



**THE APPLICATION OF FUNDAMENTAL RIGHTS TO PRIVATE RELATIONS IN KENYA:
STRIKING A BALANCE BETWEEN FUNDAMENTAL RIGHTS AND THE
FREEDOM OF CONTRACT**

**CHRISTINE NOELLA LUBANO
LBNCHR007
LLM IN CONSTITUTIONAL & PUBLIC ADMINISTRATIVE LAW**

SUPERVISOR: PROFESSOR RICHARD CALLAND

Research dissertation paper presented for the approval of the Senate in fulfilment of part of the requirements for the qualification for an LLM in Constitutional & Public Administrative Law in approved courses and a minor dissertation paper. The other part of the requirement for this qualification was the completion of a programme of courses.

September, 2013

Word Count: 24, 238 Words

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of qualification for an LLM in Constitutional & Public Administrative Law dissertation including those relating to length and plagiarism as contained in the rules of this university and this dissertation conforms to those regulations.

Signed:.....

Dated:

University of Cape Town

DEDICATION

For Dad, Mom and Teresa.

ACKNOWLEDGEMENTS

A great number of people accompanied me on this journey; I am unable to list all of you but I would like you to know that your support and encouragement made it a great and easy ride.

I am especially grateful to my supervisor, Professor Richard Calland, for his invaluable guidance, encouragement and unwavering belief in me. You continue to be a great inspiration to me and no doubt, to many other students like me.

I would also like to thank Justice David Majanja and Geoffrey Imende for taking time off their busy schedules to listen, advise and provide me with very useful insights on the Kenyan legal system. Many of the views expressed in my study are drawn from ideas that they shared or discussed with me and for that reason; I am eternally grateful.

For all the friends that made sure to keep track of my progress and of me, especially Lorna Mainnah, Milly Odari, Martha Gitonga, Nafysa Adam, Judy Gitau, Patricia Odero, Jackline Nyabwa, Anne Makhulo, Wanjiru Ngige, John Keah and Tom Magara, thank you for being there and for cheering me on.

And to my new found Capetonian friends, Stella, Amina, Imran, Justice, Faith and Tsanzo, your company, concern, friendship and laughter made the 'abroad' experience interesting and exciting. Thank you all - I look forward to many more years of what can only be described as a great friendship.

I also wish to thank Dad, Mom, Teresa Lubano and Agnes Mindila, for being my biggest fans; you inspire me to be better every day.

And finally, I must acknowledge that I would hardly have made it thus far without God's grace.

TABLE OF CONTENTS

DECLARATION	i
DEDICATION	ii
ACKNOWLEDGEMENTS	iii
TABLE OF CONTENTS.....	iv
CHAPTER 1	1
The Application of Fundamental Rights to Private Relations in Kenya: A Case of Unintended Consequences, or Not?	1
I Introduction.....	1
II Objectives of the Study.....	5
III Hypothesis.....	6
IV Literature Review.....	6
V Overview of the Study.....	8
CHAPTER 2	10
Freedom of Contract versus the Need to Protect the Weaker Party	10
I Public and Private Law	10
II Freedom of Contract.....	12
III The Need to Protect the Weaker Party	16
IV The Courts' Approach to the Application of Fundamental Rights in the Private Sphere 18	
a) <i>Brisley vs. Drotsky ('Brisley')</i>	19
b) <i>Afrox Health Care Bpk vs. Strydom (Afrox)</i>	20
c) <i>Barkhuizen vs. Napier ('Barkhuizen')</i>	21
d) <i>Maphango v Aengus Lifestyle Properties (Pty) Limited ('Maphango')</i>	22
CHAPTER 3	24
Direct and Indirect Applications of Fundamental Rights to Private Relations.....	24
I The Changing (and Conflicting) Views on 'Horizontality' in Kenya.....	24
II The Constitution Binds 'the State', 'all State Organs', 'all Persons' and 'all Law'	27
III The Obligation of Courts in South Africa to 'Develop the Common Law'	31
VI Direct Horizontal Effect vs. Indirect Horizontal Effect: A Comparative Analysis.....	33
V Conclusion.....	36

CHAPTER 4	38
Horizontality in Kenya: The Proportionality Test and Other Considerations	38
I Factors to Consider when Applying Fundamental Rights to Private Relations	38
II ‘Balancing Rights’ and the (In)adequacy of the Proportionality Test.....	44
III Indirect Horizontal Effect as a Solution to the ‘Balancing’ Problem.....	46
CHAPTER 5	49
The Way Forward: Challenges and Recommendations.....	49
I Contractual Waiver	49
II Legal Culture, Constitutional Tradition & Other Constraints.....	52
III Enabling Legislation.....	55
IV Conclusion - Are we BackWhere we Started?	57
BIBLIOGRAPHY	59

CHAPTER 1

The Application of Fundamental Rights to Private Relations in Kenya: A Case of Unintended Consequences, or Not?

'...It is highly desirable and in fact necessary to infuse the law of contracts with constitutional values...'—Moseneke DCJ¹

I Introduction

Fundamental rights and freedoms were originally regarded as protections necessarily accorded to individuals against abuse of state power and thus were framed as applicable between the state and its citizens ie, in a vertical relationship as opposed to a horizontal relationship.² This was mainly because the relationship between the state and the individual was not one of equality as the state was far more powerful than the individual. Further, the fact that the state had a monopoly on the legitimate use of force within its territory meant that an individual would be in an extremely vulnerable position if he or she was not protected by a bill of rights against abuse of the state's power.³

Over time however, fundamental rights have evolved to include an obligation on individuals and private entities to uphold them in recognition of the fact that rights abuses can also be caused by private actors.⁴ Private individuals and enterprises have even been said to infringe fundamental rights more often and to a greater extent than

¹*Everfresh Market Virginia (Pty) Limited v Shoprite Checkers (Pty) Limited* [2011] ZACC 30 para 71.

