notion that a common law rule found inconsistent with the Final Constitution could occasion a finding of invalidity. But that locution is, in fact, endorsed by the Constitutional Court. See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (2) SACR 556 (CC), 1998 (12) BCLR 1517 (CC) at para 73 (Court declares 'common-law offence of sodomy . . . inconsistent with the 1996 Constitution and invalid.'). See also *Shabalala v Attorney-General, Transvaal* 1996 (1) SA 725 (CC), 1995 (2) SACR 761 (CC), 1995 (12) BCLR 1593 (CC).

these rules of law (common law or legislation) may not give adequate effect to the specific substantive provisions of the Bill of Rights and may require the courts to develop a new rule of law that does give adequate effect to a particular provision in the Bill of Rights in so far as a dispute between private persons requires it to do so. In sum, FC s 8(2) should be understood to stand for the following proposition:

- While, on the *Hohfeldian* view, a body of extant rules — or background norms — will always govern a social relationship, those same rules will not always give adequate effect to a provision in the Bill of Rights. FC s 8(2) calls attention to the potential gap between extant rules of law and the prescriptive content of the Bill of Rights, and, where necessary, requires the courts to bridge that gap by bringing the law into line with the demands of the particular constitutional right or rights deemed to apply.

If we decide that the right invoked engages the conduct in question and that the right has been unjustifiably infringed, then we move on to FC s 8(3). FC ss 8(3)(a) and (b) enjoin the court to develop new rules of law and remedies designed to give effect to the right infringed. Thus, where FC s 8(2) acknowledges gaps in existing legal doctrine, FC s 8(3) aims to fill those gaps. In sum, FC s 8(3) should be understood to stand for the following proposition:

- If the court finds that the right relied upon warrants direct application to the conduct that has given rise to the dispute, and further finds a non-justifiable abridgment of the right, then FC ss 8(3)(a) and (b) guide the court's development of the law in a manner that gives adequate effect to the right infringed.

It may be, however, that the prescriptive content of the substantive provisions of the Bill of Rights does not engage the rule of law or conduct at issue. Two things can happen. A court can decide that the Bill of Rights has nothing at all to say about the dispute in question. A court can decide that although no specific provision of the Bill of Rights is offended by the law or the conduct in question, the Bill of Rights warrants the development of the law in a manner that coheres with the general spirit, purport and objects of Chapter 2. In sum, FC s 39(2) should be understood to stand for the following:

- Where no specific right can be relied upon by a party challenging a given rule of law or the extant construction of a rule of law, the courts are obliged to interpret legislation or to develop the law in light of the general objects of the Bill of Rights.

The black letter law and the preferred reading establish the parameters of the debate. As I noted at the outset,¹²⁰ the justification for the black letter law requires a good faith reconstruction of the arguments in *Khumalo*. That reconstruction follows directly below. Thereafter, I entertain arguments that justify the preferred reading.

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(v) A good faith reconstruction of *Khumalo*

The thinness of *Khumalo*'s reasoning makes several of its arguments appear tendentious.¹²¹ However, a good faith reconstruction suggests that *Khumalo* may not be entirely wrong, just much less than optimal.

120 See § 31.1(c) *supra*.

Let us begin this exercise by concerning ourselves with questions of textual plausibility or what Frank Michelman calls naturalness. That does not mean we set aside forever questions about what would be the ideologically or pragmatically preferable way to parse the first three subsections of FC s 8. I only postpone them.

One straightforward way to parse FC ss 8(1), (2), (3) — one that I believe closely tracks Justice O'Regan's intent in *Khumalo* — begins with a perfectly understandable and workable distinction between a constitutional norm's range of application and that same norm's prescriptive content.¹²² It is entirely possible — the Justice might say — that FC s 8(1), and the Bill of Rights, applies to all law in the following sense. FC s 8(1) rules out any contention that a piece of law is exempt from the demand for conformity with the requirements of the Bill of Rights because that piece of law falls within some genus of law — say, private law, or common law — with which the Bill of Rights is not concerned. It does not follow from this reading of FC s 8(1), however, that the extension or the prescriptive content of the substantive provisions of the Bill of Rights engage the content of every rule of law.

Take the following two norms — constitutional norm A and non-constitutional norm B. To say, as per FC s 8(1), that Norm A applies to Norm B is to say that Norm B cannot stand insofar as Norm B is inconsistent with Norm A. To see whether it is inconsistent, we have to know the content of both Norm A and Norm B, or be in a position to determine the content of one or both norms by what would normally be an act of judicial interpretation. Suppose, then, that the content of Norm A is (or is determined by some judge to be) exhausted by the proposition that 'no state lawmaker or state official may exercise lawmaking or other official powers in such a way as to limit any person's freedom of expression.' Norm A does not engage actions by any non-state actor or any other set of circumstances. Suppose that the content of Norm B is (or is determined by some judge to be) exhausted by the proposition that 'private employers have complete freedom, subject to contractual modification, to fire employees for saying things the employer does not like, on or off the work site.' Norm A undoubtedly applies, in a general or a formal sense, to Norm B (or, if you prefer, it applies to conduct justified in terms of Norm B). But in so far as Norm B is undoubtedly required to pass a test of compliance or harmony with Norm A, Norm B does, indeed, pass

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the test. Why? Because Norm A is solely concerned about censorship by state actors wielding official powers and has nothing to say, so to speak, about Norm B's content — expression in the workplace.

Armed with such a distinction between the range of application of constitutional norms and the prescriptive content of constitutional norms, one can generate an orderly set of definitions for the first three subsections of FC s 8 that assigns independent meaning to each subsection. FC s 8(1) stands for the proposition that no genus of law is exempt from testing against the norms in the Bill of Rights. (This general claim is neither empty nor idle: as we saw in *Du Plessis* — and in our

121 Not everyone believes that the five paragraphs on application in *Khumalo* are a disappointment. See, eg, Chris Roederer 'Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law' (2003) 19 *SAJHR* 57 and the discussion of this article at § 31, Appendix 3(a), *infra*.

122 I am deeply indebted to Frank Michelman for working through this good faith reconstruction of *Khumalo* with me. Much of the language in this section is drawn directly from our e-mail correspondence, and the better turns of phrase belong to him. Any mistakes made in this good faith reconstruction remain mine alone.

treatment of the application jurisprudence of other jurisdictions — there remains an abiding inclination to exempt the common law from constitutional inspection.) FC s 8(2) stands for the proposition that the prescriptive content of one or another norm in the Bill of Rights may engage or 'bind' conduct other than that of state officials wielding official powers. That is, FC s 8(2) stands for the proposition that the prescriptive content of one or another norm in the Bill of Rights 'may' engage or 'bind' the conduct of a natural person or a juristic person. (This general claim is neither empty nor idle: as we saw in *Du Plessis* — and in our treatment of the application jurisprudence of other jurisdictions — the prevailing instinct is to hold that the norms in a Bill of Rights are largely unconcerned with private conduct.) FC s 8(3) provides direction for courts in cases in which: (i) they find that a specific substantive provision binds the conduct of a private party in terms of FC s 8(2); and (ii) the law relied upon by that private party fails the test of compliance with the specific substantive provision deemed to bind the private party.

There may not, at first glance, appear to be any serious flaw in the foregoing textual exegesis. This exegesis also coheres with a perfectly plausible set of intentions to be attributed to the drafters. First, that there is but one system of law and all of the law in that system derives from the basic law — as reflected in the norms of the Final Constitution. Second, since all rules of law must comport with the dictates of the basic law, and since the law structures, or governs, all conduct, then all conduct must, ultimately, comport with the dictates of the basic law.

(aa) The First Objection

The *Khumalo* Court quite consciously crossed over the public-private divide in the application debate. The text of the Final Constitution left it little choice. *Khumalo*'s one step forward is, however, followed by two steps back. The judgment does not endorse the proposition that all legal disputes are grounded in exercises of public power that must comport with constitutional dictates. Whereas *all* disputes between the state and an individual are subject to the direct application of the Bill of Rights, *Khumalo* tells us that only *some* disputes between private parties will be subject to *some* of the provisions of the Bill of Rights. This revised public-private distinction in application jurisprudence creates the following anomaly.

In *Du Plessis*, this traditional view of constitutional review was used to *suppress* direct application of the Bill of Rights with respect to common law disputes

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between private parties. In *Khumalo*, the traditional view of constitutional review is used to *defer* — and potentially suppress — direct application of the Bill of Rights. Direct application of the substantive provisions is deferred — and by that I simply mean turned into a question of interpretation — with respect to *all* disputes between private parties. It matters not whether the law governing disputes between private parties is grounded in statute, subordinate legislation, regulation common law or customary law. The Interim Constitution's Bill of Rights was, in terms of *Du Plessis*, understood to apply directly, and unequivocally, to legislation, subordinate legislation or regulations that governed private disputes. The Final Constitution's Bill of Rights, in terms of *Khumalo*, does not. The two steps back: less law is subject to the unqualifiedly direct application of the substantive provisions of the Bill of Rights under the *Khumalo* Court's reading of the Final Constitution than it was under the *Du Plessis* Court's reading of the Interim Constitution.

(bb) The Second Objection

The Constitutional Court has created a legal regime in which (1) every exercise of state power is subject to constitutional review¹²³ and (2) every law is subject to the objective theory of unconstitutionality.¹²⁴ Much is rightly made of the Constitutional Court's bold assertion in *Fedsure, Pharmaceutical Manufacturers* and their progeny that all law derives its force from the basic law (the Final Constitution) and that all law and all conduct sourced in the law must, as a logical matter, be

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consistent with the basic law.¹²⁵ Despite the first requirement — and despite the fact that FC s 8(1) applies to all law and binds both the legislature and the executive — legislation, subordinate legislation or regulation that governs a dispute between private persons will not automatically be subject to the direct application of the Bill of Rights. Those same pieces of legislation, subordinate legislation or regulation would automatically be subject to the direct application of the provisions of the Bill of Rights if they were invoked by an individual in a dispute with the State. The absurdity of this distinction is brought into even sharper relief by the Court's own doctrine of objective unconstitutionality. (The relative desuetude of this doctrine is offset by the fact that it has, as yet, not been repudiated by the Constitutional Court.¹²⁶) In its most general form, the doctrine holds that the validity or the invalidity of any given law is not contingent upon the circumstances (say, the timing) of the case, or, more specifically, the parties to the case. If a provision of legislation would

123 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) ('*Pharmaceutical Manufacturers*'); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) ('*Fedsure*').

124 See *National Coalition for Gay & Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 28–29 ('On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person'); *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 64 (In reaffirming its commitment to the objective theory of unconstitutionality, the Court wrote that 'the practice that has been urged upon this Court carries with it the distinct danger that Courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant'); *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 26–28 ('The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.') The generous conditions for standing ensure that the objective theory of unconstitutionality will continue to operate in practice — even if the Court refuses to announce or to renounce its position on the doctrine. See, especially, *Minister of Home Affairs v Eisenberg & Associates: In re Eisenberg & Associates v Minister of Home Affairs & Others* 2003 (5) SA 281 (CC), 2003 (8) BCLR 838 (CC) (Attorneys' firm whose practice concerned mainly immigration matters was granted standing — in its own interest and as an interested member of the public — to mount constitutional challenge to immigration regulations passed without requisite notice and comment. Although the regulations did not effect the firm's members directly, the Court found that the firm had an interest in proper notice and comment procedures being followed. Said regulations were found unconstitutional.)

125 The finest restatement of the law on this subject is to be found in Frank Michelman's chapter in this work. See Frank Michlelan 'The Rule of Law, Legality, and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

be deemed to be unconstitutional when invoked by an individual in a dispute between the State and an individual, then it must likewise be unconstitutional when invoked by an individual in a dispute between that individual and another individual. However, the Court's differentiation between FC s 8(1) disputes that are invariably subject to the direct application of the Bill of Rights and FC s 8(2) disputes that are not invariably subject to direct application of the Bill of Rights is logically incompatible with the doctrine of objective unconstitutionality. The *Khumalo* application doctrine relies upon the ability to distinguish constitutional cases — and thus the constitutionality of laws — upon the basis of the parties before the court. The doctrine of objective unconstitutionality denies the ability to distinguish constitutional cases — and thus the constitutionality of laws — upon the basis of the parties before the court.

That legislation governing a dispute between private persons is not automatically subject to the direct application of the Bill of Rights is, I think, one of the strongest objections to the *Khumalo* Court's construction. Not even the good faith reconstruction of Justice O'Regan's position can meet this objection.

Several readers, upon encountering this objection, were puzzled. Others denied its truth. What explains the bemusement? It seems obvious that when a statute's constitutionality is challenged, appropriately, in a dispute between private persons, the Constitutional Court — post-*Khumalo* — will not hesitate to apply provisions of the Bill of Rights directly. It will not even consider submitting the law at issue to the 'test' set out in FC s 8(2). (That test is described above in the good faith reconstruction.) Examples of this refusal to submit a dispute between private parties governed legislation post-*Khumalo* to FC 8(2) analysis are legion. For example, in *Daniels v Campbell*, the Intestate Succession Act governed the distribution

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of an estate that was the subject of a dispute between private litigants.¹²⁷ A provision of the Bill of Rights, FC s 9(3), was applied directly by the High Court to invalidate the Act. My claim, in short, is that the Constitutional Court's construction of FC s 8(2) in *Khumalo* — on both Justice O'Regan's account and the good faith reconstruction — bars it from confirming the High Court's order without first deciding whether FC s 8(2) permits the application of FC s 9(3) to this particular private dispute. Justice Moseneke's minority opinion, which supports the High Court's disposition, fails, in terms of the Constitutional Court's own precedent, to analyze the Intestate Succession Act and the parties before the court in terms of FC s 8(2), before applying FC s 9 and invalidating that provision of the Act that discriminates against partners that enter into marital covenants under Muslim law.

Perhaps, as one interlocutor has suggested, few would care to raise such an objection to Justice Moseneke's analysis. No member of the Constitutional Court would dream of raising it. (And, of course, none did.) *Khumalo* could not possibly have committed them to the position I have just attributed to them. (But, of course, it did.)

126 See, especially, *De Reuck v Director of Public Prosecutions*, WLD 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) (Confirms expressly the continued vitality of the objective theory of unconstitutionality.) See also *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe & Another* 2003 (4) SA 584 (CC), 2003 (8) BCLR 825 (CC) at para 20 ('This Court has adopted the doctrine of objective constitutional invalidity.')

127 *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC), 2004 (6) BCLR 735 (CC).

My point is not primarily empirical. I am not saying that the Constitutional Court does do what Judge Moseneke fails to do. My point is one of logic and consistency. The Constitutional Court has, in *Khumalo*, committed itself to a particular analytical framework and Justice O'Regan's justification for this framework relies heavily on her assertion that her construction of FC s 8 is the only one that can give all the words in FC s 8 independent meaning. And yet, despite the fact that our acceptance of *Khumalo* turns on it being the only 'possible' account of how FC s 8 operates, neither the Court nor its individual members feel compelled to discipline themselves in the manner that they themselves have decided FC s 8 demands.

This general claim is neither idle nor empty. We can expect that the Constitutional Court will continue to do what Justice Moseneke did in *Daniels*. They will routinely apply the Bill of Rights to private disputes without feeling obliged to honour the demands of the official *Khumalo*-construction of FC s 8(2).

In order to clarify exactly what is at stake here with respect to my claim of a logical contretemps, let us return to the distinction made, in the good faith reconstruction, between a norm's range of application and its prescriptive content. Suppose the Constitutional Court had concluded in *Daniels* that 'spouse' cannot be construed to cover Juleiga Daniels. Direct application of FC s 9(3) to the Intestate Succession Act is, then, the only line of constitutional argument left open to her. On the good faith reconstruction of Justice O'Regan's account, the next question must logically be whether, according to the inquiry required by FC s 8(2), the prescriptive content of FC s 9(3) reaches the conduct, in these circumstances, of the natural and juristic persons with whom Ms Daniels contends for a share of the estate. Only if we answer 'yes' to FC s 8(2)'s application inquiry do we reach the point where we can test the Act's discriminatory treatment of Muslim-rite marital partners against the normative demands of FC s 9(3).

However counter-intuitive this account may seem, that (re)construction is exactly what the *Khumalo* Court endorses. The thinness of Justice O'Regan's argument simply masks its 'unnaturalness', its 'textual implausibility'.

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Does the Constitutional Court offer an alternative, somewhere in its jurisprudence, to this rather laborious mode of analysis? Given the Final Constitution's generous provisions for standing, a litigant in Juleiga Daniels' position will generally be able to launch litigation in the name of some public official responsible for carrying out the obnoxious statutory directive, thus avoiding FC s 8(2) altogether. That simply invites the reply — from me — that such a move is not contemplated by *Khumalo* and is fundamentally at odds with how Justice O'Regan expressly states that FC s 8 must be read. (Indeed it should be obvious that such a move is consistent only with my preferred reading.)

(cc) A Third Objection

The good faith reconstruction has nothing to say about the binding of the judiciary. At most, it may allow us to follow the weak reading of the phrase 'binds the judiciary' offered below.¹²⁸ In short, the weak reading holds that the judiciary's behaviour as a government institution — as manifest in tenders for contracts or hiring practices — is subject to constitutional norms.

128 The strong reading and the weak reading — as well as the case law that engages the phrase 'binds the judiciary' — are covered below at § 31.4(b)(iii).

This weak reading is strained for three reasons. First, one would have expected that judicial actions as government conduct would be subject to constitutional dictates regardless of whether they were expressly mentioned in the text or not. Second, the plain meaning of the text suggests that all judicial actions — including judicial emanations such as the common law — are without express exception (since none is offered) measured for harmony with the dictates of the Bill of Rights. Third, it defies both logic and common sense to argue that when FC s 8(1) binds the legislature and the judiciary, it is intended to bind the actions of a legislator or a judge solely in their official, but non-lawmaking, capacity. When we bind the legislature, we must bind both the law it makes and the actions it takes. The text offers no grounds for treating the judiciary any differently. While we do want state actors — legislators and judges alike — to care about the manner in which they comport themselves, we care primarily about the law that they make. But that is not what *Khumalo* says, nor can it be reconstructed in such a manner as to say so.

What should really trouble the Constitutional Court — and any other reader of the judgment — is that the *Khumalo* Court refuses to give the phrase 'binds the judiciary' any meaning at all. Perhaps the most damaging consequence of this structured silence is that it offends the 'surplusage' canon of constitutional interpretation articulated in *Khumalo* itself: The canon reads:

We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.¹²⁹

Not only does Justice O'Regan not give the provision any apparent purpose, she cannot, even on the good faith reconstruction, give it any apparent purpose. Remember that the good faith reconstruction gains its traction through a distinction between a constitutional norm's range of application and that same norm's

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prescriptive content. That creates the interpretational space to argue that while FC s 8(1) speaks to the norm's range of application — namely to every conceivable genus of law — FC s 8(2) speaks to the prescriptive content of a norm and directs us to consider whether that prescriptive content ought to be understood to govern the private conduct (of the private party) that constitutes the gravamen of the complaint. This good faith reconstruction does no work with respect to the phrase 'binds the judiciary' because the distinction applies to 'law' and not to a sphere of government. The reason the good faith reconstruction cannot be recast in a manner that speaks to the differing concerns of FC s 8(1) and FC s 8(2) is that FC s 8(2) does not concern itself with the lawmaking activity of any lawmaking institution — legislative, executive or judicial.

Can we save *Khumalo* by generating a second good faith reconstruction? No, we cannot. There is simply no way to create another account of the meaning of FC s 8 that takes cognizance of the phrase 'binds the judiciary' and that fits the first good faith reconstruction. At best, we will have two separate accounts of the single set of phenomena to which FC s 8 addresses itself. As with all phenomena, we ought to prefer the simpler of two explanations and not engage in any unnecessary multiplication of entities and theories to explain them. By choosing not to give content to the phrase 'binds the judiciary', Justice O'Regan may have saved the Court from an obvious violation of Occam's Razor. But that choice does nothing to save *Khumalo*'s account of the phenomena it claims to explain.

129 *Khumalo* (supra) at para 32.

(dd) A Fourth Objection

The final objection to *Khumalo's* construction of FC s 8 turns on the style of the argument. Recall that the Court only concludes that the common law dispute between *Khumalo* and *Holomisa* requires direct horizontal application at paragraph 33 of the judgment. One would have thought that the Court would have dealt with application in its natural place, after deciding whether the court has jurisdiction and whether the case is justiciable. It doesn't. After deciding whether the appeal has been properly lodged with the Constitutional Court,¹³⁰ the Court initiates its discussion of the substantive law with an overview of the recently revised law of defamation.¹³¹ The Court vindicates *Bogoshi's* 'new' defense of reasonableness and its elimination of strict liability. It endorses the *Bogoshi* Court's view that media organs may not claim the absence of an intent to harm as a defence.

After this discussion of defamation, the Court offers a rather peculiar account of the role of the media in creating the conditions for an open and democratic society.¹³² The concluding paragraph about freedom of expression and its role in our democracy is particularly telling. Justice O'Regan writes:

although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and equality.¹³³

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FC ss 39 and 36 tell us that, with regard to the interpretation of the Final Constitution, we are to aim for 'an open and democratic society based upon human dignity, equality and freedom.' An open and democratic society should be based, at least in part, upon freedom.¹³⁴ Indeed, Justice O'Regan, writing for a unanimous Court in *South African National Defence Union v Minister of Defence*, states that freedom of expression and a panoply of related guarantees — assembly, association, belief, the franchise — 'lie at the heart of a democracy.'¹³⁵ Freedom of expression, she continues:

is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . .

130 *Khumalo* (supra) at paras 1-5.

131 *Ibid* at paras 16-21.

132 *Ibid* at paras 21-25.

133 *Ibid* at para 26.

134 See *Sayed v Editor, Cape Times* 2004 (1) SA 58 (C), 62-63 (Constitutional Court in *Khumalo* supported the Supreme Court of Appeal in *Bogoshi* in rejecting an onus shift where the defamatory statement related to free and fair political activity. High Court suggests that given the primacy of place of democracy as an animating value in our constitutional enterprise, when the media publishes political speech, the bar to defamatory action needs to be somewhat higher.)

135 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) ('SANDU') at paras 7-8.

[F]reedom of expression [FC s 16] . . . freedom of religion, belief and opinion [FC s 15], the right to dignity [FC s 10], as well as the right to freedom of association [FC s 18], the right to vote and to stand for public office [FC s 19] and the right to assembly [FC 17] . . . taken together protect the right of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where these views are controversial.¹³⁶

What makes freedom of expression a 'non-paramount value' in the context of defamation and *Khumalo* goes unexplained. Justice O'Regan then goes on to describe how the foundational value of dignity vindicates an array of personality rights.¹³⁷

In sum, before Justice O'Regan decides whether to engage the applicant's exception on the basis of freedom of expression, she has already told us in a rather roundabout way that: (a) the law of defamation is in pretty good shape post-*Bogoshi*; (b) that freedom of expression is important but not central to an open and democratic society; and (c) that dignity is a foundational constitutional value and that individual dignity — as viewed through the lens of reputation — is of paramount concern. Only then does Justice O'Regan decide that this matter warrants direct application of the Bill of Rights.

Based upon the Court's own jurisprudence and our good faith reconstruction of *Khumalo*, a court should first decide whether the provisions of Chapter 2 apply

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to the dispute before the court. If, as in *Khumalo*, the court determines that freedom of expression applied directly, then the generally accepted two-stage rights enquiry would have begun with a first stage analysis of the scope of freedom of expression and whether the law of defamation resulted in a prima facie infringement of that right. In *Khumalo*, it would most certainly have been found to constitute such limitation. The second question would be whether the law of defamation — as currently constructed — was a justifiable limitation the right to freedom of expression. The Constitutional Court in *Khumalo* certainly would have found the law as concurrently construed to be 'proportional' under FC s 36. *Khumalo* fails to follow the accepted form of fundamental rights analysis in cases of direct application.¹³⁸ The judgment looks, in manner of delivery, much like the kinds of judgments in which, under FC s 39(2), the common law is developed via indirect application of the Bill of Rights.

136 Ibid at paras 7-8. The Constitutional Court's minimalist approach means that while freedom of expression in *SANDU* is a paramount value for a democratic society, one that quite consciously embraces controversy at the same time as it signifies the moral agency — and thus the dignity — of each citizen, in *Khumalo*, freedom of expression is not a paramount value, and certainly not one that embraces controversy at the same time as it manifests a commitment to the moral agency of the speaker.

137 *Khumalo* (supra) at paras 27-28.

138 See *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC).

The style of judgment suggests that the *Khumalo* Court considers it relatively unimportant to engage this dispute as if there is, in fact, direct application. Or more accurately, by structuring *Khumalo* as if it were simply a common law judgment, the *Khumalo* Court intimates that the difference between direct application and indirect application of the Bill of Rights is minimal. I might be inclined to accept this elision between the analytical processes required by FC s 8 and FC s 39(2) were it not for the fact that the Supreme Court of Appeal and the Constitutional Court have handed down judgments regarding constitutional jurisdiction, *stare decisis* and indirect application under FC s 39(2) that manifest a clear desire not to disturb settled bodies of common law precedent and that cannot help but immunize a substantial body of apartheid-era decisions from reconsideration by lower courts.

This last point requires some amplification.

Leaving aside the problem of surplusage raised by our courts' occasional interchangeable use of FC s 8 and FC s 39(2), the Supreme Court of Appeal in *Afrox*, extending the reasoning of the Constitutional Court in *Walters*, has held that there is at least one critical difference between direct application under FC s 8 and indirect application under FC s 39(2).¹³⁹ A High Court may revisit pre-constitutional Appellate Division precedent only where a party has a colourable claim grounded in the direct application of a substantive provision of the Bill of Rights. High Courts may not alter existing common law precedent through indirect application of FC s 39(2). (The rest of our appellate courts' doctrine (whether pre-constitutional or post-constitutional) of constitutional *stare decisis* further constrains the High Courts' constitutional jurisdiction and is discussed at length below.¹⁴⁰) What happens when our appellate courts marry this restrictive doctrine of *stare decisis* to an incrementalist gloss on FC s 39(2)? The spawn is an application doctrine that effectively disables the High Court from undertaking meaningful constitutional review of existing common law precedent (as well as all other

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constructions of law) and thereby protects 'traditional' conceptions of law and existing legal hierarchies. This observation about the manner in which a set of related doctrines that affect application, *stare decisis* and constitutional jurisdiction conspire to blunt the transformative potential of the basic law is one of the strongest rejoinders to those jurists and commentators who have suggested that whether one relies upon FC s 8 (1) or FC s 8 (2), or FC s 39(2), the song remains the same: namely, how should the law governing a dispute be developed, re-formulated or re-interpreted? If I am correct in my characterization of the Constitutional Court's proliferating doctrines on the status of the 'basic law' and their consequences in terms of the development of the case law, then (a) it does very much matter where one comes down on issues of application and (b) FC s 39(2) does not, in fact, offer nearly as much promise of transformation as some would hope.¹⁴¹

(b) Section 8(1)

139 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA); *Ex parte Minister of Safety & Security: In re S v Walters* 2002 (4) SA 613 (CC), 2002 (2) BCLR 663 (CC).

140 See § 31.4(e)(x), '*Stare decisis*', *infra*.

141 See § 31.4(e)(ii)(bb), '*Obligation to develop the common law*', *infra*; § 31.4(e)(iv)(bb), '*FC s 39(2) and the transformation of the common law*', *infra*; and § 31.4(e)(viii), '*An objective normative value system*', *infra*.

(i) What the courts say FC s 8(1) means

To understand FC s 8(1), we need first to remind ourselves of the content of the comparable text of the Interim Constitution. The Interim Constitution read:

7(1): This Chapter shall bind all legislative and executive organs of state at all levels of government.

7(2): This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

The Final Constitution reads:

8(1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all other organs of state.

The black letter law on the meaning of FC s 8(1), following *Khumalo*, takes the following form: All law and all conduct at issue in disputes between the state and a natural person or a juristic person is subject to the direct application of substantive provisions of the Bill of Rights. *Khumalo* intimates — without expressly saying — that 'the law' referred to in FC s 8(1) is not law that governs disputes between private parties.

(ii) What FC s 8(1) should mean

(aa) The real meaning of 'all law'

FC s 8(1) places the phrase 'applies to all law' prior to any mention of a sphere or branch of government. The text no longer allows for an argument comparable to that offered by Kentridge AJ in *Du Plessis*, that 'legislature' and 'executive' modify 'all law'. To be aridly textual about it, 'all law' means 'all law'. In short, on the preferred reading, 'all law' embraces legislation, subordinate legislation, regulation, common law and customary law.

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Recall that on the good faith reconstruction of the *Khumalo* Court's account of FC s 8, if one distinguishes between the range of application of and the prescriptive content of constitutional norms, one can generate an account in which FC 8(1) stands for the proposition that no genus of law is exempt — in the abstract — from testing against the norms in the Bill of Rights and still assign independent meaning to FC ss 8(2) and (3). In this respect, the good faith reconstruction and the preferred reading give 'all law' its common sense extension.

(bb) The application of FC s 8(1) to the common law

As a matter of black letter law post-*Khumalo*, FC s 8(1) subjects the common law governing disputes between the state or an individual to the direct application of the substantive provisions of the Bill of Rights. As a matter of common sense, the black letter law post-*Khumalo* on FC s 8(1) should make the common law governing private relationships subject to direct constitutional scrutiny as well.

The Constitutional Court seems confused about what 'law' in FC s 8(1) actually denotes. In *President of the Republic of South Africa v South African Rugby Football Union*, the Court suggests that 'all law' refers to the common law irrespective of the kind of dispute it governs:

the right to a fair trial has now been entrenched in our Constitution. Section 35(3) of the Constitution which deals with criminal proceedings provides that 'every accused person

has a right to a fair trial'. Section 34 of the Constitution . . . applies to other proceedings . . . These provisions must be read with s 8(1) of the Constitution . . . It follows that s 34, which is part of the Bill of Rights, applies to the Judiciary. Moreover, the common law, which is 'law' within the meaning of s 8(1), is also subject to s 34 and in terms of s 39(2) must be developed in accordance with its provisions.¹⁴²

'Law' and the 'binds the judiciary' appear in *SARFU* to possess their common sense extension.

(iii) The binding of the judiciary

FC s 8(1) contains the phrase 'binds . . . the judiciary'. Recall that the absence of 'binds . . . the judiciary' in IC ss 7(1) or 7(2) of the Interim Constitution enabled Kentridge AJ to argue that judicial emanations, namely common law precedent and rulings based thereon, were immunized from direct application of the Bill of Rights.¹⁴³ The presence of the phrase 'the judiciary' in the Final Constitution should have driven the *Khumalo* Court to the conclusion that the emanations of the judiciary — its interpretation of legislation and its common law rulings — count as law directly subject to Chapter 2's Bill of Rights. It did not.

The *Khumalo* Court seems obliged — even on the good faith reconstruction — to adopt a much weaker reading of FC s 8(1). On such a reading, the binding of the judiciary simply means that the judiciary's behaviour as a government institution — as manifest in tenders for contracts or hiring practices — is subject to

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constitutional norms.¹⁴⁴ This reading is strained for three reasons. First, one would have expected that judicial actions as government conduct — state action simpliciter — would be subject to constitutional dictates regardless of whether they were expressly mentioned in the text or not. Secondly, the plain meaning of the text suggests that all judicial actions — including judicial emanations such as the common law — are without express exception (since none is offered) measured for harmony with the dictates of the Bill of Rights. Third, it defies both logic and common sense to argue that when FC s 8(1) binds the legislature and the judiciary, it intended to bind the actions of legislators or judges in their official capacity but not in their law-making capacity. As I have already noted above, while we care about the manner in which legislators and judges comport themselves,¹⁴⁵ we care primarily about the law that they make.¹⁴⁶

142 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) ('*SARFU*') at para 28.

143 See § 31.2(a) *supra*.

144 Thus, if a judicial actor was to infringe the freedom of assembly by ordering, on his own motion, that picketers or protestors on government property must vacate the premises, then the Bill of Rights would apply to the actions of that judicial actor. However, if the judicial actor was merely arbitrating the dispute between two other social actors — let us say an employer and a picketing union — then the Bill of Rights would not apply to the judicial actor's decision. It would apply only to the law at issue. How one distinguishes between the judicial actor's decision and the law at issue is another matter.

145 See *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C), 455, 1998 (7) BCLR 916 (C) (Parliament's conduct impaired the exercise at freedom of expression in terms of FC s 58 and FC s 16. Because Parliament's treatment of parliamentary privilege amounted to conduct not governed by a law of of general application, it could not be saved by FC s 36.)

The rejection of the weak reading of the phrase suggests a gloss on 'binds the judiciary' that is on all fours with the preferred reading. 'Binds the judiciary' covers the 'law' that the judiciary generates. Such a reading is consonant with the obvious — and accepted reading — of 'binds the legislature'. Moreover, by mapping the primary meaning of 'binds the judiciary' onto 'all law' we avoid two of the primary objections to *Khumalo*: (a) the failure to give meaning to a term in the Final Constitution; and (b) the need for two different, incompatible accounts of the various sections of FC s 8. Pace *Khumalo*, the preferred reading avoids both surplusage and silence.¹⁴⁷ Pace *Khumalo*, the preferred reading affords interpretive space for FC s 8(3).¹⁴⁸

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Despite *Khumalo*, the Constitutional Court has endorsed a strong reading of FC s 8(1). It has authored a set of decisions over the past five years that have had the collective effect of subjecting every exercise of judicial power to constitutional review. In *Bannatyne v Bannatyne (Commission For Gender Equality, As Amicus Curiae)*, the Court wrote: 'In terms of s 8 of the [Final] Constitution the judiciary is bound by the Bill of Rights.'¹⁴⁹ As I noted above, the *SARFU* Court extended the notion of judicial boundedness to the common law: 'The common law, which is 'law' within the meaning of s 8(1), is also subject to s 34 and in terms of s 39(2) must be developed in accordance with its provisions.'¹⁵⁰ Deploying a concatenation of provisions, the Constitutional Court in *Boesak* ventured that:

[t]he development of, or the failure to develop, a common law rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the Supreme Court of Appeal developed, or failed to develop, the rule under circumstances inconsistent with its obligation under s 39(2) of the Constitution or with some other right or principle of the Constitution. The application of a legal rule by the Supreme

146 There are obvious exceptions to this general rule. See, eg, *S v Mamabolo (E TV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC) (Citation for contempt for scandalizing court will attract review on FC s 16); *BCGEU v British Columbia (Attorney General)* [1988] 2 SCR 214, 53 DLR (4th) 1 (Supreme Court of Canada held that an injunction issued by a judge on his own motion to restrain picketing by union in front of his courthouse was subject to the Charter — despite the fact that a court is not a government actor for the purposes of Charter review. Court found this dispute to be more 'public' than 'private' and thus the appropriate object for direct application of the Charter.)

147 Prior to *Khumalo*, some courts read FC ss 8(1), 8(2) and 8(3) in a manner consistent with the preferred reading proffered in these pages: namely, FC s 8 gives us direct, unqualified application subject only to the condition that the application of any provision to a given dispute is contingent upon the interpretation of — the prescriptive content of — a right. See *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225, 1238 (W) ('The new Constitution admits of both horizontal and vertical application for the Bill of Rights. Whether it does have application in a given case will require interpretation of the provision in question.')

148 While FC ss 8(3)(a) and (b) anticipate just such an occurrence, the courts could formulate a new rule or a new remedy even in the absence of specific FC s 8(3) direction. The courts have already read FC ss 39, 7, 38, 167, 172 and 173 as authorizing the development of the common law where the Bill of Rights requires it. See § 31.4(e)(iii) *infra*, 'The development of the Common Law and the interaction between FC s 39(2) and FC ss 7, 8, 38, 167, 172 and 173.'

149 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC) at para 19.

150 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) at para 28. See § 31.4(b)(ii)(bb) *supra*.

Court of Appeal may constitute a constitutional matter. This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.¹⁵¹

Similarly, from *Pharmaceutical Manufacturers* through *Carmichele* to *Thebus*, the Constitutional Court has made it abundantly clear that all law-making activity — no matter what its provenance — must comply with the requirements of the Final Constitution. The *Thebus* Court, quoting from *Pharmaceutical Manufacturers*, wrote:

There is . . . only one system of law and within that system the Constitution is the supreme law with which all other law must comply.¹⁵²

The High Court in *Westley v Attorneys Fidelity Fund* likewise reasoned that FC s 8(1) — read with FC s 39(2) — requires the courts '(in circumstances where the point is central to a proper decision of a matter) to raise a constitutional issue *mero motu*.'¹⁵³ In *S v Lubisi*, the High Court found that because FC s 8 binds the judiciary, FC s 8, when read with FC ss 173, 7 and 39(2), obliges every court to interpret and to develop the law in a manner that promotes the spirit, purport and objects of the Bill of Rights.¹⁵⁴ In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*, the High Court found that the binding of the judiciary in FC s 8, when read alongside the general obligations placed by FC s 7 upon the state, meant that 'all statutes must be interpreted through the prism of the Bill of Rights [and] all law-making authority must be exercised in accordance with the Constitution.'¹⁵⁵ Failure by a lower court to interpret legislation

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properly in light of the dictates of the Bill of Rights invites appellate constitutional review of the judicial decision itself.

However, despite *Boesak* and *Pharmaceutical Manufacturers*' very expansive understanding of judicial boundedness, not every action of the judiciary is meat for review under the Final Constitution. In *Mphahlele v First National Bank of SA Ltd*, the Constitutional Court held that the binding of the judiciary does not always require a court to supply reasons for its decisions.¹⁵⁶

(iv) The binding of the legislature

FC s 8(1) states that the Bill of Rights 'binds the legislature' in addition to applying to 'all law'. A plain meaning approach to the two phrases, read together, should yield

151 *S v Boesak* 2001 (1) SA 912 (CC), 2001 (1) SACR 1 (CC), 2001 (1) BCLR 36 (CC) ('*Boesak*') at para 15.

152 *S v Thebus* 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC) ('*Thebus*') at para 25.

153 2004 (3) SA 31 (C) at para 31 citing *De Beer v Die Raad vir Gesondheidsberoepe van Suid-Afrika* (Case No 13598/02)(Unreported judgment, Bertelsmann J, 16 April 2003).

154 *S v Lubisi: In Re S v Lubisi & Others* 2004 (3) SA 520 (T), 530, 2003 (9) BCLR 1041,1051(T).

155 2004 (5) SA 124 (W), 141.

156 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC) at para 4. See also *Metcash Trading Ltd v Commissioner, SARS* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC).

the proposition that all legislation, whether passed by Parliament or a provincial legislature, is always subject to the direct application of the Bill of Rights. Of course, in light of *Khumalo*, it is clear that legislation is not always automatically subject to the direct application of the Bill of Rights. Legislation is only invariably subject to the Bill of Rights when it forms part of the substratum of a dispute between the State and an individual. When legislation governs a dispute between private parties, then *Khumalo's* gloss on FC s 8(2) tells us that the Bill of Rights only applies to such disputes — and thus to the underlying legislation — if and when the right invoked is deemed to bind the natural or juristic person in question. So while FC s 8(1) applies to all conduct of legislatures, and conduct that produces law that governs the relationships between the state and the individual, it does not apply to that conduct of the legislature which produces law that governs private conduct. If one finds that proposition palatable, then *Khumalo's* gloss on FC s 8(1) may seem plausible.

Two other questions shall detain us but briefly.

The first question, dealt with at greater length below, is whether legislative powers exercised in accordance with other sections of the Final Constitution are subject to Chapter 2's rights and freedoms.¹⁵⁷ For example, to what extent are rules regarding parliamentary privilege — even if drawn from the provisions of the Final Constitution itself — subject to the Bill of Rights? In *De Lille v Speaker of the National Assembly*, the High Court suggests how, when, and why the exercise of power by a legislature sourced directly in the Final Constitution is subject to the strictures of the Bill of Rights.¹⁵⁸

The second question is whether, or when, municipal councils count as legislatures. Municipal councils exercise both legislative and executive powers. FC s 151(2) reads: 'The executive and legislative authority of a municipality is vested in its municipal council.' FC s 156 reads, in relevant part:

- i. A municipality has executive authority in respect of, and has the right to administer a. the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and b. any other matter assigned to it by national or provincial legislation.

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- ii. A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

Prior to the Interim Constitution, by-laws were viewed 'as a form of subordinate legislation' and were 'fully reviewable by the courts.'¹⁵⁹ That view changed with the advent of the Interim Constitution. The power to pass by-laws is clearly a legislative function. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*, the Constitutional Court found that IC s 24 and FC s 33 — the administrative justice provisions — may apply to the exercise of executive powers delegated by a municipal council to its functionaries, but could not be meaningfully applied to the by-laws made by the municipal council itself.¹⁶⁰ When crafting by-

¹⁵⁷ See § 31.5 *infra*.

¹⁵⁸ 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C).

¹⁵⁹ Lawrence Baxter *Administrative Law* (1984) 151.

¹⁶⁰ *Fedsure* (*supra*) at para 41.

laws, the municipality must be viewed as a deliberative legislative body.¹⁶¹ The *Fedsure* Court wrote: 'The enactment of legislation by an elected local council in accordance with the Constitution is, in the ordinary sense of the words, a legislative and not an administrative act.'¹⁶²

(v) The binding of the executive

FC s 8(1) states that the Bill of Rights 'binds . . . the executive' in addition to applying to 'all law.' A plain meaning approach to the interpretation of the two phrases, read together, should yield the proposition that all executive action, including subordinate legislation and regulation, is always subject to the direct application of the substantive provisions of the Bill of Rights.

After *Khumalo*, it is clear that executive action is not always subject to the direct application of the Bill of Rights. When executive action, say in the form of subordinate legislation, governs a dispute between natural and juristic persons, then *Khumalo's* gloss on FC s 8(2) tells us that the Bill of Rights only applies to such disputes — and thus to the underlying legislation — if and when the right invoked is deemed to bind the natural or juristic person in question.

Executive action is, however, invariably subject to the Bill of Rights when it arises in a dispute between the State and an individual. A host of cases support this proposition. In *President of the Republic of South Africa & Others v South African Rugby Football Union & Others*, the Constitutional Court observed:

Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls First, in the Bill of Rights there is the right of access to information and the right to just administrative action Secondly, all the provisions of the Bill of Rights are binding upon the Executive and all organs of State.¹⁶³

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161 Ibid at para 26. See also *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T).

162 *Fedsure* (supra) at para 42.

163 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC) at paras 133–134. See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd & Others; In Re Hyundai Motor Distributors (Pty) Ltd & Others v Smit NO & Others* 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC) at para 41 ('The Constitution also prescribes that all conduct of the State must accord with the provisions of the Bill of Rights. This is evident from s 8(1) of the Constitution which provides that '(t)he Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of State'); *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) at para 4 ('Government, as part of a formidable array of responses to the pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth and identified Nevirapine as its drug of choice for this purpose. The programme imposes restrictions on the availability of Nevirapine . . . The applicants contended that these restrictions are unreasonable when measured against the Constitution of the Republic of South Africa Act 108 of 1996, which commands the State and all its organs to give effect to the rights guaranteed by the Bill of Rights. This duty is put thus by ss 7(2) and 8(1) of the Constitution respectively'); *Fredericks v MEC For Education and Training, Eastern Cape* 2002 (2) SA 693 (CC), 2002 (2) BCLR 113 at para 11 ('In this case, the applicants have alleged an infringement of their rights under ss 9 and 33 of the Constitution. The respondents who are alleged to have infringed the rights are all bound to observe the provisions of the Bill of Rights in terms of s 8(1) of the Constitution.') See also *Mohamed v President of the Republic of South Africa (Society For The Abolition of the Death Penalty in South Africa & Another Intervening)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) at paras 70–71; *South African National Defence Union v Minister of Defence* 2004 (4) SA 10 (T); *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W).

The same problem we face when trying to understand when legislation is covered by FC s 8(1) under *Khumalo* applies with equal force to the Court's characterization of executive law-making covered by FC s 8(1). While FC 8(1) applies to all conduct of all executives, and conduct that produces law that governs the relationships between the state and the individual, *Khumalo* dictates that FC s 8(1) does not apply to that conduct of the executive which produces law that governs private conduct.

(vi) The binding of organs of state

The definition of organs of state is covered by FC s 239. For that reason, the discussion of the manner in which organs of state are bound by the Bill of Rights appears below.¹⁶⁴

(c) Section 8(2)

Section 8(2) reads:

A provision in the Bill of Rights binds all 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.

(i) What FC s 8(2) means in *Khumalo*

As we have already noted, the black-letter law in *Khumalo* on FC s 8(2) reduces to this proposition: disputes between natural persons and/or juristic persons *may* be subject to the direct application of the Bill of Rights, if the specific right is deemed to apply to the private party whose conduct (which oddly, reduces to a reliance on ordinary law) is challenged.

The good faith reconstruction of *Khumalo* runs as follows. FC s 8(1) speaks to the range of the specific substantive provisions of the Bill of Rights. It tells us that no law is exempt from the demand for conformity to the requirements of the Bill of Rights simply because that piece of law falls within some genus of law. It does

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not follow, however, that the substantive provisions of the Bill of Rights engage, jointly and severally, the content of each and every rule of law. FC s 8(2) speaks to the prescriptive content of the right and tells us, effectively, that we must consider whether the right asserted by one party was meant to cover the contested conduct of another party. What is important to note is that this is not a question of application. It is a question of interpretation. Even on a good faith reconstruction of *Khumalo*, FC s 8(2) simply sidesteps general issues of application and drives one straight to the right. Note, however, that the shape of this interpretation exercise — determined as it is by the parties before the court — does not map directly on to a standard determination of the content of a right. FC s 8(2) identifies a preliminary interpretative step.¹⁶⁵ That FC s 8(2) does not really do anything meaningful by way

164 See § 31.4(f), 'Section 239: organ of state', *infra*.

165 With respect to direct application of a provision of the Bill of Rights to a dispute governed by FC s 8(1), the interpretation stage of rights analysis concentrates on the scope of the right's protection and the infringement of the right by law or conduct. In FC s 8(2) cases, the interpretation of the right requires, as a threshold matter, that the court decide whether a right is meant to burden the party against whom it is asserted. Only then, it would appear, is the court to move on to questions of scope and infringement. Of course, it seems impossible to separate out entirely an FC s 8(2) examination of burdens without determining, to some degree, what the actual scope of a right is.

of application may explain why the courts regularly fail to acknowledge the need to undertake this preliminary interpretive step.

(ii) What FC s 8(2) should mean and the courts' support for the preferred reading

I have, above, identified four discrete reasons why we should abjure even the good faith reconstruction of *Khumalo's* gloss on FC s 8(2).

First, whereas the Interim Constitution's Bill of Rights was, per *Du Plessis* understood to apply directly, and unequivocally, to legislation or subordinate legislation that governed private disputes, the Final Constitution's Bill of Rights does not. The counter-intuitive consequence of the *Khumalo* Court's approach is that legislation that governs the conduct of private persons is not necessarily engaged by the substantive provisions of the Bill of Rights. As with a rule of common law, FC s 8(2) makes the application of the Bill of Rights to such legislation contingent upon the preliminary interpretive exercise identified above. To be able to attack the legislation in question, one must either demonstrate that the right asserted was meant to cover the private conduct contested (or find a state actor who bears responsibility for the enforcement of the rule of law asserted). Despite the dramatic assertion that there is now direct application for private conduct, less law is immediately and unequivocally subject to the substantive provisions of the Bill of Rights under the Final Constitution than under the Interim Constitution. (The force of this conclusion is in no way diminished, but rather reinforced by the fact the Constitutional Court has, itself, failed to follow its own rules regarding FC s 8(2), and acted, instead, as if it were analyzing legislation governing private conduct in terms of the preferred reading of both FC ss 8(1) and 8(2).)

Second, the objective theory of unconstitutionality holds that the validity or

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the invalidity of any given law is in no way contingent upon the circumstances of the case, or, more specifically, the parties to the case. Whereas this doctrine tells us that the validity or the invalidity of any given law cannot be made contingent upon the parties to the case, the *Khumalo* Court tells us exactly the opposite. For even under the good faith reconstruction of FC s 8(2), if the right asserted is deemed not to apply to the conduct contested, then there is no 'direct' application of the substantive provision of the law. So, the Constitutional Court has created, in a purely logical manner, a doctrine in which a provision of legislation deemed to be unconstitutional when invoked by the State in a dispute between the State and an individual would not necessarily be held to be unconstitutional when invoked by an individual in a dispute between that individual and another individual. The reason for this is that a negative response to an FC s 8(2) inquiry into 'conduct' would prevent the court from actually determining whether the right has been impaired by the 'law' in question. Put slightly differently, a negative response precludes the court from undertaking an objective assessment of the law's constitutionality.

Third, neither the *Khumalo* Court's reading of FC s 8(2) nor the good faith reconstruction can make much sense of the Final Constitution's addition of the term 'binds the judiciary'. The notion that the phrase was added to ensure that non-law-making conduct of judges would be subject to constitutional norms but not the law that judges actually make simply beggars belief.

Fourth, apart from considerations of surplusage and supervenience, the Court's elision of the analytical processes required by FC s 8(2) and FC s 39(2) has at least

one other major untoward consequence. We have seen that the Court's restrictive doctrine of *stare decisis* — a doctrine that effectively bars High Court review of existing precedent in terms of FC s 39(2) — married to an incrementalist gloss on the indirect application required by FC s 39(2) spawns an application doctrine that protects 'traditional' conceptions of law and existing legal hierarchies. This observation about the manner in which our existing array of doctrines conspire to blunt the transformative potential of the basic law is one of the strongest rejoinders to those jurists and commentators who believe that the analytical processes of FC s 8(1) or FC s 8(2) or FC s 39(2) require little or no differentiation.

The difficulties that attend even the good faith reconstruction of *Khumalo* create the space for an account of FC s 8 that possesses greater internal consistency and greater explanatory power. The *Khumalo* Court expressed concern about the redundancy of FC s 8(2), if FC s 8(1) is given the preferred reading. However, pace *Khumalo*, FC s 8(2) retains a purpose even if we give FC s 8(1) an appropriately expansive gloss. FC s 8(1) ought to govern all disputes governed by a rule of law *or* involving a government actor. If the rules of law that govern the conduct in question do not give adequate effect to the provisions of the Bill of Rights, and no government actor is involved, then the court is instructed by FC s 8(2) to consider whether a given provision of the Bill of Rights binds the 'conduct' of the natural or juristic party against whom the provision is being invoked.

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Unlike the good faith reconstruction, which relies on a workable, but not especially efficacious distinction between the range of a constitutional right and its prescriptive content, the distinction that gives FC s 8(2) more desirable content is the rather familiar distinction between law and conduct. That distinction runs as follows. While most conduct is law governed, there are instances in which private conduct is not governed by an express rule of law. For example, a plaintiff sues a defendant for refusing to hire the plaintiff for an open position. The defendant claims absolution on the ground that there is no common law norm imposing on the defendant a duty, in the current set of circumstances, to hire the plaintiff. If the defendant's claim regarding the content of the common law is upheld by a court, then quite a significant number of lawyers are inclined to endorse the two-fold proposition that (a) the defendant's conduct is not unlawful, and (b) the defendant's conduct remains conduct not governed by law.

This distinction is not philosophically sound. Indeed, I have argued against the pure form of the law/conduct distinction in an earlier iteration of this very chapter and would have preferred, *ceterus paribus*, not to have to consider it.¹⁶⁶ That said, South African lawyers and jurists continue to draw the distinction.¹⁶⁷ In addition to being underwritten by the accepted practice — or legal cosmology — of a fair number of South African lawyers, the traditional distinction between law-governed conduct and non-law-governed conduct appears to have informed the drafting of FC s 8.¹⁶⁸

This reading of FC s 8(2) covers two possible sets of disputes between private actors. First, it contemplates the possibility of a dispute over an aspect of social life that is not currently governed by any rule of law at all. (For reasons assayed in the footnote below, this locution describes a linguistic practice and not an empirical fact.¹⁶⁹) Second, it describes the gap between the prescriptive content of constitutional norms and extant express rules of law. While a body of extant legal

¹⁶⁶ See § 31.2(d)(iv)-(v) *infra*.

rules — or even background norms — may always be said to govern any particular set of relationships, it remains possible to understand FC s 8(2) as requiring that the courts develop a new rule of law *where the current rules do not give adequate effect to a provision in the Bill of Rights*.

Dennis Davis has described *Khumalo* as a perfect example of the second set of circumstances.¹⁷⁰ Davis argues that we should understand counsel's argument in *Khumalo* through the prism of the pleadings. That is, when counsel for Khumalo took an exception to the argument as framed by counsel for Holomisa, what they were effectively saying was that no rule of common law governed the relationship

167 An anecdote is instructive (though it does not, admittedly, qualify as incontrovertible evidence.) I gave a talk at the Legal Resources Centre in which the 'law never runs out' thesis did a certain amount of heavy lifting in favour of a direct, unqualified approach to application under the Interim Constitution. Despite the fact that a direct, unqualified approach better fit the progressive legal agenda of the LRC, none of the participants, at least a half dozen of whom had appeared before the Constitutional Court, accepted the proposition that the law never runs out. There were, on the accepted understanding of the common law, express rules of law and background conditions. The general thesis that the common law permits what it does not expressly proscribe did not count as 'law'. Nor was my audience moved by the Hohfeldian notion — discussed below — that a court ruling that grants a party absolution because it finds that the common law imposes no duty still cloaks the defendant's conduct in a legal relationship called 'privilege'. Rather, in such an eventuality, it was, my audience insisted, more appropriate to say that there was 'no law' and certainly, no express rule of law, that governed the conduct of the parties before the court.

168 See Halton Cheadle 'Application' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law* (2002) 19.

169 Some argue that the existence of such areas is quite limited (proposition 1). Others argue that it is always possible to characterize a dispute as one governed by a rule of law (proposition 2). As an empirical matter, the first proposition is true. As a philosophical matter, the second proposition is true. How can one hold that both propositions are true: how can the law never run out (proposition 2) and how can the law sometimes run out (proposition 1)? Like this. Proposition 1 is grounded in the fact that the law exists as a body of express, clearly articulated rules covering most, *but not all*, conduct and a court will sometimes have to craft new rules to govern the conduct of the parties before it. Proposition 2 recognizes that law as a system of rules, principles and background norms offers a sufficiently dense latticework of materials from which a court can fashion a remedy: that is, the law always supplies an answer. (Footnote continued on next page.)

Let us expand on the scenario introduced in the text above. The plaintiff (P) sues the defendant (D) for refusing to hire P for an open position. D claims absolution on the ground that there is no common law norm imposing on D a duty, in the current set of circumstances, to hire P. If D's claim regarding the content of the common law is upheld, then the judgment is that D's conduct has not been unlawful. As a philosophical matter, there is and can be for a judge or lawyer no gap between such a judgment and a judgment that the conduct is lawful. In Hohfeldian terms, the result is a judgment to the effect that the common law cloaks D's conduct, relative to P, with the legal relation called 'privilege'. Privilege is not the absence of law. When the judge grants D's plea for absolution, she is applying the law in D's favour.

The linguistic — and legal sociological — gap is created, as I noted above, by the deeply entrenched inclination to say that when the judge rules in D's favour she merely relies on a background condition of the common law that runs as follows: when there is no other relevant law — or no legal duty imposed by a rule of law — the defendant prevails. This is the heart of the strong 'no law thesis'. Its truth is fixed by reference to a definition of law that restricts the extension of the term to express rules of law that impose duties.

The discomfort occasioned — in some — by accepting such a restrictive definition flows in part from the obvious counterfactual. Assume that the judge rules in P's favour and crafts a new remedy that imposes a duty on D in the very circumstances that gave rise to the suit. The judge's ruling in favour of P is law. How else would one describe it? So too then was the ruling in favour of D in the original hypothetical. We are, on the Hohfeldian account, never lawless.

between the parties in a manner contemplated by the Bill of Rights. Counsel, on Davis' view, should have characterized its argument as a request that the Court develop the law to fill a gap in existing defamation doctrine created by the presence of a new, more basic, norm — the constitutional right to freedom of expression.

Danie Brand and I think that there is an additional way of describing the problem that supplements Davis' gloss. We would prefer not to emphasize the pleadings, but rather the relationship between rights interpretation and remedies. On our account, FC ss 8(2) and 8(3) contemplate situations in which there exists no adequate legal remedy for a rights infringement. That is, FC ss 8(2) and 8(3) anticipates that existing law will not always provide *adequate* remedies in terms of what a given right requires. In *S v Thebus*, the Constitutional Court wrote that: '[I]t is in this context that courts are enjoined . . . to develop the common law in order to give effect to a protected right.'¹⁷¹ Likewise, while the Constitutional Court in *Fose* found that the common law at the time was adequate for the vindication of

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the constitutional rights asserted, the *Fose* Court left open the possibility that another set of facts would throw up constitutional interests not adequately vindicated by existing remedies.¹⁷²

Recent case law offers numerous examples in which the existing body of rules do not do adequate justice to the demands of a given right. The High Court in *Afrox v Strydom* can be understood as viewing existing principles of the law of contract — say, *pacta sunt servanda* — that would uphold negligence waiver clauses in hospital admission forms as a failure to vindicate the constitutional right of access to health care services.¹⁷³ It filled this gap in existing doctrine with a rule of common law grounded in the requirements of FC s 27.¹⁷⁴ The new rule ultimately creates a remedy heretofore unavailable at common law.¹⁷⁵

Similarly, the High Court in *Ross v South Peninsula Municipality* should be understood as attempting to revisit existing property law in light of FC s 26(3)'s requirement that 'no one may be evicted from their home . . . without an order of

I think that the difference between the Hohfeldian account and the no-law thesis can be split by my second variation on FC s 8(2): namely where a body of extant rules — or even background norms — may be said to govern a particular set of relationships, FC s 8(2) requires the courts to develop a new rule of law where the current rules do not give adequate effect to a provision in the Bill of Rights. We are, on this account, never lawless. What we lack are rules of law adequate to the task of giving content to the new universe of legal norms imposed by the basic law — the Final Constitution.

170 Dennis Davis 'Presentation on the Horizontal Application of the South African Bill of Rights' *RULCI Conference*, University of the Western Cape (9 August 2004.)

171 *Thebus* (supra) at para 25.

172 *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC). See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) ('*Carmichele*'). Had *Carmichele* been decided in terms of ss 8(2) and 8(3), it might have provided a perfect fit for the scenario contemplated here. *Carmichele* does not create a constitutional remedy distinct from delictual remedies available at common law. What it did do is force the High Court and the Supreme Court of Appeal to revisit the existing law of delict and expand the duty of care. The new rule of common law thereby gives effect to the rights protected in the Bill. See, especially, *President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd* CCT 20/04 (May 15 2005)(Court creates a constitutional remedy grounded in FC s 34 and FC s 1(c)).

court made after considering all the relevant circumstances.'¹⁷⁶ By shifting the onus to the owner of the property to demonstrate that the circumstances required

for an eviction order are present, the High Court in *Ross* crafts a new rule of common law grounded in the requirements of FC s 26.¹⁷⁷ The *Ross* Court's emphasis on changing the common law in order to shift the onus of proof and the attendant alteration of the form and the content of the pleadings provides a paradigmatic example of how Dennis Davis' pleadings analysis and my own conduct analysis (sometimes) reinforce one another. What starts off in *Ross* as an *exception* to an existing common law rule based upon the direct application — through FC s 8(2) — of FC s 26(3) to the *conduct* under scrutiny, becomes a new common law rule — generated through FC s 8(3) — that vindicates the right.¹⁷⁸

173 The High Court found a disclaimer in a private hospital's admissions contract unenforceable. *Strydom v Afrox Healthcare* [2001] 4 All SA 618 (T) ('*Afrox I*'). See Dire Tladi 'One Step Forward, Two Steps Back for Constitutionalising the Common Law: *Afrox Healthcare v Strydom*' (2002) 17 *SA Public Law* 314–315 and 317 (Discussion of *Afrox I*). Mavundla AJ began his analysis with the unassailable proposition that a common law rule with a contractual term contrary to the public interest is unenforceable. (This rule was recognised and applied in a host of cases. See *Wells v South African Alumenite Company* 1927 AD 69; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); and *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A). For more recent discussions of the rule, see *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA); *De Beer v Keyser* 2002 (1) SA 827 (SCA) and *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA).) Relying upon FC ss 27(1) and 39(2), Mavundla AJ further reasoned that the rule must be interpreted in light of the Bill of Rights and, in particular, the respondent's constitutional right to have access to health care services. Access to health care was, in turn, read to mean 'access to health care, whether private or public, administered by professional and trained people with skill and care.' *Afrox I* (supra) at 627. The right to have access to health care services, so the High Court reasoned, entitled the claimant to have access to health care services provided in a professional manner and with reasonable care. The contract's disclaimer, insulating the appellant against claims for negligence, impaired the respondent's right to health care services provided with the requisite professionalism and care. The High Court found the disclaimer unenforceable. *Ibid* at 627–628. Because the common law prior to *Afrox I* did not contemplate the extension of the 'contrary to the public interest' proviso to such disclaimers, Mavundla AJ was obliged to craft a new rule of common law that vindicated the FC s 27 right to health care.

174 The Supreme Court of Appeal reversed the *Afrox I* High Court in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) ('*Afrox*').

175 It is beyond the scope of this section of the chapter to engage in an extended discussion about the ontological status of rules and values in the common law. But for my considered view on the subject in so far as it relates to application, see my criticism of Chris Roederer's position at § 31, Appendix 3(a).

176 2000 (1) SA 589 (C) ('*Ross*').

177 *Ross* (supra) at 596.

178 *Ibid* at 596. Josman AJ describes the constitutionally mandated change in the common law as follows:

Section 26(3) of the Constitution in effect requires a court hearing an application or action for the eviction of a person from his or her home not to issue the order until it has had an opportunity to consider all the relevant circumstances At issue is how those circumstances should be placed before the court As the court has to consider all the relevant circumstances, the adversarial system predicates that the plaintiff should place such information before the court as it considers relevant, to which the defendant can plead by answering the allegations as well as by raising additional issues. The plaintiff in turn can

The subject matter of *Mahambehlala v MEC for Welfare, Eastern Cape, & Another* — a failure by the State to pay timeously a welfare grant — requires that application analysis take place in terms of FC s 8(1). However, the court's analysis still provides a guide as to how to understand common law rule and remedy creation under FC ss 8(2) and 8(3).¹⁷⁹ The *Mahambehlala* High Court found that the failure to pay a welfare grant at the appropriate time was a function of the responsible department's negligence. The High Court concluded, however, that existing remedies at common law would not enable the plaintiff to recover amounts lost — including the interest that should have accrued — as a result of the delay. Leach J wrote:

I do not see how the applicant can recover an amount in respect of that period under common law review. She would probably be able to institute an action for damages based upon the negligent failure to process her application timeously, but one cannot lose sight of the fact that she is in straightened [sic] financial circumstances and may well be unable to

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fund such an action. In those circumstances, the knowledge of a potentially successful right of action is a poor balm to relieve the loss of a social grant for five months. In my opinion, in the light of these considerations, the applicant's common law remedies are insufficient to be regarded as appropriate relief as envisaged by s 38 of the Constitution In the light of this, I am of the view that it is incumbent upon this Court to attempt to fashion what may loosely be referred to as 'constitutional relief' to cater for the fact that the common law relief to which the applicant would be entitled is insufficient to address the effects of the delay of her social grant for five months and that it is unrealistic to expect her to institute a separate action to claim damages.¹⁸⁰

The appropriate new 'constitutional' remedy for the negligent conduct of the State is the award of an amount equal to that which the plaintiff would have received had the grant been paid timeously. The court then turns its attention to the issue of interest. Leach J finds that 'the general rule of the common law is that interest is not payable.' Once again Leach J holds that a meaningful constitutional remedy requires the award of such interest.¹⁸¹ The direct application of the Final Constitution to 'conduct' by the state requires the crafting of new rules of and remedies at 'constitutional common law'. In form, Leach's approach to direct application of the

respond to those allegations in reply. In this manner the pleadings will introduce the issues and define them, the evidence will provide the substance and detail, and the court will then be able to exercise its discretion after having considered all the relevant circumstances. In this manner the adversarial system allows for and in most instances will ensure that all such circumstances are placed before the court. The court can presumably call for amplification if, after considering the issues raised in the pleadings, it deems it necessary. If both parties to a case involving eviction from a home raise the issues which they consider to be relevant, the court should ultimately have sufficient information before it to consider all the relevant circumstances prescribed by the Constitution.

Ibid. Of particular relevance to my analysis is the very end of the very last sentence. While the common law and statute covered evictions prior to the enactment of the Final Constitution, the enactment of the Final Constitution — and in particular FC s 26(3) — creates new prescriptive content for the law of eviction. Whether the law of eviction as it stood prior to enactment of the Final Constitution meets the demands of the basic law is a question about which the courts have differed. The Supreme Court of Appeal reversed *Ross* in *Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA). But, consistent with my view of FC s 8(2), Josman AJ found that the Final Constitution required the courts to develop a new rule of law where the current rules did not give adequate effect to a substantive provision in the Bill of Rights.

179 2002 (1) SA 342 (SE), 2001 (9) BCLR 890 (SE) ('*Mahambehlala*').

180 *Mahambehlala* (supra) at 354–355.

Final Constitution to state conduct where the statute is insufficient to vindicate a constitutional entitlement is no different than it would be for direct application of the Final Constitution to private conduct where the common law, or any other rule of law, is deemed insufficient to vindicate a constitutional entitlement.¹⁸²

(iii) The preferred reading, the no-law thesis and the problem of surplusage

181 Leach J leans heavily on dicta in *Fose* as the basis for his crafting new rules of and remedies at 'constitutional common law'. See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC). Leach J quotes Ackermann J to the effect that 'appropriate relief will in essence be relief that is required to protect and enforce the rights enshrined in the Constitution.' *Fose* (supra) at para 19. He endorses Kriegler J's observation in *Fose* that when courts grant relief, 'they attempt to synchronise the real world with the ideal construct of a constitutional world.' *Fose* (supra) at para 94.

182 The following example is meant to demonstrate this proposition. Imagine that a farmer prevents workers from leaving the property in order to vote. The farmer may be guilty of unjustifiable detention under existing common law. However, no existing rule of law covers expressly the situation in which an employer refuses to allow his workers to leave the property in order to vote. (In other words, the employer currently has no specific duty to enable his workers to leave the property to vote.) To see that the existence of such a rule may well matter, one might ask whether the existing remedies for unjustified detention gives the workers what they want: namely, the right to vote or damages designed to make good any interference. If the law and its existing remedies do not do so, then it seems reasonable to conclude that such conduct by private parties is both repugnant to the right to vote and requires the crafting of a new, more specific, rule of common law and the creation of remedies adequate to the right. See *Bel Porto School Governing Body & Others v Premier, Western Cape, & Another* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) ('*Bel Porto*') (Mokgoro J and Sachs J, dissenting, note that 'if a court finds law or conduct inconsistent with the Constitution, it must declare that law or conduct to be invalid to the extent of its inconsistency. In addition to the declaration, the court may proceed to provide additional appropriate relief. Sometimes a declaration of invalidity may not be sufficient, or appropriate on its own. The constitutional defect might lie in the incapacity of the common law or legislation to respond to the demands of the Bill of Rights. Section 8(3) then requires that the Court should develop a suitable remedy. No particular remedy, apart from the declaration of invalidity, is dictated for any particular violation of a fundamental right. Because the provision of remedies is open-ended and therefore inherently flexible, Courts may come up with a variety of remedies in addition to a declaration of constitutional invalidity. An 'all-or-nothing' decision is therefore not the only option.') See also *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 27 (Kriegler J writes that '[o]ur flexibility in providing remedies may affect our understanding of the right.' Kriegler J's comment requires amplification. The flexibility of which he speaks should not be viewed as a negative capability. Rather an expansive approach to remedies has the attendant consequence of expanding our understanding of what a right protects. Indeed, Kriegler J notes that South Africa compares quite favorably to other jurisdictions in terms of the 'broad range of remedial options [available] when rights are threatened or infringed.')

The hypothetical voting rights case reminds us of the fact that FC s 8(2) raises questions not of application, but of interpretation. Having said that FC s 8(2) raises questions not of application, but of interpretation, there remain two possible readings of the section: a strong reading and or a weak reading. On the strong reading, a right will apply to a natural person or a juristic person unless the right makes expressly clear that only certain kinds of relationships are meant to be protected by it. For example, the rights to property, housing, health care, food, water, social security, education, information and the rights of children and arrested, detained and accused persons contain wording that may seem to limit the ambit of those rights — in large part or whole — to relationships between the state and individuals and thereby resist application to relationships between natural and/or juristic persons currently ungoverned by any express rule of law. But appearances can be deceiving. As Frank Michelman presciently pointed out several years ago, a compelling case can be made for extending the rights to housing, food and water to the many feudal private relationships which currently operate in both agricultural and urban communities. Assume that an NGO committed to providing adequate, affordable housing to South Africa's poor attempts to lease a

It should be clear, from the jurisprudential arguments in § 31.2 regarding fortuity of form, the arbitrariness of application, the untenability of the public-private distinction, and judicial boundedness, coupled with the detailed textual arguments already offered in § 31.4, that FC s 8(1) alone could do all of the application work required by the Bill of Rights (without engendering a problem of surplusage.) In short, FC s 8(1) functions as a reply to all of the primary objections of Justice

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Kentridge in *Du Plessis*: namely, that the absence of the phrases 'all law' and 'the judiciary' from IC s 7(1) indicated that IC Chapter 3 did not apply horizontally.

As we have already seen, the additional presence of FC ss 8(2) and (3) generates multiple possible readings.¹⁸³ Some surplusage seems inevitable. Even allowing for the possibility of surplusage, the good faith reconstruction of *Khumalo* produces so many anomalies as to warrant rejection. The question, of course, is whether the preferred reading offered in this chapter better meets the challenges of the text and the charge of surplusage.

As Frank Michelman notes, according to the preferred reading, I am obliged to defend some form of a 'no-law thesis' (NLT) in order to give FC s 8(2) a meaningful role. In its strongest possible form (a form I do not defend), the NLT stands for the proposition that FC s 8(2) covers dispute-generating conduct between private actors over an aspect of social life that is not currently governed by any rule of law *at all*. As a philosophical matter, I agree with Michelman that the NLT so characterized is vulnerable to the charge that, in fact, all social disputes that are disposed of by a court of law are governed by some rule of law. On the Hohfeldian account of law — which I employed as part of the critique of *Du Plessis* — when a judge grants a defendant's claim of absolution on the grounds that the common law imposes no duty on the defendant, the judgment cloaks the defendant's conduct, relative to the plaintiff, in a legal relation called 'privilege'. Privilege is not the absence of law. When the judge grants the plea for absolution, she is applying the law in the defendant's favour.

large unused expanse of land from a landowner on the outskirts of Johannesburg. The landowner refuses. He says he would prefer the land to lie fallow. The NGO institutes an action against the landowner asserting that FC s 26(1)'s right to adequate housing applies to private relationships ungoverned by statute or regulation and that it trumps the common-law right to alienate one's property as one wishes. The argument that FC s 26(1) applies to private relationships is given greater force when FC s 26(1) is compared with FC s 26(2). FC s 26(2) requires that the state take 'reasonable legislative and other measures . . . to achieve the progressive realization of this right.' FC 26(1), so the argument goes, would have been unnecessary — redundant — unless it applied to relationships other than the state-citizen relationships contemplated by FC s 26(2). Michelman's example asks us to reconsider our initial intuitions regarding the applicability of socio-economic rights to private relationships ungoverned by statute or regulation. Remarks of Frank Michelman *Centre for Applied Legal Studies Seminar on Horizontality and the 1996 Constitution* (28 January 1997). Indeed, the Constitutional Court recently took a significant step in that direction. See *President of the Republic & Others v Modderklip Boerdery (PTY) Ltd* CCT 20/4 (13 May 2005) at para 26 (Constitutional Court acknowledges possible horizontal application of FC s 25(1) to land invasions.) See also Danie Brand 'Socio-Economic Rights in FC s 27: Health Care, Food, Water and Social Security' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 56. The weaker reading of FC s 8(2) precludes, tout court, the application of certain rights to conduct by and relationships between natural and/or juristic persons. Michelman's example, and the recent decisions identified above, undercut this second, weaker reading of FC s 8(2).

183 One could imagine background conditions in which all readers would arrive at the same conclusion about the meaning of FC s 8. But the current differences in political orientation towards this issue, coupled with the text's flawed phrasing, over-determine the grounds for disagreement on the meaning of FC s 8.

I am not defending the strongest possible form of the NLT. I am defending a much narrower version of the NLT which stands for the proposition that while a body of extant rules — or even background norms — may be said to govern a particular set of private relationships, the purpose of FC s 8(2) — along with FC s 8(3) — is to get us to recognize that the law as it stands may not give adequate effect to a provision, or multiple provisions, in the Bill of Rights. This narrow version of the NLT — and the narrow construction of FC s 8(2) — does not offend the Hohfeldian account to which both Michelman and I subscribe. It merely emphasizes an obvious aspect about our extant jurisprudence to which the drafters of the Final Constitution clearly wanted us to attend: that there is a gap between the body of law to which we are currently subject and the idealized, but still inchoate, account of the law to which we aspire under the Final Constitution. Justices Mokgoro and Sachs recognize this 'gappiness' in our law in *Bel Porto* when they write that:

[I]f a court finds law or conduct inconsistent with the Constitution, it must declare that law or conduct to be invalid to the extent of its inconsistency. In addition to the declaration, the court may proceed to provide additional appropriate relief. Sometimes a declaration of invalidity may not be sufficient, or appropriate on its own. The constitutional defect might lie in the incapacity of the common law or legislation to respond to the demands of the Bill of Rights. Section 8(3) then requires that the Court should develop a suitable remedy.¹⁸⁴

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It would seem, therefore, that to be saddled with the weaker version of the NLT is not quite the burden Professor Michelman initially anticipated. The weaker version of the NLT splits the difference between the strong version of the NLT and the Hohfeldian notion that the law never runs out. The distinction with a difference is the weak NLT's acknowledgement of the 'gap' identified by the Final Constitution, in general, and FC ss 8(2) and (3), in particular. That gap is the space between our extant body of express rules of law — the 'law that is' — and the prescriptive content of the substantive provisions of the Bill of Rights — the 'law is what it is becoming'. So to recap. It is true that there is, in fact, never any conduct that is not law governed; it is also true that there will be conduct that is not governed by an express rule of law that is consistent with the Final Constitution.

It should be apparent now that the preferred reading attempts to meet the surplusage challenge in four discrete but related ways. The first two arguments are grounded in intention and in perception. Because my preferred reading of FC s 8 is an idealist account, the gloss these arguments place on FC s 8(2) ought not to be understood in terms of, nor framed by, theories of original intent.

Despite the persistence of views to the contrary, FC s 8(2) makes little sense other than as textual response to the outcome in *Du Plessis*. However one chooses to read FC s 8(2), it must stand — at a minimum — for the proposition that some of the substantive provisions in the Bill of Rights will apply to some disputes between private parties currently governed by rules of common law. That proposition is

184 *Bel Porto* (supra) at para 180. Though all law may, as the Constitutional Court states, derive its force from the Final Constitution, not all law adequately reflects the basic law's dictates. The Constitutional Court had, under the Interim Constitution, refused to extend the force of such an argument to the question of whether common law disputes between private parties are subject to the direct application of the Bill of Rights. FC s 8(2) invited, as Steve Ellmann gently puts it, the Constitutional Court to revisit that judgment. Steven Ellmann 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444; See discussion of Steven Ellmann's work at § 31, Appendix 4(c) infra.

different in kind from the *Du Plessis* Court's conclusion that no such general invitation to apply the Bill of Rights to private disputes could be gleaned from IC ss 7(1) and 7(2). For a South African audience inclined not to apply the Bill of Rights to common law disputes between private parties, such an invitation does real work.

By distinguishing between 'law' and 'no-law', FC s 8(2) — on my account — fits the jurisprudential predispositions of a fair number of South African lawyers. We need not agree as to whether the Hohfeldian account is correct. 'The truth of the matter' is besides the point for any attempt to understand what the drafters meant and how they expected to be read. Many lawyers are accustomed to seeing 'gaps', 'holes', 'no-law spaces' where the law imposes no duty on a party to act in a particular way. FC s 8(2) and FC s 8(3) speaks to that way of perceiving the law by telling us that conduct which does not warrant censure under the current non-constitutional regime of law will still be subject to the provisions of the Bill of

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Rights, and, if that conduct fails the FC s 8(2) mandated 'test' for Bill of Rights consistency, then the courts are, under FC s 8(3), obliged to craft a rule of law that does impose duties on the party whose conduct or reliance on a rule of law can no longer be justified. FC ss 8(2) and 8(3) fill in the gaps. For an audience that tends not to buy the Hohfeldian account, my preferred reading of FC s 8(2) does real work.

These two intentionalist readings serve both pragmatic and rhetorical ends. Pragmatic: the reading relies upon what these words in FC s 8 are generally understood to mean. Rhetorical: the reading opens up the interpretive space for my idealist account by relying on what most readers understand the words to mean and thus securing initial acceptance for the propositions that follow. (NB: If there is still surplusage after all is said and done, then there is surplusage for a reason — namely a pre-disposition of the drafters and the readers to talk a certain way.) It should also be clear that while these two intentionalist readings support just about every account of FC s 8(2) — *Khumalo*, the good faith reconstruction, and my idealist account — they do not exhaust the possible meanings of the clause. My reading of FC s 8(2) narrows the space afforded by the two intentionalist readings in a manner that will permit FC s 8(2) to still fit my readings of FC ss 8(1) and 8(3). My reading, while anchored to a broadly shared understanding of the words in the text, is not, however, constrained by a particular version of the drafting history.

Despite having given FC s 8(2) apparent purpose, I am not yet home free. While this construction of FC s 8(2) gives it something distinctive to do in the eyes of the drafters and the readers, it still must cohere with my reading of FC s 8 as a whole. And it does. The gap identified by FC s 8(2) is not between the absolute absence of law and express rules of law. The gap is between extant rules of law and those rules of law that must exist in order for our law to be consistent with the Final Constitution. Again, FC s 8(2) reminds us of the inevitable, but not ineffable, presence of such gaps, and tells us to fill them in where appropriate.

Does this reading cohere with the preferred reading of FC s 8(1)? It certainly does to the extent that the weak NLT construction of FC s 8(2) eliminates any doubt (a) about the application of the substantive provisions of the Bill of Rights to disputes between private parties, in general, and (b) about the ability to use the Bill of Rights to develop new rules of law and new remedies that will give adequate effect to the specific provisions of the Bill, in particular.

One response is that this notion of an aspirational gap is equally true of express rules of law engaged by FC s 8(1) — be they statute, regulation, common law, or

customary law. A second response — again along Hohfeldian lines — is that one could make do with FC s 8(1) alone. (Then again, I would say, we could make do without FC s 8 in its entirety.¹⁸⁵) Both assertions are true. An application doctrine

grounded solely in FC s 8(1) would be neat, comprehensive and require no special pleading. But in constitutional law, as in life, 'you must dance with who brung ya.' FC s 8(2) forces us to linger a little longer on the floor.

(d) Section 8(3)

FC s 8(3) reads:

In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court —

- (a) in order to give effect to a right in the Bill, must apply, or where necessary develop, the common law to the extent that legislation does not give effect to that 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).