²J Fedtke 'Drittwirkung in Germany' in *Human Rights and the Private Sphere: A Comparative Study* 126. See also Cheadle, Davis & Haysom in *South African Constitutional Law: the Bill of Rights* where they state that the primary function of a constitution is to restrain the state in respect of the kind of laws it passes and the manner in which it conducts itself (3-2). See also JH Knox's article titled 'Horizontal Human Rights Law' available at http://www.asil.org/pdfs/ajil_horizontal_human_rights_law.pdf where he observes that the drafters of the initial human rights instruments such as the Universal Declaration of Human rights were aware of the possibility of human rights applying horizontally but chose to adopt an approach that relegated private duties to the margins because they saw the danger of governments relying on such duties to limit human rights in unpredictable and unacceptable ways.

³Currie & De Waal *The Bill of Rights Handbook 5ed* (2005) 43.

⁴D Chirwa 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' available at <http://www.saflii.org/za/journals/LDD/2006/9.pdf> where he demonstrates a growing trend towards an increasing recognition of the relevance or applicability of constitutional rights to private actors.

public authorities.⁵ It is therefore not surprising that very few jurisdictions still adopt a purely vertical approach.⁶

Ordinarily, the extent to which the courts of a country will enforce fundamental rights against individuals and private entities will vary from jurisdiction to jurisdiction, often depending upon legal culture, constitutional tradition and conceptions of fundamental rights.⁷ A key factor is the status of norms contained in the constitutional system. If these norms are envisaged as primarily concerned with controlling the functions of public bodies then there may be some reluctance to apply fundamental rights in the private sphere. However, if constitutional norms are seen as fundamental legal principles that should permeate all law whether public or private, and which all legal actors should respect, then there may be much greater willingness to apply these norms in private law.⁸

In Kenya, the application of the fundamental rights in the private sphere remains a highly controversial and unresolved issue. As this study will demonstrate, there are no easy answers, rather, ample scope for confusion and therefore, uncertainty as the jurisprudence develops.

Consider for instance, two recent decisions by the High Court of the Republic of Kenya (“**the High Court**”) that dealt with the application of fundamental rights between private parties. The judges presiding over each of these cases applied different constitutional provisions to arrive at diametrically opposed conclusions on the matter.

The first case was a decision delivered on 5th April 2013 by *Lenaola J* which concerned a constitutional petition by Mr. Uhuru Muigai Kenyatta (“**Mr. Kenyatta**”) in which he complained about a publication by the *Nairobi Star* newspaper which suggested that he was involved in a plot to murder the former head of the outlawed *Mungiki* sect. The publication also suggested that if Mr. Kenyatta succeeded in his presidential quest, he would be the most depraved president the country would ever

⁵C Mak ‘Interaction between Fundamental Rights and Contract Law’ in *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy, England* 47, 48.

⁶C O’Cinniede ‘Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment’ in *Human Rights & the Private Sphere: A Comparative Study* 245.

⁷Ibid.

⁸O’Cinniede op cit (n6) 214.

know.⁹Mr. Kenyatta argued that the publication constituted a gross violation of the constitutional right to freedom of expression and the media.¹⁰

On its part, *Nairobi Star* objected to Mr. Kenyatta's petition arguing that the fundamental rights and freedoms set out in the Kenyan Constitution can only be enforced against the state and state organs and not private individuals as sought by Mr. Kenyatta. *Nairobi Star* further argued that Mr. Kenyatta's claim if any, was a claim under the tort of defamation and could only be remedied in a civil suit and not through a constitutional petition.

In determining the matter, *Lenaola J* relied on Article 21(1) of the Kenyan Constitution and local and international case law to find that fundamental rights and freedoms did not apply between private parties.¹¹ In his view, the said provision required the state and every state organ to observe, protect, promote and fulfil the fundamental rights and freedoms in the Bill of Rights. He observed that a similar obligation had not been imposed on private parties. *Lenaola J* quoted with approval the findings of *Maxwell C.J.* in *Teitiwinnang and Ariong & Others*¹², where the latter stated that:

'Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of the fundamental rights provisions of the Constitution. The rights and duties of individuals and between individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the governed. I am of the opinion that an individual or a group of individuals as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals...no action for a declaration that

⁹*Kenyatta vs. Nairobi Star Publications Limited* High Court Petition No. 187 of 2012. Article 33 of the Constitution guarantees the right to freedom of expression while Article 34 guarantees the right to freedom of the media.

¹⁰Mr. Kenyatta was elected as the President of the Republic of Kenya on 9th April 2013.

¹¹Article 21 of the Constitution states that:

"It is a fundamental duty of the State and every State organ to observe respect, promote and fulfil the fundamental rights and freedoms in the Bill of rights. The local cases relied upon by Justice Lenaola were all decided under the former Constitution of the Republic of Kenya (1969) and their application and relevance to the current case is rather doubtful.

¹²[1987] L.R.C. Const. 517.

there has been a breach of duty under the provision can be or be maintained in the case before me, and I so hold.'