(i) What the courts say FC s 8(3) means

According to *Khumalo*, under FC s 8(3)(a), a court will be called upon to craft a new rule of common law if, in the normal course of Bill of Rights analysis under FC s 8(2), the right is deemed to have been infringed. In arriving at its conclusions, the *Khumalo* Court made much of the potential redundancy of FC s 8(3) if FC s 8(1) was to be given the reading pressed upon it by counsel. But as the above discussion of FC s 8(2) is meant to demonstrate, the Constitutional Court has ignored both the logic and the content of its construction of FC s 8(3) in a welter of other cases.

As it turns out, FC s 8(3) does work without FC s 8(2). Lots of work.

For example, the Constitutional Court in *Thebus* states that where a court undertakes the development of the common law under FC s 39(2), the 'courts are enjoined,' under FC ss 8(3)(a) and (b), 'to apply and, if necessary, to develop the common law in order to give effect to a protected right, provided that any limitation is in accordance with s 36'.¹⁸⁶ *Thebus* is not a FC s 8(2) case.

In *Du Plessis v Road Accident Fund*, the Supreme Court of Appeal wrote that '[i]n terms of s 8 of the Constitution a Court, in order to give effect to a right in the Bill of

185 FC s 8(1), FC s 8(2) and FCs 8(3), properly understood, express canons of constitutional interpretation. In this instance, they tell the courts what kinds of law are engaged by the substantive provisions of the Bill of Rights, what conduct is engaged by these provisions and how to remedy any defects or deficiencies in the law. So, for example, *Du Plessis* told us that one canon of constitutional interpretation under the Interim Constitution's Bill of Rights was that the substantive provisions of the Bill did not apply directly to disputes between private persons governed by common law. *Khumalo* rejects that canon with respect to the question of whether the substantive provisions of the Final Constitution's Bill of Rights can apply directly to disputes between private persons governed by common law. The new canon reads that they *may*. More than that FC s 8 does not say.

186 *Thebus* (supra) at para 25.

Rights, must develop the common law to the extent that legislation does not give effect to that right.¹⁸⁷ *Road Accident Fund* is not a FC s 8(2) case.

In *Bel Porto School Governing Body v Premier, Western Cape*, several justices on the Constitutional Court observed that

'[t]here are several provisions in the Constitution which are important to bear in mind when considering constitutional remedies, in particular ss 38, 172(1), 8(3), and 39(2) In

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addition to [a] declaration of invalidity, the court may proceed to provide additional appropriate relief. Sometimes a declaration of invalidity may not be sufficient, or appropriate on its own.¹⁸⁸

Bel Porto is not a FC s 8(2) case.

In *Petersen v Maintenance Officer, Simon's Town Maintenance Court*, the Cape High Court found that 'an existing common law rule violated an extra-marital child's constitutional rights to equality and dignity', that the 'common law rule [was] unreasonable and unjustifiable and should be declared unconstitutional and invalid,' and FC 's 8(3)(a) of the Constitution enjoins the Court in order to give effect to a right in the Bill of Rights set out in Chap 2 of the Constitution, where necessary, to develop the common law to the extent that legislation does not give effect to that right.'¹⁸⁹ *Petersen* is not — at least on the Court's own analysis — a FC s 8(2) case.

Why does FC s 8(3) feature in non-FC s 8(2) cases? As I note below in the discussion of the development of the common law under FC s 39(2), a profusion of provisions — from FC ss 1, 7, 8, 38, 39, 167, 172 to 173 — inform the courts' assessment of the judiciary's capacity to craft new common law remedies. FC s 8(3) is simply one of the sections that the courts routinely cite when they intend to create a new common law rule and a new common law remedy.

As for the general response of the courts to the specific demands of the text of FC ss 8(3)(a) and (b), perhaps van der Westhuizen J, in *Holomisa v Khumalo*, put it best: 'I am not going into the philosophical and academic debate around the meaning and interpretation of this sub-clause.'¹⁹⁰ Whatever FC s 8(3) *really* means, the Constitutional Court has, before and after *Khumalo*, attributed to the sub-clause meaning that is both independent of and not exhausted by the meaning that counsel in *Khumalo* (and I) would attach to FC s 8(1). Given that this is the case, the judgments in *Thebus* and *Bel Porto* have already effectively responded to the surplusage objection raised in *Khumalo*.

(ii) What FC s 8(3) should mean

It should be obvious that, pace *Khumalo*, (FC s 8(3) does have a purpose once we give both FC s 8(1) and FC s 8(2) their appropriate extension.) Where law or conduct

187 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA) ('*Road Accident Fund*') at para 35.

188 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 180.

189 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) at para 8.

190 2002 (3) SA 38 (T).

is found to violate a constitutional right, FC s 8(3) provides the mechanism for the creation of a new rule of law and a new remedy. On its own terms, FC s 8(3) provides the mechanism for the creation of a rule where, heretofore, neither an express rule of common law nor a provision of legislation gave adequate expression to the demands of a specific constitutional right.

As a matter of black letter constitutional law, FC s 8(3) retains a purpose even where FC s 8(2) is not part of the application or the interpretation analysis on a given case. It has been deployed both in terms of direct application under

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FC s 8(1) and indirect application under s 39(2). FC s 8(3) simply reinforces the courts' inherent power to create rules and remedies where the Bill of Rights so demands.¹⁹¹

(iii) Meaningless phrases in FC s 8(3)

There are several phrases in FC s 8(3) to which the courts have refused to attend. Part of the reason that these phrases have not been defined is that the phrases may well be meaningless.

The phrase 'must apply' in that part of FC s 8(3)(a) that says a court 'must apply, or where necessary develop, the common law', adds nothing. If applying the existing common law was all that was necessary to give effect to a right, then that would be identical to saying that the extant common law is consonant with the dictates of the right in question. One does not need FC s 8(3)(a) to keep the common law as it is.

191 The language of FC s 8(3) is certainly confusing and misleading. In the First Edition of this work, I suggested that the section appeared to be designed to cut back on the extent to which the Bill of Rights can be used to effect radical alterations to the existing body of common law and that it made the existing body of common law the departure point for analysis of the constitutionality of particular rules of common law. I was wrong: at least about the intent of the drafters. According to Halton Cheadle, all the parties in the Constitutional Assembly supported direct horizontal application. They simply differed on the best language to make such intent manifest. Remarks of Halton Cheadle *Centre for Applied Legal Studies Seminar on Horizontality and the 1996 Constitution* (28 January 1997). See also Halton Cheadle, 'Application' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 19. On this view, the changes made to FC ss 8(2) and (3) between 23 April 1996 and 8 May 1996 reflect nothing more than the efforts of the parties to achieve optimal transparency of their intent. Halton Cheadle may be correct about the general intent of the drafters. But his remarks shed absolutely no light on the content of FC s 8(3). To get a better sense of how FC s 8(3) should be understood, it is worth comparing the wording of FC s 8(3) in the 23 April 1996 draft with the final wording of FC s 8(3). The 23 April 1996 version read, in relevant part: 'When a right in the Bill of Rights binds a natural or juristic person, and there is no law of general application that grants a remedy based upon that right, a court must develop a remedy based upon that right . . .' The 23 April 1996 version of FC s 8(3) requires a court to create a new remedy or a cause of action that makes good the requirements of an impaired right where no adequate remedy at common law or statute exists. So understood, this earlier incarnation of FC s 8(3) does not appear to demand that one take a position on whether FC s 8(2) engages law or conduct or both. Whether one believes that the common law never runs out or that common law consists of only those rules that have been expressly articulated by a court, the 23 April 1996 version of FC s 8(3), when read with FC ss 8(1) and (2), reminds us that: (1) rules of common law are, in fact, subject to direct constitutional review; and (2) where no legal remedy gives effect to the demands of a specific provision in the Bill of Rights, a new remedy must be formulated to do so. That is exactly how we should read the final version. See *S v Zuma* 1995 (2) SA 642 (CC), 651, 1995 (4) BCLR 401 (CC) (Discussing the relationship between constitutional law and rules of common law, the Court wrote: 'Proper attention to our legal history, traditions and usages does not imply that constitutional rights should be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.')

The phrase 'to the extent that legislation does not give effect to that right' in that part of FC s 8(3)(a) which states that a court 'must . . . develop . . . the common law to the extent that legislation does not give effect to that right,' adds nothing. As with the phrase 'must apply . . . the common law', if applying the protection of existing legislation were all that was necessary to give effect to a right, then that would be the same as saying that no new remedies need be created. The Constitutional Court in *National Education Health and Allied Workers*

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Union v University of Cape Town captures the logic — or the lack thereof — of this part of FC s 8(3)(a)'s formula:

In many cases, constitutional rights can be honoured effectively only if legislation is enacted. *Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution.* Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. *In this way, the courts and the Legislature act in partnership to give life to constitutional rights.*¹⁹²

As the *NEHAWU* Court makes clear, the existence of legislation designed to give effect to the right does matter. But it only matters to the extent that the legislation gives constitutionally adequate effect to the requirements of the right. Should an act, say the Labour Relations Act at issue in *NEHAWU*, fail to effect constitutional objectives or fail to achieve constitutional objectives by constitutionally permissible means, it does not satisfy FC s 8(3)(a). If it does satisfy constitutional obligations within constitutional limits, then the issue ostensibly addressed by FC s 8(3)(a) never arises. One does not need FC s 8(3)(a) to keep both the common law and legislation as it is.¹⁹³

The final phrase in FC s 8(3) to which the courts have refused to attend is that part of FC s 8(3)(b) that says a court 'may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).' One would have thought that the whole point of FC s 8(3) was to give adequate effect to a provision of the Bill of Rights where no express rule of law currently does so. It is difficult to fathom how the injunction to create such new remedies to give effect to 'the' right can possibly constitute a limitation on that same right. To see that the right limited is the same right to which the new remedy gives effect, look at the word 'the'. If the drafters had meant to specify that another right was infringed by the new rule of or remedy at common law, then it would have been necessary for them to use either 'a' or 'another'. Moreover, 'the right' referred to in FC s 8(3)(b) must refer to that same right referred to in FC s 8(3)(a) in order for either to make any sense.

(e) Section 39(2)

FC s 39(2) reads:

192 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) ('*NEHAWU*') at para 14 (emphasis added).

193 As I note below in the section on 'Shared constitutional interpretation', both the *NEHAWU* Court and FC s 8(3)(a) indicate that the courts and legislatures must work together to give effect to the rights enshrined in the Final Constitution. See § 31.4(e)(vii) *infra*.

When interpreting any legislation and *when* developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (emphasis added).

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(i) What FC s 39(2) means

What is the import of FC s 39(2), now that, post-*Khumalo*, FC s 8 subjects *all* disputes between the state and the individual and some disputes between individuals to the direct application of the substantive provisions of the Bill of Rights? At a minimum, FC s 39(2) requires the courts to interpret legislation or to develop the common law in light of the general objects of the Bill of Rights where no specific right can be relied upon by a party challenging a rule of law, the extant construction of a rule of law, or conduct.

(ii) FC s 39(2) and the process of developing the common law

The Constitutional Court, in *Carmichele*, wrote as follows:

It needs to be stressed that the obligation of Courts to develop the common law in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the Courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2).¹⁹⁴

As to what the FC s 39(2) inquiry requires of any tribunal, the *Carmichele* Court wrote:

[T]here are two stages to the inquiry a court is obliged to undertake . . . The first stage is to consider whether the existing common law, having regard to the s 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives.¹⁹⁵

Despite the fact that these passages from *Carmichele* have been repeatedly quoted with approval, the subsequent case law has thrown up several problems with this initial construction of FC s 39(2).

(aa) FC s 39(2) and the over-determination of changes to the common law

The *Thebus* Court's gloss on FC s 39(2) obligation 'to develop the common law in the context of the s 39(2) objectives' is, perhaps, the most perplexing. Justice Moseneke, for the *Thebus* Court, writes:

It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of

194 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) ('*Carmichele*').

195 *Ibid* at para 40.

the common law to resolve the inconsistency. The second possibility arises even when a rule

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of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution.¹⁹⁶

The *Carmichele* Court's use of the term FC s 39(2) objectives does not seem to embrace the two-fold meaning that the *Thebus* Court attributes to FC s 39(2). Fulfilling FC s 39(2) objectives is not about direct challenges to laws that conflict with specific provisions of the Bill of Rights. That is why we have the various provisions of FC s 8. This gloss of the *Thebus* Court on FC s 39(2) offends the 'no surplusage' canon of constitutional interpretation by making parts of FC s 8 redundant.

As I note below, the approach of the *Thebus* Court does not merely suffer from a lack of analytic precision.¹⁹⁷ The over-determination of the textual bases for changing the common law contradicts the Constitutional Court's own distinctions between (1) direct application and indirect application and (2) those remedies that flow from findings of constitutional invalidity and those remedies that flow from a re-formulation or a re-interpretation of the law in light of the spirit, purport and objects of the Bill of Rights. If the Constitutional Court's judgments in *National Coalition for Gay and Lesbian Equality v Minister of Justice*¹⁹⁸ or *Khumalo* tell us anything, it is that FC ss 8(1) and s 8(2) engage rules of common law directly, and that remedies for any violation of a specific provision take place in terms of FC ss 172(a) and 172(b) or 8(3). The Constitutional Court in *Amod* appears to address the distinction between changes to the common law via FC ss 8(2) and (3) and changes to the common law via FC s 39(2). The *Amod* Court writes:

Section 8(2) makes the Bill of Rights [directly] binding on natural and juristic persons . . . Section 8(3) requires Courts in giving effect to s 8(2) to 'apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right . . .' The development of a coherent system of law may call for the development of the common law under . . . s 39(2) of the 1996 Constitution to be done in a manner consistent with the way in which the law will be developed under s 8(2) and (3) of the 1996 Constitution . . . When a constitutional matter is one which turns on the direct application of the Constitution . . . considerations of costs and time may make it desirable that the appeal be brought directly to this Court. But when the constitutional matter involves the development of the common law, the position is different. The Supreme Court of Appeal has jurisdiction to develop the common law in all matters including constitutional matters. Because of the breadth of its jurisdiction and its expertise in the common law, its views as to whether the common law should or should not be developed in a 'constitutional matter' are of particular importance.¹⁹⁹

196 *Thebus* (supra) at para 28.

197 See § 31.4(e)(ii)(aa), 'FC s 39(2) and the over-determination of changes to the Common Law', infra.

198 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*') at paras 90 and 96.

199 *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC) ('*Amod*') at paras 31–33. See also *De Freitas & Another v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) at paras 20–21.

The *Amod* Court recognizes that the unitary system of law contemplated by the Final Constitution 'may' require development of the law as a result of the

indirect application of the Bill of Rights in a manner that coheres with the development of the law as a result of the direct application of the Bill of Rights. It is difficult to make any sense of this observation unless FC s 8 analysis and FC s 39(2) analysis are different in kind.

Is there any further evidence for the proposition that FC s 39(2) is not the intended engine for changes in the common law that flow from the direct application of the Bill of Rights? Kentridge J held in *Du Plessis* that the purpose of FC s 39(2)'s predecessor — IC s 35(3) — was to enable the judiciary to develop common law through the indirect application of the Bill of Rights.²⁰⁰ High Courts in both *Eastern Metropolitan Substructure v Peter Klein Investments (Pty)*²⁰¹ and *Bongoza v Minister of Correctional Services*²⁰² have noted that the complainants before them 'did not contend that a specific constitutional right was violated,' but rather requested that the courts engage in 'the process of developing common law in the context of s 39(2).'²⁰³

(bb) The obligation to develop the common law

Carmichele's general, and not purely discretionary, obligation to develop the common law reflects an attempt to chart a course between the Scylla of transformation and the Charybdis of tradition.²⁰⁴ On the one hand, the Constitutional Court's constitutional supremacy doctrine has expanded its limited jurisdiction such that every common law case — and any other exercise of judicial authority — is, potentially, a constitutional matter.²⁰⁵ As the Constitutional Court notes in *Boesak*:

The development of, or the failure to develop, a common law rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the Supreme Court of Appeal developed, or failed to develop, the rule under circumstances inconsistent with its obligation under s 39(2) of the Constitution or with some other right or principle

200 *Du Plessis* (supra) at paras 60 and 61.

201 2001 (4) SA 661 (W) at para 40 (Citing *Du Plessis*, the *Eastern Metropolitan* Court wrote that 'the facts of this case call for an indirect application of the fundamental rights provisions embodied in the Constitution. The degree of development required is of a limited nature. What is required, in the present instance, is not a setting aside of the common-law rule but an incremental change in its application, necessary to ensure that the underlying values and constitutional objectives are achieved. Instead of permitting a barrier to the raising of estoppel against a public authority exercising public power, the common law should be developed to emphasise the equitable nature of estoppel, and its function as a rule allocating the incidence of loss.')

202 2002 (6) SA 330 (Tkh) at para 7 quoting *Carmichele* (supra) at para 36.

203 *Ibid* at para 7.

204 See § 31.4(e)(iv), 'FC s 39(2) and the transformation of the common law', *infra*.

205 For more on the jurisdictional implications of the Court's constitutional supremacy doctrine, see Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11.

of the Constitution. The application of a legal rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.²⁰⁶

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In *S v Pennington*, the Constitutional Court unequivocally places itself at the top of the constitutional food chain. It wrote:

On a proper construction of the 1996 Constitution there can be no doubt that this Court has appellate jurisdiction, including jurisdiction to hear appeals from decisions of the Supreme Court of Appeal on constitutional matters. Section 167(3)(a) of the 1996 Constitution provides that the Constitutional Court 'is the highest court in all constitutional matters'. Section 168(3) provides that the Supreme Court of Appeal 'may decide appeals in any matter. It is the highest court of appeal *except in constitutional matters*.' The 'highest' Court of appeal in respect of constitutional matters is therefore the Constitutional Court.²⁰⁷

On the other hand, the Constitutional Court has assured the Supreme Court of Appeal and the High Courts that this radical doctrine of constitutional supremacy does not mean that every judicial decision is meat for constitutional review or that the Constitutional Court will supplant the Supreme Court of Appeal as the guardian of the common law. In *S v Bierman*, the Constitutional Court wrote:

It is clear that special leave to appeal against a decision of the Supreme Court of Appeal will be granted only when it is in the interests of justice to do so. This Court has . . . also held that where the development of a rule of the common law is in issue, this Court will be reluctant to grant an applicant leave to appeal directly to this Court and ordinarily requires the application to be heard first by the Supreme Court of Appeal . . . [W]here an applicant asserts that the common-law rules require reconsideration in the light of the Constitution, such arguments must be placed before the Supreme Court of Appeal before being raised in this Court.²⁰⁸

But while the Constitutional Court will accord due deference to the Supreme Court of Appeal with respect to the latter's role in the development of the common law, the Constitutional Court's retention of ultimate appellate jurisdiction in constitutional matters places a sword of Damocles over the Supreme Court of Appeal and any High Court that shirks the 'general' obligation to ensure the development of the common law in light of constitutional dictates.²⁰⁹

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How then should we understand the obligation that courts are under with respect to the development and interpretation of law in light of FC s 39(2)'s general

206 *Boesak* (supra) at para 15.

207 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at para 10. FC s 167(6) makes the Constitutional Court's position absolutely clear: 'National legislation or the Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court — (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court.' The Pennington Court holds that the 'words "any other court" include the Supreme Court of Appeal.' Ibid.

208 2002 (5) SA 243 (CC), 2002 (10) BCLR 1078 (CC) at para 7.

209 Lower courts have acceded to this hierarchy and division of labour. In *Carmichele v Minister of Safety and Security*, the High Court admitted that it had erred in failing to recognize its obligations under FC s 39(2). 2003 (2) SA 656 (C), 2002 (10) BCLR 1100 (C). Chetty J wrote:

objectives? As Danie Brand has pointed out, FC s 39(2)'s obligation should be read with both FC s 7(2)'s injunction that the judiciary must protect and promote the Bill of Rights and FC s 8(1)'s binding of the judiciary. These textual provisions, along with the Constitutional Court's jurisprudence on the unity of the law and constitutional jurisdiction, frame the preferred reading of FC s 39(2)'s obligation:

- Where courts decide that the rights asserted by a party do not apply directly to the dispute before the court in terms of either FC s 8(1) or FC s 8(2), then the court may still apply the Bill of Rights indirectly to the dispute before the court and modify the law accordingly;
- The language — 'when interpreting any legislation and when developing the common law and customary law' — obtains in a context in which specific constitutional rights are not being asserted expressly;
- A court *must* always infuse any law with the general spirit purport and objects of the Bill;²¹⁰
- The courts must be prepared to raise, of their own accord, constitutional issues that may affect the interpretation of legislation or the development of the common law;²¹¹
- However, simply because an interpretation of a statutory provision or a common law rule could, in the abstract, raise some kind of constitutional issue does not mean that counsel must offer a free-standing constitutional argument in every dispute or that a tribunal must provide a constitutional analysis of the

In upholding the appeal, the CC refrained from itself deciding whether the law of delict should be developed on the basis contended for on behalf of the plaintiff. What it did hold, however, was that 'where the common law deviates from the spirit, purport and objects of the Bill of Rights, the courts have an obligation to develop it by removing that deviation.' It furthermore held that under the Constitution, courts are obliged to develop the common law under s 39(2) of the Constitution and that both I and the SCA 'assumed that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions of this kind should be applied,' and in so doing 'overlooked the demands of s 39(2)'. I must confess that I did not have regard to the demands of s 39(2).

Ibid at para 5.

210 The word 'must' marks a subtle shift in emphasis from IC s 35(3) to FC s 39(2). IC s 35(3) reads, in relevant part, that '[i]n . . . the development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter'. On the other hand, FC 39(2) reads, in relevant part, that 'when developing the common law and customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Although 'shall' is rarely read as permissive in South African case law, the change to 'must' clearly reflects an intent both to make the language more natural and to make the contemplated development of the common law mandatory.

211 The idea behind this reading is that there is now a core set of values — an objective normative value system — which undergirds our entire legal system. For a discussion of the meaning of 'an objective normative value system' in the context of FC s 39(2), see § 31.4(e)(viii) *infra*. See also *S v Thebus* 2003 (6) SA 505 (CC), 524-525, 2003 (10) BCLR 1100, 1119-1120 (CC) ('The Constitution embodies an "objective normative value system" and . . . the influence of the fundamental constitutional values on the common law is authorized by s 39(2). It is within the matrix of this objective normative value system that the common law must be developed. Thus, under s 39(2), concepts which are reflective of, or premised upon, a given value system 'might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.')

status of the common law, or a piece of legislation in every case in which such a rule is dispositive.²¹²

(iii) The development of the common law, interaction between FC s 39(2) and FC ss 7, 8, 38, 167, 172 and 173, and a difference in remedies

The logic of the relationship between FC s 8 and FC s 39(2), post-*Khumalo*, is one

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that should require the courts to interpret legislation or to develop the common law in light of the general objects of the Bill of Rights *only* where no specific right can be relied upon by a party challenging a given rule of common law, the extant construction of a provision of legislation or conduct.²¹³ But the plethora of provisions that courts have relied upon when engaging the constitutionality of various rules of common law — from FC s 7, 8, 39, 167, 172 through 173 — has led to some confusion in the Constitutional Court itself about how FC s 39(2) operates. It is worth returning, in this regard, to the language of Moseneke J's judgment in *S v Thebus*:

It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution.²¹⁴

As we have already noted, textual over-determination for the development of the common law is just fine, until it leads the Constitutional Court to contradict its own textual grounds for distinguishing between different forms of application and various kinds of remedies. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*, the Court wrote the following with regard to the common law offence of sodomy:

In this judgment the conclusion has already been reached that this offence should be declared constitutionally invalid in its entirety. *This conclusion has been reached by a*

212 See *Bongoza v Minister of Correctional Services* 2002 (6) SA 330 (Tkh) at para 8 (In refusing to develop the common law with regard to the laws of evidence, the court found 'that there is no reasonable possibility of another court coming to a different conclusion regarding the development of the common law involved in the present matter.')

213 Again, to risk repetition, direct challenges, which occur in terms of FC s 8, describe instances in which the prescriptive content of a specific provision or provisions of the Bill of Rights governs the law or the conduct at issue. Indirect challenges, which occur in terms of FC s 39(2), describe instances in which no specific provision of the Bill of Rights applies to law or to conduct. Indirect challenges rely upon the spirit, purport and objects of the entire Bill to interpret or to develop the law in order to settle the dispute before the court. A particular right may be relevant to the more amorphous assessment of whether a rule of law remains in step with more general spirit of our constitutional order. But it is relevant as a value, *not* a rule. For more on the distinction between rules and values, see Frank Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 11; *Minister at Home Affairs v National Institute of Crime Prevention* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC); § 31, Appendix 3(a), *infra*.

214 *Thebus* (supra) at para 28.

*direct application of the Bill of Rights to a common law criminal offence, not by a process of developing the common law.*²¹⁵

The *NCGLE I* Court is obliged by FC s 172(1)(a) to make an order of invalidity. FC s 172(1)(b) then empowers the Court to make any order that is 'just and equitable.' The *NCGLE I* rightly concludes that it is impossible to make an order under FC s 172(1)(b) which is just and equitable in relation to the invalidity of the inclusion of the offence of sodomy in the statutory schedules, without at the same time making such an order in relation to the invalidity of the common law offence itself.

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Similarly, in *Khumalo*, the Court wrote:

In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by s 8(2) of the Constitution. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by s 8(3) of the Constitution.²¹⁶

Where an order of invalidity for a rule of common law that violates a specific provision of the Bill of Rights is sufficient, the courts should rely upon FC s 172. Where the common law violates a specific provision of the Bill of Rights and requires development in order to comport with constitutional dictates, courts should rely upon FC s 8(3).

The error made by the *Thebus* Court is quite similar to that which the Constitutional Court itself identified in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*. The *National Coalition for Gay and Lesbian Equality II* Court wrote:

There is a clear distinction between interpreting legislation in a way which 'promote[s] the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)(b), following upon a declaration of constitutional invalidity under s 172(1)(a) . . . The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.²¹⁷

In sum, FC ss 172 and 8(3) apply to instances in which the *direct* application of the Bill of Rights to a rule of common law requires one form of remedy. FC s 39(2) applies to instances in which the *indirect* application of the Bill of Rights to a rule of common law is ultimately determined to require the development of the common law and thus another form of remedy.

215 *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE I*') (Emphasis added).

216 *Khumalo* (supra) at para 33.

217 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) ('*NCGLE II*') at para 24.

Assuming a court is able to keep straight the different remedial requirements that flow from direct application and indirect application, FC s 39(2) may be read together with a range of other provisions. But that probably assumes too much. At the moment the courts are apt to rely on a dizzying array of provisions in the Final Constitution when they choose to develop the common law: FC ss 7, 8, 38, 39(2), 167, 172 and 173. In *S v Lubisi: In re S v Lubisi & Others*, the High Court read FC s 173's protection of the courts' 'inherent power to protect and regulate their own process' — together with FC s 7 and FC s 8 — as 'establishing the Bill of Rights as the cornerstone of democracy and underlining the fact that the Judiciary is bound thereby, . . . as well as

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[FC] s 39(2).²¹⁸ In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*, the High Court read FC s 39(2) together with FC s 7 and FC s 8.²¹⁹ In *Petersen v Maintenance Officer, Simon's Town Maintenance Court*, the High Court runs FC s 39(2) into FC s 173 and FC s 8.²²⁰ The *Petersen* Court makes clear our courts' general confusion about the textual bases for the development of the common law by saying too much about the provisions it invokes. In deciding that a common law rule articulated in *Motan* violated an extra-marital child's constitutional rights to equal support from maternal and paternal grandparents, Fourie J in *Petersen* writes that while he is

bound by the decision in *Motan* with regard to the interpretation of the common law, . . . s 173 of the Constitution provides that the Court has the inherent power to develop the common law, taking into account the interests of justice. Section 8(3)(a) of the Constitution enjoins the Court in order to give effect to a right in the Bill of Rights set out in Chap 2 of the Constitution, where necessary, to develop the common law to the extent that legislation does not give effect to that right. Section 39(2) of the Constitution provides that when developing the common law, the Court must promote the spirit, purport and objects of the Bill of Rights.²²¹

The common law rule articulated in *Motan* was deemed to have impaired, specifically, the rights to equality and dignity. Where, as in *Petersen*, rights bind directly a state actor under FC s 8(1), FC s 8(3)(a) is the appropriate mechanism for development of the common law.

The Supreme Court of Appeal is equally guilty of running these disparate and incompatible provisions together. In *Juglal v Shoprite Checkers (Pty) Ltd T/A Ok Franchise Division*, the Supreme Court of Appeal read the FC s 39(2) requirement to develop the common law in terms of FC ss 8 and 173. In *Du Plessis v Road Accident Fund*, the Supreme Court of Appeal used the same formula.²²² The *Road Accident Fund* Court wrote that:

218 2004 (3) SA 520, 530 (T), 2003 (9) BCLR 1041, 1050 (T).

219 2004 (5) SA 124 (W), 141.

220 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C).

221 *Ibid* at para 8.

222 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1120 (SCA) ('*Road Accident Fund*').

Section 173 of the Constitution provides that the Constitutional Court, this court and the High Courts have the inherent power to develop the common law, taking into account the interests of justice. In terms of s 8 of the Constitution a Court, in order to give effect to a right in the Bill of Rights, must develop the common law to the extent that legislation does not give effect to that right. A Court should in terms of s 39(2), when developing the common law, promote the spirit, purport, and objects of the Bill of Rights.²²³

The mistake the *Road Accident Fund* Court makes is identical to that made by the *Petersen* Court. In cases of direct application, the development of the common law proceeds under FC s 8(3). In cases of indirect application, the development of the common law proceeds under FC s 39(2).

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(iv) FC s 39(2) and the transformation of the common law

As we noted already, much of the Constitutional Court's jurisprudence that engages FC s 39(2) attempts to chart a path between transformation and tradition. The combination of the legality principle or the rule of law doctrine and the doctrine of constitutional supremacy — as articulated in cases such as *Fedsure, Pharmaceutical Manufacturers* and *Carmichele* — radically expands the Constitutional Court's limited jurisdiction. By making every exercise of public power and every judicial construction of both law and conduct a 'constitutional matter', the Constitutional Court retains the capacity to review each and every judicial decision.²²⁴ At the same time, the Constitutional Court has attempted to assuage the fears of courts of general jurisdiction that every judicial decision is in fact meat for constitutional review by the Constitutional Court.²²⁵

Not surprisingly, the Supreme Court and the High Courts have responded to this manichean construction of the doctrine of constitutional supremacy in a variety of different ways. The Supreme Court of Appeal has often cautioned against — and resisted — radical doctrinal change. It prefers to characterize FC s 39(2)'s obligation to transform the common law as one that requires incremental, not punctuated, evolution. In *Road Accident Fund*, the Supreme Court of Appeal noted that the Constitutional Court in *Carmichele* had 'quoted with approval a passage to the effect that the Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.'²²⁶

Some High Courts have adopted the Supreme Court of Appeal's incrementalist approach. In *Bongoza v Minister of Correctional Services*, the High Court emphasized the dicta in *Carmichele* that '(i)n exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should

223 Ibid at para 35.

224 See *S v Pennington* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at para 10 ('On a proper construction of the 1996 Constitution there can be no doubt that this Court has appellate jurisdiction, including jurisdiction to hear appeals from decisions of the Supreme Court of Appeal on constitutional matters.') See also *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC), 1998 (10) BCLR 1207 (CC).

225 *Bierman* (supra) at para 7. See also *Metcash* (supra) at para 14.

226 *Road Accident Fund* (supra) at para 35.

be the Legislature and not the Judiciary.' ²²⁷ The *Bongoza* Court, in light of this dicta, concluded that: (1) FC s 39(2)'s obligations did not require an analysis of the constitutionality of common-law rules of evidence; and (2) no court — and by implication the Constitutional Court — could find that FC s 39(2) required a different conclusion. ²²⁸

Other High Courts have accepted the Constitutional Court's invitation to revisit common law doctrine in light of the demands of FC s 39(2). In *S v Lubisi: In Re S v Lubisi & Others*, Bertelsmann J wrote that '[a]lthough the powers granted' to the court in terms of FC ss 39(2) and 173 'have to be exercised with caution

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and circumspection, the Constitution has broadened the scope for judicial activism where such appears to be in the interest of justice.' ²²⁹ He further wrote that:

The debate on the rewards to be reaped by imaginative orders made by activist Judges on the one hand, and the dangers associated with an overzealous approach to usurp the function of the Legislature, or to transgress into the domain of the Executive on the other, are the subject of ongoing and vigorous debates in the European Union, the United States and other countries. In general, the conclusion may be drawn that an innovative approach is justified in all instances where it is motivated by a teleological interpretation of a constitution or treaty and has as its aim the proper realisation of the principles, ideals and values underlying the constitution or treaty concerned. The Constitutional Court has repeatedly emphasised that constitutional rights must be generously interpreted. ²³⁰

(v) FC s 39(2) as a mandatory canon of statutory interpretation

The Constitutional Court has made it quite clear that FC s 39(2) creates a mandatory constitutional canon of statutory interpretation. In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*, the Constitutional Court wrote: 'This means that all statutes must be interpreted through the prism of the Bill of Rights.' ²³¹ The Constitutional Court amplified this point in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*:

[N]o matter how indispensable they may be for the economic well-being of the country . . . [fiscal statutory provisions] are not immune to the discipline of the Constitution and must conform to its normative standards. In . . . *Carmichele* . . ., this Court held that the obligation of courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary . . . The courts are under a general obligation to develop the common law appropriately where it is deficient, as it stands, in promoting the s 39(2)

227 2002 (6) SA 330 (TkH) at para 7 quoting *Carmichele* (supra) at para 36. See also *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W).

228 Ibid at para 8.

229 2004 (3) SA 520 (T), 532.

230 Ibid at 532-533.

231 2001 (1) SA 545 (CC), 588, 2000 (2) SACR 349 (CC), 2000 (10) BCLR 1079 (CC) ('*Hyundai*') at para 21.

objectives. *There is a like obligation on the courts, when interpreting any legislation — including fiscal legislation — to promote those objectives.*²³²

The Constitutional Court had previously offered a similar, though not identical, gloss on FC s 39(2) in *National Coalition For Gay and Lesbian Equality v Minister of Home Affairs*.²³³

Lower courts have tracked the Constitutional Court's language in *Hyundai* and *FNB*. The High Court in *Bezuidenhout v Bezuidenhout* found that when 'determining whether to make a redistribution order and, if so, the extent of such order, [it

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was] required to interpret . . . the Act' in terms of FC s 39(2)'s requirement that all statutory interpretation 'must promote the spirit, purport and objects of the Bill of Rights.'²³⁴ In *Paola v Jeeva NO*, the High Court found that it was bound to consider any and all constitutional implications of the statutory construction relied upon by the parties. Kondile J wrote that '[a]lthough the parties have not raised the issue of the constitutionality of s 7(1)(b)(ii) of the Act, this Court is constrained to advance the spirit, purport and objects of the Constitution in interpreting this section.'²³⁵

(vi) Reading down

FC s 39(2) enables courts to read down legislation so that it conforms to the dictates of the Bill of Rights.²³⁶ In *S v Bhulwana*, the Constitutional Court held that a court may save a legislative section which is 'reasonably capable' of a more restrictive, but still constitutional, interpretation.²³⁷ How does one read down? The wrong way round, as the court in *Zimbabwe Township Developers v Lou's Shoes Ltd* noted, is to 'interpret the Constitution in a restricted manner in order to accommodate the challenged legislation.'²³⁸ The *Zimbabwe Township* court wrote that '[t]he Constitution must [first] be properly interpreted,' and '[t]hereafter the challenged legislation must be examined to see whether it can be interpreted to fit into the

232 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) ('*FNB*') (Emphasis added).

233 *NCGLE II* (supra) at para 24 ('There is a clear distinction between interpreting legislation in a way which "promote[s] the spirit, purport and objects of the Bill of Rights" as *required* by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)(b), following upon a declaration of constitutional invalidity under s 172(1)(a). The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning.' (Emphasis added).)

234 2003 (6) SA 691, 707 (C).

235 2002 (2) SA 391 (D), 405-406 ('*Paola*').

236 See *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) at para 21 quoting *Paola* (supra) at 405-406 ('Although there is no equivalent in s 39 of the Constitution to s 35(2) of the interim Constitution, the presumption of consistency with the Bill of Rights exists independently of its expression in s 35(2) of the interim Constitution.')

237 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC) at para 28.

238 1984 (2) SA 778, 783 (SCA).

framework of the Constitution.'²³⁹ The process of reading down presupposes: (1) an assessment by the court of the ambit of the right or rights in question and (2) a determination of whether the impugned statutory provision limits the right or rights so interpreted.²⁴⁰

Because FC s 39(2) — unlike its precursors IC ss 35(2) and 35(3) — does not distinguish between indirect application and reading down, courts have erroneously assumed that when courts are asked to read legislation in light of the spirit, purport and object of the Bill of Rights, they are *always* charged with the task of attempting to read legislation so that it conforms to the demands of a particular right or set of rights. But this cannot be so. First, there will inevitably be instances in which no particular right enshrined in FC Chapter 2 engages a given piece of legislation. In other words, the universe of legislation subject to the direct application of a particular right, or even all the rights in Chapter 2, is not co-extensive with the universe of legislation subject to 'normal' legal analysis. Legislation

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that is subject to two-step fundamental rights analysis as a result of direct application of the Bill of Rights is a subset of legislation subject to judicial interpretation. Second, the instruction to read legislation in light of the spirit, purport and objects of the Chapter is, in cases where no right can be said to apply directly, a constitutionally-mandated canon of statutory interpretation. This new canon requires that given two possible readings of a provision, one that takes into account the general value commitments to be found in Chapter 2 and one that does not take these values into account (assuming only two such possible readings), the former is to be preferred. In sum, FC s 39(2) contemplates at least two different kinds of interpretation of legislation. A court may be asked to read down legislation so that it conforms to the dictates of a particular right (or rights) in the Bill of Rights. A court may be asked to interpret legislation so that it offers the best fit with the Chapter's general commitments.²⁴¹

It should also be obvious that reading down is a fundamentally different process than reading in. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Constitutional Court wrote:

There is a clear distinction between interpreting legislation in a way which 'promote[s] the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)(b), following upon a declaration of constitutional in-

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validity under s 172(1)(a) The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.²⁴²

(vii) Shared constitutional interpretation and FC s 39(2)

239 Ibid.

240 *NCGLE II* (supra) at para 24. See also See Stu Woolman & Danie Brand 'Is There a Constitution in this Classroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 18 *SA Public Law* 38; Jonathan Klaaren 'Remedies' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 9.

FC s 39(2) — as construed by our courts — contemplates a regime of shared constitutional interpretation. What is 'shared constitutional interpretation'? In short, it stands for four basic propositions:

First. It supplants the notion of judicial supremacy with respect to constitutional interpretation. All branches of government have a relatively equal stake in giving our basic law content. Second. It draws attention to a shift in the status of court-driven constitutional doctrine. While courts retain the power to determine the content of any given provision, a commitment to shared constitutional interpretation means that a court's reading of the constitutional text is not meant to exhaust all possible readings. To the extent that a court consciously limits the reach of its holding regarding the meaning of a given provision, the rest of the judgment should read as an invitation to the co-ordinate branches or other organs of state to come up with their own alternative, but ultimately consistent, gloss on the text. Third. Shared constitutional competence married to a rather open-ended or provisional understanding of the content of the basic law is meant to increase the opportunities to see how different doctrines operate in practice and maintain the space necessary to make revision of constitutional doctrines possible in light of new experience and novel demands. In this regard, the Constitutional Court might be understood to engage in norm-setting behaviour that provides guidance to other state actors without foreclosing the possibility of other effective safeguards for rights or other useful methods for their realization. Fourth. A commitment to shared interpretation ratchets down the conflict between co-ordinate branches of government. Instead of an arid commitment to separation of powers — and empty rhetorical flourishes about courts engaging in legal interpretation not politics — courts are freed of the burden of having to provide a theory of everything and can set about articulating a general framework within which different understandings of the

241 In *Govender v Minister of Safety and Security*, the SCA thought that, in reinterpreting section 49(1)(b) of the Criminal Procedure Act 51 of 1977 ('CPA'), it was engaging in 'reading down'. 2001 (4) SA 273 (SCA), 2001 (11) BCLR 1197 (SCA), 2001 (2) SACR 197 (SCA) ('*Govender*'). That is, it believed that it was reinterpreting section 49(1)(b) to accord with constitutional dictates, as part of a process of direct application, so as to avoid having to invalidate it. This characterization suggests that the High Court's broader finding that the SCA 'overstepped its constitutional mandate' — by engaging in direct rather than indirect application — is on target. Throughout *Govender*, Olivier JA appears to assume that the SCA had the power to apply the Interim Constitution's Bill of Rights directly to section 49(1)(b) of the CPA. (It did not.) For instance, at the outset of his constitutional inquiry, Olivier JA makes the following statement: 'Section 49(1) of the Act self-evidently imposes a limitation on these [constitutional] rights. The question then is whether the limitation it imposes as properly interpreted passes the tests laid down in s 33(1) of the interim Constitution'. *Govender* (supra) at 280. Further on he states that after determining the 'objects and purport of the Act or the section under consideration', a judge must 'examine the ambit and meaning of the rights protected by the Constitution', 'ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, ie by protecting the rights therein protected', 'if such interpretation is possible, to give effect to it, and', 'if it is not possible, to initiate steps leading to a declaration of constitutional invalidity.' *Govender* (supra) at 280-281 (my emphasis). Olivier JA operates as if the SCA possessed the power under the Interim Constitution to interpret specific rights of the Bill of Rights and to test section 49(1)(b) against those rights. (It did not.) He also seems to believe that the SCA possessed the power to find that an infringement of the rights in question had occurred, and then go on to consider the justifiability of section 49(1)(b), in terms of IC s 33, and to invalidate s 49(1)(b) if it chose to do so. These beliefs are predicated upon a wholly erroneous underlying presupposition that the SCA under the Interim Constitution had the power to engage in direct application. In formal terms, this error means that the SCA did indeed 'overstep its constitutional mandate'. In terms of the substantive outcome of the case, the High Court's characterization may lack any meaningful purchase. Regardless of what it thought it was doing and what it was entitled to do, the SCA in *Govender* can be re-read as having re-interpreted section 49(1)(b) in light of the general constitutional objects of the IC's Bill of Rights. This particular truth about *Govender* does not mean that distinctions between direct application and indirect application and between reading down and indirect application could not, in principal, affect the outcome of a case. Nor does it mean that we should tolerate sloppy elisions in the kinds of analysis the Bill of Rights contemplates.

242 *NCGLE II* (supra) at para 24.

basic text can co-exist. The courts and all other actors have more to gain from seeing how variations on a given constitutional norm work in practice.²⁴³

In *National Education Health and Allied Workers Union v University of Cape Town*, the Constitutional Court recognizes that the process of interpreting the Labour Relations Act in light of the demands of both FC s 39(2) and FC s 23(1) requires an appreciation of the legislature's and the courts' shared responsibility for interpreting the Final Constitution. It wrote:

The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by s 23 of the [Final] Constitution.' In doing so the LRA gives content to s 23 of the [Final] Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. Therefore the proper interpretation

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and application of the LRA will raise a constitutional issue. This is because the Legislature is under an obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. In many cases, constitutional rights can be honoured effectively only if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. *In this way, the courts and the Legislature act in partnership to give life to constitutional rights.*²⁴⁴

The creation of remedies for rights violations requires a similar sort of institutional comity. The *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* Court wrote:

243 Stu Woolman & Li Yu 'The Selfless Constitution: Flourishing & Experimentation as the Foundations of the South African State' (2006) 21 *SA Public Law* — (forthcoming). See also Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' 2000 *Sup Ct Rev* 61.

244 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) at para 14 (Emphasis added). See also *Institute for Democracy in SA & Others v ANC & Others* [2005] JOL 14201 (C) ('IDASA') at paras 16–18. In *IDASA*, Griesel J reinforces this understanding of the shared responsibility for constitutional interpretation, especially with regard to constitutionally-mandated super-ordinate legislation. He writes that:

Currie & Klaaren express preference for the view that [FC] s 32 remains, after the commencement of PAIA, as 'a free-standing constitutional right of access to information'. As to *when* such constitutional right of access to information can be directly invoked, however, the learned authors are more guarded: When can the constitutional right of access to information be directly relied on? The answer is only in the exceptional case where a provision of the AIA, other legislation or conduct beyond the reach of the AIA is challenged as an infringement of s 32. This answer is in accordance with the principle of avoidance which dictates that remedies should be found in common law or legislation (interpreted or developed, as far as possible, so as to comply with the Constitution) before resorting to direct constitutional remedies. It is related to the principle that norms of greater specificity should be relied on before resorting to norms of greater abstraction. Most compellingly, however, deference must be given to the constitutional authority that [FC] s 32(2) accords to Parliament to give effect to the constitutional right of access to information. This means that the Act must be treated as the principal legal instrument defining and delineating the scope and content of the right of access to information, establishing the mechanisms and procedures for its enforcement and limiting the right where necessary. The constitutional right therefore recedes to the background, indirectly informing the interpretation of the Act but rarely directly applicable. It appears, therefore, that the learned authors envisage a two-fold role for s 32: the one is to 'inform' the interpretation of PAIA; the other is to serve as a basis for a possible challenge to the constitutionality of PAIA for being either under-inclusive or over-restrictive.

It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them.²⁴⁵

Shared responsibility for interpreting the Final Constitution has its limits. The legislature — or the executive — must make a good faith attempt to revisit an issue in a new and constitutionally permissible way. In *Satchwell v President of the Republic of South Africa*,²⁴⁶ the Constitutional Court was asked to assess the constitutionality

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of a statutory and regulatory framework almost identical to one that it had declared unconstitutional only a year earlier in *Satchwell v President of the Republic of South Africa*.²⁴⁷ In *Satchwell I*, the Constitutional Court had declared ss 8 and 9 of the Judges' Remuneration and Conditions of Employment Act²⁴⁸ unconstitutional because they discriminated against homosexual Judges' same-sex partners. The *Satchwell I* Court ordered that the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' be read into the provisions after the word 'spouse'. Subsequent to the judgment in *Satchwell I*, Parliament promulgated a new Act, the Judges' Remuneration and Conditions of Employment Act.²⁴⁹ This Act took no notice of the *Satchwell I* Court's order. In *Satchwell II*, the Constitutional Court refused to accord Parliament any deference, declared the new provisions discriminatory, and read into the new legislation the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.'²⁵⁰

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(viii) An objective normative value system

Ibid at para 16 quoting Iain Currie & Jonathan Klaaren *The Promotion of Access to Information Act Commentary* (2002) § 2.12 and citing Jonathan Klaaren & Glenn Penfold 'Access to Information' in S Woolman, T Roux, J Klaaren, A Stein and M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2002) Chapter 61.

245 *NCGLE II* (supra) at para 76.

246 2003 (4) SA 266 (CC), 2004 (1) BCLR 1 (CC) ('*Satchwell II*').

247 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC) ('*Satchwell I*').

248 Act 88 of 1989.

249 Act 47 of 2001.

250 See Michael Dorf & Barry Friedman 'Shared Constitutional Interpretation' (2000) *Sup Ct Rev* 61, 81–83. Dorf and Friedman use the cases of *Miranda* and *Dickerson* on to great effect in explaining how shared constitutional interpretation works. See *Miranda v Arizona* 384 US 436 (1966) ('*Miranda*'); *US v Dickerson* 530 US 428 (2000) ('*Dickerson*'). As any viewer of US police dramas knows, *Miranda* rights take, in part, the form of warnings that law enforcement officers must give detained persons prior to any custodial interrogation. What few viewers appreciate is the extent to which most of those warnings were intended as judicial guidelines and not as excavations of constitutional bedrock. The *Miranda* Court, as Dorf and Friedman point out,

How does one know 'how' to develop the common law in terms of FC s 39(2)? The Constitutional Court recognizes that there are any number of notionally different approaches one could take when pruning this bramble bush. There is, however, only one true way: '[I]t is within the matrix of . . . [the Final Constitution's] objective normative value system that the common law must be developed.'²⁵¹ Exactly what this phrase means — cribbed as it is from German constitutional jurisprudence — remains unclear.²⁵² The courts have done little to delineate its extension. The use of synonyms such as 'normative' and 'value' and the adjective 'objective' might lead one to conclude, correctly, that the phrase does no heavy lifting. It would be wrong, however, to say it does no work at all.

explains that it granted certiorari 'to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.' The Court sets out its 'holding' at the outset, and that holding is only that the prosecution may not use statements made in custodial interrogation 'unless it demonstrates the use of procedural safeguards effective to secure' the privilege. And '[a]s for the procedural safeguards to be employed, unless other fully effective means are devised to inform the accused persons of their right of silence and to assure a continuous opportunity to exercise it' the specific *Miranda* guidelines are required. The Court then devotes an entire paragraph to encouraging governmental bodies to devise their own ways of safeguarding the right. At least twice more, the Court repeats the holding and re-extends the invitation.

Dorf & Friedman (*supra*) at 81-83. Congress accepted the invitation. But as the judgment in *Dickerson* reflects, it willfully misconstrued the nature of the invitation. Congress did not, as the Supreme Court suggested, come up with equally effective ways of safeguarding the right to remain silent and not to have statements made in custodial interrogation used by the prosecution unless adequate safeguards have been put in place. Instead, Congress simply enacted as legislation the pre-*Miranda* test that the voluntariness of a confession would be assessed in terms of a totality of the circumstances. The *Miranda*-specific warnings were merely included as factors to be taken into account when determining voluntariness. Not surprisingly, the *Dickerson* Court rejected Congress' 'new' take on the voluntariness of custodial confessions. It did so, as Dorf and Friedman argue, because Congress had failed to take seriously the Court's concerns about the 'compulsion inherent in custodial interrogation' and had failed to offer an alternative that could be deemed 'equally effective in ameliorating this compulsion.' Dorf & Friedman (*supra*) at 71. While the 34 years between *Miranda* and *Dickerson* might have witnessed confusing dicta from the Court regarding the status and the reach of the holding in *Miranda*, Dorf and Friedman convincingly show that Congress and other government actors did indeed possess significant space to place their own gloss on the Fifth Amendment's protections. What they were not free to do was ignore entirely even the narrowest possible construction of the *Miranda* Court's holding.

251 *Carmichele* (*supra*) at para 54. See also *Thebus* (*supra*) at para 27.

252 See *Luth BVerfGE* 7, 198 (1958) ('The basic rights are primarily of the citizen against the State (negative rights); the basic rights of the Basic Law, however, also embody an objective system of values, to be taken as the basic constitutional determination for all areas of law [N]o provision of private law may contradict [the Basic Law]; each must be interpreted in its spirit.') See also Gerhard Casper 'The Karlsruhe Republic — Keynote Address at the State Ceremony Celebrating the 50th Anniversary of the Federal Constitutional Court' (2001) 2 (18) *German Law Journal* at paras 18-21, available at www.germanlawjournal.com (accessed on 17 September 2004); Donald Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) 368, 370.

It is no coincidence that the phrase is borrowed from the Germans.²⁵³ For both Germans and South Africans, the phrase attempts to address the anxiety that the judgments of constitutional courts might simply reflect the parochial for the idiosyncratic views of the individual judges. Post-Third Reich, Germans want to be able to say that the Basic Law speaks directly to and for everyone. Post-apartheid, South Africans want to say that the Final Constitution speaks directly to and for everyone. As Davis J writes in *Geldenhuys v Minister of Safety and Security*:

The content of this normative system does not only depend on an abstract philosophical inquiry but rather upon an understanding that the Constitution mandates the development of a society that breaks clearly and decisively from the past and where institutions that operated prior to our constitutional dispensation had to be instilled with a new operational vision based on the foundational values of our constitutional system. The facts of this case recall a sad part of the apartheid past, of individuals left to die in cells, of a systematic destruction of human dignity of people who were in the custody of the police. That was our past and it can no longer be our future, for if it is, then the wonderful aspirations and magnificent dreams contained in the Constitution will turn to post-apartheid nightmares. The transformation of our legal concepts must, at least in part, be shaped by memory of that which lay at the very heart of our apartheid past. When considering police action, the past is of great importance in assisting to shape legal concepts which are congruent with our constitutional future.²⁵⁴

As Davis J suggests, the phrase 'objective normative value system' reflects a modernist response to post-modern anxiety about how memory and power turn

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law into hotly contested political terrain. The appeal to universally shared values ostensibly blunts the force of assertions that the Court plays politics or that its judgments reflect controversial ethical positions.

Moreover by stating that the Final Constitution embodies an 'objective normative value system', the Constitutional Court would appear to reject a purely procedural approach to constitutional interpretation in favour of an approach that rests upon comprehensive vision of the good life. In *S v Jordan & Others (Sex Workers Education & Advocacy Task Force & Others as Amici Curiae)*, the Court wrote:

To posit a pluralist constitutional democracy that is tolerant of different forms of conduct is not, however, to presuppose one without morality or without a point of view. A pluralist constitutional democracy does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but it is not neutral in its value system. Our Constitution certainly does not debar the State from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep civic morality Yet, what is central to the character and functioning of the State is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself.

²⁵⁵

253 See *Carmichele* (supra) at para 54 ('Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: "The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the Legislature, Executive and Judiciary." The same is true of our Constitution.' (Citation omitted.))

254 *Geldenhuys v Minister of Safety and Security* 2002 (4) SA 719 (C), 728.

Whether our courts possess the capacity to give meaningful content to such a comprehensive vision of the good life is quite another matter. In *S v M*, the High Court found that the common law offence of bestiality was perfectly consistent with the civic morality enshrined in our Final Constitution.²⁵⁶ That take on the content of our civic morality was consistent with previously articulated Constitutional Court dicta on the very same point.²⁵⁷ In *Transnet Ltd T/A Metrorail v Rail Commuters Action Group*, however, the Supreme Court of Appeal differed with the Cape High Court over the content of the civic morality enshrined in the Final Constitution.²⁵⁸ In *Rail Commuter Action Group v Transnet Ltd T/A Metrorail*, the High Court had found that the Final Constitution imposed a legal duty on Transnet to ensure that all railway commuters — regardless of race or class — enjoyed a certain level of physical safety.²⁵⁹ While recognizing the 'objective' moral content of our basic law, the Supreme Court of Appeal rejected the proposition that our constitutionally mandated morality demanded that a legal duty of care be imposed on Transnet in order to remedy the endemic violence visited upon commuters from historically disadvantaged communities.

The Court is not really concerned with making fine distinctions between the right and the good. What animates this line of thought are more mechanical matters: namely how does a specialized constitutional court ensure that the basic law transforms the manner in which courts with plenary jurisdiction dispose of ordinary disputes. Like the legality principle, an 'objective normative value system' grounded in the 'objectives' of FC s 39(2) has the potential to expand dramatically the jurisdiction of the Constitutional Court. If the FC s 39(2)

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objectives map directly on to this 'objective normative value system', then the Constitutional Court may assert constitutional jurisdiction through FC s 39(2) whenever it believes that a rule of the common law or the interpretation of a statute does not conform with its understanding of our basic constitutional norms. The Constitutional Court relies on this characterization of FC s 39(2) in *Carmichele* in order to compel the Supreme Court of Appeal and the High Court to develop the common law of delict. So despite the *Thebus* Court's admission that FC s 39(2) 'does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified', the failure of any court to adhere to the FC s 39(2) obligation to develop the common law in light of the demands of the Final Constitution's 'objective normative value system' risks reversal by our highest constitutional tribunal.

(ix) Customary law

255 2002 (6) SA 642 (CC), 2002 (2) SACR 499 (CC), 2002 (11) BCLR 1117 (CC) ('*Jordan*') at para 104.

256 2004 (3) SA 680 (O) at paras 18-25.

257 Justice Sachs provides the putative grounds for such distinctions in *NCGLE I*: 'There are very few democratic societies, if any, which do not penalize persons for engaging in inter-generational, intra-familial, and cross-species sex, whether in public or in private . . . The privacy interest is overcome because of the perceived harm.' *NCGLE I* (supra) at para 118.

258 2003 (6) SA 349 (SCA), 2003 (12) BCLR 1363 (SCA).

259 2003 (5) SA 518 (C), 573, 2003 (3) BCLR 288 (C).

Where customary law is found to be in conflict with a specific provision of the Bill of Rights, it must be declared invalid to the extent of its inconsistency and, where necessary, a new rule of customary law must be crafted. Where customary law is found to be out of step with the spirit of the Bill of Rights, it must be developed so that it comports with FC s 39(2)'s objectives. In *Mabuza v Mbatha*, Hlophe JP wrote:

[A]ny custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say that African customary law should not be opposed to the principles of public policy or natural justice. That approach is fundamentally flawed as it reduces African law (which is practised by the vast majority in this country) to foreign law - in Africa! The approach whereby African law is recognised only when it does not conflict with the principles of public policy or natural justice leads to an absurd situation whereby it is continuously being undermined and not properly developed by the Courts, which rely largely on 'experts'. This is untenable. The Courts have a constitutional obligation to develop African customary law, particularly given the historical background referred to above. Furthermore, and in any event, s 39(2) of the Constitution enjoins the Judiciary when interpreting any legislation, and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights. ²⁶⁰

The Constitutional Court endorsed this very approach to customary law in *Bhe v Magistrate, Khayelitsha*. ²⁶¹

(x) *Stare decisis*

(aa) *Walters and Afrox*

In a number of recent cases, the Constitutional Court and the Supreme Court of

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Appeal have deployed the doctrine of *stare decisis* in a manner that dramatically curtails the ability of High Courts to use the Bill of Rights, generally, and FC s 39(2), in particular, to develop the common law or to re-interpret legislation in ways that depart from Constitutional Court, Supreme Court Appeal, or Appellate Division precedent. The Constitutional Court in *Walters* restricted its conclusions about *stare decisis* to precedent handed down by the Constitutional Court, the Supreme Court of Appeal and the Appellate Division in the (rather ambiguously described) 'constitutional era.' ²⁶² The Supreme Court of Appeal in *Afrox* extended binding precedent — backwards — past the very beginning of even the most controversial understanding of the 'constitution era'. ²⁶³ The *Afrox* Court recognized that High

260 2003 (4) SA 218 (C) at paras 30–31.

261 See, eg, *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*') at paras 42–46 (Succession based upon male primogeniture found unconstitutional. The Court wrote: 'At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution. This status of customary law has been acknowledged and endorsed by this Court.') For an extended discussion of the various tropes employed by the courts when transforming customary law. See the analysis of both *Bhe* and *Mabuza* in Stu Woolman & Michael Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64.

262 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC) ('*Walters*') at para 61.

263 2002 (6) SA 21 (SCA) ('*Afrox*').

Courts could retain constitutional jurisdiction for any *direct* attack on a rule of law grounded in a pre-constitutional decision of the Appellate Division. However, where a High Court is persuaded that a pre-constitutional decision of the Appellate Division should be developed, through FC s 39(2), so that it accords with the spirit, purport and objects of the Bill of Rights (true *indirect* application), its hands are tied. The High Court is bound to follow the pre-constitutional decisions of the Appellate Division. Brand JA, for the *Afrox* Court, writes:

Die antwoord is dat die beginsels van *stare decisis* steeds geld en dat die Hooggeregshof nie deur artikel 39(2) gemagtig word om van die beslissings van hierdie Hof, hetsy pre- hetsy post-konstitusioneel, af te wyk nie. ²⁶⁴

As Danie Brand and I have argued elsewhere, the problems with *Walters* and *Afrox* on the issue of *stare decisis* and the constitutional jurisdiction of the High Courts are legion. ²⁶⁵ What is particularly troublesome for the purposes of application analysis is that the Constitutional Court and the Supreme Court of Appeal have said that FC s 39(2) is the appropriate vehicle for development of the common law — both directly and indirectly — but that the High Courts may not disturb settled precedent through FC s 39(2). ²⁶⁶

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(bb) After *afrox* and *walters*

Since *Afrox* and *Walters* were handed down, several cases have engaged the principle of *stare decisis* and the development of the common law through FC s 39(2). None have altered the manner in which the *Afrox* and *Walters* doctrine shapes constitutional jurisdiction and the development of the common law. ²⁶⁷

264 Ibid at para 29 ('The answer is that the principles of *stare decisis* still apply and that the High Court is not authorised by section 39(2) to depart from decisions of this Court, whether pre-constitutional or post-constitutional.' (Danie Brand's translation).)

265 See Stu Woolman & Danie Brand 'Is There a Constitution in This Classroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 18 *SA Public Law* 38-83 (Sets out the doctrine of *stare decisis* for all courts with constitutional jurisdiction, and the limits the doctrine imposes on the High Courts.)

266 One other space remains within which to contest existing precedent. The *Afrox* Court states that High Courts will be able to deviate from SCA, AD and CC precedent with respect to how they understand such open-ended notions as *boni mores* and public interest. *Afrox* (supra) at para 28. A second line of attack may be open to the High Courts. Where the Supreme Court of Appeal has assiduously avoided constitutionalising an issue of law, then the Constitutional Court's doctrines of legality, the unity of the law, constitutional supremacy and an objective normative value system suggests that the High Courts should have an opportunity to test such a rule of law against the basic law's dictates. To this end, the Constitutional Court in *Boesak* writes:

The development of, or the failure to develop, a common-law rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the Supreme Court of Appeal developed, or failed to develop, the rule under circumstances inconsistent with its obligation under s 39(2) of the Constitution or with some other right or principle of the Constitution. The application of a legal rule by the Supreme Court of Appeal may constitute a constitutional matter. This may occur if the application of a rule is inconsistent with some right or principle of the Constitution.

Boesak (supra) at para 15. Neither the *Boesak* Court nor the *Walters* Court make clear whether such a failure can be remedied by all courts with constitutional jurisdiction or only by the Supreme Court of Appeal and the Constitutional Court. Cf *K v Minister of Safety and Security* CCT 52/04 (13 June 2005).

The Constitutional Court has not had its authority with respect to precedent, jurisdiction or the development of the common law challenged. It has even extended ever so slightly the reach of its precedent. In *National Director of Public Prosecutions v Mohamed*, the Constitutional Court noted that not only does the holding of a case constitute binding precedent, the reasons supporting the holding themselves constitute 'an objective precedent, with such binding force on other courts as the principles of *stare decisis* and the status of the Court delivering the judgment dictate.'²⁶⁸

The Supreme Court of Appeal has had its authority to develop or to interpret the law under FC s 39(2) contested on a number of occasions. In *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd*, the Supreme Court of Appeal dressed down a High Court judge for having the temerity to suggest that the Supreme Court review its conclusions in an earlier decision.²⁶⁹ The *Blaauwberg Meat Wholesalers* Court wrote: 'In the absence of a constitutional challenge, to which other considerations would apply, perceived equities are not a legitimate basis to depart from a decision of a higher Court or to avoid the strictures of a statute.'²⁷⁰

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What these 'constitutional' considerations are, the *Blaauwberg Meat* Court does not say. In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*, the Supreme Court of Appeal refused the invitation to revisit its own precedent and to develop the

267 High Courts have accepted the 'dominant principles' set out in *Afrox and Walters*. See *Harper v Morgan Guarantee Trust Co of New York, Johannesburg* 2004 (3) SA 253 (W), 267('It is argued that this Court is bound by the principles of *stare decisis*. Confirming that both the inherent and the constitutional right of the Supreme Court to develop the law are subject to the principles of *stare decisis* is *Afrox Healthcare Bpk v Strydom* . . . That was stated to be the case in respect of post-1994 judgments in *Ex parte Minister of Safety and Security & Others: In re S v Walters & Another* . . . There is no decision deciding on the appellant's argument specifically, but there are decisions about dominant principles.') See also *Ritchie v Government, Northern Cape* 2004 (2) SA 584 (NC)('None of the issues before us require a decision whether or not a politician (for example MEC Block) is competent to sue the applicants . . . I am nevertheless also of the respectful view that Joffe J's decision that a cabinet minister does not have the right to sue for damages falls foul of the principles enunciated by the Constitutional Court in *Khumalo v Holomisa* . . . and that in accordance with the established principles of *stare decisis* the learned Judge was bound thereby. See *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* . . . [and] *Afrox Healthcare Bpk v Strydom*.')

268 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC) at para 57.

269 2004 (3) SA 160 (SCA).

270 *Ibid* at para 20 quoting *Dischem Pharmacies (Pty) Ltd v United Pharmaceutical Distributors (Pty) Ltd* 2003 CLR 9 at para 13 and citing *Walters* (supra) at para 61 and *Afrox* (supra) at paras 25–26. See *S v Kgafela* 2003 (5) SA 339 (SCA), 341(Court *a quo* granted leave to appeal to the Supreme Court of Appeal, and 'after setting out a full review of the general sentencing rules, . . . felt "impelled to venture" that [the Supreme Court of Appeal] might welcome the opportunity to revisit the decision in *Malgas* in order to give more definition or formulation to the phrase "substantial and compelling circumstances", and to reverse the order of the enquiry. The Supreme Court of Appeal tersely dismissed the High Court's invitation and wrote: This is an approach to granting leave that cannot be accepted.' The Supreme Court of Appeal then quoted, in support of this contention, *Cassell and Co Ltd v Broome & Another* [1972] AC 1027. The House of Lords in *Cassell* wrote: 'The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers.') See also *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA).

common law of delict.²⁷¹ It did not merely view its own precedent as dispositive. It suggested that only the legislature should initiate the dramatic change in the law that a departure from its own precedent would require. With regard to the displacement of its own precedent, the *Wagner* Court found that while it might be obliged to reverse itself in 'a situation . . . in . . . which there was no remedy at all in existence or a patently inadequate one, and the dictates of the Constitution led to the need for change, . . . that is not the situation we have before us.'²⁷²

The *Wagner* Court's view, that the development of the common law under FC s 39(2) — or FC s 8(3) — requires that there be either no remedy at law or a patently inadequate one, sets an almost insuperable threshold for revisiting existing precedent. Marry the Supreme Court of Appeal's resistance to doctrinal development to a refusal to afford High Courts the space to alter existing Appellate Division or Supreme Court of Appeal precedent via FC s 39(2) and it is hard to imagine why any given litigant would seek to challenge such precedent in either a High Court or the Supreme Court of Appeal. Moreover, given the Constitutional Court's reluctance to alter the common law without the Supreme Court of Appeal having first fully vetted a particular rule or doctrine of common law, it seems reasonable to conclude that few litigants will underwrite expensive challenges to existing rules of law via FC s 39(2).

Some challenges to existing common law precedent via direct application of the Bill of Rights have succeeded. In *Victoria & Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre As Amicus Curiae)* Desai J noted counsel's reliance on 'the judgment of the Supreme Court of Appeal in *Afrox Healthcare Bpk v Strydom*.'²⁷³ He then wrote as follows:

As I understand . . . *Afrox* . . . , if I am convinced that any common law rule is in conflict with the Constitution, I am obliged to differ from it . . . The obligation to differ from the common law is, for obvious reasons, more compelling where it is in conflict with the fundamental liberties entrenched in the Bill of Rights contained in the Constitution.²⁷⁴

In *Petersen v Maintenance Officer, Simon's Town Maintenance Court*, the High Court found that while it was technically 'bound by the [AD's] decision in *Motan* with regard to the interpretation of the common law', the rule articulated in *Motan* violated an 'extra-marital child's constitutional rights to equality and dignity enshrined in [FC] ss 9 and 10 . . . and is contrary to the best interest of the child' according to

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FC s 28(2).²⁷⁵ Direct application of these three rights resulted in a finding that the *Motan* rule was unconstitutional. The *Petersen* Court then crafted a new rule of common law using its powers under FC s 173, FC s 8(3) and FC s 39(2).

271 2003 (7) BCLR 710 (SCA).

272 Ibid at para 30.

273 2004 (4) SA 444 (C), 449.

274 Ibid at 449-450.

275 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) at para 7.

Other challenges to existing common law precedent via direct application of the Bill of Rights have failed. In *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council*, decided prior to both *Afrox* and *Walters*, the High Court recognized that, unlike IC 7(1), FC s 8(1) 'applies to all law and binds, inter alia, the Judiciary' and thus might be understood to change the body of law being applied to the case before the court.²⁷⁶ Cloete J wrote:

I am fully aware that in terms of s 8(1) of the final Constitution the Bill of Rights applies to all law and binds, inter alia, the Judiciary. I am also aware that, whereas s 35(3) of the interim Constitution required a court, when interpreting a statute, to have 'due regard' to the spirit, purport and objects of the chapter on fundamental rights, s 39(2) of the final Constitution goes further and provides that a court 'must promote' the spirit, purport and objects of the Bill of Rights.²⁷⁷

But Cloete J refused to accept the proposition that the shift in the language from the Interim Constitution to the Final Constitution in any way altered the 'law' being applied to the case before the court.²⁷⁸ He wrote:

I respectfully agree with the view of Cameron J in *Holomisa v Argus Newspapers Ltd* . . . that the Constitution requires that its provisions and values 'must be given primacy over the rules of the common law, even when those rules have been invested with the highest stature of pre-constitutional judicial authority.' *But where a superior Court has decided what the effect of the Constitution is on established law, whether substantive or procedural, a lower court must in my view follow that decision, the supremacy of the Constitution notwithstanding.* . . . To hold otherwise would be to invite chaos.²⁷⁹

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276 1999 (4) SA 799 (W) ('Bookworks').

277 Ibid at 810-811.

278 But see Stu Woolman & Danie Brand 'Is There a Constitution in this Classroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 18 *SA Public Law* 38. We argue that the Final Constitution is a different body of law from the Interim Constitution. The differences in the provisions governing direct application and indirect application require that decisions made using the application provisions of the Final Constitution are, for the purposes of *stare decisis*, not identical with decisions made using the provisions under the Interim Constitution. However, even if that thesis is controversial, the application of the substantive provisions of the Bill of Rights from either the Interim Constitution or the Final Constitution to any legal dispute must change the body of law applied from that body of law applied prior to the enactment of the Interim Constitution. The willingness of the Constitutional Court to acquiesce to the Supreme Court's bold assertion that pre-constitutional precedent binds High Courts in terms of the development of the common law — or the interpretation of statutes — would appear to fly in the face of the Constitutional Court's assertion that all law now derives its force from the Final Constitution and that the Final Constitution makes manifest an objective normative value system. Can the body of law being applied by the High Court under the Final Constitution truly be said to be the same body of law applied before either the Interim Constitution or the Final Constitution came into effect?

279 *Bookworks* (supra) at 810 (Emphasis added). Cloete J's take appears consistent with the *Afrox* Court's restrictive understanding of *stare decisis*. Other judges, however, continue to push the envelope of *stare decisis*. Davis J, in *Sayed v Editor, Cape Times*, averred that the Constitutional Court had erred in *Khumalo & Others v Holomisa* when it confirmed the Supreme Court of Appeal's position on defamation in *National Media Ltd & Others v Bogoshi*. 2004 (1) SA 58 (C). Davis J suggested that given the primacy of place of 'democracy' in 'our constitutional enterprise', the bar to defamatory action with respect to political speech 'needed to be somewhat higher'. Davis J, having thrown the gauntlet down, was forced to concede that '*Khumalo* was now the law which the Court was obliged to follow.' Ibid at 61-62.

What Cloete J appears to be saying is that where the Supreme Court of Appeal (or the Appellate Division) have decided that neither the Interim Constitution nor the Final Constitution has any meaningful effect on a rule of law — even when the Court lacked the jurisdiction to apply the Interim Constitution directly or did not realize that it possessed the jurisdiction to apply the Interim Constitution indirectly — a High Court would not be free to depart from such SCA or AD precedent.

(f) Section 239: organ of state

FC s 239 reads, in relevant part, as follows:

Definitions

In the Constitution, unless the context indicates otherwise — . . .

'organ of state' means —

- (a) any department of state or administration in the national, provincial or local sphere of government; and
- (b) any other functionary or institution —
 - (i) exercising a public power or performing a public 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.

FC s 8(1) tells us that 'organs of state' are amongst the bodies bound directly by the Bill of Rights. FC s 239 tells us that organs of state come in two varieties: those identified in FC s 239(a); and those identified in FC s 239(b). While the courts have no problem identifying organs of state, they have thus far been reluctant to fit them into either of these two categories.

Laundry lists may not seem especially helpful when one is attempting to understand the analytical framework that has been developed for determining whether an entity is an organ of state. Still, such an inventory may give the reader a better sense of the constellation of bodies that have already been identified as being part of this universe. 'Organs of state' embraces Transnet,²⁸⁰ South African Airways,²⁸¹ the Commission for Conciliation, Mediation and Arbitration,²⁸² the Magistrates' Commission,²⁸³ the President,²⁸⁴ the Ministers of Finance and

280 *Hoffman v SAA* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC); *Claase v Transnet* 1999 (3) SA 1012 (T); *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W), 1998 (8) BCLR 1024 (W), [1998] All SA 336 (W).

281 *Hoffman v SAA* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

282 *Mkhize v Commission for Conciliation, Mediation and Arbitration* 2001 (1) SA 338 (LC); *Carephone v Marcus* 1999 (3) SA 304 (LAC).

283 *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC), 2002 (2) SACR 222 (CC), 2002 (8) BCLR 810 (CC) citing *Van Rooyen & Others v The State & Others* 2001 (4) SA 396 (T), 2001 (9) BCLR 915 (T); *De Kock & Others v Van Rooyen* 2005 (1) SA 1 (SCA); *Chevron Engineering (Pty) Ltd v Nkombule & Others* 2004 (3) SA 495 (SCA); *Ruyobeza & Another v Minister of Home Affairs & Others* 2003 (5) SA 51 (C); *Moldenhauer v Du Plessis & Others* 2002 (5) SA 781 (T).

Provincial Affairs,²⁸⁵ the Minister of Trade and Industry,²⁸⁶ provincial premiers in Kwa-Zulu Natal,²⁸⁷ the Western Cape,²⁸⁸ and the Eastern Cape,²⁸⁹ the National Gambling Board,²⁹⁰ the Kwa-Zulu Natal Provincial Gambling Board,²⁹¹ the University of Bophuthatswana,²⁹² the Permanent Secretary of the Department of Welfare for the Eastern Cape,²⁹³ the Western Cape's Minister of Education,²⁹⁴ the Western Cape's Department of Education,²⁹⁵ the Greater George Municipal Council,²⁹⁶ the Public Accountants' and Auditors' Board,²⁹⁷ the Independent Electoral Commission,²⁹⁸ the Langeberg Municipality,²⁹⁹ the Cape Metropolitan Council,³⁰⁰ Port Elizabeth Municipality,³⁰¹ the Eastern Cape Appropriate Technology Unit,³⁰² the Director of

284 *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC).

285 *Uthukela District Municipality & Others v President of the Republic of South Africa & Others* 2003 (1) SA 678 (CC), 2002 (11) BCLR 1220 (CC).

286 *National Gambling Board v Premier, Kwa-Zulu Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC).

287 *MEC for Health, KwaZulu-Natal v Premier, KwaZulu-Natal: In Re Minister of Health & Others v Treatment Action Campaign* 2002 (5) SA 717 (CC), 2002 (10) BCLR 1028 (CC).

288 *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC), 1999 (4) BCLR 382 (CC).

289 *Cekeshe v Premier, Eastern Cape* 1998 (4) SA 935 (Tk).

290 *National Gambling Board v Premier, Kwa-Zulu Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC).

291 *Ibid.*

292 *Baloro & Others v University of Bophuthatswana & Others* 1995 (4) SA 197 (B), 1995 (8) BCLR 1018 (B).

293 *Permanent Secretary, Department of Welfare, Eastern Cape, & Another v Ngxusa & Others* 2001 (4) SA 1184 (SCA), 2001 (10) BCLR 1039 (SCA).

294 *Naptosa v Minister of Education* 2001 (2) SA 112 (C), 2001 (4) BCLR 388 (C).

295 *Ibid.*

296 *Pedro v Breater George Transitional Council* 2001 (2) SA 131 (C).

297 *Association of Chartered Certified Accountants v Chairman, the Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W).

Public Prosecutions, Cape of Good Hope,³⁰³ and the Truth and Reconciliation Commission.³⁰⁴

(i) 'Any department of state or administration in the national, provincial or local sphere of government'

While much of the legal action and the academic commentary around the meaning of 'organ of state' has been driven by FC s 239(b), it is worth pausing to see exactly what is meant by FC s 239(a). FC s 239(a) binds departments of state or administrative bodies whether or not they act 'in terms of' the Final Constitution, a provincial constitution or a piece of legislation. As a result, FC s 239(a) stands, at a minimum, for three propositions.

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One. Even when a 'Department of State or Administration' does not act within the express terms of a constitution or piece of legislation, they are bound by constitutional dictates. In other words, all conduct of FC s 239(a) entities is subject to the Bill of Rights.

Two. As a consequence of this first position, a 'Department of State or Administration' is bound by the Bill of Rights in the commercial or contractual realm. The position under the Final Constitution marks a notable shift from the position under the Interim Constitution.³⁰⁵

Three. The phrase 'a Department of State or Administration' does not generate a bright line rule. As Stephen Ellmann has persuasively argued, there are good reasons to conclude that parastatals and entities privatised by the state, but still functionally public, are captured by FC s 239(a).³⁰⁶ With regard to parastatals, Ellmann relies on the reasoning of the US Supreme Court in *Lebron v National Railroad Passenger Corporation*.³⁰⁷ In *Lebron*, the Court held:

That where, as here, the Government creates a corporation by special law, for the furtherance of government objectives, and retains for itself permanent authority to

298 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), 2001 (9) BCLR 883 (CC).

299 *Ibid.*

300 *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others* 2001 (3) 1013 (SCA), 2001 (10) BCLR 1026 (SCA).

301 *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E).

302 *Mgijima v Eastern Cape Appropriate Technology Unit* 2000 (2) SA 291 (Tkh).

303 *Director of Public Prosecutions, Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C), 2000 (2) BCLR 103 (C).

304 *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (3) SA 119 (C), 2000 (5) BCLR 534 (C).

appoint a majority of the directors of that corporation, the corporation is part of the Government for the purposes of the First Amendment [of the Constitution].³⁰⁸

The Constitutional Court reached a similar conclusion in *Hoffmann v South African Airways*.³⁰⁹ In finding that the parastatal Transnet, and thus SAA as a wholly owned subsidiary of Transnet, was an organ of state, the *Hoffmann* Court held that SAA satisfied FC s 239 because it was both a statutory body and controlled by the State.³¹⁰ The *Hoffmann* Court wrote as follows:

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Transnet is a statutory body, under the control of the State, which has public powers and performs public functions in the public interest. It was common cause that SAA is a business unit of Transnet. As such, it is an organ of State and is bound by the provisions

305 See *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC). Kentridge AJ was willing to find that government reliance on common-law rules with respect to the criminal law could be attacked directly. He seemed less inclined to allow common law rules governing state activities in the commercial or contractual sphere to be similarly subject to direct attack. See also J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition 2001) 50. The authors agree that what was once an open question under the Interim Constitution is now closed under the Final Constitution. However, the authors are surely wrong to suggest that common law rules governing state activities in the commercial or contractual sphere are governed by the application provision of FC s 8(2). Even if one accepts their *Khumalo*-like assessment of the split between FC s 8(1) and FC s 8(2), there is certainly no good reason to accept the conclusion that legal relationships between a government actor and a natural or juristic person are governed by FC s 8(2). Organs of state are bound by FC s 8(1). The text is unequivocal about that. (The only possible way in which FC s 8(2) could apply would be if we read FC s 8(2) to always govern the conduct of a private party being challenged, even when the other party in the dispute is the state. Such a reading would expand implausibly the disputes captured by FC s 8(2).)