Contrast the above decision with a second one that was delivered by *Githua J* on 21st December 2012.¹³ In this case, *Cradle*, a non-governmental organization with a mandate to protect the rights of children sought an order to compel *Nation Media Group Limited (Nation Media)* to provide sign language insets or subtitles in all newscasts, educational programmes and all programmes covering events of national significance. *Cradle* argued that *Nation Media's* failure to do so constituted a violation of the express provisions of section 39 of the Persons with Disabilities Act as well as a violation of the constitutional right of persons with disabilities to receive information and not to be discriminated against on account of their disability.¹⁴

On its part, *Nation Media* argued that pursuant to Article 21(1) of the Kenyan Constitution, it is the duty of the state and not *Nation Media* to address the needs of vulnerable groups in society. *Nation Media* further argued that the implementation of sign language insets was costly and would expose it to heavy losses. It justified its position on the basis of Article 44(1) of the Kenyan Constitution which entitled it to use a language of its choice including sign language.¹⁵ *Nation Media* further argued that the orders sought by *Cradle* if granted would amount to interference or control of *Nation Media's* broadcasting function contrary to Article 34 of the Kenyan Constitution.¹⁶

In determining the matter, *Githua J* relied on Article 2(1) and Article 20(1) of the Kenyan Constitution as a basis for finding that the Bill of Rights '*applies to all laws and binds all state organs and all persons*'.¹⁷ In her view, state organs as well as private entities such as *Nation Media* were bound to respect and obey all the provisions of the

¹³*Cradle (The Children Foundation) suing as trustee through Geoffrey Maganya vs. Nation Media Group Limited*, High Court JR. Misc. App. No. 217 of 2011.

¹⁴ Article 27(4) and 27(5) state that:

"(4) The State shall not discriminate directly or indirectly against any person on any grounds including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)."

¹⁵ Article 44(1) states that:

"Every person has the right to use the language and to participate in the cultural life of the person's choice."

¹⁶ Article 34(2)(a) of the Constitution states that:

"The State shall not;

(a) Exercise control over or interference with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium."

¹⁷See note 11 on Article 21(1) of the Constitution. Article 2(1) of the Constitution states that:

"The Constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government."

Kenyan Constitution. She therefore found that the Kenyan Constitution imposed a duty on all persons and not just the state to ensure access by persons with disabilities to all places, public transport and information. In reaching this conclusion, *Githua J* stated that:

‘The Constitution makes it clear that there is both a vertical – state to citizen and horizontal – citizen to citizen application of the Bill of Rights...’

The *Kenyatta Case* and the *Cradle Case* are currently pending before the Court of Appeal of Kenya for determination. Consequently, neither decision can be said to conclusively represent the correct legal position on the matter in Kenya.¹⁸ These cases and (several others discussed in Chapter 3) are illustrative of the confusion that exists in Kenya regarding the application of fundamental rights in the private sphere. Indeed, one could be forgiven for wondering whether the legislators of the Kenyan Constitution truly intended that fundamental rights should apply between private parties or whether such an application (if any) was the unintended consequence of heavy borrowing of constitutional provisions from other jurisdictions such as Germany and South Africa; both of which have very unique constitutional histories and took deliberate steps to ensure that fundamental rights could be enforced against private actors.¹⁹

II Objectives of the Study

The main objective of this study is to consider whether the Kenyan Constitution supports a horizontal application of fundamental rights and if so, the extent to which the courts in Kenya may enforce such rights against private persons. The study offers a considered analysis of when and how fundamental rights should be applied to private relations. In this regard, it is a modest attempt to contribute to the almost non-existent jurisprudence of the concept of ‘horizontality’²⁰ in Kenya and it is also hoped that the study will be of practical interest to judges and legal practitioners. Although the study is mainly concerned with the intervention of fundamental rights in contractual relationships, a number of the examples that will be referred to shall be drawn from cases dealing with

¹⁸The writer is not aware of any decisions of the Court of Appeal or the Supreme Court of Appeal that deal with the issue of the application of fundamental rights and freedoms between private parties.

¹⁹D Oliver and J Fedtke in *Human Rights and the Private Sphere: A Comparative Study* observe that the Basic Law is in many respects a reaction to the severe human rights violations committed in Germany following Hitler’s rise to power in January 1933, violations committed not only by the state and its agents but also by single individuals or organizations outside any official context. They also observed that in South Africa, a full application of human rights in the private sphere was regarded as the most appropriate safeguard against ‘privatized apartheid’. 128,361.

²⁰Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* at 3-4 describe the term ‘horizontality’ as the manner in which the Bill of Right engages with natural or juristic persons.

tort actions as some of the issues arising in those cases are relevant to the matters under discussion.

III Hypothesis

This study proceeds from the presumption that both fundamental rights and freedom of contract are extremely important for any legal order. However, the study acknowledges that the two concepts will sometimes conflict particularly when fundamental rights are applied to private relations. This study seeks to explore ways in which a balance can be struck between the two concepts in order to ensure the maximum protection of fundamental rights with the minimum amount of interference with the contractual autonomy of parties.²¹

The study proposes that an indirect horizontal approach offers the best method of striking this balance as it acknowledges the importance of fundamental rights while at the same time seeks to resolve conflicts primarily through the prism of private law.²² It is therefore regarded as a compromise between the dangers of suffocating state intervention via broadly phrased constitutional phrases and an equally unattractive acceptance of unrestricted commercial power in the private sphere.²³

The study further proposes that whereas an indirect horizontal approach is the preferred method of ensuring that fundamental rights are protected in the private sphere, it is not on its own, an adequate means of achieving this objective and will require to be complemented by legislation that is aimed at giving effect to the fundamental rights in question.

IV Literature Review

It is not possible to set out a comprehensive literature review of the study. I therefore propose to briefly discuss a few of the principle works that have been referred to in the study.

The theoretical framework of the study is principally drawn from the early works of *Pound's* essay titled '*Liberty of Contract*'.²⁴ Whereas the application of fundamental rights in the private sphere has always been perceived as an unwarranted interference with contractual autonomy, *Pound's* article suggests that this doctrine was never

²¹O'Cinniede op cit (n6) 243.