306 S Ellmann 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444, 446-448.

307 513 US 374 (1995).

308 *Ibid* at 400.

309 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) ('*Hoffmann*').

310 The *Hoffmann* Court also held that Transnet, and thus SAA, was an organ of state that possessed public powers and that exercised public functions, in terms of legislation, in the public interest. *Ibid* at para 23. Its analysis of the statutory basis for this finding is worth quoting in full:

Transnet Ltd has its origin in the South African Railways and Harbours Administration, which was administered by the State under the Railway Board Act 73 of 1962. In terms of s 2(1) of the South African Transport Services Act 65 of 1981 the South African Railways and Harbours Administration was renamed the South African Transport Services. In terms of s 3(1) it was not a separate legal person, but a commercial enterprise of the State. It was empowered, in terms of s 2(2)(a), amongst other things, to 'control, manage, maintain and exploit . . . air services (under the title 'South African Airways' or any title in the Minister's discretion)'. Pursuant to ss 2(1) and 3(2) of the Legal Succession to the South African Transport Services Act 9 of 1989 Transnet was incorporated as a public company and took transfer of the whole of the commercial enterprise of the South African Transport Services. SAA is a business unit within Transnet, established in terms of s 32(1)(b) of that Act. In terms of s 2(2), the State is the only member and shareholder of Transnet. Section 15 requires it to provide certain services in the public interest. Its services must be performed in accordance with the provisions of Schedule 1 to the Act.

Ibid at para 23, fn 17. The language of the *Hoffman* Court implies that Transnet qualifies as an organ of state in terms of both FC s 239(a) and FC s 239(b).

of the Bill of Rights in terms of s 8(1), read with s 239, of the Constitution. It is, therefore, expressly prohibited from discriminating unfairly.³¹¹

In reaching its conclusion, the *Hoffmann* Court notes that under the South African Transport Services Act, South African Transport Services [Transnet's precursor] was 'not a separate legal person, but a commercial enterprise of the State.'³¹² In the *Hoffmann* Court's eyes, neither a name change nor a statutory change alters Transnet's status as part of the State:

Pursuant to ss 2(1) and 3(2) of the Legal Succession to the South African Transport Services Act 9 of 1989 Transnet was incorporated as a public company and took transfer of the whole of the commercial enterprise of the South African Transport Services.³¹³

The Constitutional Court's inclination to avoid fitting its findings into a pre-conceived test makes it difficult to press down particularly hard on its FC s 239 analysis in *Hoffmann*. The facts and the holding are, however, consistent with the reasoning offered by both Ellmann and the *Lebron* Court.

A knottier question, but one of some moment in South Africa, is whether the 'privatisation and sale' of a parastatal 'removes it from government for the purposes of [FC] s 239(a)?'³¹⁴ One should suppress any initial intuition that such a sale removes the entity from the *orbit* of government — and thus the ambit of FC s 239 — if various indicia of government and government control remain present. If, as Ellmann suggests, 'the government retains some seats on the privatised entity's board of directors' or supplies the entity with 'subsidised electricity or guaranteed contracts', then there is every reason to believe that the entity 'has never actually departed from the government's ambit.'³¹⁵ Failure to hold such entities

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accountable as organs of state would permit the state to escape its constitutional obligations 'under a veneer of privatisation.'³¹⁶

311 Ibid at para 23.

312 Ibid at para 23, fn 17.

313 Ibid.

314 Ellmann (supra) at 447.

315 Ibid.

316 Ellmann (supra) at 447. Ellmann pushes the envelope for those kinds of private entities that could be captured by FC s 239(a) when he argues that private building contractors, if they possess a significant fraction of the tenders for a government programme designed to deliver adequate housing as per FC s 27, might legitimately be taken to be part of the state apparatus. One implicit ground for this argument is that because the progressive provision of adequate housing is a constitutional obligation imposed upon the state, the state should not be able to avoid any irregularities in its programme simply through the privatization of the work. That implication seems relatively uncontroversial. However, as soon as Ellmann starts creating distinctions between builders or a building association with a significant fraction of the total budget for housing and smaller contractors, the coherence of his argument collapses. Ibid at 450. No percentage of such work can, save by fiat, create an *institutional* link between the state and the party employed to do its bidding. A *functional* test that grounds the finding that an entity is an organ of state avoids such a mathematical miasma.

This last line of analysis cannot be avoided by arguing that FC s 239(b) was designed for just such an eventuality. If one proffers a very literal — and potentially cramped — reading of FC s 239(b), and the privatised entity under scrutiny is no longer exercising a power or function in terms of the Final Constitution or a piece of legislation, then the entity's para-governmental function might escape both FC ss 239(a) and (b). In such cases, where the entity lies at the very periphery of our vision of what constitutes an organ of state, the courts are under some obligation to craft two sets of tests adequate to the taxonomic task of determining which entities count as government and which entities do not.³¹⁷

(ii) Any other functionary or institution

Given the other changes wrought by the Final Constitution with respect to issues of application, one would expect a similar sea-change with respect to the definition of 'organ of state' under FC s 239(b). Under the Interim Constitution, only institutions

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under the direct control of the government were considered organs of state.³¹⁸ In *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting*, Van Dijkhorst J set out the basic contours of this restrictive definition:

By control, I do not mean inspection or supervision in respect of the quality of his services, but the right to prescribe what the function is and how it is to be performed. He must be part of the government apparatus . . . The concept must be limited to institutions which are an intrinsic part of government, . . . ie where the majority of members are appointed by the state or where the functions of that body and their exercise is prescribed by the state to such an extent that it is effectively in control. In short, the test is whether the state is in control.³¹⁹

317 Of course, it remains possible to interpret both FC ss 239 (a) and (b) with sufficient generosity as to capture such entities at either stage. As Ellmann's analysis suggests, what matters is whether the entity possesses the requisite indicia of government. As with all state action enquiries, the analysis is going to be driven less by the text and more by the court's inclination towards making the Bill of Rights applicable directly to a wider or a narrower body of actors. For example, the judgments of Van Dijkhorst evince a clear desire to draw sharp lines between state and non-state actors and to hold as few of the latter as possible subject to the direct application of the Bill of Rights. See *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T); *Wittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T)(Van Dijkhorst J holds that state-aided secondary school was not an organ of state under the Interim Constitution); *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T), 2000 (3) BCLR 309 (T)(Van Dijkhorst J holds that test employed for organs of state under Interim Constitution remains the same under the Final Constitution.) The judgments of Davis J reflect a more expansive approach to 'organ of state' analysis and a recognition that for purposes of application the important questions are not how power has been traditionally described, but how power is actually exercised. See, eg, *Inkatha Freedom Party v TRC* 2000 (3) SA 119 (C), 133 (To be defined as an organ of state, entity need not be under direct control of government but must merely 'fulfill objectives identified in the Constitution' or a piece of legislation.) See also J De Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition 2001) 51 (Narrow construction of organ of state inconsistent with a 'central objective' of the Final Constitution: to impose a 'culture of justification and openness on private persons and institutions' that 'perform public functions'.)

318 1996 (3) SA 800 (T), 810 ('*Directory Advertising Cost Cutters*'); *Wittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T)(Holds that state-aided secondary school was not an organ of state under the Interim Constitution.)

319 *Directory Advertising Cost Cutters* (supra) at 810.

By contrast, the Final Constitution provides expressly that those institutions and individuals bound by its dictates are those exercising 'public power' or engaging in a 'public function' in terms of some underlying legislation or constitutional provision. These institutions and individuals need not be an 'intrinsic part' of what we have commonly or historically considered to be the 'government'. They need not be subject to the effective control of elected legislative or executive bodies. The drafters of the Final Constitution have crafted this section in such a manner as to ensure that if the state created the conditions for the exercise of some power or function, then the institutions produced and the individuals so empowered are going to have to answer for their actions in the same manner as those institutions and officials to whom we have no trouble ascribing the appellation 'government'.³²⁰

To understand the difference this distinction makes one must first appreciate what the control test allowed. The government control test, as elaborated by Van Dijkhorst J, sought to allow institutions created by government, but not under its direct control or supervision, to operate without fear of constitutional sanction.³²¹

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Perhaps, as Mark Tushnet has suggested, the central purpose of the Final Constitution — to subject private parties, as well as state parties, to the basic law's provisions — makes these fine distinctions between organs of state and non-organs of state less pressing than they might otherwise be.³²² But given the Constitutional Court's penchant for avoiding the constitutionalization of 'private' disputes, the

320 For an extended discussion of the case law concerning 'organ of state' under the Interim Constitution, see the version of this chapter in the first edition. Stuart Woolman 'Application' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) § 10.3(a)(iv)(cc).

321 The control test, borrowed as it is from Canadian constitutional jurisprudence, has a certain amount of give in it. In the early 1990s, the Canadian Supreme Court held that the Charter did not apply to a publicly created and funded university because it fell outside the state's direct control. See *McKinney v University of Guelph* [1990] 3 SCR 229, 76 DLR (4th) 545. See also *Connell v University of British Columbia* [1990] 3 SCR 451 (Limited state supervisory role and significant fiscal control did not make university 'government' for purposes of Charter.) The *McKinney* Court found that although the University of Guelph was subject to government regulation and dependent upon government funding, it was not a state actor because it managed its own affairs and allocated those funds along with tuition moneys, endowment funds and other sources. Similarly, in *Stoffman v Vancouver General Hospital*, the Canadian Supreme Court found that the Charter did not apply to hospital regulations even though fourteen of sixteen hospital board members were government appointees and the Minister had the power to veto and compel regulations made by the board and to compel the board to enact regulations. [1990] 3 SCR 483 ('*Stoffman*'). The Court held that Charter did not apply because government presence was only supervisory and did not effect actual operation of hospital. Recently, however, the Canadian Supreme Court has adopted a more relaxed approach to the control test. In *Eldridge v British Columbia*, the Canadian Supreme Court found that a hospital was subject to the Charter despite the absence of direct control over the hospital's operation. [1997] 3 SCR 624 at paras 43-51. That the hospital was, in significant part, governed by and funded under British Columbia's Hospital Services Act was sufficient to secure review under the Charter. Although there is little difference, factually, between *McKinney*, *Stoffman* and *Eldridge*, the legal conclusions are worlds apart. In *McKinney* and *Stoffman*, the absence of state actors ends the Supreme Court's constitutional analysis. In *Eldridge*, the finding of a sufficient quantum of government presence underwrites the Supreme Court's decision to review the hospital's conduct under s 15 of the Charter.

Peter Hogg notes the factual similarities and legal differences with some dismay. He concludes that *Eldridge* was wrongly decided and that the Charter should not have applied. See Hogg, 'Application' in *Constitutional Law of Canada* (4th Edition 2001) Chapter 34. But given this difference in outcome, it is hard to maintain, as Hogg does, that the control test looks solely to 'an institutional or structural link' with government as opposed to a 'functional' link. *Ibid* at 34-17. At a minimum, the control test now enables a Canadian court to rely either on institutional affiliation alone or public function (when tied to some state foundation).

characterization of a legal relationship as one between the state and an individual — as opposed to one between private parties — retains its value.

The courts have not, as yet, tested the outer limits of FC s 239 analysis in the manner suggested by Ellmann and Canadian case law. However, a clutch of cases largely confirm the conclusion that our courts have rejected the restrictive, anachronistic understanding of 'organ of state' offered up by Van Dijkhorst J in *Direct Cost Cutters* and *Korf* and that they are inclined to prevent the state from delegating responsibilities so as to immunize itself from liability for the actions of its creations.³²³

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In *Hoffmann*, the Constitutional Court found that a change of legal form from a state commercial enterprise to a state-owned public company was insufficient to take Transnet and SAA out of the orbit of government. A public function and the exercise of public power — in the public interest and in terms of legislation — makes both Transnet and SAA organs of state for the purposes of FC s 239(b) and thus FC s 8(1). Similarly, non-governmental professional regulatory bodies and public service entities that possess all the trappings of state power have been found to satisfy the requirements of FC s 239(b). In *Association of Chartered Certified Accountants*, the High Court found that the Public Accountants and Auditors Board is an 'organ of state' as defined in FC s 239(b)(i) and (ii).³²⁴ The *Association of Chartered Certified Accountants* Court reasoned as follows:

The Board clearly exercises a public power; it is a creation of statute and the source of its power is to be found in the Public Accountants and Auditors Act 80 of 1991. The Board also appears to fulfil a public function in terms of the said legislation. The Board is a regulatory body entrusted with the task of ensuring that proper standards are maintained in the accounting and auditing profession. It functions in close co-operation with structures of State authority, its members are appointed by the Minister and include persons selected among the persons holding office as State functionaries, it is also dependent upon the State for infrastructural support.³²⁵

The High Court in *Mkhize* employed similar reasoning regarding the FC s 239(b) status of the Commission for Conciliation, Mediation and Arbitration ('CCMA').³²⁶ The CCMA was established in terms of a statute — the Labour Relations Act³²⁷ — and exercises a public function and a public power. *Mkhize* seems especially close in facts, reasoning and outcome to *Eldridge v British Columbia*. In both cases, the hook

322 See, eg, Mark Tushnet 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1 *Journal of International Constitutional Law* 79.

323 Cf Duncan Kennedy 'The Stages of the Decline of the Public-private Distinction' (1982) 130 *University of Pennsylvania LR* 1349 (While Kennedy argues, correctly, that public-private distinctions rarely do any meaningful work, we, in South Africa, do not have the same liberty to dispense with that distinction for the purposes of FC s 239 organ of state analysis.)

324 *Association of Chartered Certified Accountants v Chairman, the Public Accountants' and Auditors' Board* 2001 (2) SA 980 (W).

325 *Ibid* at 996.

326 *Mkhize v Commission for Conciliation, Mediation and Arbitration* 2001 (1) SA 338 (LC).

327 Act 66 of 1995.

was the enabling legislation. Once the entity was demonstrated to be a statutory body, the court only needed to show that the entity operated as an extension of the state, or furthered state objectives or played a role traditionally associated with the state.

31.5 Application of the bill of rights to other sections of the constitution

The wording of FC s 8 offers no indication as to how the substantive provisions in the Bill of Rights engage other sections of the Final Constitution. However, the text — especially where it has changed from the Interim Constitution to the Final Constitution — intimates when and where the substantive provisions of the Bill engage other constitutional provisions.

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The supremacy clause of the Interim Constitution, s 4(1), read as follows:

This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, *unless otherwise provided expressly or by necessary implication*, be of no force and effect to the extent of the inconsistency. (Emphasis added.)

The supremacy clause of the Final Constitution, s 2, reads:

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled.

At a minimum, the Interim Constitution contemplated the possibility that a constitutional provision — and government action taken in terms of that provision — could, in the abstract, conflict with the requirements of another constitutional provision. I say 'in the abstract' because the Constitutional Court has committed itself to the proposition that all constitutional provisions must be read in a manner that permits them to be harmonized with one another.³²⁸ While harmonization as a canon of constitutional interpretation implies that a substantive provision in the Bill of Rights might have to bow before the requirements of another constitutional provision, the text of the Final Constitution indicates that harmonization ought, as a general matter, to cut the other way.³²⁹ FC s 7(1) provides that:

The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic rights of human dignity, equality and freedom.

328 *United Democratic Movement v President of the Republic of South Africa & Others (African Christian Democratic Party & Others Intervening; Institute for Democracy in South Africa & Another as Amici Curiae)(No 2)* 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('UDM') at para 12 (Court held that 'amendments to the Constitution passed in accordance with the requirements of s 74 of the Constitution became part of the Constitution. Once part of the Constitution, they could not be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, had to be read as a whole and its provisions had to be interpreted in harmony with one another.') See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

329 *UDM* (supra) at para 12 (Since an amendment to the Final Constitution must be read as part of the Final Constitution, all other provisions must be harmonized with the new provision. So although FC s 19 or FC s 1 could be given a gloss that would put them at odds with the practice of floor-crossing any interpretations consistent with floor-crossing must be given precedence.)

By making fundamental rights an indispensable component of South Africa's political process, FC s 7 provides support for the argument that where another provision can be read either to undermine a fundamental right or to give effect to a fundamental right, it should be read so as to do the latter.³³⁰

One further section of the Final Constitution deserves our attention. FC s 36(2) reads, in relevant part, that:

Except as provided in subsection (1) or in any other provision of this Constitution, no law may limit any right entrenched in this Chapter.

The phrase 'any other provision of this Constitution' should give us pause. On one reading, the phrase would appear to permit the override of fundamental

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rights by other provisions of the Final Constitution without the requirement that they be justified by reference to the test laid out in FC s 36(1).

There is, however, a better reading. Given the primacy of place the Final Constitution accords the Chapter's fundamental rights, and their express purpose of placing clear limits on the exercise of government power, it would be counterintuitive to subordinate automatically these rights to the exercise of government power. At the very least it should remain an open question as to whether or not the exercise of power expressly provided for by the Final Constitution should be permitted to limit a fundamental right. While we may not want to subject such limitations to the justificatory test set out in FC s 36(1), another kind of justificatory test is warranted. Such a test would treat the kinds of justification for a constitutional-power-based incursion into a fundamental right quite differently than FC s 36(1) treats the justifications for statutory, executive, common law or customary law infringements of fundamental rights.

The position adumbrated above is consistent with the Canadian learning on 'internal' constitutional conflicts. No part of the Canadian Constitution is deemed to be superior to any other part. The Charter, therefore, may not be used to invalidate other provisions of the Constitution.³³¹ The Canadian Supreme Court has crafted a more subtle distinction that permits application of the Charter to *acts* performed in the *exercise* of a constitutional power.³³² The test the Supreme Court employs turns on whether acceding to the Charter argument negates or removes a constitutional power (part of the tree itself). If so, the Charter does not apply. If, however, the attack merely engages the exercise of a constitutional power (the fruit of the tree), then a court can entertain the Charter argument.³³³

330 *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) ('De Lille').

331 See *Reference re Act to Amend Education Act (Ont)* [1987] 1 SCR 1148, (1987) 40 DLR (4th) 18. With regard to the determination of whether a law is constitutional or not, Peter Hogg argues for the logical priority of the constitutional provisions regulating the legislative process over the rights and freedoms found in the Charter as follows: 'It is impossible for a nation to be governed without bodies possessing legislative powers, but it is possible for a nation to be governed without a Charter Another point in favour of the logical priority of federalism issues over Charter issues is the presence in the Charter of Rights of the power of override.' 'Judicial Review on Federal Grounds' *Constitutional Law of Canada* (4th Edition 2002) 15-2-15-5.

332 See *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319, (1993) 100 DLR (4th) 212.

Both *De Lille* and *UDM* provide some clarity on the South African courts' take on this complex set of issues.

In *De Lille* the applicant was found by Parliament to have violated alleged rules of parliamentary procedure.³³⁴ She was duly punished and suspended. The question for the court was whether the constitutional provisions dealing with the powers of Parliament could justifiably limit the constitutional rights of the applicant: especially the rights to administrative justice, political participation and freedom of expression. Parliament had taken the position that the rules of parliamentary privilege — which, amongst other things, include the power of the National Assembly to

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order its own affairs — were not an appropriate object for judicial review. The *De Lille* court rejected this view.

The *De Lille* court observed that, in terms of FC s 2, the Final Constitution is the supreme law of the Republic and that any law or conduct inconsistent with the Final Constitution is invalid. The court then noted that, according to FC s 8(1), the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.³³⁵ Any conduct or legislation regarding privilege inconsistent with the Final Constitution — even if drawn from the provisions of the Final Constitution itself — must be found infirm. In *De Lille*, the court found that power to craft rules or make decisions regarding parliamentary privilege was so inextricably bound up with the exercise of that power that the two could not be distinguished. The *De Lille* court was therefore obliged to hold that the determination of the extent of this privilege must relate to its exercise, and that both must therefore be subject to judicial review. If the court had decided otherwise, Parliament would have had a blank cheque to set

333 Ibid at 373. See Peter Hogg 'Application' *Constitutional Law of Canada* (4th Edition 2002) 34-9-34-12.

334 The decision of the Cape High Division was confirmed by the Supreme Court of Appeal, but on non-constitutional grounds. See *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA)(Court found suspension beyond the scope of Parliament's authority — *ultra vires* — in the absence of legislation or rules that might permit such punishment.)

335 Judge Hlophe reinforces this point when he writes that:

Ours is no longer a parliamentary state. It is a constitutional state founded on the principles of supremacy of the Constitution and the rule of law. A new political and Constitutional order has been established in South Africa. The new Constitution shows a clear intention to break away from the history of parliamentary supremacy. There are many other provisions in the Constitution which do not support Mr. Heunis' contention. For example: (i) s 1(c) says the Republic of South Africa is a democratic state founded on the supremacy of the Constitution and the rule of law; (ii) s 2 provides that the Constitution is the supreme law of the Republic and law or conduct inconsistent with it is invalid; (iii) s 34 states that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court of law or, where appropriate, another independent and impartial tribunal or forum; (iv) s 38 entitles anyone alleging that a right in the Bill of Rights has been infringed or threatened to approach law courts for appropriate relief; (v) s 165(3) provides that no person or organ of state may interfere with the functioning of the courts; (vi) s 172(1)(a) provides that when a court decides a Constitutional matter within its power it must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; (vii) s 8 provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state; and (viii) other relevant sections include s 165(2), s 39(1)(a) and 39(2).

Ibid at 452.

the limits of its own powers.³³⁶ Most importantly, this specific exercise of judicial review enabled the court to find that Parliament had *exercised* its powers in breach of the substantive provisions of Chapter 2. *De Lille* suggests that where a non-fundamental rights provision of the Final Constitution appears to contemplate a limitation of a fundamental right, no such limit should be permitted without clear and convincing textual evidence.³³⁷

De Lille also supports the proposition that the exercise of powers sourced from non-Chapter 2 constitutional provisions that impair the exercise of a substantive provision of Chapter 2 cannot — unless authorized by a law of general application — be justified by reference to FC s 36. Judge Hlophe writes:

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The suspension of the first applicant fails the first leg of the limitations test because it did not take place in terms of law of general application. There is no law of general application which authorises such suspension. It is not authorised by the Constitution, the Powers and Privileges of Parliaments Act of 1963 or the Standing Rules of the National Assembly. The law of Parliamentary privilege does not qualify as a law of general application for purposes of s 36. It is not codified or capable of ascertainment. Nor is it based on a clear system of precedent. Therefore there is no guarantee of parity of treatment. It is essentially ad hoc jurisprudence which applies unequally to different parties. . . . Accordingly, the law of privilege fails the 'law of general application' leg of the limitations test.³³⁸

When can the parliamentary right to free speech afforded by FC s 58, and reinforced by FC s 16, be justified by reference to FC s 36(1)? Beyond finding that any restrictions on privilege must be justified in terms of a law of general application, the *De Lille* court does not say.

The Constitutional Court in *UDM* offers a somewhat different, although ultimately consistent, take on the subject.³³⁹ In June 2002, Parliament passed four Acts that aimed to allow members of national, provincial and local government to change parties without losing their seats. The four Acts were: (1) the Constitution of the Republic of South Africa Amendment Act 18 of 2002 (the First Amendment Act); (2) the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 (the Second Amendment Act); (3) the Local Government: Municipal Structures Amendment Act 20 of 2002 (the Local Government Amendment Act); and (4) the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002 (the Membership Act).

With regard to the constitutional attack on the validity of two constitutional amendments — the First Amendment Act and the Second Amendment Act — the *UDM* Court was quite clear:

336 Ibid at 446-447.

337 Ibid at 455.

338 *De Lille* (supra) at 455. See also *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA), 1999 (11) BCLR 1339 (SCA) (Finding that Parliament acted *ultra vires* consistent with High Court finding that Parliament did not act in terms of any cognizable law.)

339 *United Democratic Movement v President of the Republic of South Africa and others (African Christian Democratic Party and others Intervening; Institute for Democracy in South Africa and another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) ('UDM').

Amendments to the Constitution passed in accordance with the requirements of s 74 of the Constitution become part of the Constitution. Once part of the Constitution, they cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another. It follows that there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities.³⁴⁰

Only in extraordinary circumstances, where the 'basic structure' of the Final

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Constitution is threatened by an amendment, will the Constitutional Court even consider challenges to amendments 'passed in accordance with the prescribed procedures.'³⁴¹ As a result, various challenges to the two amendments failed.

A normal act of Parliament — even one married to constitutional amendments — is not due such deference. The Membership Act — having failed to comply with the requirements of Item 23A of Annexure A to Schedule 6 to the Final Constitution — was held to be unconstitutional.³⁴²

Read together, *De Lille* and *UDM* provide support for the following propositions:

- Chapter 2's fundamental rights and freedoms will take precedence over law and conduct that is generated in terms of other constitutional provisions.
- While the primacy of place of fundamental rights in the Final Constitution militates against subordinating fundamental rights to constitutionally articulated government powers, fundamental rights have no automatic claim of priority over constitutionally articulated government powers.
- Accepted canons of constitutional interpretation require that the courts must attempt to harmonize Chapter 2 and non-Chapter 2 claims.
- When harmonizing the rights and freedoms found in Chapter 2 with constitutionally articulated government powers, a court should construe constitutionally articulated government powers in a manner that gives greatest effect to the rights and freedoms at issue.

340 *UDM* (supra) at para 12.

341 *UDM* (supra) at paras 14-17. The *UDM* Court referred to *Premier, KwaZulu-Natal & Others v President of the Republic of South Africa & Others*, in which Mahomed DP had written, with the full support of the Court, that:

There is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.

1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC) at para 47.

342 Item 23A of Annexure A to Schedule 6 to the Final Constitution contained the anti-defection provision relevant to the national and provincial legislatures and could be amended by ordinary legislation 'within a reasonable period after the new Constitution took effect' to make it possible for a member of the legislature who ceased to be a member of the party which nominated that member to retain membership of such legislature. The *UDM* Court found that Parliament had failed to Act in a reasonable period of time after the Final Constitution took effect.

The last proposition points to one of the strengths of *De Lille*. As I noted at the outset of this section, Chapter 2's Bill of Rights is, in the words of FC s 7, a 'cornerstone of democracy in South Africa'. *De Lille* recognizes this relationship of reciprocal effect between rights and democracy and quite consciously reads the constitutional provisions regarding rules and orders of Parliament in terms of the Final Constitution's commitment to freedom of speech. As *UDM* demonstrates, however, this reciprocal effect may sometimes cut the other way. The Constitutional Court in *UDM* is surely correct in noting that there as many types of multi-party democracy as there are tokens and that the Final Constitution did not commit itself to a type of multi-party democracy that precluded floor-crossing.³⁴³

31.6 Extraterritorial effect of the Bill of Rights of the Final Constitution

The Final Constitution, and Chapter 2 in particular, applies to various forms of law and conduct within South Africa. What the text does not indicate is whether persons outside South Africa's borders can benefit from the rights in Chapter 2, whether the exercise of state power by the South African government outside South Africa's borders is subject to the strictures of Chapter 2, and whether the Bill of Rights has anything to say about disputes governed by foreign law in foreign jurisdictions. The next two sections speak to these fundamental questions in some detail. But first a brief set of responses.

Is the South African government obliged to abide by the Final Constitution's requirements outside South Africa's border? The initial, short answer was yes. The Constitutional Court in *Mohamed* found that the state was subject to constitutional dictates even though the person subject to the exercise of state power was neither legally resident in South Africa nor still within its borders.³⁴⁴ At present the answer is unclear. The Constitutional Court in *Kaunda* muddied the waters by running together two discrete issues: whether state action outside South Africa's borders can be subject to the requirements of Chapter 2, and whether disputes governed by foreign law in foreign jurisdictions can be subject to the requirements of Chapter 2.³⁴⁵ The *Kaunda* Court held that the Bill of Rights of the Final Constitution did not apply extraterritorially, for reasons largely to do with the comity of nations, but that South African law might apply to nationals abroad in special circumstances.

343 If anything, the presence of Item 23A reinforces the argument the Final Constitution contemplates a type of democracy that permits floor-crossing. If this last proposition is true, then the Constitutional Court was correct in harmonizing the Final Constitution's provisions in such a fashion as to give the maximum possible effect to both the floor-crossing amendments and the existing provisions against which they were being measured. For more on *UDM*, floor-crossing and representative democracy, see Steven Budlender 'National Legislative Authority' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 17; Glenda Fick 'Elections' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 29 and Theunis Roux 'Democracy' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 10.

344 *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa)* 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) ('*Mohamed*').

345 *Kaunda & Others v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa Amicus Curiae)* 2005 (1) SACR 111 (CC), 2004 (10) BCLR 1009 (CC) ('*Kaunda*').

Are foreign legal regimes in any way subject to the dictates of the Bill of Rights? The short answer is no and yes. Respect for the sovereignty of foreign countries — along with the practical realization that the review of foreign laws apparently in conflict with the Bill of Rights would be logistically and politically impossible for our courts — demands that we restrict the application of the Final Constitution. However, where, as in *Mohamed*, a South African court properly exercises jurisdiction in a matter that potentially involves the extradition of a person for trial in a foreign jurisdiction, the Constitutional Court has found that a South African court is required to take into account the penalties to be exacted upon that person if extradited to another country and then convicted in its courts. The court must determine the extent to which such penalties would constitute a breach of his or her fundamental rights under the South

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African Constitution. A significant breach would require intervention. A court order requiring the South African government to intervene in the proceedings of a trial in a foreign jurisdiction in order to correct a violation of South African constitutional law by South African officials was not understood, by the *Mohamed* Court, to be a violation of the principle of separation of powers.

Kaunda cuts back *Mohamed's* understanding of extraterritoriality. Pace *Mohamed*, the Constitutional Court in *Kaunda* found that the South African government is under no obligation to intervene in a trial of a South African national under foreign law in a foreign jurisdiction until there is an imposition of a penalty that would constitute a significant breach of his or her rights under the South African Constitution. The *Kaunda* Court characterized as a violation of separation of powers any order by a South African court requiring government intervention prior to the meting out of punishment by a foreign court.

(a) Persons outside South Africa's borders

Chapter 2 is clearly concerned with the South African government's treatment of people within its borders. There seems to be no good reason why abuses of state power within South Africa's borders should be subject to Chapter 2, but abuses of state power outside the borders should not be similarly subject. To relax the strictures on extraterritorial exercise of state power — and even private power — seems to offer a licence to the state — or another party burdened by Chapter 2 — to abuse persons abroad in ways it would never contemplate at home. ³⁴⁶ FC s 8(1) tells us that the Bill of Rights binds the conduct of the government. It does not distinguish home from abroad.

The United States Constitution provides some protection for US citizens outside US borders. ³⁴⁷ Aliens abroad are far less likely to benefit from the US Constitution's protections. ³⁴⁸ Where aliens abroad are concerned, the US courts regularly 'uphold' law enforcement violations of the Fourth Amendment's

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prohibition of unreasonable searches and seizures. ³⁴⁹ It is not clear why benefits should flow to non-citizens within the United States' borders when subject to state

³⁴⁶ South Africa was ahead of the curve on this issue even before the post-1994 constitutional dispensation. See *S v Ebrahim* 1991 (2) SA 553 (A)(Appellate Division held that a cross-border warrantless kidnapping by security forces violated the fundamental rights of the accused. The court further justified its landmark opinion on the grounds that to permit such cross-border kidnappings would violate the sovereignty of other states and undermine the dignity and integrity of the judicial system asked to endorse such acts.)

power, but not to non-citizens outside the borders when subject to that same state power.³⁵⁰

Persons outside Canada's borders are entitled to the benefit of some Charter rights.³⁵¹ The Canadian Supreme Court has even held that non-citizens abroad are entitled to the Charter's protection when subject to the exercise of police power by Canadian officials in a foreign jurisdiction.³⁵² The Supreme Court of Canada implicitly recognizes that to hold otherwise valorizes state sovereignty and treats all government action abroad as the legal equivalent of war in defense of the nation.³⁵³

The limited succour to be had by non-citizens in American courts makes the Constitutional Court's decision in *Mohamed* that much more remarkable.³⁵⁴ At the time of the Constitutional Court hearing on the matter, the appellant was on trial in a US federal court on capital charges related to the bombing of the United States embassy in Dar es Salaam, Tanzania in August 1998. Although the applicant was now beyond the Constitutional Court's jurisdiction, his representatives asked the Court to find: (i) that the interrogation and the handing over of Mr Mohamed by South African officials to US agents was unlawful, and (ii) that the government had

347 See *Rochin v California* 342 US 165 (1952)(Citizens abroad are protected against government violations so egregious that they 'shock the conscience'. These protections are, however, 'diluted'.) See also *In Re Ross* 140 US 453 (1891)(No right to jury trial abroad); *Reid v Covert* 354 US 1, 75 (1957)(Not every 'provision of the Constitution must be automatically applicable to American citizens in every part of the world'); *US v Warren* 578 F2d 1058 (5th Cir 1978)(Coast Guard stoppage of American vessel, apparently without reasonable grounds for suspicion, not deemed violation of Fourth or Fifth Amendments). Even the Hungarian Constitution, a document of more recent vintage, maintains this citizen/non-citizen distinction. According to Article 69(3): 'Every Hungarian citizen is entitled to enjoy the protection of the Republic of Hungary, during his/her legal stay abroad.'

348 But see *Rasul v Bush* 542 US —, 124 SCt 2686 (2004)(Foreign nationals held at Guantanamo Bay entitled to bring legal action in Federal Court challenging the alleged grounds for their detention.)

349 *US v Verdugo-Urquidez* 494 US 259 (1990); *Lujan v Gengler* 510 F2d 62 (2d Cir 1975). But see *US v Toscanino* 500 F2d 267 (2d Cir 1974)(Abduction of alien abroad so shocks conscience as to violate constitution) Poll case. See, generally, Louis Henkin *Foreign Affairs and the Constitution* (1972) 251-70.

350 See *Johnson v Eissentrager* 339 US 763 (1950)(Non-resident enemy aliens outside territorial jurisdiction of United States not entitled to a writ of habeas corpus.)

351 See *R v A* [1990] 1 SCR 995. But see Peter Hogg 'Application' *Constitutional Law of Canada* (3rd Edition 1992) 34-5, fn 23. Despite the changes in Canadian law cited herein, Hogg maintains that the extraterritorial benefit of rights ought to extend only to Canadian citizens. See Peter Hogg 'Application' *Constitutional Law of Canada* (4th Edition 2002) 34-5, fn 23.

352 *R v Cook* [1998] 2 SCR 597(US citizen arrested in US for murder committed in Canada still entitled to protection of Charter when interrogated by Canadian police officers in the US. Failure to apprise the accused of right to counsel violated Charter. Moreover, the enforcement of the Charter did not constitute a violation of US sovereignty.)

353 See Jonathan Klaaren 'Human Rights Legislation for a New South Africa's Foreign Policy' (1994) 10 *SAJHR* 260 (Klaaren argues that human rights ought to be a linchpin of South African foreign policy.)

354 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC).

breached Mr Mohamed's constitutional rights by handing him over to the US government without first obtaining an assurance that the death penalty would not be imposed or carried out in the event of Mr Mohamed's conviction. Furthermore, the appellants sought an order 'directing the Government of the Republic of South Africa to submit a written request . . . to the Government of the United States of America that the death penalty not be sought, imposed nor carried out' in the event of conviction.³⁵⁵ By and large, the Constitutional Court granted the relief sought by the applicant. In rejecting claims made by the government that a court order in this matter was 'futile', beyond the Constitutional Court's powers, and a breach of the separation of powers, the *Mohamed* Court wrote:

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To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.³⁵⁶

Having found the government's actions unlawful under the Aliens Control Act and unconstitutional under FC ss 10, 11, and 12, the *Mohamed* Court then ordered that a copy of its judgment be sent, as a matter of urgency, to the apposite US federal district court. On the more general issue of the Constitutional Court's — and thus the Final Constitution's — reach, the *Mohamed* Court's judgment stands for the proposition that the Final Constitution applies to aliens both within and without South Africa's borders and that the government cannot undo our basic law's fetters simply by claiming that a case concerns sensitive political issues or foreign affairs. Moreover, even if a court has a limited capacity to affect directly the manner in which the government carries out its foreign affairs, a finding that the government violated the constitutional rights of a person within its borders might support an action in delict and thereby influence the government's behaviour in the future.³⁵⁷

If *Mohamed* is an advance with respect to the extraterritorial application of the Bill of Rights to the exercise of state power beyond our borders, then *Kaunda* must be viewed as a retreat. The Constitutional Court in *Kaunda* was approached by 69 South African citizens held in Zimbabwe on a variety of charges related to alleged mercenary activities. They requested relief ranging from an order directing the South African Government to seek the release and the extradition of the applicants from Zimbabwe and Equatorial Guinea back to South Africa, to a more limited order directing the South African Government to seek assurance from the Zimbabwean

355 *Mohamed* (supra) at para 4.

356 *Mohamed* (supra) at para 71 citing, in support of these various proposition, FC s 1(c), and FC s 7(2) read with FC ss 38 and 172(1)(a). See also *Metlika Trading v South African Revenue Service* 2005 (3) SA 1 (SCA)(Enforceability or effectiveness of order not sole criterion granting requested relief.)

357 See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC). In *Carmichele*, the failure by the state to protect adequately a person it knew to be in danger led to the development of the common law of delict so as to create a duty of care that would enhance the likelihood that state actors would not fail to exercise this duty in the future. It is reasonable to imagine that a court, having placed the government on notice that violations of the rights of aliens at home or abroad is unconstitutional, will be willing to extend the duty of care in a delictual action to include government agents responsible for the care or the welfare of aliens at home or abroad. Moreover, the recent decision of the Constitutional Court in *Modderklip* strengthens the claim that the failure of the state to discharge a constitutional duty may occasion a finding that the state must bear the costs incurred by its conduct or its omission. *Modderklip* (supra) at para 68.

and Equatorial Guinean Governments that they would not impose the death penalty on the applicants. The Constitutional Court denied all seven forms of requested relief.

The textual basis for the *Kaunda* Court's rejection of the claim that the Bill of Rights applies to extraterritorial legal proceedings begins with a curiously cursory appraisal of FC s 7(2) and ends with what ultimately amounts to a very narrow construction of the holding in *Mohamed*. The *Kaunda* Court writes:

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The starting point of the enquiry into extraterritoriality is to determine the ambit of the rights that are the subject matter of section 7(2) [T]he rights in the Bill of Rights on which reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African state to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. ³⁵⁸

Foreigners are entitled to all but a few of the rights enshrined in Chapter 2 — when they are in South Africa. That is what *Mohamed* told us.

The *Kaunda* Court continues: 'Clearly, [foreigners] lose the benefit of that protection when they move beyond our borders. ³⁵⁹ There is nothing clear about the basis for this assertion. The text says nothing about what foreigners do and do not possess with respect to extraterritorial application. Nor does it make any distinction between citizens and non-citizens. The *Kaunda* Court then turns to the extraterritorial entitlements of citizens. It asks:

Does section 7(2) contemplate that the state's obligation to South Africans under that section is more extensive than its obligation to foreigners, and attaches to them when they are in foreign countries? ³⁶⁰

This rhetorical use of FC s 7(2)'s ostensible treatment of foreigners primes the Court's intuition pump with respect to its subsequent analysis of the appropriate constitutional contours of the state's obligations to South African nationals. Unfortunately, FC s 7(2) has nothing to say about the treatment of foreigners or nationals. The *Kaunda* Court looks to FC s 7(1) for an answer. FC s 7(1) reads:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people *in* our country and affirms the democratic values of human dignity, equality and freedom. (My emphasis.)

It is difficult to discern in FC s 7(1) the basis for denying the extraterritoriality of the Bill. The *Kaunda* Court writes:

The bearers of the rights are people *in* South Africa. Nothing suggests that it is to have general application, beyond our borders. ³⁶¹

358 *Kaunda* (supra) at para 36.