²²Fedtke op cit (n2)153.

²³Fedtke op cit (n2)155.

²⁴R Pound '*Liberty of Contract*' Volume 18 of the Yale LJ 17.

envisaged as being entirely free from restrictions or limitations. He does so by explaining how the laws of equity and other legal doctrines have always played a role in limiting contractual autonomy. This study relies on the arguments made by *Pound* to justify the restrictive role that fundamental rights play in the private sphere.

The works of *Bhana & Pieterse* in '*Toward a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited*' as well as the works of *Cockrell* in '*Can You Paradigm? – Another Perspective on the Public Law/Private Law Divide*' provide extremely valuable insights on the concept of bargaining power in contractual relationships. Both authors provide what is perhaps the strongest justification for the intervention of human rights in the private sphere by drawing a distinction between '*formal equality*' and '*genuine equality*' in contractual transactions. Their studies lend support to the proposition that fundamental rights ought to play a greater role in contracts that do not appear to represent a genuine equality in bargaining power.

Excerpts from *Professor Liebenberg's* book titled *Socio-Economic Rights: Adjudication under a Transformative Constitution* are extensively cited in the study. Although her focus is on the enforcement of socio-economic rights in South Africa, she provides a comprehensive analysis on the horizontal enforcement of fundamental rights and makes a very strong case for their direct enforcement in the private sphere. Her position suggests that constitutional norms and values should take precedence over contractual autonomy. However, unlike *Liebenberg's* position, this study argues that neither of the two legal concepts ought to privilege the other.

The study also refers extensively to the works of *Collins*, a professor at the London School of Economics and Political Science. In a Law Society Economy Working Paper titled '*The (In)compatibility of Human Rights Discourse and Private Law*', *Collins* argues that fundamental rights (as traditionally understood) are unsuitable for the resolution of disputes between private parties. He therefore advocates for the 'modification' or 'translation' of fundamental rights before they can be suitably transposed into the private sphere. *Collins* works are significant to the study as they serve to highlight some of the difficulties that are likely to arise from the practical application of fundamental rights in the private sphere and make various suggestions of how they can be overcome.

The study also refers to an article authored by *Cherednychenko* titled '*Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or Towards Walking Circles*' where she discusses the question of horizontality from a European perspective and advocates for the limitation of the impact of fundamental rights in the private sphere. Whereas *Liendenberg* argues that fundamental rights should play a greater role in the private sphere in order to protect weaker parties, *Cherednychenko* is of the view that fundamental rights should play a limited role in the private sphere. She argues that a dispute between private parties is to remain substantively and procedurally a private law dispute even though the rights and duties arising under the contract would be influenced by constitutional rights. Similar views are expressed by *Cheadle, Davis & Haysom* in their book titled *South African Constitution Law: The Bill of Rights*. The approach proposed by *Cherednychenko* is significant to this study because it is consistent with an indirect horizontal effect which the study recommends as being the most appropriate approach for Kenya's legal system.

Finally a comparative study of how countries such as South Africa, Germany, Ireland, Canada and USA have dealt with the issue of horizontality is carried out in Chapter 4 of this study. This analysis mainly relies on a collection of studies on horizontality by various authors which have been compiled by *Fedtke & Oliver* in *Human Rights and the Private Sphere: A Comparative Study*.

V Overview of the Study

Chapter 2 begins by examining the implications of the public/private divide on the application of fundamental rights to private relations. It also explores the different arguments made in support of the horizontal application of fundamental rights including the fact that such an intervention serves to protect the weaker party in contractual disputes. The arguments made in opposition to the application of fundamental rights in the private sphere are also discussed in this chapter. Here, the main concern raised is that such an application would interfere with a party's autonomy and freedom of contract.²⁵ Chapter 2 concludes with a brief analysis of South African case law on the point.

Chapter 3 traces the development of fundamental right in Kenya from the period before the promulgation of Kenyan Constitution to date. Various provisions of the

²⁵E Barendt 'The United States and Canada: State Action, Constitutional Rights and Private Actors' in *Human Rights and the Private Sphere: A Comparative Study* 425.

Kenyan Constitution are also examined with a view to considering whether they lend support to the horizontal application of fundamental rights. The main focus of this chapter is however on the different ways in which fundamental rights can be enforced against private parties; that is, directly or indirectly. Also discussed are the merits and demerits of an indirect and a direct horizontal approach to the application of fundamental rights in the private sphere. Chapter 3 concludes with a comparative analysis of the approach that various countries such as Germany, South Africa, Ireland, Canada and USA have adopted with regard to the application of fundamental rights in the private sphere.

Chapter 4 is concerned with the question of when and how to apply fundamental rights in the private sphere. The chapter begins by setting out the factors that the courts ought to consider when determining whether fundamental rights should be applied horizontally. It also examines the adequacy of the proportionality test as a means for 'balancing' fundamental rights when they come in conflict in private disputes and explains why this test may require substantial modifications to render it appropriate for a horizontal application.

The final chapter identifies some of the challenges that affect the application of fundamental rights and freedoms in the private sphere in Kenya. The focus of this chapter is on two issues, namely; a) an inflexible legal culture and constitutional tradition in Kenya and b) the custom of 'contracting out' or contractual waiver. Chapter 5 concludes by making various recommendations and proposals for reform.