359 *Ibid.*

360 *Ibid.*

361 *Kaunda* (supra) at para 37 (My emphasis).

The *Kaunda* Court's entire textual argument on the lack of extraterritoriality turns on the presence of a word — the preposition 'in' — that could never have been intended to carry such weight. The *Kaunda* Court cites no authority — neither travaux préparatoires nor academic writing — in support of this proposition.³⁶²

There are better textual sources than the preposition 'in' with regard to the extraterritoriality. Under FC s 8(1), the Bill of Rights binds the executive as well

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as the other two branches of government. Under FC s 2, all laws and all conduct inconsistent with the provisions of the Final Constitution are invalid. Neither provision gives the State a free ride when it acts outside the borders of South Africa. As Justices O'Regan and Mokgoro note in their dissent:

There is nothing in our Constitution that suggests that, in so far as it relates to the powers afforded and the obligations imposed by the Constitution upon the executive, the supremacy of the Constitution stops at the borders of South Africa. Indeed, the contrary is the case. The executive is bound by the four corners of the Constitution. It has no power other than those that are acknowledged by or flow from the Constitution. It is accordingly obliged to act consistently with the obligations imposed upon it by the Bill of Rights wherever it may act.³⁶³

The *Kaunda* Court's error flows from the conflation of two discrete issues: (1) the extraterritorial application of the Bill of Rights to state conduct and persons beyond our borders; and (2) the extraterritorial application of the Bill of Rights to the law of foreign jurisdictions. As a result, the *Kaunda* Court concludes that:

There may be special circumstances where the laws of a state are applicable to nationals beyond the state's borders, but only if the application of the law does not interfere with the sovereignty of other states. For South Africa to assume an obligation that entitles its nationals to demand, and obliges it to take action to ensure, that laws and conduct of a foreign state and its officials meet not only the requirements of the foreign state's own laws, but also the rights that our nationals have under our Constitution, would be inconsistent with the principle of state sovereignty. Section 7(2) should not be construed as imposing a positive obligation on government to do this.³⁶⁴

This conflation of issues has its source in the failure by the *Kaunda* Court to recognize the textual basis for the extraterritorial application of the Bill of Rights to every exercise of power by the South African state. As Justice O'Regan writes:

362 Anthony Stein offers another perfectly tenable, and to my mind more plausible, reading of 'in' that would turn not on a literal sense of time or place, but on the broader connotation of 'in' — namely 'of the people of South Africa'. The *Kaunda* Court's reading leads to a *reductio ad absurdum*: it suggests that if all of us in South Africa today were to go to Mozambique for a holiday tomorrow, the Bill of Rights would, tomorrow, cease to enshrine the rights of any and all South Africans.

363 *Kaunda* (supra) at para 228. Justice O'Regan continues: 'It is not necessary to consider in this case whether the provisions of the Bill of Rights bind the government in its relationships outside of South Africa with people who have no connection with South Africa.' Ibid. However, as Justice O'Regan intimates later in her dissent, the logic of the proposition that the exercise of state power is always circumscribed by the Bill of Rights creates a rebuttable presumption that the Bill of Rights does indeed bind the state in its actions beyond its borders — whether or not citizens or foreigners are involved. Whether such a rebuttable presumption may be overcome more easily beyond our borders is another matter and beyond the scope of this chapter.

364 *Kaunda* (supra) at para 44.

So, the extraterritorial application of the provisions of the Bill of Rights will be limited by the international law principle that the provisions will only be enforceable against the government in circumstances that will not diminish or impede the sovereignty of another state. The enquiry as to whether the enforcement will have this effect will be determined on the facts of each case. As a general principle, however, our Bill of Rights binds the government even when it acts outside South Africa, subject to the consideration that such application must not constitute an infringement of the sovereignty of another state.³⁶⁵

Justice O'Regan's exemplary analysis of the distinction between the Bill of Rights' application to the South African state and the Bill of Rights' application to

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foreign law invites some future majority of the Constitutional Court to reconsider its cramped understanding of the extraterritorial application of the Bill of Rights.

(b) Foreign law and the Final Constitution

A different set of considerations militates against the subjection of foreign law to Chapter 2's strictures. Here the issue is not the exercise of South African state power against individuals, but respect for the sovereignty of another country. Such respect generally demands both the recognition that the laws of other countries may differ fundamentally from our own and the practical realization that we cannot subject foreign laws to review every time they might appear to abrogate Chapter 2 rights.³⁶⁶ Leaving aside questions of time, capacity and enforcement, the courts would quickly find themselves embroiled in the kinds of international political disputes that clearly fall outside their proper domain.

365 Ibid at para 229.

366 See *Swissborough Diamond Mines Ltd v Government of the Republic of South Africa* 1999 (2) 279 (T)(Court held that, given the act of state doctrine (or a doctrine of judicial restraint in foreign affairs), a court must be extraordinarily circumspect when applying South African law to the behaviour of the Government of Lesotho within its own borders. Court described request for review of decisions taken together by the governments of South Africa and Lesotho as a 'judicial no-man's land'.) See also TW Bennett 'Redistribution of Land and the Doctrine of Aboriginal Title in South Africa' (1993) 9 *SAJHR* 444 (On how the act of state doctrine may interact with discontinuities in rule — between various pre- and post-apartheid legal regimes — and aboriginal land claims in South Africa; effectively asks age-old question of whether a new regime can take cognizance of legal relationships in previous regimes, and thus whether the past is, in fact, a foreign country.) The 'act of state' doctrine in US jurisprudence severely curtails the application of US constitutional law to foreign bodies of law. It holds that 'the courts of one nation will not sit in judgment on the acts of another nation within [the latter's] own territory.' *Banco Nacional de Cuba v Sabbatino* 376 US 398, 416 (1964). A domestic tribunal is only competent to examine the validity of foreign law where a treaty or some other agreement clearly establishes controlling legal principles. Canada has recently rejected a similarly restrictive doctrine. In the first few years of the Charter, the Canadian Supreme Court refused to apply Charter rights to foreign law. See *Canada v Schmidt* (1987) 39 DLR (4th) 18, [1987] 1 SCR 500 (Canadian Charter cannot be given extraterritorial effect to govern how criminal proceedings in a foreign country are to be conducted); *Kindler v Canada* (1991) 84 DLR (4th) 438. (Since Charter was not applicable to foreign law, a fugitive could legitimately be extradited to the US, even though he might be executed and such execution violated Charter's s 7.) However, the Canadian Supreme Court expressly reversed itself in *United States v Burns*. [2001] 1 SCR 283 ('*Burns*'). In *Burns*, the Court wrote that 'in the absence of exceptional circumstances, . . . assurances in death penalty cases [that the penalty will not be sought] are always constitutionally required.' In *Suresh v Canada*, the Canadian Supreme Court extended the holding in *Burns* to cover cases in which deportation of a foreign national was likely to result in torture of that person. [2002] 1 SCR 72. However, as Peter Hogg notes, the Supreme Court has allowed extradition to the United States when the 'fugitive faced penalties that were more severe than penalties for similar crimes in Canada' and which, if imposed in Canada, would be deemed contrary to the Charter. Hogg (supra) at 34-29 citing *US v Jamieson* [1996] 1 SCR 465; *US v Ross* [1996] 1 SCR 469; *US v Whitley* [1996] 1 SCR 467.

That said, *Mohamed* forces the reader to rethink the Final Constitution's relationship to foreign affairs and the law of foreign jurisdictions.³⁶⁷ While no South African court can expect its judgment to have the force of law in another jurisdiction, *Mohamed* suggests that a South African court can expect that its

judgment will exert influence over the conduct of foreign affairs in a number of different ways. First, a South African court should expect that its own government will fashion its actions in a manner consistent with the South African Constitution. Second, the increased use of comparative (foreign) constitutional materials and the enhanced status of international law means that a foreign court will likely take note of a specific South African judgment that speaks directly to that court. Third, the Final Constitution also ties more closely the jurisprudence of other jurisdictions to our own by: (a) making some international agreements a part of domestic law;³⁶⁸ (b) treating some international law as authority falling somewhere between the Final Constitution and Acts of Parliament, on the one hand, and such bodies of law as the common law or subordinate legislation, on the other;³⁶⁹ and (c) employing international law as a guide to the interpretation of the Final Constitution and many pieces of legislation.³⁷⁰ The influence of international law on our constitutional law ensures that there will be a reciprocal effect of South African constitutional law on international law. (That reciprocal effect is one of the engines that powers the development of international law.)

Kaunda rolls back *Mohamed*. It sets very strict limits on the extent to which the Final Constitution requires the South African government to intervene in the internal legal affairs of a foreign state and the extent to which foreign tribunals, after being put on notice by the South African government, must take cognizance of South African law. The *Kaunda* Court concludes that FC s 3 does not create an enforceable right to 'diplomatic protection'. At best, 'South African citizens are entitled to request

367 *Metlika v South African Revenue Service* 2005 (3) SA 1 (SCA)(Court held that the possible lack of effectiveness did not prevent it from granting an order that might have to be enforced in and by another state.)

368 FC s 231, International Agreements, reads, in relevant part: (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

369 FC s 232, Customary International Law, reads as follows: Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

370 See FC s 233, Application of International Law, and FC s 39(1)(b), Interpretation. FC s 233 reads as follows: When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. FC s 39 (1)(b), reads, in relevant part: When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law. For more on the effect of international law on South African constitution analysis, Kevin Hopkins & Hennie Strydom 'International Law and Agreements' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, September 2004) Chapter 30.

South African protection under international law against wrongful acts of a foreign state.' ³⁷¹ The *Kaunda* Court writes:

[G]overnment policy concerning nationals in foreign countries, who are required to stand trial there on charges for which capital punishment is competent, is to make representations

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concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen. This policy adopted by South Africa in its relations with foreign states is not inconsistent with international law or any obligation that the government has under the Constitution. ³⁷²

In addition to loosening considerably, and somewhat disconcertingly, the South African state's specific obligation to intervene with respect to the death penalty, *Kaunda* curbs significantly the doctrine of extraterritorial application articulated in *Mohamed*.

The *Kaunda* Court distinguishes *Kaunda* from *Mohamed* on the facts. According to the *Kaunda* Court, the South African Bill of Rights has bite in *Mohamed* because the accused had been subject to the exercise of South African state power while *in* South Africa. The *Mohamed* Court's requirement that the South African government pass along its judgment to the apposite US federal district trial court is, ostensibly, grounded in the South African state's failure to adhere to the South African Bill of Rights. There is, here, an obvious sleight of hand. The *Mohamed* Court's intervention in the affairs of a foreign tribunal in a foreign state is required because a foreign national who has passed rather quickly through the legal apparatus of South Africa is now potentially subject to a legal penalty that could never have been imposed within South Africa. The Constitutional Court found itself obliged to put the US trial court on notice that the death penalty ought not to be imposed because it would violate the South African Constitution. The 'absence' of the exercise of South African state power in *Kaunda* ostensibly takes the matter out of the *Mohamed*-recognized orbit of the Bill of Rights. Of course, the South African government in *Kaunda* *did* exercise power comparable to that exercised in *Mohamed*. In *Kaunda*, the South African government informed the government of Zimbabwe of the presence of the alleged mercenaries. This information led, ineluctably, to the arrest of the alleged mercenaries. At a minimum, the South African government ought to have been under a comparable constitutional obligation to make efforts to ensure that the death penalty was not imposed. Recall that in *Mohamed*, South African agents assisted US agents in secreting the accused back to the US for trial. The South African government then found itself under a constitutional obligation to make efforts to ensure that the death penalty was not imposed. ³⁷³

One cannot help but wonder whether the identity of the foreign states involved in the respective cases influenced the Constitutional Court's disparate decisions. After

371 *Kaunda* (supra) at para 60.

372 *Kaunda* (supra) at para 144.

373 Even if the *Kaunda* Court had articulated a principled distinction between the treatment of nationals, who, of their own accord, subject themselves to the full force of a foreign legal system, and the treatment of nationals, who, through the interposition 'or action' of the South African state, find themselves subject to the full force of a foreign legal system, such a distinction would not, in the hands of this court, have led to a different result.

acknowledging substantial deficits in the administration of justice in both Equatorial Guinea and Zimbabwe, the *Kaunda* Court writes:

The situation which exists in the present case is one which calls for delicate negotiations to ensure that if reasonably possible the fears that the applicants entertain can be put to rest, and that the trial, if one takes place, is conducted in a way that meets internationally accepted standards. The assessment of the risk, the best way of avoiding it and the timing

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of action are essentially matters within the domain of government The situation that presently exists calls for skilled diplomacy the outcome of which could be harmed by any order that this Court might make. In such circumstances the government is better placed than a court to determine the most expedient course to follow. If the situation on the ground changes, the government may have to adapt its approach to address the developments that take place. In the circumstances it must be left to government, aware of its responsibilities, to decide what can best be done.³⁷⁴

No such reservations about the wisdom of court-sanctioned state intervention in the legal processes of the United States are voiced in *Mohamed*.

The second problem with *Kaunda* is that state intervention with respect to the imposition of the death penalty — even with respect to nationals — has become a matter of policy not constitutional law. The South African government's concerns regarding any imposition of the death penalty need only be articulated after a death sentence has been imposed. Both aspects of the holding in *Kaunda* appear to roll back the protections afforded to the non-national accused in *Mohamed*.

Once again, Justice O'Regan's dissent invites some future majority of the Court to reconsider its highly permissive reading of the constitutional obligations of the South African government with regard to the treatment of South African nationals subject to foreign law in foreign tribunals. According to Justice O'Regan, FC s 3(2) creates an entitlement to diplomatic protection. That entitlement creates a state obligation. Justice O'Regan writes:

[G]overnment [is] not . . . constitutionally permitted simply to ignore a citizen who is threatened with or has experienced an egregious violation of human rights norms at the hands of another state. Were government to be entitled to do so, the achievement of human rights would be obstructed and international human rights norms undermined. Accordingly, and in the light of my understanding of the values of our Constitution, I would conclude that it is proper to understand section 3 as imposing upon government an obligation to provide diplomatic protection to its citizens to prevent or repair egregious breaches of international human rights norms. Where a citizen faces or has experienced a breach of international human rights norms that falls short of the standard of egregiousness, the situation may well be different. Thus, I conclude that to the extent that section 3(2) states then that 'citizens are equally entitled to the . . . privileges and benefits' of citizenship, it is not only an entitlement to *equal* treatment in respect of the privilege and benefit of diplomatic protection, but also an entitlement to diplomatic protection itself.³⁷⁵

31.7 The waiver of rights

(a) A category mistake

374 *Kaunda* (supra) at paras 132-133.

375 *Ibid* at para 238.

Whether the beneficiaries of constitutional rights can waive their rights is an underdeveloped and confusing area of constitutional law. It is underdeveloped and confusing because (a) no constitutional provision is made for waiver and (b) few meaningful discussions of the notion of 'waiver' have percolated up through the courts.

For reasons that will become clear, the 'waiver' of constitutional rights should

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never be tolerated. But to say waiver should never be tolerated is to speak the language of waiver. It is the thesis of this section that *there is no such thing as waiver*. The basis for this thesis is not at all obvious. It is not obvious because many courts and commentators have failed to see that what is at issue in all of these cases is not actually the waiver of a right, but the interpretation of a right. To talk of waiver is to make a category mistake.³⁷⁶

What is a category mistake? A category mistake is the attribution to one, sometimes non-existent, entity attributes that properly belong to another entity, and the unnecessary multiplication of explanations for a single phenomenon. For example, you may take a visitor for a tour around the firm at which you work — introduce her to the managing partner and your articles clerk, show her the boardroom and the library, have her sit in your chair in your office. If, at the end of your tour, she asked you 'But where is the firm?', as if it were something different, something over and above what she had already seen, you would be perplexed. The cause of her confusion — and yours — is that she has made a category mistake. This is the kind of error made by those who speak of waiver as if it were an entity — a phenomenon — over and above the content of the specific substantive rights found in Chapter 2. It isn't.

The clearest Constitutional Court statement on the subject of waiver occurs in *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa)*.³⁷⁷ In *Mohamed*, the South African government handed Mr Mohamed over to US authorities for prosecution on capital charges related to the bombing of the United States embassy in Dar es Salaam, Tanzania in August 1998. In defense of its handing over a person within South Africa and within South African government control to the representatives of a state in which Mr Mohamed could receive the death penalty if convicted, the South African government claimed that Mr Mohamed had waived those constitutional rights that would have (a) barred his extradition or (b) made such extradition subject to assurance by the United States that it would not seek the death penalty if Mr Mohamed were convicted. The *Mohamed* Court rejected both of the government's contentions. First, the Court wrote:

It is open to doubt whether a person in Mohamed's position can validly consent to being removed to a country in order to face a criminal charge where his life is in jeopardy. The authorities ought not to be encouraged to obtain consents of such a nature.³⁷⁸

Second, assuming for the sake of argument, and no more, that the government could secure legitimately such a waiver of rights, the *Mohamed* Court held that:

376 See Gilbert Ryle *The Concept of Mind* (1951).

377 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC) ('*Mohamed*') at para 61.

378 *Ibid* at para 61.

To be enforceable, however, it would have to be a fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent.³⁷⁹

Third, the *Mohamed* Court declared that '[t]he onus to prove such waiver is on the government.'³⁸⁰ As a matter of fact, the *Mohamed* Court found that under no

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plausible construction of the case history could the government demonstrate that it had discharged its obligations. The *Mohamed* Court is a bit fuzzy, however, as to whether, as a matter of law, the government could have discharged its obligations. Earlier in the judgment, the *Mohamed* Court makes much of the government's failure to even attempt to seek assurance that the death penalty would not be imposed: assurance that seemed to be required because of South Africa's commitment to the rights to dignity, to life and to not be punished in a cruel, inhuman or degrading way. The *Mohamed* Court seems to suggest that absent such assurance, no extradition could be justified. But the entire discussion of waiver undercuts this conclusion. The extradition to the United States ultimately turns on whether Mr Mohamed 'was aware of his crucial right to demand [that the South African government secure such assurances as necessary to] protect against exposure to the death penalty.'³⁸¹ One must assume, from the manner in which the Court writes, that had Mr Mohamed possessed legal counsel, had he been in a position to offer or to withhold meaningful consent and had he still reached the conclusion that he wished to go to the United States to stand trial without any assurance regarding a death sentence, the Court would have allowed him to go.³⁸² If this invitation to a beheading is what the *Mohamed* Court actually had in mind, then there seems to me to be good reason to decline to follow its reasoning about waiver.

The Supreme Court of Appeal has taken a firmer line on waiver. In *Transnet Ltd v Goodman Brothers (Pty) Ltd*, the respondent (Goodman Brothers) had unsuccessfully tendered to supply wristwatches to the appellant (Transnet).³⁸³ The respondent, relying on FC s 33 read with FC Item 23(2)(c) of Schedule 6, contended that the part of the tender conditions that provided that Transnet would not 'assign any reason for the rejection of a tender/quotation' was unconstitutional and that Transnet was

379 Ibid at para 62.

380 Ibid at para 64.

381 *Mohamed* (supra) at para 65.

382 The *Mohamed* Court writes:

Here South African government agents acted inconsistently with the Constitution in handing over Mohamed without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice.

Ibid at 68. The *Mohamed* Court's vacillation on whether consent to extradition would suffice seems difficult to square with such pronouncements as 'the rights to life and dignity are the most important of all human rights, and the source of all other personal rights.' *S v Makwanyane & Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC) at para 144.

383 2001 (1) SA 853 (SCA), 2001 (2) BCLR 176 (SCA) ('*Transnet*').

obliged to furnish reasons for rejection of the respondents tender.³⁸⁴ The applicant argued that since the Bill of Rights contains no general rule barring the waiver of rights, contracting parties could, with respect to at least some rights, stipulate to their waiver. The Supreme Court of Appeal rejected the applicant's argument. It reasoned as follows:

The correct approach to the question of waiver of fundamental rights is to adhere strictly to the provisions of s 36(1) of the Constitution. It provides that 'the rights in the Bill of Rights may be limited only in terms of law of general application . . .' A waiver of a right is a limitation thereof. One must be careful not to allow all forms of waiver, estoppel, acquies

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cence, etc to undermine the fundamental rights guaranteed in the Bill of Rights. In my view, a strict interpretation of s 36(1) is indicated. Transnet has not made out a case that the waiver it relies upon is warranted by law of general application.³⁸⁵

The reasons for the *Transnet* Court's conclusions are sound: with two very important exceptions. First, it is not clear why the correct approach to waiver is to adhere to the provisions of FC s 36(1). There is nothing about FC s 36 that has any obvious bearing on questions of waiver. One way to understand the *Transnet* Court's remark about limitations is to read it as part of a characterization of waiver as 'conduct' that does not qualify as law of general application. Second, the *Transnet* Court's approach to waiver begs the primary question: does the waiver amount to or lead to the violation of a right? The *Transnet* Court assumes — which it is not entitled to do — that *all* assertions of waiver are *always* parasitic on the violation of a right. (As we shall see, in many instances of alleged waiver, there is no right upon which one party may simultaneously rely and waive.) Only if one defines a right in a fashion that excludes the possibility of waiver does limitations analysis under FC s 36 ever begin to matter. (Again, in many instances of alleged waiver, there is, in fact, no right upon which a party may rely, and thus, there is no issue of waiver.) And it goes without saying, if there is no infringement of a right, there can be no question about limitations — for there are none.

The *Transnet* Court was certainly correct on the facts of *this* case. The respondent was entitled to be furnished with reasons for the rejection of its tender. Given that the case law holds that a tenderor's rights are always adversely affected by the rejection of a tender, and a tenderor is entitled to the provision of reasons for a rejection, the failure to supply those reasons is a violation of the right to just administrative action.

When it looks beyond the facts, the *Transnet* Court seems inclined to establish the following rule: waiver ought not to be allowed to undermine the rights enshrined in Chapter 2. It would have been more interesting if the *Transnet* Court had taken a stronger line: no waiver can take place in the context of an infringement of a fundamental right. As it stands, the *Transnet* Court and the *Mohamed* Court seem uncomfortable with waiver, but not adamantly opposed to it. Neither court is able to articulate, in any principled way, when we should permit waiver and when we should bar it.

384 The contract read in relevant part: '10(a) The Company does not bind itself to accept the lowest or any tender/quotation nor will it assign any reason for the rejection of a tender/quotation.'

385 *Transnet* (supra) at paras 47-48.

Here then is the strong coherent line that courts should adopt. No fundamental right can ever be waived. Consent to a given state of affairs — *contractual waiver* — can only occur where no right can be violated. The basis for this conclusion is not as casuistic as it may appear. Some rights in Chapter 2 will rarely, if ever, permit an interpretation of their scope that will create the space for legal and social relations that, at least notionally, enable rights' bearers to forego them. Some rights do permit interpretations of their scope that enable both rights bearers and other parties to engage in a *wide* array of activities and to form legal relationships that appear, at least notionally, to engage the subject matter

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of those rights, but do not result in their abrogation. Put pithily, what is at issue in all these cases is not the waiver of a right, but the interpretation of a right.

Academic commentary on this subject has only aided and abetted our courts' confusion. Some of this analysis is worth further consideration if only to set out in somewhat starker relief the choices before us.

The least attractive position — and one given the Constitutional Court's imprimatur of approval in *Mohamed* — is that there exists a hierarchy of rights: at the top, those rights that are so important as to never permit waiver; at the bottom, those rights that are of such little consequence that waiver is effectively built into their exercise. With such a hierarchy clearly in mind, Halton Cheadle simply asserts that the 'rights to life, dignity and non-discrimination cannot be waived.'³⁸⁶

Johan De Waal, Iain Currie and Gerhard Erasmus bear some responsibility for Halton Cheadle's assertion. They contend that the nature of the 'rights to human dignity . . . , to life . . . the right not to be discriminated against or the right to a fair trial does not permit them to be waived.'³⁸⁷ Other rights — say, the freedoms of expression, religion, assembly, property, occupation, association — may be waived. Part of this distinction appears to rest on a rather obtuse if not orotund distinction that De Waal, Currie and Erasmus draw between rights that have a positive and a negative dimension and rights that do not have both dimensions. The authors do not tell us what such dimensions mean, save to say, rather enigmatically, that the right to 'dignity cannot be exercised by being abused,'³⁸⁸ but that freedom of expression can be exercised by being silent.³⁸⁹

More disconcerting are the following paired set of claims. The first claim reads: 'a waiver cannot make otherwise unconstitutional laws or conduct constitutional and valid;'³⁹⁰ and '[t]he actions of a beneficiary can have no influence on the invalidity of unconstitutional law or conduct. That is why a person cannot undertake to behave

386 Halton Cheadle 'Application' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 19 citing with approval Johan De Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4th Edition 2001).

387 De Waal, Currie & Erasmus *The Bill of Rights Handbook* (supra) at 43-44.

388 Ibid at 44.

389 Ibid at 43.

390 Ibid at 42.

unconstitutionally.³⁹¹ The second claim reads: '[w]hat individuals may do is waive the right to exercise a fundamental right. The individual may undertake not to invoke the constitutional invalidity of state or private conduct.'³⁹² The first leg of the first claim seems unobjectionable. The second leg of the first claim raises a flag. As an empirical matter, the actions of a beneficiary of a right *will* have an influence on a finding of validity or invalidity of law or conduct because it is only as a result of the beneficiary's attempt to exercise and enforce her rights that we will come to know whether law or conduct of a particular kind is or is not unconstitutional.

It is true, as the *Handbook* authors suggest, that a person cannot agree to behave unconstitutionally. But not for the reasons that De Waal, Currie and Erasmus think. A successful annulment of a contract on constitutional grounds stands for the

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proposition that there never really was a *valid* contract in the first place and that the applicant's constitutional right was not waived. When a party goes to court to have an agreement annulled on constitutional grounds and loses, she was, the court tells us, never in a position to assert legitimately that the right in question trumped the agreement in question. The prescriptive content of the substantive provision of the Bill of Rights is deemed not to cover the conduct at issue. In this second case, the party never possessed a constitutional right that she could waive.

We can see now that De Waal, Currie and Erasmus have things the wrong way around. Individuals may not, as a logical matter, choose to allow other individuals or the state to treat them — via law or conduct — in unconstitutional ways. There is nothing for them to choose in this regard. What De Waal, Currie and Erasmus should have said is that when we *interpret* the freedom to trade, occupation and profession or the freedom of expression or the freedom of religion to permit two parties to contract, we really mean that these various rights, correctly interpreted, do not proscribe the kinds of activities or relationships or contracts engaged in or entered into by the respective parties.³⁹³ Now that is a method of proceeding profoundly different from the creation of (a) hierarchies of rights, or (b) categories of negative and positive dimensions of rights, or (c) distinctions between freedoms and rights. Whether we are talking about life, dignity, torture, slavery, religion, expression or property, the question is always the same: does the right permit the kind of activity, relationship or status contemplated — at some point in time — by the parties before the court. If it does not, then, as we noted above, the right bars the law or conduct contemplated and no such thing as waiver can occur. If the right in question permits the kind of activity or agreement in question, then the parties may do as they wish and the question of waiver never arises.

391 Ibid at 43.

392 Ibid.

393 In talking about the concept of unconstitutional conditions — in which the government may withhold benefits or privileges subject to conditions designed to encourage a given set of policy aims and which bear a family resemblance to notions about waiver — Lawrence Tribe writes:

Independently unconstitutional conditions — those that make the enjoyment of a benefit contingent on sacrifice of an independent constitutional right — are invalid; whether a condition is unconstitutional depends on whether government may properly demand sacrifice of the alleged right in a given context.

Kevin Hopkins' recent work on the problem of waiver reflects how deeply entrenched the language of waiver is, and how difficult the language is to shrug off.³⁹⁴ Hopkins begins his discussion in the thrall of Currie's arguments. He quotes Currie's explanation of the 'waiver' permitted by the Court in *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society*³⁹⁵ as follows:

[The waiver is permissible] because freedom rights can be positively or negatively exercised. Just as one can exercise the right to freedom of expression by choosing to remain silent, one is free to practise one's religion and equally free to choose not to. A waiver therefore amounts, as it were, to an undertaking to exercise the right negatively. The undertaking in clause 20 (b) [of the contract of sale] not to make calls to prayer would be similar to a contractual undertaking not to disclose certain information, or not to work in one's chosen

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profession, or to perform nude on stage, or to attend religious instruction in a private school. These are respectively waivers of the rights to freedom of expression, to occupational freedom, to privacy and to freedom of religion. There should, in principle, be no objection to enforcing contractual undertakings such as these since they are not violations of a constitutional right.³⁹⁶

Note the last sentence. 'There should, in principle, be no objection to enforcing contractual undertakings such as these since they are not violations of a constitutional right.'³⁹⁷ Currie and Hopkins each run right past the easiest possible answer to this entire problem: there is no issue or problem of waiver, because there is no violation of a constitutional right about which we need be worried.³⁹⁸

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Having failed to take heed of Currie's own words, Hopkins continues to use the categories of inalienable and alienable rights with which he has been saddled. Only at the conclusion of his article does Hopkins begin to realize that the distinctions he is both relying upon and making up are rendered meaningless by a few basic propositions to which he rightly adheres:

To summarize the position on the waiver of a constitutional right (other than an inalienable right) is in effect to re-iterate my argument that contracts are enforceable unless contrary to public policy. This is the position in the common law as it currently stands. But, as I have also argued, public policy must now be informed by the values that underlie the Constitution generally, and in particular it must be informed by the provisions contained in the Bill of Rights. *This means that contracts whose enforcement would entail the violation of a right in the Bill of Rights are unenforceable because they are contrary to public policy.* Enforcement of such a contract (waiver) would mean, in effect, the limitation of a contractant's constitutional right — this can only be done if the requirements (for the valid limitation of a constitutional right) in the limitations analysis are met. Two of these requirements are 'reasonableness' and 'proportionality'. And so in addition to there being 'good reason' for the limitation, there must also be proportionality.

394 'Constitutional Rights and the Question of Waiver: How Fundamental are Fundamental Rights' (2001) 16 *SA Public Law* 122 (Hopkins 'Waiver').

395 1999 (2) SA 268 (C).

396 Iain Currie 'Bill of Rights Jurisprudence' (1999) *Annual Survey of South African Law* 54–55.

397 *Ibid.*

My argument that all contracts which purport to waive a fundamental right are unenforceable because they are contrary to public policy seems at first blush to render redundant the need to distinguish between rights that are alienable and rights that are inalienable. This is because, one might argue, the respective contracts purporting to waive either type of right (alienable or inalienable) are both effectively unenforceable. Although I concede that this is so, the distinction becomes relevant not at the interpretation stage of the enquiry but rather at the limitation stage. This, I argue, is because only alienable rights are capable of being justifiably limited; inalienable rights on the other hand are, by their definition, incapable of limitation — therein lies the need for treating the rights differently and by implication drawing the distinction.³⁹⁹

Let us make clear the two points with which Hopkins does battle. First, 'all contracts which purport to waive a fundamental right are unenforceable because they are

398 See *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 (2) SA 268 (C). The contract between the two parties for the sale of land had been concluded in 1979, well before either the Interim or Final Constitution came into effect. The respondent had been formed with the objective of erecting and maintaining a mosque and madressah in the area being developed. The agreement for sale of land between the applicant and the respondent contained provisions that the respondents would not conduct any activities that would be the source of nuisance or disturbance to other owners in the township, particularly prohibiting the use of sound amplification equipment. Instead, the agreement stated that the call to prayer would be made by the use of a light on the top of the minaret that would be switched on at the appropriate time. In spite of these provisions, the respondent installed sound amplification equipment and added a loud speaker to the mosque that it had built on the property purchased. In response to complaints from the residents of the surrounding properties, the applicant had applied for an interdict barring the respondent from using any sound amplification equipment and obliging it to remove such equipment. The Court held that the agreement — with its various restrictions — did not violate FC s 15. It did not discuss the concept of waiver. (Instead, it made a rather spurious distinction between calls to prayer and amplified calls to prayer — the former it identified as an integral part of the religion, the latter it found not to be an integral part of the religion.) The correct basis for the decision — the conclusion itself is correct — is that the right to freedom of religion does not entitle a party to engage in practices that disturb the general peace of the community. (Indeed, the parties' agreement to such restrictions reflects the recognition by both parties that such practices as amplification of calls to prayer, in fact, constitute a breach of the peace.) For a general account of the grounds for judicial intervention in religious affairs, and a relatively strict test for such intervention, see Paul Farlam 'Freedom of Religion, Thought, Belief and Conscience' S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41. But see Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44 (Defending a test for religious association that takes such ways of being seriously but does not simply concede the arguments made by religious groups with regard to the centrality of particular beliefs.)

Similarly, Iain Currie, Johan De Waal & Gerhard Erasmus wrongly describe *Wittmann v Deutscher Schulverein, Pretoria & Others* as an instance of constitutional waiver of the right to religious freedom. 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T). In *Wittmann*, a learner was expelled from an independent school for refusing to attend compulsory religious instruction classes. Van Dijkhorst J correctly notes that the case turns on questions of associational freedom, not religious freedom:

In respect of these educational institutions, the fundamental freedom of religion of 'outsiders' is limited to the freedom of non-joinder. Outsiders cannot join on their own terms and once they have joined cannot impose their own terms.

Ibid at 455A–B. See, further, Stu Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44. In sum, the right of a student to religious freedom is not impaired by her agreement to attend compulsory religion classes at a private religious educational institution in which she has chosen to enrol. It would be comparable to saying that when I attend Sunday Mass at my local parish church that I am waiving my right to read the Torah amongst my fellow Catholic congregants. I never had a right to read the Torah there. No reasonable understanding of religious freedom could embrace any other thesis.

399 Hopkins 'Waiver' (supra) at 137–138 (Emphasis added).

contrary to public policy seems at first blush to render redundant the need to distinguish between rights that are alienable and rights that are inalienable.'⁴⁰⁰ Correct. Once a right is interpreted to proscribe either law or conduct, no amount of fair bargaining can save the contract or agreement in question. Second, the issue is ultimately whether 'the respective contracts purporting to waive either type of right (alienable or inalienable) are both effectively unenforceable.'⁴⁰¹ Correct. But Hopkins will simply not let go of an unworkable distinction. So he puts it to new, and equally useless, service. He tells us the distinction continues to do work 'because alienable rights are capable of being justifiably limited; inalienable rights on the other hand are, by their definition, incapable of limitation.' Two further points put this distinction out of our misery. One. If we have just found that a right renders a contract or an agreement unenforceable, then there is no

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saving it under the limitation clause. The *Transnet* Court was certainly correct in holding that a contract or an agreement is not a law of general application. FC s 36 cannot, therefore, be used to justify them. Two. No rights are inherently or textually beyond the limitations exercise. We have no limitation-proof rights.

(b) Waiver and the law of contract as neutral backdrop

What is the explanation for this pervasive category mistake? Elsewhere in this chapter we have noted how the traditional conception of the common law as a neutral backdrop for a variety of social contracts between 'autonomous' individuals shaped the *Du Plessis* Court's views on IC s 7 and informed the drafters' views of the distinction between law and conduct in FC s 8. The 'common law as neutral backdrop' does similar work here.

The traditional view of the common law is wedded to the idea of the sanctity of contract. Even in those areas of social life where the language of contract is far less appropriate — say where law enforcement officials are holding an alleged terrorist incommunicado, and thus out of the reach of any potential legal assistance — we cling to the notion that, just perhaps, Mr Mohamed consented to his extradition to stand trial on capital charges. The predisposition to describe even non-contractual relationships in terms of contract coupled with the inclination to make common-law rules the departure point for constitutional analysis explains why many academics and jurists accord the 'contract' between parties primacy of place and describe constitutional rights in contractual terms. But in a country where 'all law derives its force from the constitution', and all law is measured for its consistency with the basic law, to describe constitutional rights in contractual terms gets things back to front. One can contract only to do those things that are constitutionally permitted. And since one cannot do what the Final Constitution does not permit, there is nothing to waive.

(c) The Poverty of Waiver

The doctrine of waiver is worth worrying about because contracts of adhesion are still relatively pervasive. In *Afrox Healthcare Bpk v Strydom*, an agreement was concluded between the appellant, the owner of a private hospital, and the

400 Ibid.

401 Ibid.

respondent, a party seeking medical treatment.⁴⁰² After an operation at the hospital, negligent conduct by a nurse led to complications that caused further injury to the respondent. The respondent argued that the negligent conduct of the nurse constituted a breach of contract by the appellant and instituted an action holding the appellant responsible for the damages suffered. The hospital's admissions document contained an exemption clause in which the respondent:

[a]bsolved the hospital and/or its employees and/or agents from all liability and indemnified them from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of any nature) flowing directly or indirectly from any injury (including fatal injury) suffered by

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or damage caused to the patient or any illness (including terminal illness) contracted by the patient whatever the cause/causes are, except only with the exclusion of intentional omission by the hospital, its employees or agents.⁴⁰³

The appellant relied on the above clause to avoid liability. The respondent advanced several reasons — including a constitutional claim based upon FC s 27(1)(a) — as to why the provisions of the exclusion clause could not operate against him. The Supreme Court of Appeal rejected the respondent's claims on the grounds that such contractual terms are the norm and that the courts are duty bound to enforce the contractual terms unless the Final Constitution or the *boni mores* of the community clearly dictate otherwise. The reasoning of the Supreme Court of Appeal in *Afrox* is tantamount to a construction of the hospital admissions form that holds that the respondent 'waived' whatever constitutional (or other) rights he possessed when he signed the form. If we are concerned about contracts entered into (a) by parties who do not possess the requisite capacity to understand fully the document they sign or (b) by parties in radically unequal bargaining positions, then we should be concerned about a constitutional doctrine that supports the enforcement of such contracts on the grounds that lack of knowledge or compulsion is equivalent to 'waiver'.⁴⁰⁴ *Afrox* rests on the fiction identified above — namely that the common law constitutes a neutral contractual backdrop for relations between fully autonomous individuals. Waiver now looks less like an innocent category mistake and more like a potentially pernicious pre-constitutional relic.

(d) The relationship between waiver and the benefits of fundamental rights

The behaviour of beneficiaries influences whether the conduct of private parties will be found to be unconstitutional. Only the beneficiaries of rights are going to ensure that their rights — even those ostensibly compromised by a contract to which they

402 2002 (6) SA 21 (SCA) ('*Afrox*').

403 *Afrox* (*supra*) at para 3.

404 For critical perspectives on *Afrox*, see Danie Brand 'Disclaimers in Hospital Admission Contracts and Constitutional Health Rights' (2002) 3:2 *ESR Review* 17-18; Pieter Carstens & Anton Kok 'An Assessment of the Use of Disclaimers Against Medical Negligence by South African Hospitals in View of Constitutional Demands, Foreign Law, Medical Ethics and Medical Law' (2003) 18 *SA Public Law* 430; Dire Tladi 'One Step Forward, Two Steps Back for Constitutionalising the Common Law: *Afrox Health Care v Strydom*' (2002) 17 *SA Public Law* 473; Stu Woolman & Danie Brand 'Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Public Law* 38.

are a party — are protected. And they will have to go to court to do so. How a court views the behaviour of the party who asserts the benefit of a right and the party who allegedly bears the burden determines whether or not the conduct at issue passes constitutional muster.

What makes the doctrine of waiver more pernicious than it might otherwise be is that we are unlikely to see too many cases in which parties contest contracts of adhesion. This is so because the persons who need to contest their alleged waiver of constitutional rights are the least likely to be in a position to bargain effectively

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to protect their constitutional rights and are, similarly, unlikely to be in a position to litigate subsequent claims. The poverty and powerlessness of many South Africans shapes the content of our constitutional rights through the structured silence of disputes that never make it to court. The doctrine of waiver, however, assumes — wrongly — what my understanding of this structured silence denies: that all contracting parties are in a position to make an informed and freely willed choice about their bargaining position as well as their legal remedies.

31.8 Temporal application of the Bill of Rights

As the term 'temporal' indicates, we are concerned here with issues of application as they relate to time. Such issues fall into two broad categories: (1) retrospective application; (2) application of the Interim and the Final Constitution to matters pending upon commencement of the Final Constitution. As time goes on, issues of temporal application will recede in importance.⁴⁰⁵

(a) Retrospectivity

Neither the Interim Constitution nor the Final Constitution applies retrospectively.⁴⁰⁶ In other words, neither constitution applies to conduct that took place before they came into operation. Before we interrogate this claim, and limn the precedents for the exceptions to the rule, let me first set out the general framework for retrospectivity analysis.

In *Du Plessis v De Klerk*, the defendants based part of their defense to a claim of defamation on IC s 15 — the freedom of expression. It was common cause that the conduct at issue occurred in March 1993, well before the commencement of the Interim Constitution on 27 April 1994. After placing a gloss on some early precedents that would have otherwise undermined the *Du Plessis* Court's conclusions, Justice Kentridge wrote:

The difficulty facing the defendants in this Court was their inability to point to anything in the Constitution which suggests that conduct unlawful before the Constitution came into force is now to be deemed to be lawful by reason of chapter 3. Indeed, all indications in the text are to the contrary. First, there is IC s 251(1) itself, which fixes the date of commencement. Then there is s 7(2), which provides that chapter 3 should

405 For an excellent account of temporal application, see Johan De Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4th Edition 2001) 57–62.

406 *Northern Province Development Corporation v Attorneys Fidelity Fund Board of Control* 2003 (2) SA 284 (T) citing *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BCLR 401 (CC) and *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC).

apply 'to all law in force and all administrative decisions taken and *acts performed during the period of operation of this Constitution.*' Again, IC s 98(6) provides: 'Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof — (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.' That subsection enables this Court, where the interests of justice and good government require it, to antedate the operation of a declaration of invalidity. Although there is no

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express limit on the power to antedate a declaration of invalidity, it could hardly be suggested that any such declaration could refer to a date earlier than the date of the commencement of the Constitution.⁴⁰⁷

After rejecting both claim (a), that the damages in delict were analogous to sentences of capital punishment, and claim (b), that it would be arbitrary and absurd — and therefore unjust — to allow 'one category of persons . . . to enjoy the human rights guarantees of the Constitution' and to deny such entitlements to a similarly situated group simply because the dates of the conduct differed, Justice Kentridge concluded that 'the Constitution does not turn conduct which was unlawful before it came into force into lawful conduct.'⁴⁰⁸ Justice Kentridge then formulated the following exception to the rule:

The consequences of that general principle are, however, not necessarily invariable [W]e leave open the possibility that there may be cases where the enforcement of previously acquired rights would, in the light of our present constitutional values, be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis. It is not necessary to spell out examples. It is sufficient to say that cases such as the one before us obviously do not fall into that category.⁴⁰⁹

The truly interesting developments with respect to retrospectivity have not involved a direct constitutional challenge to a rule of law in order to make unlawful conduct

407 *Du Plessis* (supra) at para 15 (Kentridge J's emphasis) citing *S v Zuma* 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BCLR 401 (CC).

408 *Du Plessis* (supra) at para 20.

409 *Ibid* at 20. See also *Tsotetsi v Mutual & Federal Insurance Co Ltd* 1997 (1) SA 585 (CC), 1996 (11) BCLR 1439 (CC). The *Tsotetsi* Court confirmed the existence of the exception created in *Du Plessis* but rejected its application to the instant case. Justice O'Regan wrote:

It is unnecessary in this case to decide the question to which I have referred in para [7] which was expressly left open in *Du Plessis v De Klerk*. Even if it is accepted that there may be exceptional cases where the general rule of non-retroactivity may not apply, it cannot be said that this is such a case. Such a case could only arise, first, if it was clear that the challenged provision or conduct was a gross violation of the provisions of the Bill of Rights, and, secondly, if there were special and peculiar reasons which would suggest that an order with retroactive effect should be made in a particular case. No such circumstances exist in this case. Even if the applicant were to persuade this Court that the impugned provisions of the Schedule do constitute a breach of the equality clause, it cannot be said that those provisions constitute such a gross breach of that clause that a special exception to the general rule concerning the retrospective application of the Constitution should be made.

Tsotetsi (supra) at para 9. With respect to retrospectivity and the Final Constitution, see *S v Pennington & Another* 1997 (4) SA 1076 (CC), 1999 (2) SACR 329 (CC), 1997 (10) BCLR 1413 (CC). The *Pennington* Court wrote:

lawful or offensive laws unconstitutional. They have, rather, involved the use of the concept of indirect application of the Bill of Rights to develop the

common law in such a manner as to make unlawful conduct lawful or offensive laws unconstitutional. In cases such as *Gardener v Whitaker*,⁴¹⁰ *Key v Attorney General*⁴¹¹ and *Brummer v Gorfil Brothers Investments*,⁴¹² the Constitutional Court has acted as if it possesses the discretion to develop the common law — in line with either IC s 35(3) or FC s 39(2) — and thus change what may have been unlawful conduct before the commencement of either constitution into lawful conduct thereafter.⁴¹³

De Waal, Currie and Erasmus lament the lack of forthrightness by the Constitutional Court about the consanguinity of indirect application and retrospectivity. They hold both that FC s '39(2) demands . . . development' of the common law in light of the spirit, purport and objects of the chapter and that 'judge-made law is always retrospective.'⁴¹⁴ With respect, the courts legitimately feel somewhat queasy about this back-door retrospective application of the Final

There is nothing in the 1996 Constitution which suggests that the decision as to retroactivity in *Du Plessis v De Klerk* is no longer applicable, or that it was intended that the 1996 Constitution should have retroactive application. It should perhaps be added that even if the phrase 'unless the interests of justice require otherwise' was wide enough not only to make the provisions of the 1996 Constitution applicable to pending proceedings in appropriate cases, but also to make them applicable retroactively, it could hardly be said to be in the 'interests of justice' to allow completed trials to be re-opened and to be dealt with in accordance with laws of procedure and evidence which were not in force at the time of the trial.

Ibid at para 36.

410 1996 (4) SA 337 (CC), 1996 (6) BCLR 775 (CC). In *Gardener*, Justice Kentridge wrote:

Both the issue of retrospectivity and the issue of horizontality have, however, now been dealt with by this Court in the case of *Du Plessis and Others v De Klerk and Another*. It follows from the judgment in that case that, although Froneman J was correct in his interpretation of s 241(8), the right of freedom of speech under s 15 cannot be invoked as providing a defence to an action for damages founded upon a defamation uttered before the Constitution came into force. The judgment and order of Froneman J nonetheless stand. *As I have indicated, the Judge in my view reached his decision not on a direct horizontal application of s 15, but by purporting to develop the common law, having regard, inter alia, to the values embodied in s 15 and, I emphasise, by applying it as so developed to the case before him.* Ibid at para 13. (My emphasis).

411 1996 (4) SA 187 (CC), 1996 (2) SACR 113 (CC), 1996 (6) BCLR 788 (CC) at para 13 (Despite bowing to the rules on retrospectivity set out in *Du Plessis*, the Key Court held that a criminal trial court would always have to ensure that the accused enjoyed the benefit of the right to a fair trial guaranteed by IC s 25(3) and that the benefits of that right might require that evidence obtained unconstitutionally — and prior to the date of the Interim Constitution's commencement — be excluded.)

412 2000 (2) SA 837 (CC), 2000 (5) BCLR 465 (CC) at para 7 (Court asserts that it possesses the discretion to develop common law retrospectively.)

413 But see *Mthembu v Letsela* 2000 (3) SA 867 (SCA)(Supreme Court of Appeals assumes that retrospective application of the Final Constitution means just that. It refuses to find that the case before it fits the *Du Plessis* exceptions of gross injustice and abhorrence before the law nor does it use indirect application of the Final Constitution to alter a rule of customary law that prevented illegitimate children from securing inheritance.)

414 De Waal, Currie & Erasmus (supra) at 59.

Constitution. There can be no doubt that the courts are changing conduct unlawful at the time it was undertaken into lawful conduct and that the instrument for such change is the Final Constitution. De Waal, Currie and Erasmus are wrong to think that by calling a process of constitutional interpretation 'indirect application' rather than 'direct application' that one thereby disposes of the problem of retrospectivity.

(b) Application of the Bill of Rights to matters pending upon commencement of the Final Constitution

FC Schedule 6, Item 17 reads as follows:

All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new constitution had not been enacted, unless the interests of justice require otherwise.

In *S v Pennington & Another*, the Constitutional Court held firm the line on

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retrospectivity.⁴¹⁵ It also refused to read the phrase 'unless the interests of justice require otherwise' as a license to re-open completed trials and dispose of them according to the constitutional rules 'of procedure and evidence which were not in force at the time of the [original] trial.'⁴¹⁶

In *Sanderson v Attorney-General (Eastern Cape)*, the Constitutional Court put a slightly more generous spin on the phrase 'unless the interests of justice require otherwise.'⁴¹⁷ It wrote that the phrase 'denotes an equitable evaluation of all the circumstances of a particular case.'⁴¹⁸ In particular, a court would be required to determine 'whether [an] individual's position is substantially better or worse under the Final Constitution than under the Interim Constitution.'⁴¹⁹

This rule on taking the respective benefits of the Final Constitution and the Interim Constitution into account has both substantive and procedural dimensions. In *S v Naidoo*, the High Court found that because FC s 35(3) barred the admission of evidence that would have been deemed legally obtained under the Interim Constitution, the accused was entitled to the benefit of FC s 35(3).⁴²⁰ In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*, the Constitutional Court held that if the application of the procedures and the provisions of the Final Constitution would not prejudice any party to a case, then the Final Constitution should be used to guide the courts.⁴²¹ For example, if a High Court or the Supreme Court of Appeal would have lacked jurisdiction to hear particular kinds of claims under the Interim Constitution — say challenges to the constitutionality of

415 *Pennington* (supra) at para 36.

416 *Ibid.*

417 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC).

418 *Ibid* at para 17.

419 *Ibid.*

420 1998 (1) BCLR 46 (D).

an Act of Parliament — but would possess such jurisdiction under the Final Constitution, then goods like increased systemic efficiency and diminished litigation costs would favour treating cases in which such issues arose as if the proceedings had commenced after the Final Constitution was enacted.⁴²²

Appendix: Academic contributions to the application debate

Quite a bit of jurisprudence has been generated about the meaning of and relationship between FC ss 8(1), 8(2), 8(3) and 39(2). It is worth taking stock of the broad range of opinion on the subject, not simply as an academic exercise, but because the arguments made elsewhere shed light on a host of concerns not yet engaged by our courts. I did not engage these significant contributions within the body of the chapter so that I might hew to a 'relatively' tight narrative line and focus the reader's attention on the deficiencies in the Constitutional Court's current doctrine and the grounds for the preferred reading.

The writers canvassed in this appendix fall into roughly four camps.

The first find that nothing fundamentally changed from the Interim Constitution to the Final Constitution. According to Michael Osborne and Chris Sprigman, the position articulated by the Constitutional Court in *Du Plessis* remains the best possible reading of the Final Constitution's comparable provisions on application.

The second surmise that even if the language of the Interim Constitution and the Final Constitution is palpably different — and points towards very different conceptions of application — the courts should act, consistent with a commitment to avoidance, as if the final text demands indirect application if and when it requires any application of the Bill of Rights at all. Iain Currie, Johan de Waal and Gerhard Erasmus champion this cause.

The third opine that it does not fundamentally matter whether we employ direct application or indirect application: the 'values' enshrined in the Final Constitution demand that we use whatever tools we have at our disposal to bring public and private relationships into line with the basic law. Chris Roederer and Kevin Hopkins offer variations on this theme.

The fourth map out a constellation of positions not dissimilar from those on offer in *Khumalo*. The virtue of Halton Cheadle and Dennis Davis' account is its candour about the textual hooks for the argument and their unwavering commitment to the proposition that the drafters of the Final Constitution meant the Bill of Rights to apply unequivocally to all forms of law and all manifestations of private power. Johan Van der Walt likewise acknowledges a signal difference between the interim text and the final text. Unlike most other authors, he sets great store in the extension of FC s 8(1). The strength of Van der Walt's normative claims about the ability of FC s 8(1) to reach all law — and ultimately all conduct — makes it unclear as to whether his subsequent view about the sufficiency of a doctrine he describes as 'progressive indirect application' constitutes an empirical claim about what the courts have done and will do, or expresses a preference as to how we, as a community, ought to proceed. Steven Ellmann's preoccupation is with the variety of different ways in

421 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) reversing *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 1115 (SCA), 1998 (6) BCLR 671 (SCA).

422 For a similar view, see *S v Meaker* 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73 (W).

which the Final Constitution extends the application of the Bill of Rights — from socio-economic rights, to organs of state, and, ultimately to private disputes. Ellmann takes care to note that while the Final Constitution invites direct application with respect to legal disputes between private parties, it does so with great circumspection.

(1) Sprigman and Osborne ⁴²³

In 1999, Chris Sprigman and Michael Osborne found themselves in the unenviable position of having to argue against the grain of the text of the Final Constitution in order to resurrect *Du Plessis*. Such a sisyphian task earns the authors more than grudging respect. ⁴²⁴

The difficulty of their task does not make weak textual arguments any more compelling. Sprigman and Osborne begin by writing that:

Section 7 of the Interim Constitution provided that '[the Bill of Rights] shall bind all legislative and executive organs of state at all levels of government.' The *Du Plessis* majority noted that s 7 binds only the legislature and executive, and not the judiciary. Had the drafters of the Interim Constitution intended that the Bill of Rights bind the judiciary, the majority argued, all common law disputes, even those between private parties, would be subject to constitutional scrutiny for the simple reason that a court, if it were bound in all cases by the Bill of Rights, could not issue an order inconsistent with any provision of the Bill of Rights. If that were the intent of the drafters, they would expressly have included the judiciary as an organ of state bound under s 7(1). ⁴²⁵

This argument is correct, so far as it goes. It fails to note the *Du Plessis* majority's gloss on IC s 7(2), its take on the relationship between IC ss 7(1) and (2), the distinction made between IC s 4 and IC s 7, arguments based upon IC ss 33(1) and (4) and 35 (3) and various assertions about the implicit limits of the Constitutional Court's jurisdiction under the Interim Constitution.

These are minor cavils. Let us suppose that a *Dolphin Delivery*-like argument based upon the exclusion of the judiciary from IC s 7(1) were sufficient for the *Du Plessis* court to have reached its ultimate conclusion about the limits of direct application. The authors go on to note that:

In contrast to s 7, s 8(1) of the 1996 Constitution provides explicitly that the Bill of Rights binds the judiciary, in addition to the legislature, the executive, and all other organs of state. Moreover, s 8(2) of the 1996 Constitution provides that a right in the Bill of Rights: 'binds a natural or juristic person if, and to the extent that, it is applicable,

423 Chris Sprigman & Michael Osborne '*Du Plessis* is not Dead: South Africa's 1996 Constitution and The Application of the Bill of Rights to Private Disputes' (1999) 15 *SAJHR* 25.

424 I must, however, note that Sprigman and Osborne's powerful arguments are undermined by careless errors with respect to the correct characterization of other works of commentary or the Final Constitution itself. These errors, when viewed cumulatively, suggest a practice of disregard for the actual content of other texts. For example, they attribute Johan Van der Walt's work to Andre Van der Walt. They ascribe a remark made by me in the chapter on 'Application' in the first edition of this work to the chapter written by me on Limitation in that same text. In quoting from the German Basic Law ('GBL'), the authors write that the GBL 'shall bind the legislature, the executive and the judiciary as directly enforceable law. In as much as it specifically includes the judiciary, that provision mirrors s 8(2).' FC s 8(2) contains no such language. FC s 8(1) mirrors the language of the GBL.

425 Sprigman & Osborne (*supra*) at 30.

taking into account the nature of the right and the nature of any duty imposed by the right.⁴²⁶ (Quotation marks added.)

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Does the authors' studious refusal to mention that 'all law' appears in FC s 8(1) and that the term can no longer be restricted — as under IC s 7(2) — to legislative and executive enactments warrant censure? Maybe not. But it is hard to know how to respond to an argument that relies on the intent of the wording of the interim text at the same time as it refuses to infer that a change in wording in the final text manifests a change in intent. Having agreed, by more than mere implication, with the *Du Plessis* Court's conclusion that the text of the Interim Constitution immunized private legal disputes governed by common law from direct application of the Bill of Rights, they provide little by way of argument for the proposition that the express binding of 'the judiciary' under the Final Constitution does not, as one might expect, subject those very same private legal disputes governed by common law to direct application of the Bill of Rights. Instead, they claim that while the Final Constitution allows 'horizontal application', it does not require it: They write:

[W]e believe that the best reading of s 8 is that it simply defers the question of application. *Whatever* the intentions of the men and women involved in the drafting and the ratification of the 1996 Constitution's application provision actually were, they settled on language that leaves entirely to the courts the determination of when, if ever, horizontal application is appropriate.⁴²⁷

There is, as I have already noted, a sense in which the authors' suggestion that questions of application are by their nature always deferred is correct.⁴²⁸ To say that the Bill of Rights applies as a general matter to a given 'kind' of dispute is not to say that that the interpretation of a particular right (or set of rights) has anything to say about the specific law or conduct being challenged.⁴²⁹ The good faith reconstruction of *Khumalo* rests on just such a distinction between the range of application of a specific right and the prescriptive content of that right. The authors mean to say something stronger. They mean to say that however strong the textual and drafting indications to the contrary might be, the courts still have the power to ignore the text's invitation to engage in direct horizontal application *per se*.

Let us ignore, since the authors do, FC s 8(1)'s injunction that the Bill of Rights 'applies to all law'. Can Sprigman and Osborne make the running when only faced with the single hurdle of the phrase 'binds . . . the judiciary'? Much of their argument that the binding of the judiciary does not 'inevitably give rise to horizontal application' rests on comparative constitutional jurisprudence. With respect to the German Basic Law ('GBL'), the authors argue that the GBL applies only indirectly to disputes between private parties.⁴³⁰ How to best describe — or understand — application analysis under the GBL is certainly contested terrain.

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426 Ibid.

427 Sprigman & Osborne (*supra*) at 30–31.

428 See § 31.4(a)-(c) *supra*.

429 As I have noted above, however, interpretation of the ambit of a right is — at least in so far as FC s 8(1) application analysis is concerned — a wholly separate enquiry. See § 31.4(a)-(c) *supra*. FC s 8(2) creates a threshold interpretation inquiry not required by FC s 8(1).

Both Johan Van der Walt and Mark Tushnet resist Sprigman and Osborne's characterization in their most recent work.⁴³¹ In Van der Walt's estimation, the Federal Constitutional Court has applied the Basic Law directly to the rulings of lower courts with regard to disputes between natural persons and/or juristic persons. The authors' contentions about American jurisprudence often appear oddly anachronistic. It would be churlish to deny the merits of federalism arguments when *Shelley* was handed down in 1948. However, in the face of a long line of cases that take an expansive view of the extent to which the 'state action' doctrine engages non-federal bodies of law, such federalism arguments lose much of their purchase. Moreover, it is not clear how arguments from federalism inform application analysis in South Africa's decidedly non-federal judicial system. The authors' observation that American legal academics excoriated the Court for its expansive view of state action in *Shelley* is underwritten solely by two well-regarded pieces by Herbert Wechsler and Louis Henkin. It ignores the subsequent history of the American legal academy and its long-standing and now almost universal agreement that the US Supreme Court's position on 'state action' is incoherent because the Court fails to endorse the view that state power structures all legal relationships and that the state action required for purposes of constitutional review is, in fact, notionally present in all legal disputes. This selective engagement with a complex body of jurisprudence and scholarship lends little support to the dubious proposition that FC s 8(1)'s binding of the judiciary does not extend to all law that emanates from the courts.

The most powerful weapons in Sprigman and Osborne's arsenal are their arguments from democracy. They contend that we should not subject disputes between private parties governed by common law to direct application because it inevitably requires us to do limitations analysis that courts are ill-equipped to undertake. Assuming, for the sake of argument, that this is true, then it must likewise be true of disputes governed by common law between the state and its subjects. Moreover, it is unclear, as always, how direct application of the Bill of Rights to a statute that governs a private dispute is different from direct application of the Bill of Rights to a rule of common law that governs a private dispute. If anything, the author's arguments from democracy should have them prefer the direction application of the Bill of Rights to the common law over direct application of the Bill of Rights to statute.

Sprigman and Osborne aver that courts are often ill-equipped to deal with 'the voluminous, confusing and contradictory factual evidence submitted by the state in support of . . . [the] justification' of the statutory or common law rule in

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question.⁴³² If this proposition is true, then it has significant implications not simply for the judicial process and constitutional review (about which the proposition would

430 Sprigman & Osborne (supra) at 32 citing *Du Plessis v De Klerk* (supra) at paras 98-106 (Ackermann AJ concurring).

431 Johan Van der Walt 'Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relationship between Common Law and Constitutional Jurisprudence' (2001) 17 *SAJHR* 341; Mark Tushnet 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' (2003) 1(1) *Journal of International Constitutional Law* 79, 84. When writing about the subjection of all state action — including judicial pronouncements — to the German Basic Law, Tushnet articulates a thesis pressed throughout the pages in this chapter: 'It is not clear to me why a theory of state duty [to uphold the Constitution] is less radical than a theory that individuals are directly bound. I believe that . . . the theories are precisely equivalent.' Indeed, South Africa's Final Constitution makes this point about equivalence clear by having the Bill of Rights apply to 'all law', bind 'the judiciary' and apply, if applicable, to natural and juristic persons.

appear agnostic at best). It is a scathing indictment of the democratic process of law-making. If the justifications for a statute are contradictory or confusing or both in court, then one must have reason to doubt whether they are any less so in Parliament. If our elected officials en masse are not even able to offer a patina of plausible intent for legislation, then it is difficult to understand what the institutional argument against judicial review of legislation (or common law) is. The baggy pants of democracy are not big enough to hide a problem of that magnitude. It is simply impossible to square the authors' initial negative assessment of the democratic state's ability to construct justificatory arguments for its laws with their subsequent hackneyed appeal to 'the exhaustive investigation, committee deliberation, publicity, debate, negotiation' that ostensibly distinguish parliamentary processes and secure their legitimacy.⁴³³

The authors then reverse gears and claim that standard two-stage Bill of Rights analysis is possible for legislation — despite the inadequacies of evidentiary record — but too unduly complicated for a rule of common law. The authors make this assertion despite that fact that the Constitutional Court has engaged in two-stage analysis of both kinds of legal rules under the Interim Constitution and the Final Constitution.⁴³⁴ Their empirically false assertion is not rehabilitated by the equally tendentious thesis that while vertical disputes 'pit individual rights against the state, horizontal disputes pit individual rights against one another.'⁴³⁵ Both legs of this claim are, at best, misleading. Classically vertical challenges to a statute often occur in the context of disputes between private persons. One natural or juristic person relies on the statute; another natural or juristic persons attacks it. Moreover, while the party challenging the constitutionality of a statute must invoke a provision of the Bill of Rights, it is also quite common — though not necessary — for the party relying on the statute in question to invoke another, competing right as part of its argument in justification. With regard to the second leg, an individual relying upon a rule of common law will not necessarily

432 Sprigman & Osborne (supra) at 41.

433 Ibid at 46.

434 See, eg, *NCGLE I* (supra) at para 57 (Common-law offence of sodomy found inconsistent with rights to equality, dignity and privacy and 'the criminalisation of sodomy in private between adult consenting males' and the 'limitation in question in our law regarding such criminalisation cannot be justified under [FC] s 36(1).') See also *S v Thebus & Another* 2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC), 2003 (10) BCLR 1100 (CC) at para 65 (An arrested person had the right to remain silent and drawing an adverse inference on credibility from silence limited the right. The Court wrote: 'The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is one which is well recognised in our common law. As such, it is a law of general application. However, like all law, common law must be consistent with the Constitution. Where it limits any of the rights guaranteed in the Constitution, such limitation must be justifiable under s 36(1). Whether this rule is justifiable in terms of s 36(1) is a question to which I now turn'); *Fidelity Guards Holdings (Pty) Ltd T/A Fidelity Guards v Pearmain* 2001 (2) SA 853 (SCA), 862 ('Insofar as . . . restraint [of trade clauses constitute] . . . a limitation of the rights entrenched in [FC] s 22, the common law as developed by the Courts, in my view, with the requirements laid down in [FC] s 36(1). Any party to any agreement where a restraint clause is regarded as material is free to agree to include such a clause in the main agreement and the common law in this regard is therefore of general application.')

435 Sprigman & Osborne (supra) at 42.

invoke a constitutional right. The mere fact that a party defending a common law rule believes that she can rely upon a given right does not support the proposition that the party is, in fact, entitled to the protection afforded by the right invoked.

(2) De Waal and Currie

Johan De Waal and Iain Currie offer one of the most detailed, and complicated, arguments in favour of any given take on application. While De Waal and Currie admit that the Bill of Rights of the Final Constitution contemplates direct application, they argue that the direct application of specific provisions of the Bill of Rights should be studiously avoided.

They initiate their discussion of the latter, and more controversial half, of their conclusions as follows:

Traditionally, a bill of rights regulates the relationship between the individual and the state. However, the 1996 Bill of Rights goes further than is traditional. It recognises that private abuse of human rights may be as pernicious as violations perpetrated by the state. For this reason, the Bill of Rights is not confined to protecting individuals against the state. In certain circumstances, the Bill of Rights protects individuals against abuses of their rights by other individuals.⁴³⁶

They then appear to take the textual bull by the horns:

It may be argued that since s 8(1) provides that the Bill of Rights applies to all law and binds the judiciary, the subsection precludes 'all law' and 'the judiciary' from upholding private conduct that conflicts with the Bill of Rights. If this is so, private persons will not be able to seek the assistance of the law, or the courts, to enforce their unconstitutional behaviour.⁴³⁷

The above two points suggest that if (a) the Bill of Rights applies to abuses of private power and (b) the Bill of Rights prevents reliance on express rules of law or judicial constructions of law inconsistent with its provisions, then (c) the Bill of Rights governs disputes between individuals in the same manner as it governs disputes between the state and an individual. That is not the conclusion De Waal and Currie draw. Instead they write that:

Such an interpretation confuses the two application issues that we identified at the outset. The reach of the Bill of Rights must be considered before its relationship with the ordinary law is considered. Its reach must be determined with reference to the actors it binds. The result determines the extent to which the Bill of Rights applies directly to the law. By providing that the Bill of Rights 'applies to all law', s 8(1) merely recognizes that when the Bill of Rights does not apply directly to the law, it does apply indirectly to the law.⁴³⁸

This paragraph, articulated with De Waal and Currie's customary elan, obscures a rather critical distinction: that of 'reach' and 'application.' The fact that no mention of 'reach' is made in the Final Constitution is not, in and of itself, fatal to the argument. [The good faith reconstruction of *Khumalo* requires

436 Johan de Waal, Iain Currie & Gerhard Erasmus *The Bill of Rights Handbook* (4th Edition 2001) 45.

437 *Ibid* at 46.

438 *Ibid*.

such artifice.] But it does require that the reader search the book in order to determine the extension of 'reach'. Elsewhere, in a section entitled 'Direct Application', the authors write:

Direct Application. The *reach* of the Bill of Rights (beneficiaries, duties and time) demarcates the types of legal disputes to which the Bill of Rights *applies as directly* applicable law. Within this demarcated area, the Bill of Rights overrides ordinary law and any conduct inconsistent with the Bill of Rights and . . . generates its own set of remedies. ⁴³⁹

Reach appears to mean direct application. But it is direct application of a rather desiccated sort. Read together, these two paragraphs reduce to a single supposition: when the Bill of Rights states that it applies to 'all law', it does not, in fact, apply to all law. All that 'all law' means is that when the Bill of Rights is deemed to 'reach' a certain set of duties or beneficiaries or time, then it may apply directly or indirectly. It might be tempting to conclude that the authors mean to offer a variation on the good faith reconstruction of *Khumalo* and its use of the distinction between the range of application of a norm and the prescriptive content of the norm to explain the difference between FC s 8(1) and FC s 8(2). However, De Waal and Currie make clear that this clever fiction of 'reach' simply services their more general thesis that indirect application is always to be preferred to direct application:

It is convenient to consider the reach of the Bill of Rights before looking at its application in legal disputes and its relationship with the ordinary law. Once the reach is determined, a consideration of the relationship between the Bill of Rights and ordinary law can be sensibly divided between direct application to law and conduct and indirect application of the Bill of Rights to law. ⁴⁴⁰

It would be 'convenient' if we knew what 'reach' was or understood the textual hook for this lexical ordering of our analysis: reach before application. Instead of being told what 'reach' is, and told how 'reach' analysis precedes 'application' analysis, we are told, again, that the indirect application of the Bill of Rights must always be considered before its direct application of the Bill of Rights:

It must be stated at the outset, however, that in practice the indirect application of the Bill of Rights must always be considered before its direct application to law or conduct. The reason for this is the principle, laid down by the Constitutional Court in an early decision, that where it is possible to decide a case without reaching a constitutional issue, that is the course that should be followed. Where a legal dispute cannot be resolved without reference to the Constitution, the principle clearly prefers indirect application . . . over direct application. ⁴⁴¹

The reason to prefer this canon of interpretation over any other, the authors opine, is that the Constitutional Court prefers to avoid constitutional issues where it is possible to do so. To put it pithily, we are to prefer some kind of application

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of the Bill of Rights of the Final Constitution (let us say indirect), because the Constitutional Court has told us to avoid applying the Final Constitution (including the Bill of Rights) where it is possible to do so. But by making avoidance the canon

439 De Waal, Currie & Erasmus (supra) at 37 (Emphasis added).

440 Ibid.

441 Ibid at 37 citing *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 59.

of choice, the authors offend quite a number of other canons of constitutional construction in the process.

For starters, De Waal and Currie's commitment to avoidance turns FC s 8(1) into surplusage. FC s 8(1)'s injunction 'all law' appears to mean that the Bill of Rights will apply — indirectly or directly — if the Bill of Rights is deemed to apply in terms of benefit, time and duty.⁴⁴² Aside from the difficulties that attend any reconstruction of the logic of this reading, 'law' does no work. The Bill of Rights applies only if the benefit of the right, the time of the conduct in question and the duties imposed by the right in question require it — and then it should apply indirectly, rather than directly. Is this a plausible interpretation of FC s 8(1)?

FC s 8(1) creates another insuperable problem for De Waal and Currie. The authors defend the proposition that when FC s 8(1) 'binds . . . the legislature', the Bill of Rights applies to legislation. They defend the proposition that when FC s 8(1) 'binds . . . the executive', the Bill of Rights applies to subordinate legislation.⁴⁴³ But when asked to defend the proposition that when FC s 8(1) binds the judiciary, it binds the common law or any judicial construction of law, De Waal and Currie balk. They do not say why FC s 8(1) embraces the law-making function of the legislature and the executive, but does not encompass the law-making function of the judiciary. To the extent that De Waal and Currie offer a defence of their position, it takes the form of an explanation of what it means for the judiciary to make law:⁴⁴⁴

On the one hand, every court order can be considered to become part of the common law and add to the common law. That is, unless or until it is overturned by a higher court or the legislature. If this is so, no court order may give legal effect to private conduct that is inconsistent with the Bill of Rights. For practical purposes, private persons will then always be bound to [sic] the Bill of Rights.

On the other hand, all court orders can be considered to be the application of a pre-existing common law principle to a new set of facts. This approach rests on the fiction that the judiciary does not make law, but 'finds' the law and then applies it. If this is so, then the judiciary will find that the Bill of Rights sometimes does not directly apply to private conduct, leaving them to apply the common law to the dispute.⁴⁴⁵

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The authors' seem inclined to view the former position as the most accurate characterization of judicial law-making. They take comfort from the latter because it best fits their approach to application analysis. Their preference for this 'fiction' results in the following difficulties.

If the judiciary takes law as it finds it, but does not make law each time it applies it, then it is — apparently — free to apply the law without worrying about the constitutionality of the rules it applies. This move begs every question. It is not clear

442 De Waal, Currie & Erasmus (supra) at 46.

443 On their reading, the Bill 'binds' these two branches only if the benefit of the right, the time of the conduct in question and the duties imposed by the right in question require it. This reading is neither natural nor plausible. Even the cramped reading the *Du Plessis* Court offered of IC s 7(1) subjected legislative and executive enactments to direct application *tout court*.

444 Ibid at 54 (Emphasis added).

445 Ibid.

why previously created judicially-made law is not bound by FC s 8(1), but previously created legislatively-made law or previously created executively-made law is so bound. It is not clear why, when a court 'finds' an applicable common law rule, FC s 8(1) does not bind either this 'finding' of the court. The emphasis on time and whether each instantiation of a rule of common law entails the creation of a new rule is a red herring. It does no work.

It is also simply untrue that 'every court order can be considered to become part of the common law and add to the common law.'⁴⁴⁶ Some court orders — and here the authors must mean judgments — are simply a gloss on legislation, subordinate legislation, customary law, executive conduct, the actions of organs of state or even non-law-making judicial behaviour.

Even if FC s 8(1) only recognizes that the Bill of Rights might apply to 'all law', and might bind the legislature and the executive assuming other conditions are met, what meaning do we attach to FC ss 8(2), 8(3) and 39(2)? We are, I think, to assume that FC s 8(2) and FC s 8(3) indicate that the Bill of Rights might apply to private conduct and might require the development of new rules of law and new remedies assuming other conditions — benefit, duty, time — are met. This gloss on FC s 8(2) and FC s 8(3) may fit the overall structure of De Waal and Currie's argument, but it is most unnatural. In terms of what the drafters intended or what a reader might have expected the words to mean, it is implausible. But worst of all, the sections have no real independent meaning. Their meaning is entirely parasitic on a distinction between indirect application and direct application.

Which brings us to the meaning of FC s 39(2). Unless the two processes of application are identical — which the authors themselves tell us they are not — then the various sections of the Bill of Rights that deal with application must contemplate at least two distinct modes of analysis and must employ language that reflects such a distinction. Moreover, as a matter of logic, one must know when direct application is or is not required in order to know when indirect application is or is not required. Direct application means that the prescriptive content of the substantive rights found in FC ss 9 through 35 engage the law or conduct at issue. Where the prescriptive content of the substantive rights found in FC ss 9 through 35 does not engage the law or the conduct at issue, then FC s 39(2) tells us that the more general spirit, purport and objects of the chapter may inform our efforts to bring all law into line with the Final Constitution. If we reverse the spin, and we first use FC s 39 to bring the law into line with the

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general spirit, purport and objects of the Bill of Rights, there is simply nothing left to be done in terms of direct application. The reason is obvious. If the general spirit, purport and objects of Chapter 2 — which embraces the entire value domain constituted by the substantive provisions of the Bill of Rights — does not require a change in the law, then no narrower set of values and purposes reflected in a single provision could be expected to do so.

The jurisprudence of avoidance does not appear to stop with a reversal of the lexical ordering of indirect application and direct application. Avoidance, on their account, means that we rely, whenever and wherever possible, on the use of extant rules of ordinary law as the departure point for dispute resolution. At the same time, the authors write that 'the Bill of Rights overrides ordinary law.' Given that our existing corpus of law provides an answer to almost all legal disputes, the priority

446 De Waal, Currie & Erasmus (supra) at 54.

given the avoidance principle would effectively render almost all disputes immune to constitutional review. The Bill of Rights would actually never override ordinary law. That cannot be right. But if it is, the authors have contradicted themselves.

Again, as a logical matter, the authors seem to be saying: 'A(application) = not A(application)'. We have seen that avoidance equals indirect application *and* that the principle of avoiding application entails a preference for (indirect) application over (direct) application. So, if the principle of non-application of the Final Constitution does *not* obtain (and we have seen that non-application equals indirect application), then the principle of non-application entails (indirect) application of the Final Constitution over (direct) application. One cannot both apply and not apply the Final Constitution. This is, quite literally, nonsense.

Even a good faith reconstruction seems implausible. A strong view of avoidance prevents ordinary rules of law from ever being displaced by the Final Constitution. A weaker view holds that to the extent that avoidance does not preclude application, then we must engage in indirect application. But even on the weaker view, indirect application exhausts the universe of possibilities for application of the Bill of Rights and we would never be required to engage in direct application.

Let us attempt a reconstruction of their argument from avoidance that is weaker still. Assume that the authors mean 'reading down' when they say avoidance. On this account, they are attempting to avoid a finding of invalidity through direct application and even a 'change' in the law through indirect application. But 'reading down' does not avoid constitutional analysis. It is a mandatory canon of constitutional interpretation that enables a court to skirt a finding that a rule of law is unconstitutional and, therefore, invalid. Before one can 'read down' a rule of law, one must first ascertain what the ambit of the applicable constitutional provision is. Only when one has determined that ambit — and this is hardly avoidance — is one in a position to determine whether a preferred gloss on a rule is or is not consistent with constitutional dictates. Analysis of the Final Constitution is logically prior to the analysis of the common law.

The logical incoherence of this approach flows from the authors' commitment to minimalism and their attempt to make minimalism a theory of everything. Minimalism stands for the proposition that courts ought to develop the body of substantive constitutional law 'one case at a time' and that the basic law ought to upset existing doctrine no more than is absolutely necessary. With

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respect to some constitutional doctrines, say, how one approaches the interpretation of individual rights, minimalism may be a plausible jurisprudential line. But it works only as a 'style', not as a rule. When minimalism is converted into a rule, as the authors must do in order to give the specific provisions of FC s 8 and FC s 39 content, it does too much work and turns all of FC s 8 into surplusage.

(3) Roederer and Hopkins

(a) Roederer

Chris Roederer's strategy in 'Post-*Matrix* Legal Reasoning' bears a family resemblance to De Waal and Currie's account.⁴⁴⁷ Neither Roederer nor De Waal and Currie feel particularly constrained by the text. De Waal and Currie, however, are

447 Christopher Roederer 'Post-*Matrix* Legal Reasoning: Horizontality and the Rule of South African Law' (2003) 19 *SAJHR* 57.

primarily concerned with safeguarding extant non-constitutional rules of law from unnecessary constitutional alteration. Roederer demonstrates no appreciable concern for law as a rule-governed exercise. The novelty of Roederer's project is that it depicts constitutional interpretation, generally, and application analysis, in particular, as a value-driven, but largely rule-free, exercise.

Roederer's conclusions about the application of the Bill of Rights under the Final Constitution are as follows. First, there is no meaningful difference between direct application of the Bill of Rights under FC s 8 and indirect application under FC s 39(2). Second, those who believe a meaningful difference exists between analysis under FC ss 8 and 39 rely on a clear cleavage between rules and values. Third, since no clear cleavage exists between the rule-governed analysis and the value-governed analysis under the Final Constitution, then any distinction between the two sections grounded in the belief that they require different kinds of analysis collapses. Fourth, the collapse of both the rule/value distinction and the direct application/indirect application distinction liberates the courts from the yoke of South Africa's traditional legal matrix and unleashes the full transformative potential of the Final Constitution. Fifth, *Khumalo* offers a perfect example of a decision that recognizes that there is no meaningful difference in the analysis that occurs under FC s 8 and FC s 39(2).

This no-text, no rule, approach may seem like an odd interpretive strategy. But Roederer has two aims that seem to require this technique: (a) to offer a particular kind of justification for the Constitutional Court's decision in *Khumalo*; (b) to make an intervention in the debate about application which allows him to argue that there is no longer anything worth arguing about.

Roederer's first contention is that there is no meaningful difference between direct application of the Bill of Rights under FC s 8 and indirect application under FC s 39. But despite sections entitled 'Is there a distinction based on the text?' and 'The distinction is an illusion', Roederer never actually tells us what the sections should mean. It is therefore impossible to gauge whether there is, in fact, a legitimate distinction based on the text, whether such a distinction could

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be deemed meaningful and what the alternative is.⁴⁴⁸ At minimum, one might expect an explanation as to why FC s 8 is entitled *Application* and FC s 39 is entitled *Interpretation*.