CHAPTER 2

Freedom of Contract versus the Need to Protect the Weaker Party

'Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.' – Lord Northington²⁶

This chapter seeks to identify the theoretical location of fundamental rights in the private sphere. The study begins by discussing the implications of the application of fundamental rights to the public/private divide. Thereafter, it examines the doctrine of freedom of contract with a view to exploring the extent of its boundaries. Ultimately, the central question that this chapter seeks to answer is whether the need to protect the weaker party in a contractual relationship justifies a limitation or restriction of the contractual freedom of others by means of fundamental rights.

I Public and Private Law

Public law was developed in response to actual and potential abuses of power by public authorities. The content and character of those rights has evolved to combat different kinds of abuse of power encountered in that context, whether it be the imposition of restrictions on liberty by a majority in the legislature in the name of some particular values or religion, or the misuse of coercive powers by executive agencies such as the police.²⁷ Although analogous problems of abuse of power may occur in a private law context, they are not generally speaking, a central concern of private law. Private law is more oriented towards the protection of economic interests of individuals against harms caused by other individuals, whether through commission of wrongs against those interests or breaches of contractual undertakings and other promises.²⁸

Accordingly, the idea has always been that 'public law' governs the relations between persons and the state, while private law is concerned with the relationship between individual citizens.²⁹ Whereas in public law rights serve principally as a defensive weapon against infringement by the state, in private law, rights are positive claims (often described as interests) that must be balanced between the

²⁶Vernon v Bethel, 2 Eden 110,113.

²⁷H Collins 'On the (In)compatibility of Human Rights Discourse and Private Law' in LSE Law Society & Economy Working Papers 7/2012 11,12.

²⁸Ibid.

²⁹A Cockrell 'Can You Paradigm? – Another Perspective on the Public Law/Private Law Divide' (1993) *Acta Juridica* 227.

parties.³⁰ Further, while public law is actively interventionist, private law is considered to be minimalist.³¹

Legal critics have often argued that the differences between private and public law provide the underlying reason for doubt about the practicality and appropriateness of inserting fundamental rights into private law.³² Collins makes this point as follows;

*“.. the proposal to use fundamental rights to determine the rules governing private relationships breaks down the traditional legal demarcation between the rules of public law, which govern the relation between the citizen and the state and the rules of private law which regulate private relations between citizens and business associations. The categories of public and private law are perhaps legal constructions that may not matter very much in themselves and a blurring of those boundaries may not create a serious risk for a legal system. However, the boundaries are not pointless. They have evolved as a functional response to practical problems of government and adjudication.”*³³

However, Gertenberg & Van der Walt argue that private and public law are intertwined and inseparable and that coherence throughout an entire legal system is more likely to be achieved through some method of ensuring a common set of values apply in both areas than by creating unsustainable barriers.³⁴ Similarly, Cockrell, argues that every facet of private law carries with it a public aspect.³⁵ In other words, all law, both private and public, rests ultimately on the core protection of fundamental rights and if this is true; then there can be no objection in principle to granting horizontal effect to fundamental rights.³⁶

There is a school of thought that suggests that public law and private law should be treated separately because the relationship between the state and the individual is essentially one of unequal parties whereas private law is concerned with relationships between parties who are possessed of equal power.³⁷ Cockrell disagrees with this assertion; he states that one only needs to look at the vast disparities of power that

³⁰Collins op cit (n27) 4.

³¹Cockrell op cit (n29) 223.

³²Collins op cit (n27) 14.

³³Collins op cit (n27) 32.

³⁴O’Cinniede op cit (n6) 247.

³⁵Cockrell op cit (n29) 220

³⁶Collins op cit (n27) 20.

³⁷Cockrell op cit (n29) 228.

attaches to the unequal possession of material resources in contemporary society to see that contractual relationships between private persons are not always equal. He argues that a shift of focus from '*formal equality*' to '*economic inequality*' will reveal the vast imbalances in power between private parties that were hitherto suppressed.³⁸ As we shall see later in this chapter, the absence of '*genuine equality*' of bargaining power (as opposed to '*formal equality*') between contracting parties provides one of the strongest justifications for the intervention of fundamental rights in the private sphere.

It has also been contended that the application of fundamental rights in a private law context would result in ascribing to them a function outside their original scope and purpose.³⁹ Legal critics have also expressed concern about the ability of broadly phrased constitutional principles to provide adequate solutions for the more intricate problems of private law. They argue that the open-endedness of constitutional values means that their content is inevitably contested and consequently, can become a ground for competing political philosophies such as libertarianism and egalitarianism.⁴⁰

As stated above, fundamental rights are particularly important in situations of unequal contractual bargaining power. They also operate as a remedy of last resort in situations where private law does not provide any remedy or is insufficient. Further, while it is true that constitutional norms are broadly phrased and were not conceived with private interests in mind, there is nothing to prevent the courts from developing and modifying the content of a particular fundamental right to render it suitable for application in the private context. This can also be achieved through the formulation of legislation aimed at giving effect to the various fundamental rights. In Kenya, such legislation includes the Employment Act and the National Gender & Equality Commission Act, the Consumer Protection Act and the Basic Education Act among others.

II Freedom of Contract

One of the strongest arguments lodged against the application of fundamental rights in the private law sphere is that a horizontal application of fundamental rights will constitute an unwarranted intrusion of the contractual autonomy of individuals.⁴¹

Consequently, those opposed to the application of fundamental rights in the private

³⁸Cockrell op cit (n29) 227, 228.

³⁹Collins op cit (n27) 12,13.

⁴⁰D Bhana & M Pieterse 'Toward a Reconciliation of Contract Law and Constitutional Values: Brisley and Afro Revisited' *SAHRLJ* (2005) 876.

⁴¹Cheadle, Davis & Haysom op cit (n20) 3-7.

sphere often advocate for an autonomous civil society with which the state should interfere as little as necessary.⁴² I discuss this argument below.