The differences between the interpretive technique Roederer employs and the interpretive technique employed by the *Khumalo* Court in the decision he seeks to defend are difficult to reconcile. The refusal to take the text seriously and to then claim that there is effectively no meaningful distinction between FC s 8 and FC s 39 flies directly in the face of Justice O'Regan's injunction that we should not attribute meaning to one section of the Final Constitution that renders another section, quite literally, senseless.⁴⁴⁹ If they both mean the same thing, then one of those sections is entirely superfluous.

The attribution of distinct purposes to the two sections is an absolutely essential exercise. FC s 8(1) requires that the substantive provisions of the Bill of Rights apply to each and every 'kind' of law. It does not mean that the prescriptive content of the substantive provisions in the Bill of Rights cover each and every legal dispute. Put another way, while the specific provisions in the Bill of Rights cover a large domain of law-governed activity, they do not engage all law-governed activity. The

448 Roederer (supra) at 71-80.

independent purpose of FC s 39(2) is to cover those law-governed activities that are not engaged by any of the specific provisions set out in Chapter 2.

A counterfactual makes this distinction clear. Assume that FC s 39(2) and FC s 8 do require the same mode of analysis. Assume, as Roederer would have us do, that this mode of analysis is purely a value-driven exercise. Why even have a Bill of Rights? Why not just have a grocery list of a few general goods? Or even one longer list that embraces all of the values made manifest in the substantive provisions in Chapter 2? The correct reply is that the drafters intended for there to be two different processes. The first process — direct application — takes the rights and freedoms — and the general rules derived from them — as our departure point for determining whether law or conduct is invalid. The second process allows for a mode of analysis that neither specifies a particular right that demands vindication nor permits a finding of invalidity. Instead, as *Carmichele* and *Thebus* tell us, the courts operate under a general injunction to bring all law into line with the 'spirit, purport and objects' of the Bill of Rights and the 'objective, normative value system' made manifest in the text of the Final Constitution as a whole.

Roederer's second contention is that those who believe a meaningful difference exists between analysis under FC s 8 and FC s 39 rely incorrectly on a cleavage between rules and values. He claims that since FC ss 39 and 36 require that we

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analyze both rights and limitations of rights in light of the same five core values that we must necessarily be engaged in the same kind of 'global' assessment of provisions and values whether we are doing direct application or indirect application. This is false. When we ask whether a statutory provision or a rule of common law violates the equality clause, we do not engage in some global assessment of competing Bill of Rights considerations. We know that FC s 9 requires us to ask very specific kinds of questions about 'differentiation', 'discrimination,' 'unfairness,' 'systemic disadvantage' and 'impairment of dignity.' Likewise, it could hardly be the case that when we interpret the right to housing in light of those five core values we end up with the same content as when we interpret the right to access to court in light of those five core values. However general their wording might be, these provisions are rules with real purchase. Roederer should know that simply because there is never an incontrovertible answer to the skeptical challenge as to exactly how a rule will be applied in some future instance it does not follow that we are not engaging in rule-governed behaviour when we try to follow a given rule or to apply

449 Does the putative collapse in the rule/value distinction better justify the result in *Khumalo*? Once we make this move, there is only one question we could ask when faced with any allegation of a rights violation: Stepping back from it all, is the law or conduct under review the kind of law or conduct that the 'entire scheme of the Bill of Rights . . . is meant to achieve?' Such a broad inquiry inevitably makes questions about the particular kinds of application of fundamental rights required by FC ss 8 and 39 superfluous. But this interpretative strategy floats so free of the text that it makes any analysis of the specific rights in FC ss 9 through 35 superfluous. That would seem to violate with a vengeance the non-redundancy or non-surplusage requirement articulated by Justice O'Regan in *Khumalo*.

the rule to a case in court.⁴⁵⁰ His second effort to blur the rule/value distinction takes the following form:

Any rule-like provision is subject to the interpretive exercise enunciated in s 39. The broader the interpretation, the more likely there will be conflict with or limitations on other rights. The more tailored and limited the application the less likely that it will heavily impact on

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other horizontally applicable rights. In the end, a balancing must take place between the various rights in issue. The balancing cannot be done, or rather, should not be done by a myopic technical evaluation of competing provisions. It can only be done properly by stepping back and looking at the entire scheme of the Bill of Rights and what it is meant to achieve.⁴⁵¹

But it is not clear which interpretive exercise in FC s 39 Roederer is talking about. He must be talking about FC s 39(1) and not FC s 39(2). If he were talking about FC s 39(2), he would simply be comparing FC s 39(1) analysis to FC s 39(2) analysis. I do not believe he could have intended a tautology. If, however, he is talking about how FC s 39(1) informs Bill of Rights analysis, then Roederer has overshot the mark. What FC s 39(1) tells us is that 'when interpreting the Bill of Rights, a court . . . must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.' FC s 39(1) is intended to help us think about how we

450 Though Roederer is sometimes careful to say that he is merely talking about supplanting old rules of law with new justifiable rules, when he talks about constitutional provisions a sort of naïve skepticism creeps into the discussion. He writes:

For the most part, the provisions in the Bill of Rights of the 1996 Constitution and the rights included therein are not rule-like self-interpreting provisions. They do not appear in the form of statutory entitlements or administrative regulations.

Roederer (*supra*) at 75–76. True, the rights in the Final Constitution are not like administrative regulations. However, the distinction or the comparison does no work. No rule is self-interpreting in the sense that Roederer implies. Perhaps Roederer's anxiety is that the very breadth of a constitutional provision makes it impossible to apply. This view of language and rules Wittgenstein describes as follows:

This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made to conflict with it. And so there would be neither accord nor conflict here.

See Ludwig Wittgenstein *Philosophical Investigations* (1953) § 201. That sounds like what Roederer is saying. However, Wittgenstein's point is not to entertain such naïve skepticism, but rather to oppose it. Following rules — or trying to follow rules — is what meaningful action is all about. Roederer's exhortation to not engage in rule-following behaviour is meaningless unless it reduces to something like 'Don't follow those rules, follow these rules.' Roederer, wanting to be inside and outside the legal community simultaneously, is loath to supplant one form of rule-following behaviour with another. The result is the use of extant rules articulated in cases like *Khumalo* (though he doesn't call them rules) that suggests an end-run around his initial opposition to rule-following. He cannot have it both ways. Wittgenstein puts this point crisply when he writes:

There is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one rule for another.

Ibid. For a full account of Wittgenstein's views on rule-following as well as the skeptical answer to the skeptic's challenge, see Saul Kripke *Wittgenstein: On Rules and Private Language* (1982); for an account of Wittgenstein's view of rule-following that abjures skeptical moves entirely, see GP Baker & PMS Hacker *Skepticism, Rules and Language* (1984).

451 Roederer (*supra*) at 76.

determine the content of any given right. But it is not a substitute for applying our mind to the particular purposes or the specific values that determine the ambit or the prescriptive content of a substantive provision. When he then writes that 'the broader [and I assume here that he means something like the more notional or the more generous] the interpretation [of the right], the more likely there will be conflict with or limitations on other rights,' he assumes two things that he is not entitled to assume. He assumes that a broad interpretation will inevitably yield an infringement of the right. There is no reason to grant Roederer this assumption. If it were true, then it would be an argument against both Bill of Rights analysis generally and a notional approach to Bill of Rights analysis in particular. He also assumes that every infringement of a right that leads to limitations analysis invariably leads to a balancing of conflicting rights. However, unless we believe that we can reconfigure every justification for a limitation into a rights claim itself, I see no reason to grant this assertion. The state can limit the right to smoke dagga — and thus infringe a Rastafarian's right to engage in a particular religious practice — and make no reference to a countervailing constitutional right. Its concerns — concerns the *Prince* Court vindicated — are captured by a desire to limit drug-trafficking and to limit the kinds of gateway drug abuse that may lead to hard-core drug abuse and to higher levels of crime. The state may proscribe bestiality and thereby limit a person's right to privacy.⁴⁵² The court may uphold such a proscription. However, since there is no constitutional right that entitles an animal to be free from bestiality, then it would

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be incorrect to say that a countervailing right justifies the state's limitation of my privacy rights. There is, in this instance, no balancing of rights claims.⁴⁵³

In considering the explanatory power of Roederer's collapse of the rule/value distinction, it may be worth reflecting upon the Constitutional Court's own take on the distinction between rules and values and the different uses to which the Final Constitution puts them. In *Minister of Home Affairs v National Institute for Crime Prevention*, Chaskalson CJ writes:

The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is

452 The Constitutional Court is on record as having some sympathy for the criminalisation of just these sorts of victimless crimes. See *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 609 (CC) ('Case') at para 99. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('NCGLE I') at para 118.

453 As this analysis makes clear, Roederer has used FC s 39 to jettison rights analysis completely and somehow get us to the point where, under FC s 36, we are balancing conflicting rights. But we have already seen that the justificatory analysis required by FC s 36 does not presuppose the assertion of a countervailing right. What then does he mean when he writes that: 'The more tailored and limited the application the less likely that it will heavily impact on other horizontally applicable rights.' Roederer (*supra*) at 76. What he must mean is: 'the more narrowly circumscribed the content of a right is, the less likely it will be to impair the exercise of another right.' Is this true? In any event, constitutional analysis does not normally proceed in terms of pitting rights against rights. We are generally measuring ordinary law for consistency with constitutional dictates. If a law impairs the exercise of a right, then we ask whether that impairment can be justified. We may well do so by reference to the values made manifest in other rights. But it need not be so. If the law or the conduct in question does not impair the exercise of a right, then we do not get to ask whether that impairment can be justified by reference to some value made manifest in another right. Roederer wants to set up the balancing of rights as an ineluctable part of Chapter 2 analysis. It clearly isn't.

structured and in particular the provisions of Chapter 2 which contains the Bill of Rights.
454

Values are one thing, the *NICRO* Court appears to be saying, rules another. While it is certainly true that the fundamental values articulated in the Final Constitution will shape the rules expressed therein, and that the rules will have a reciprocal effect with respect to our understanding of those fundamental values, there remains a distinction with a difference. Rights give rise to rules and enforceable claims. Values do not.

(b) Hopkins

Kevin Hopkins is primarily interested in how FC s 39(2) can be used to develop the common law in light of the spirit, purport and objects of the Bill of Rights.⁴⁵⁵ He has written that:

Each and every pre-Constitutional precedent will need to once again be scrutinized, this time against the *values* that permeate through the Bill of Rights, so as to make sure that all

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law (including case law) is constitutionally compliant. That it is our duty to do this is beyond question — the common law must be developed so that it is brought into line with our Constitution.⁴⁵⁶ (Emphasis added)

But Hopkins' writings rarely mention 'how' the Bill of Rights applies and how courts are to understand their obligations. His writings appear to reflect a two-fold inclination to view: (1) the common law as a rather seamless web that should be preserved in so far as it is can; and (2) direct constitutional application of the Bill of Rights as an intrusion upon the well considered assessments of equity and fairness made manifest in the common law. He writes:

Certainty in the common law is supposed to be maintained by the doctrine of precedent and it is in the judges of our courts that we trust to correctly (and carefully) apply this doctrine when they go about resolving legal disputes. This is a far easier task in an established common law system such as the one that existed in South Africa before the new constitutional era was ushered in. But now, in this new era, the emphasis seems to have shifted from consistency to compliance so that a new imperative now rests with judges: that all law, including the common law, be made constitutionally compliant [with FC 39(2)] . . . [However,] [j]udges need to be more disciplined when using the Constitution: unless they give clear reasons articulating how they arrive at their decisions we run the risk of eroding the certainty created by centuries of well-thought out and carefully applied common-law rules.⁴⁵⁷

454 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) ('*NICRO*') at para 21.

455 See, eg, Kevin Hopkins 'The Common Law is Indeed a Living Creature: A Noteworthy Decision is Handed Down in the Cape High Court' (2001) 118 *SALJ* 149; Kevin Hopkins 'Constitutional Rights and the Question of Waiver: How Fundamental are Fundamental Rights?' (2001) 16 *SA Public Law* 122.

456 Kevin Hopkins 'The Influence of the Bill of Rights on the Enforcement of Contracts' 2003 (August) *De Rebus* 22.

457 Kevin Hopkins 'Constitutional Values and The Rule of Law: They Don't Mean Whatever You Want Them To Mean' (2004) 19 *SA Public Law* 433 ('Constitutional Values')(Emphasis added).

FC s 39(2) is Hopkins' preferred mechanism for development of the common law because the invocation of direct application under FC s 8 ostensibly forces the courts to come up with new constitutional remedies. Hopkins' orientation towards FC s 39(2) seems to have been informed by the Constitutional Court's very cautious approach to the creation of new and self-standing constitutional remedies in damages — as distinct from common law and statutory remedies — for rights violations.⁴⁵⁸ However, the creation of a novel constitutional remedy for damages need not be the outcome of direct application of the Bill of Rights to a rule of common law. *National Coalition for Gay and Lesbian Equality v Minister of Justice* is a good example of direct application of the Bill of Rights to a rule of common law and a finding that the rule is unconstitutional.⁴⁵⁹

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Hopkins argues that direct application of the Final Constitution requires

a two-part enquiry. In the first part we ask whether the right has been limited, and in the second part (assuming that the first part is answered in the affirmative) we ask whether the limitation is reasonable and justifiable.⁴⁶⁰

For reasons that go unexplained, Hopkins then asserts that

direct application' works well with attacks on legislation — because the claim is usually that the infringing legislation limits a specific constitutional right in an unreasonable and unjustifiable way.⁴⁶¹

Direct application, he claims, does not work for attacks on rules of common law.

This claim is wrong as a matter of law.⁴⁶² First, there have been any number of successful, direct attacks on rules of common law in which the standard two-stage approach has been employed by the courts.⁴⁶³ Second, there is no reason to

458 See, eg, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) ('*Fose*'); *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC), 2002 (1) SACR 79 (CC), 2001 (10) BCLR 995 (CC) ('*Carmichele*'). In *Fose*, the Court rejected a request to develop a self-standing constitutional action — above and beyond an action in delict — that could result in the award of damages on top of those awarded at common law. In *Carmichele*, the Court modified slightly its views in *Fose* and required the development of the law of delict in light of the spirit, purport and objects of the Bill of Rights. But see *Modderklip* (supra) at para 68 (Court creates a new constitutional remedy grounded in the violation of FC s 34 and the rule of law.)

459 *NCGLE I* (supra) at para 90 ('In this judgment the conclusion has already been reached that this offence should be declared constitutionally invalid in its entirety. This conclusion has been reached by a direct application of the Bill of Rights to a common-law criminal offence, not by a process of developing the common-law'.)

460 Hopkins 'Constitutional Values' (supra) at 435.

461 *Ibid.*

462 See *Shabalala & Others v Attorney-General, Transvaal, & Another* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) (Common-law docket privilege relied upon by the state held by Constitutional Court to be unconstitutional.)

463 *NCGLE I* (supra) at paras 18–90.

conclude that an attack on legislation is based upon one right alone. Constitutional challenges to law are often grounded in multiple rights.⁴⁶⁴

The claim also seems incorrect as a matter of logic. If a rule of common law and a statutory provision can be articulated in exactly the same language, then there are no grounds to support the claim that a rule of common law and an identically phrased statutory provision cannot both be attacked as (a) infringing a specific right and (b) infringing that specific right in an unreasonable and unjustifiable way.

(4) Cheadle, davis, van der walt and ellmann

(a) Cheadle and davis

Halton Cheadle and Dennis Davis are not reluctant to apply the Bill of Rights directly to disputes between individuals. In their article 'The Application of the

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1996 Constitution in the Private Sphere',⁴⁶⁵ they express absolutely no doubt that the Final Constitution is meant to 'subject private power to constitutional scrutiny.'⁴⁶⁶ Their analysis of the text of FC s 8, however, encounters many of the same problems that manifest in *Khumalo*.

The two authors begin by noting that because 'FC s 8(1) binds the state in its different manifestations to the provisions of the Bill of Rights . . . the specific inclusion of the judiciary [in FC s 8(1)] will give rise to its own difficulties.'⁴⁶⁷ What those interpretive challenges are, Cheadle and Davis do not say. Instead of engaging the extension of FC 8(1), Cheadle and Davis focus their attention almost entirely on FC s 8(2). They write:

When we say that the executive is bound that means that the executive cannot act in breach of the Constitution. This means in each case that the legislature and the executive do things that the courts have to measure against the Constitution. Can we ever make the same claim in respect of the courts? Their conduct — the processing of

464 The Constitutional Court often deploys rights simultaneously in the service of its arguments — and it often describes rights as interdependent and symbiotic. See eg, *Khumalo v Holomisa* 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC)(Court twinned privacy and dignity in support of personality rights in a suit for defamation); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC)(Mutually reinforcing rights of religion and culture were deemed to be in conflict with, and ultimately subordinate to, constellation of equality, dignity, freedom and security of the person and children's rights considerations); *NCGLE I* (supra) at paras 28–29 (The constitutional protection of dignity 'requires us to acknowledge the value and the worth of all individuals as members of society'; moreover, 'the rights of equality and dignity are closely related, as are the rights of dignity and privacy'); *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)(Concatenation of rights — conscience, expression, assembly, association, political participation — support finding that sections of Defense Act are constitutionally infirm.)

465 (1996) 12 *SAJHR* 44, 46 ('As both authors were party to the constitutional negotiations and Halton Cheadle was directly involved in the formulation of Chapter 3 [of the Interim Constitution], we have some justification for believing that Chapter 3 required a constitutional audit of all law. Chapter 3 did not create direct constitutional causes of action against private persons, but if a rule of law was involved in private litigation, Chapter 3 was applicable to that rule of law.')

466 *Ibid* at 54–55.

467 *Ibid*.

law claims and the passing of judgments - is not extraneous action to be tested against the Constitution - it is constitutive of the law, including the Constitution, itself. 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 puts beyond dispute that the Bill of Rights can bind natural or juristic persons. ⁴⁶⁸

While I agree with the last sentence, it is hard to comprehend fully the textual basis for the claim. The binding of the executive — like the binding of the judiciary or the application of the Bill of Rights to 'all law' — occurs in terms of FC s 8(1). The authors assert, without argument, that when the common law — an emanation of the judiciary — governs a private dispute, the Bill of Rights applies only in terms of FC s 8(2).

Cheadle and Davis are quite conscious of, and admirably candid about, the fact their analysis of FC s 8 — and their reliance on FC s 8(2) — resurrects, in a modified form, doctrinal difficulties created by *Du Plessis*. Cheadle and Davis write presciently that:

The deep convictions that fired the debate and the majority judgment in *Du Plessis* case will fuel the controversy built into this formulation — how far should judges go in binding private persons to the strictures of the Bill of Rights. Those who fear the Constitution's incursion into private law will use the discretion given in this section to put the brakes on the application of the Bill of Rights to private persons. Those who recognise that power is not the sole prerogative of the state, particularly as the state privatises many of its functions, will use the discretion to provide a remedy to bring private conduct into line with the Constitution when the legislature fails to do so. ⁴⁶⁹

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The rest of their article is given over to a detailed explanation of why FC s 8(2) should not be used to avoid subjecting private relationships to constitutional scrutiny. Addressing themselves to the better angels of those who defend the sanctity of the common law, they write:

The text enjoins a court to take account of the nature of the right and the nature of the duty imposed by the right. The nature of the right may reveal that it is a right capable of being applied to private persons - the right to dignity (*injuria*, defamation); the right to freedom and security of person (*delict*), the right to privacy, the right to an environment that is not harmful to health or well-being (nuisance), right to property, and childrens' rights. We have deliberately selected rights already recognised in the common law to demonstrate that there is an imminent horizontality in respect of many of the rights in Chapter 2. The common law recognition of any of the rights does not always cover the whole ambit of the constitutional right, but the fact that part of the right is capable of application suggests that the right is suitable for application to private persons. ⁴⁷⁰

The argument draws down on the generally accepted notion that the common law seeks to 'balance' competing rights claims in order to service a comparable claim about fundamental rights. I have my doubts about the persuasive power of this rhetorical move. If one thinks that the legislature is best placed to structure the relationships between private persons, then one will be disinclined to use the Bill of

468 Ibid.

469 Ibid at 56.

470 Cheadle & Davis (*supra*).

Rights to restructure such legislation. If one thinks that the body of common law that governs relations between private parties is a densely woven tapestry that is best left to the courts to weave, slowly, incrementally, stitch by stitch over time, then one may be disinclined to use the Bill of Rights to alter the fabric of the common law to suit the emerging exigencies of the constitutional order.

In his recent chapter on application, Halton Cheadle rehearses many of the arguments above.⁴⁷¹ The chapter possesses the added virtue of recognizing that FC s 8(1) 'states that the Bill of Rights "applies to all law."' ⁴⁷² Cheadle then goes on to make the unobjectionable claim that 'all law' means 'law' in all its various manifestations: legislation, subordinate legislation, regulation, common law and customary law. More importantly, he rejects the assertion that the application of the Bill of Rights to legal disputes between the state and an individual differs materially from the application of the Bill of Rights to legal disputes between individuals.⁴⁷³ Such a distinction, Cheadle writes:

. . . has no basis in law, given the changes made to the [F]inal Constitution. All law is now subject to constitutional scrutiny regardless of how and with whom it arises in litigation. A common law rule is no different from any other legal norm — if it is invalid, a court must declare it invalid.⁴⁷⁴

Such a statement should put to rest the issue of the application of the substantive provisions of the Bill of Rights to common law disputes between private

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parties. Several pages later, however, Cheadle writes that FC s 8(2) 'limits' the application of the Bill of Rights with respect 'to private power.'⁴⁷⁵ Some rights — say FC s 9(4)'s injunction against any and all discrimination — must apply to legal disputes between private parties. Other rights — the criminal process rights in FC s 35 and the political rights in FC ss 19(2) and (3), 20 and 21(2), (3) and (4) — can only meaningfully apply to relations between the state and individuals. As for the rest, the Bill of Rights applies if a right asserted is found to be 'suitable for application.'⁴⁷⁶ Perhaps Cheadle means only to draw the distinction offered in the good faith reconstruction of *Khumalo*: namely that while FC s 8(1) commits us to the proposition that the Bill of Rights applies to every kind of law, FC s 8(2) draws our attention to the fact the prescriptive content of the substantive rights may not speak to a particular legal relationship between or to particular kinds of conduct engaged in by private parties.

471 Halton Cheadle 'Application' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 19.

472 *Ibid* at 31.

473 *Ibid* at 33.

474 *Ibid*.

475 Cheadle (*supra*) at 36.

476 *Ibid* at 37.

Cheadle prefers to explain the meaning of FC s 8(2) in terms of what he describes as 'the South African Constitution's special genius.'⁴⁷⁷ What is this 'special genius'? Cheadle writes:

Precisely because generally stated rights are not appropriate vehicles for the imposition of standards of conduct, section 8 seeks to avoid application of the right to conduct of private persons by requiring either legislation or a common law rule 'to give effect to the right.' This constitutional motif of an intermediate law between the constitutional right and the conduct of the state or of the private actor repeats itself throughout the Bill of Rights.⁴⁷⁸

What I understand Cheadle to be saying is that the Bill of Rights rarely, if ever, applies directly to 'conduct'. It applies to law. Is this 'special'? I guess that depends on one's perspective. If one adopts the Hohfeldian view that every dispute that makes it to court is, at bottom, rule-governed, then FC s 8 does not avoid 'application of [a] right to private persons' but rather characterizes the constitutional challenge to the private conduct in question as an attack on a rule of law. FC s 8 may, however, reflect the 'special genius' of its drafters if it is read against the background of a community of practitioners hesitant to adopt the Hohfeldian account and wary of the disruption that generally stated norms might have on a well-settled body of law. The notion that all conduct is, in fact, law-mediated, and mediated through express rules of a statute or the common law, suggests that the Final Constitution is not designed to create a new jurisprudence out of whole cloth but to tailor the existing law to fit the basic law. Is this 'genius'? If Cheadle's elaboration of FC s 8 can convince South African jurists, practitioners and academics that direct application of the specific substantive provisions of the Bill of Rights to all species of law and all kinds of disputes is not something to be feared, but embraced, then his account of FC s 8 is genius incarnate.

I have but one serious qualm about Cheadle's account. For Cheadle, FC s 8(3)(a) stands for the proposition that a court is obliged to develop the common law only where no 'mediating' or existing rule of common law or statutory provision exists to

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give effect to the right that has been violated. I do not agree. If anything, FC s 8(3)(a) must be concerned with the absence of appropriate mediating rules of law. In cases where customary law, common law or statute do not give effect to constitutional imperatives, Chapter 2's rights and freedoms become the unavoidable vehicles for the imposition of new standards of conduct. How could it be otherwise? Where the existing common law is out of step with the rights enshrined in Chapter 2, the courts must set the law right and craft a new rule of common law.⁴⁷⁹ The same is true of statutes. The preferred modality is to strike down a statute or sever an

477 Ibid at 29.

478 Ibid.

479 If striking down common law rules or statutory provisions that govern private conduct — and potentially replacing these rules — especially common law rules — with rules derived from a constitutional right is an accepted, and indeed necessary, part of constitutional review, then it is hard to explain why an area of the law as yet ostensibly ungoverned by an express common law rule or a statutory provision is exempt from direct application of the Bill of Rights. It is especially difficult to see with respect to the common law. That the courts hate to announce that they are making law has more to do with style — the rhetoric of *stare decisis* and judicial law-making — than it does with substance. See Stu Woolman & Danie Brand 'Is There a Constitution in this Courtroom? Constitutional Jurisdiction after *Walters* and *Afrox*' (2003) 192 *SA Public Law* 38.

offending provision. But it is also fair to say that this Constitutional Court has not been shy about 'reading in' words in order to remedy the constitutional flaw in legislation.⁴⁸⁰

'The constitutional motif' of mediating law may also refer to what I have described as the Final Constitution's commitment to 'shared constitutional interpretation.' Various pieces of super-ordinate legislation — the Promotion of Administrative Justice Act, the Access to Information Act, the Equality Act and the Labour Relations Act — give effect to constitutional rights. Such legislation forces the courts to recognize that they share responsibility for giving content to the Final Constitution.⁴⁸¹ Where, however, neither super-ordinate legislation, normal legislation, subordinate legislation nor common law effectively mediate conduct in a manner consistent with the Final Constitution, FC s 8(3)(a) makes it incumbent upon the courts to assist other government actors in developing a system of best practices — at least until constitutionally-mandated enabling legislation appears.⁴⁸²

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(b) Van der Walt

Johan Van der Walt has pedalled, of late, a position on application that deviates somewhat from the rather strong line he took shortly after the Constitutional Court delivered *Du Plessis* and certified the Final Constitution.⁴⁸³ In 'Progressive Indirect Horizontal Application of the Bill of Rights', Van der Walt starts off by defending the proposition that FC s 8(1)'s injunction that the Bill of Rights 'applies to all law' captures both statute and common law alike.⁴⁸⁴ He presses the point by further asserting that whether it is statute or common law that governs a legal dispute

480 See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 67, 68, 70 (Court held that as far as deference to the legislature is concerned, there is 'in principle no difference between a court rendering a statutory provision constitutional by removing the offending part by actual or notional severance, or by reading words into a statutory provision. In both cases the parliamentary enactment, as expressed in a statutory provision, was being altered by the order of a court: in the one case by excision and in the other by addition. The only relevant enquiry was what the consequences of such an order were and whether they constituted an unconstitutional intrusion into the domain of the Legislature. Any other conclusion would lead to the absurdity that the granting of a remedy would depend on the fortuitous circumstance of the form in which the Legislature had chosen to enact the provision in question. Reading in was, depending on all the circumstances, an appropriate form of relief under s 38 of the Constitution and whether a Court read in or struck out words from a challenged law, the focus of the Court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.')

481 *IDASA v ANC* [2005] JOL 14201 (C).

482 For example, FC s 41(2) requires Parliament to pass legislation designed to mediate disputes between organs of state. While draft legislation on intergovernmental relations has now appeared, the lacuna in the law — the lack of mediating law — did not prevent the Constitutional Court from using FC ss 40 and 41 to develop rules designed to resolve intergovernmental disputes. See Stu Woolman, Theunis Roux & Bernard Bekink 'Cooperative Government' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, June 2004) Chapter 14.

483 See John Van der Walt 'Perspectives on Horizontal Application: *Du Plessis v De Klerk* Revisited' (1997) 12 *SA Public Law* 1

484 *Ibid* at 346–347.

between private persons, it is state action all the same.⁴⁸⁵ It matters not whether the law emanates from Parliament or the Constitutional Court. With respect to common-law rules that govern private legal relations, he asks:

Is it not strictly speaking still the relationship between state action and citizens of the state that is at issue here, rather than relations between citizens?

To demonstrate that this is not fanciful academic rhetoric, Van der Walt endorses the reasoning of the US Supreme Court in *Shelley v Kraemer*: non-statutory private law rules can be understood to constitute state action.⁴⁸⁶ On this account, it matters not whether a rule or a relationship is described as vertical or horizontal. An enforceable legal rule is, whatever its provenance, always backed up by the power of the state. When the state acts, the Final Constitution always applies. Van der Walt's gloss on 'Drittwirkung cases decided by the Bundesverfassungsgericht' backs up his thesis on state action:

[V]irtually all the important Drittwirkung cases decided by the Bundesverfassungsgericht turn on an application of the [general] rule [regarding state action articulated] in *Shelley*. Nowhere does the [German Constitutional] Court resort to terminology that suggests that a fundamental right was violated by a private legal subject. The violation of the fundamental right is always attributed to an incorrect interpretation of the bearing of the Federal Constitution of Germany or Grundgesetz on the private dispute by a trial court.

. . . .

The most consistent position to take would be that one can never take the vertical relation or involvement of the state out of horizontal or private legal relationships . . . This implies, of course, that the constitutional review of private legal relations is fundamentally a matter of regular constitutional review of state power.⁴⁸⁷

Van der Walt then equivocates with respect to the proper extension of FC ss 8(2) and (3). Rather than offer a reading of these subsections consistent with his take on FC s 8(1), Van der Walt states that 'I do not wish to again take issue with the interpretive question whether the 1996 Bill of Rights applies directly or indirectly to private disputes.'⁴⁸⁸ He further concludes that:

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We can assume that the future impact of the Bill of Rights will predominantly take place through what has come to be understood as the indirect horizontal application of the Bill of Rights.⁴⁸⁹

This comment could simply reflect Van der Walt's assessment of how the courts have used both the Interim Constitution and the Final Constitution to alter ordinary law. That the claim is probably descriptive, and not prescriptive, is born out by his subsequent statement that the Constitutional Court's ruling in *Fose* underwrites this

485 Ibid at 347.

486 334 US 1 (1948).

487 Van der Walt 'Progressive Indirect Horizontal Application' (supra) at 347-348.

488 Ibid at 351.

489 Van der Walt 'Progressive Indirect Horizontal Application' (supra) at 351.

conclusion. *Fose* supports the contention that the courts are more comfortable modifying the common law through indirect application via FC s 39(2) than through direct application via FC s 8.

That Van der Walt is not, in fact, content to let the matter rest with a descriptive claim is reflected in the following question:

Is it so that there are social relations between private individuals which do not found causes of action and on which the law for this reason, and the 1996 Constitution for that matter (if we ignore for the moment s 8(2), as had to be done when *Du Plessis* was decided) have no bearing? ⁴⁹⁰

It seems to me that Van der Walt wants to say that it is true — in an arguably trivial sense — that there are instances of private conduct that do not found causes of action and upon which the law and the Final Constitution have no *immediate* bearing: namely those instances of private conduct that do not lead to a dispute that winds up in court. To the extent that a dispute must be resolved by a court, it is inevitably mediated by law, and the Final Constitution may have a material bearing on the outcome. I am less certain about how Van der Walt understands FC s 8(2) and FC s 8(3). I think it safe to say that he would not object too strenuously to my preferred reading: namely, they indicate that the courts must create new rules of law to govern the conduct of private persons in those instances in which extant and express rules of ordinary law do not give adequate effect to a substantive provision in the Bill of Rights.

(c) *Ellmann*

As I have already noted, Ellmann devotes the better part of his discussion of application jurisprudence in 'Constitutional Confluence' to a patient explanation of how the term 'organ of state' expands the kinds of entities and relationships captured by FC s 8(1). ⁴⁹¹ After completing his analysis of organs of state, Ellmann moves directly into an analysis of FC ss 8(2) and (3). ⁴⁹²

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About FC ss 8(2) and (3), Ellmann writes:

[S]ection 8(2) states the circumstances in which rights bind private actors — 'if, and to the extent that' they are applicable. Its phrasing seems more instructive than conditional. It does not say that 'rights *may* apply' in certain circumstances, but that they do. Moreover, s 8(3) goes on to specify how courts are to develop the law 'when applying a provision in the Bill of Rights to a natural or juristic person in terms of subsection (2)'; again the import of such phrasing is that there will be such cases. So it does not seem correct to read the new Constitution as 'simply defer[ring] the question of application'; the text is an invitation to such application. What the invitation leaves

490 Ibid at 354.

491 Steven Ellmann 'A Constitutional Confluence: American State Action Law and the Application of Socio-Economic Rights Guarantees to Private Actors' in P Andrews & S Ellmann (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 444, 446-448.

492 Just prior to addressing FC ss 8(2) and (3), however, Ellmann indicates that he believes that the inclusion of the phrase 'binds the judiciary' constitutes the second significant shift in the application provisions of the Final Constitution. He fails to offer an explanation of the significance of this change. Ibid at 450.

very much to the Courts, however, is the elaboration of the proper occasions for this horizontal application, and of the proper methods of carrying it out.⁴⁹³

This paragraph is meant to dispatch the contention that the text is so open-ended that the courts can still avoid direct application entirely.⁴⁹⁴ Ellmann is, however, concerned less with setting out a framework for direct application analysis and concerned more with its ramifications for institutional relations between coordinate branches of government.⁴⁹⁵ As a result, two questions dominate Ellmann's analysis: what are the risks that attach to the courts' acceptance of this invitation to apply the Bill of Rights directly to private legal disputes and how will this acceptance affect the shared responsibility that the courts and the legislature have for shaping constitutional doctrine.

Ellmann has a modicum of sympathy for the view expressed by some that direct application of the Bill of Rights to disputes between private parties may impair majority rule. His sympathy, however, has clear limits. He notes that the Final Constitution reflects a political choice by the majority of South Africans. That democratically determined decision commits our polity to justiciable rights and the direct application of these justiciable rights to private disputes, both of which of necessity 'limit[] legislative prerogatives.'⁴⁹⁶ Failure to recognize these

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express incursions into a supposedly pure legislative domain would itself be an affront to 'democratic principles'.⁴⁹⁷

Ellmann notes that the South African Bill of Rights has a way of mitigating 'infringements on majority rule and the impairment of policy-making.'⁴⁹⁸ The capacity for 'indirect application' of the Bill of Rights — and the ability to create constitutional common law — 'avoids the potentially undemocratic and inflexible character of constitutional adjudication by turning instead to development of the common law guided by constitutional values.'⁴⁹⁹ The apparent advantage of indirect

493 Ellmann (supra) at 451.

494 Ellmann goes on to note that while the dominant tradition in application jurisprudence has been one that eschews direct application to private actors, that tradition 'may be shifting' and that the drafters of the South African Constitution intended to 'depart from [that tradition] to some extent.' Ibid at 452.

495 Ellmann's failure to address the meaning of FC s 8(1)'s 'applies to all law' and 'binds . . . the judiciary' leads him to speak as if direct application is also something that FC s 8(1) invites rather than demands. As I have noted, application is, in fact, always only an invitation. Application analysis never determines the prescriptive content of a right — although it may serve to shape it. Ellmann's two-fold omission reflects, however, a momentary lapse in analytical rigour. As I have already noted in the body of the chapter, while much of the application debate engages disputes between private parties governed by common law, it is at least important to discuss what it means for Chapter 2 to bind the legislature or to apply to legislation. Ellmann, like most commentators, refuses to draw the unavoidable conclusion that if FC s 8(2) determines the conditions for direct application of the Bill of Rights to all legal disputes between private parties, then it necessarily determines the conditions for direct application of the Bill of Rights to all legal disputes between private parties governed by legislation. Conversely, if the binding of the judiciary in FC s 8(1) is genuinely a noteworthy change, it must be because it means that *all* emanations from the judiciary are subject directly to the provisions in the Bill of Rights.

496 Ellmann (supra) at 453.

application is that such constitutional common-law rules can be 'overridden freely by the legislature.'⁵⁰⁰

This weaker form of judicial intervention is not a complete solution to separation of powers problems. Ellmann identifies two distinct causes for concern.

Indirect development of the common law does not ensure judicial deference to later legislative interventions in the same area of law. As Ellmann observes in his discussion of the history of the *Miranda* rule in US jurisprudence, even an invitation by the courts to the legislature to address afresh an area of law may later be withdrawn.⁵⁰¹

Sometimes, however, indirect application may not be intrusive enough. Ellmann writes that the choice to develop the common law under FC s 39(2) means that future violators of the new common law rule will only be guilty of violating the common law and not the Final Constitution. Why this outcome counts as a separation of powers concern is not quite clear. After all, the courts are not guilty of doing too much vis-à-vis the legislature. They seem to be doing too little.

The potential for judicial over-reliance on FC s 39(2) and indirect application forces Ellmann to attend once again to the point of the invitation extended by FC ss 8(2) and (3). He states that we could not possibly be meant to rely entirely on

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FC s 39(2) for the development of constitutional common law because that would leave us exactly where we were after *Du Plessis* and 'undercut the symbolic force of [FC] s 8(2).'⁵⁰²

497 Ellmann (supra) at 453. The Constitutional Court has repeatedly noted that as one of the guardians of the Bill of Rights, it is sometimes obliged to reject the considered opinions of the other two co-ordinate branches of government. *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of The Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC); *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC); *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC).

498 Ellmann (supra) at 454.

499 Ibid.

500 Ibid.

501 *Miranda v Arizona* 384 US 436 (1966) ('*Miranda*'). While the US Congress enacted such legislation two years later — making a *Miranda*-like warning but one of several considerations for the admissibility of a confession — the statute was rarely utilized because of 'doubts about its constitutionality.' Ibid at 455. When the statute finally arrived at the Supreme Court's doorstep over three decades after its passage, the institutional comity of the initial invitation for a legislative override was itself overridden by the US Supreme Court's view that the decision had now become part of accepted police practice and, perhaps more importantly, a part of 'our national culture.' See *Dickerson v United States* 530 US 428 (2000).

502 Ellmann (supra) at 456.

One clear virtue of this line of analysis is that it recognizes expressly the distinct processes required by FC ss 8(2) and (3), on the one hand, and FC s 39(2), on the other. FC s 8(2)'s invitation to undertake direct application of the Bill of Rights to private disputes entails that the new remedies anticipated by FC s 8(3) cover cases in which a specific provision of the Bill of Rights applies directly to a dispute between private actors. FC s 39(2) addresses instances in which the 'Bill of Rights [does] not apply' directly, 'but [is] merely guiding.'⁵⁰³

For those committed to a transformative vision of the Final Constitution, FC s 8(1), s 8(2), s 8(3) and s 39(2) support the claim that 'there are no legal questions left in South Africa to which the Bill of Rights is simply and inherently irrelevant.'⁵⁰⁴ For those concerned about issues of institutional comity, this sliding scale of application allows, on the one hand, for the constitutionalization of private legal disputes through the articulation of clear constitutional rules that emanate directly from specific provisions of the Bill of Rights — rules which are not especially amenable to override — and, on the other hand, makes provision for the creation of constitutional common-law rules that have no clear textual lineage — rules which leave room for 'legislative innovation'.⁵⁰⁵

503 Ibid.

504 Ibid at 457.

505 Ibid.