Private law is aimed at providing strong protection to vested private property rights and the negative freedom to contract freely without undue judicial intervention (expressed in the doctrine, *pacta sunt servanda*).⁴³ In the United States, for example, it is said that the great object of the framers of the constitution undoubtedly was to secure the inviolability of contracts. This principle was to be protected in whatever form it might be assailed. The fundamental maxims of free government seemed to require that the rights of personal liberty and private property be held sacred.⁴⁴

In other jurisdictions, the freedom to contract was regarded as a natural right.⁴⁵ The decision to enter into a potentially restrictive private law relationship in the first place was in many cases considered to be an expression of private autonomy and as such, a consequence of freewill of the parties.⁴⁶ The value of liberty was in its classical sense understood to imply that individuals were free to choose how to live their lives and that no entity should be allowed to interfere with individual choices which have freely been made.⁴⁷ This was emphasized in the case of *Allgeyer v Louisiana*,⁴⁸ where *Mr. Justice Bradely* stated that:

'The liberty mentioned ... means, not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration; but the term is deemed to embrace the right of the citizen... to be free to...enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes mentioned above.'

In England, freedom of contract was viewed as a means of enhancing human progress.⁴⁹ *Mr. Justice Field* who led the individualist crusade was of the view that the individual counted for more than the state imposed law.⁵⁰ The individualist's task was therefore to abolish a body of antiquated institutions that stood in the way of human

⁴²Fedtke op cit (n2)129.

⁴³S Liebenberg *Socio-Economic: Adjudication under a Transformative Constitution*317, 341.

⁴⁴R Allen *Constitutional Protection of Private Property and Freedom of Contract* (2000) 505.

⁴⁵Pound op cit (n24) 17.

⁴⁶Fedtke op cit (n2) 144.

⁴⁷Bhana & Pieterse op cit (n40)877.

⁴⁸165 U.S 578.

⁴⁹Pound op cit (n24) 19.

⁵⁰Pound op cit (n24) 32.

progress; freedom of contract was viewed as the best instrument at hand for this purpose. Common law too became thoroughly individualistic.⁵¹

Arguably, the result was the exaggeration of private rights at the expense of the public interest. Blackstone's proposition that '*the public good is in nothing more essentially interested than in the protection of every individual's private right*' was quoted in more than one decision. Courts concerned themselves primarily with the formal validity and enforcement of contracts rather than their substantive fairness. The result was a certain prediction and efficient framework within which parties could contract.⁵² Most courts overthrew legislation that was considered in derogation of liberty, and insisted that only common law incapacities could be given legal recognition and that new incapacities; growing out of new conditions in business and industry could not be taken advantage of in legislation.⁵³ The right to contract freely was to yield only to the safety, health or moral welfare of the public.⁵⁴

According to the scholarship of *Pound*, this approach assumed that incapacities not known to common law could not be recognized by the legislature and ignored the fact that Courts of Chancery had wielded a not inconsiderable power of interference with freedom of contract.⁵⁵ In fact, freedom of contract has always been limited by public interests.⁵⁶ From the time that promises not under seal have been enforced, equity had interfered with contracts in the interests of weak, necessitous, or unfortunate promisors. Common law, it was said, would not help a fool but equity existed to help and protect him. As *Pound* observed, '*it is because there are fools to be defrauded and imposed upon and unfortunates to meet with accidents and careless to make mistakes that we have courts of equity.*'⁵⁷ In other words, the law of contract may enable individuals to pursue their goals by making binding transactions but it will not enforce every promise that was made. For instance, it will consider whether there was a good reason for entering the transaction (by requiring the presence of some form of consideration), or

⁵¹Pound op cit (n24) 19.

⁵²Bhana & Pieterse op cit (n40)867.

⁵³Pound op cit (n24) 467.

⁵⁴Pound op cit (n24) 23.

⁵⁵Pound op cit (n24) 473.

⁵⁶M Hunter-Hein 'Horizontal Application and the Triumph of the European Convention on Human Rights' in *Human Rights & the Private Sphere: A Comparative Study* 120.

⁵⁷Pound op cit (n24) 45.

whether consent given to the contract or whether it was vitiated by force, fraud, or undue influence or involved an illegality.⁵⁸

In Kenya, the court will set aside contracts that are proved to have been affected by common law grounds such as incapacity, mistake, fraud, misrepresentation, public policy, and duress. Accordingly, the potential today of contract law to address the problems faced by weaker parties is not surprising because the idea of protecting the weaker party was not entirely repugnant to it. Contract law has always been concerned with imbalances in power which may arise for example between minors and uneducated people in general on the one hand and on the other, potentially much more powerful market actors on the other.⁵⁹

This raises the question whether there is a need to afford the weaker party additional protections through the intervention of fundamental rights when the law of contracts and common law in general has already done so. As *Cherednychenko*, states:

*'the fact that fundamental rights are hardly suitable for resolving disputes between private parties in contract law means that the need to shift the emphasis from contract law to the level of fundamental rights in order to ensure the protection of the weaker party in contract law could only be justified if contract law were unable to address this issue itself.'*⁶⁰

It must be recalled however, that private law (and therefore contract law) is the product of an aggregation of different principles and rules shaped over a long period of historical and legal development, much of which predated the coming into force of modern human rights values. As a result, private law was not intended or designed with the intention of vindicating fundamental rights. Further, it tends to focus on the conduct of the defendant rather than the entitlements of the plaintiff. All this means that existing private law norms may often be an inadequate tool to deliver sufficient protection for an individual's constitutional right.⁶¹

For example, one will not find a prohibition on discrimination on the basis of race, sex, and other protected characteristics in the common law of contract. Private law has also not adequately adapted its protection of privacy in view of modern technologies

⁵⁸Collins op cit (n27) 42.

⁵⁹O Cherednychenko, 'Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or Towards Walking in Circles?' in *Constitutional Values & European Contract Law (2008)* 47.

⁶⁰Cherednychenko op cit (n59) 45.

⁶¹O'Cinniede op cit (n6) 246.

such as the camera in the nineteenth century as well as current threats to privacy posed by the vast technologies of covert surveillance. A horizontal application of fundamental rights in such cases may therefore be beneficial in the sense of updating the law to modern values and its social context.⁶²

In conclusion, a solid system of contract law cannot be based predominantly on an interpretation of sanctity of contract that in turn is based purely on a limited notion of consensus as articulated in crystallized rules. While such a construction promotes the worthy policy objectives of certainty, predictability and efficiency, it is also important for the law of contract to adequately accommodate competing social (normative) considerations like fairness, dignity and social equality.⁶³ As stated above, private law is not always sufficiently equipped to achieve this, hence the need for fundamental rights in the private sphere.

III The Need to Protect the Weaker Party

Legal history reveals many examples of constitutional courts declaring social legislation designed to protect weaker parties as invalid under the constitution on the ground that it deprived the holders of rights such as rights to property of their entitlements. In particular, in the United States, both at federal and state level, courts manipulated the constitution to assist challenges to legislation designed to help weaker parties such as workers on the ground that such legislation was a restriction of individual freedom or an interference with the right to private property.⁶⁴

However, there are certain contexts in which it is particularly appropriate to impose positive duties on private actors to protect or facilitate fundamental rights. Such situations may arise where there is a special relationship between the parties or where the private entity has significant power to control access to a particular social resource or service.⁶⁵ The Constitutional Court of South Africa affirmed this in the case of *Khumalo vs. Homolisa*⁶⁶ where it held that the application of any right in the Bill of Rights to a private party should depend on the power of the private party concerned to undermine the interests and values protected by the particular right.⁶⁷

⁶²Collins op cit (n27) 24.

⁶³Bhana & Pieterse op cit (n40)868.

⁶⁴Collins op cit (n27) 38.

⁶⁵Liebenberg op cit (n43) 330.

⁶⁶CCT 53/01 [2002] ZACC 12.

⁶⁷Liebenberg op cit (n43) 331.

The classical model of contract envisages consensus on the basis of theoretical arm's length negotiations in trade and industry between parties of roughly equal standing.⁶⁸ In practice however, prospective contracting parties often face a stark choice between agreeing to contractual terms as presented or not contracting at all. Terms are therefore generally imposed upon them by certain parties (such as employers and consumers) rather than negotiated. This is most often the direct result of an inequality in bargaining power between the parties and the absence of any real freedom of choice or negotiation when contracting.⁶⁹

In addition, many clauses have become 'standard' in various industries (such as exemption clauses in the private health care sector or time limitation clauses in the insurance industry) with the result that although consumers can choose with whom to contract, they have no real freedom in relation to the terms of the contract. More often than not economic necessity compels a party to contract and that means that in reality there is no freedom to contract.⁷⁰ Yet the realities of economic pressures and unequal bargaining power between contracting parties and its effect on consensus largely remain a non-issue for the law of contract. Contracts are consistently upheld on the basis of long standing rules of contract law as founded in the concept of consensus. The reality of unequal bargaining power undermines the very notion of freedom along with the substance of consensus underlying *pacta sunt servanda*.⁷¹

In view of the foregoing, this study proposes that the role of the law ought to be viewed from two perspectives; on the one hand, the law should operate to assist people to make worthwhile choices but on the other, it should deter or frustrate efforts by people to make unwise bargains that are not in their long-term interest. If this freedom is used for instance to harm the dignity of another, to invade another's privacy, or to exploit the weakness of another or more controversially to harm oneself, it is arguably not serving a worthwhile purpose.⁷² In other words, whilst a person is at liberty to impose constraints on himself by contract, freedom to impose these constraints in the hands of the weak and necessitous defeats the very end of liberty.⁷³

⁶⁸Bhana & Pieterse op cit (n40)883.

⁶⁹Ibid.

⁷⁰Bhana & Pieterse op cit (n40)885.

⁷¹Bhana & Pieterse op cit (n40)884.

⁷²Collins op cit (n27) 42.

⁷³Pound op cit (n24) 484.

A court will therefore be asked to strengthen or enlarge the existing protection for fundamental rights in order to strike a new balance between competing rights and interests. This legal reasoning emphasizes the importance of party autonomy or freedom of contract but it is understood in the broad sense to require *genuine autonomy* which ensures weaker parties proper possibilities for self-determination, unconstrained by pressure or deficits in information. The effect of this reasoning is to assist the position of a weaker party to redress a situation of structural inequality.⁷⁴

In summary, the principle of freedom of contract must be respected but it should be capable of limitation where significant inequalities in the parties negotiating positions imply that one of the contracting parties has such weight that unilaterally determines the contents of the contract. It will then be up to the law to attempt to ensure that the fundamental rights of the parties involved are guaranteed in order to prevent self-determination being transformed into domination by the stronger over the weaker party.⁷⁵

IV The Courts' Approach to the Application of Fundamental Rights in the Private Sphere

While it is generally accepted that the main objective of resorting to fundamental rights in contract law is the protection of the weaker party, it is less clear to what extent such protection should extend or, indeed entail. For instance, should a surety who concedes that he received independent legal advice be bound by the terms of a potentially ruinous agreement with the bank? Further, if it is the issue of informed consent that is at stake, under what circumstances will the stronger party be deemed to have fulfilled his obligation to explain the risks of the transaction to the weaker party.⁷⁶ The answers to these questions are to be found in case law. It is therefore appropriate at this point to examine some of the leading South African cases that deal with the matter.⁷⁷

⁷⁴Collins op cit (n27) 39,40.

⁷⁵J Hager, 'Fundamental Rights in National (Namely) German Contract Law' in *Constitutional Values & European Contract Law*(2008) 27.

⁷⁶Cherednychenko op cit (n59) 44.

⁷⁷The writer is not aware of any Kenyan cases that deal with this question.

a) *Brisley vs. Drotsky* ('*Brisley*')⁷⁸

Brisley, concerned the validity of a non-variation clause in a standard form lease according to which any alterations or variations of the contract would be valid only if recorded in writing. Despite this the parties orally agreed that the applicant could pay her rent late for a few months. Later, the respondent refused to accept the late rent and evicted the applicant. The court rejected the applicant's plea to enforce the oral agreement and upheld the eviction. In doing so, *Cameron JA* clearly affirmed that all law including the common law of contract derives its force from the constitution and 'is subject to constitutional control'.⁷⁹ He however cautioned that the constitution and its value system does not give courts 'a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith....'⁸⁰ He observed that the constitutional values of dignity, equality and freedom 'require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint.'⁸¹

The court also emphasized that non-variation clauses protect both the 'stronger' and the weaker parties to a contract and that overturning the *Shifren* principle (the principle according to which an oral variation would be invalid in the face of a non-variation clause) would cause tremendous uncertainty in the law of contract.⁸²

Liebenberg has criticized the approach of the court in *Brisley* arguing that the decision illustrates the courts' insistence on the strict enforcement of contracts and the limited role envisaged for infusing open ended normative values and standards such as good faith and public policy with constitutional rights and values in the evaluation of contractual disputes.⁸³ She also disagrees with the reasoning that the sanctity of contract is a right in the Bill of Rights;⁸⁴ a view that is supported by *Bhana & Pieterse* who criticize the *Brisley* decision for its lack of engagement with the content of the values underlying the Constitution.⁸⁵ *Bhana & Pieterse* further argue that the content given to the value of freedom (and as a result contractual autonomy) is illustrative of the court's failure to acknowledge and engage with the inequalities in bargaining power between

⁷⁸*Brisley vs. Drotsky* 432/2000 [2002] ZASCA 35.

⁷⁹*Brisley vs. Drotsky* supra (n78) at para 88, see also *Liebenberg* op cit (n43) 359.

⁸⁰*Brisley vs. Drotsky* supra (n78) at para 93, see also *Liebenberg* op cit (n43) 360.

⁸¹*Brisley vs. Drotsky* supra (n78) at para 94, see also *Liebenberg* op cit (n43) 360.

⁸²*Brisley vs. Drotsky* supra (n78) at para 90.

⁸³*Liebenberg* op cit (n43) 360.

⁸⁴*Liebenberg* op cit (n43) 364.

⁸⁵*Bhana & Pieterse* op cit (n40) 887.

the respective parties to the case.⁸⁶ Similarly, *Cheadle, Haysom & Davis* have criticized the decision in *Brisley* stating that:

“..the SA Constitution is not reflective of a laissez faire model of the economy in which commercial autonomy is an unqualified good but rather it encompasses a social democratic vision for South Africa in which commercial autonomy must be tempered by way of flexibility inherent in the value of good faith... it appears that the Chinese wall between public and private law and the jurisprudential amnesia about the effect of private power remain alive in our law...”⁸⁷

b) Afrox Health Care Bpk vs. Strydom (Afrox) ⁸⁸

Afrox concerned the validity of a contract signed by the respondent when he was admitted to hospital. The contract included a clause exempting the hospital for negligence of any of its staff. After suffering damage as a result of a nurse's negligence during post-operative care, the respondent argued that the clause was against public interest and he urged the court to invalidate it in light of the provisions of the Bill of Rights. The court acknowledged that the notions of public policy and public interest in contract law had now to be interpreted in light of the rights and values enshrined in the constitution.⁸⁹ However, the Court dismissed the respondent's contention that the exemption clause was contrary to public policy on grounds that the respondent had adduced no evidence that he was in fact in a weaker bargaining position than the private hospital concerned.⁹⁰

The court observed that a contractual term is only contrary to public interest when either due to extreme unfairness or other policy considerations, it conflicts with the interests of the community.⁹¹ *Smallberger JA* cautioned that:

‘The power to declare contracts contrary to public policy should however be exercised sparingly and only in the clearest of cases lest uncertainty as to the validity of contracts result from arbitrary and indiscriminate use of power...in grappling with this often difficult problem, it must be born in mind that public policy generally favours the utmost freedom of contract and requires that

⁸⁶Bhana & Pieterse op cit (n40) 882.

⁸⁷Cheadle, Davis & Haysom op cit (n20) 33-11.

⁸⁸*Afrox Health Care Bpk vs. Strydom* 2002 (6) SA 21 (SCA).

⁸⁹*Afrox Health Care Bpk vs. Strydom* supra (n88) at para 8.

⁹⁰*Afrox Health Care Bpk vs. Strydom* supra (n88) at para 12.

⁹¹*Afrox Health Care Bpk vs. Strydom* supra (n88) at para 10.

*commercial transactions should not be unduly trammelled by restrictions on that freedom.*⁹²

The court also held that contractual autonomy which finds expression in the doctrine of *pacta sunt servanda* was a competing value also supported by constitutional values.⁹³ It affirmed its rejection in *Brisley* of *bona fides* as a free floating ground for setting aside unfair contractual provisions re-emphasizing that principles of *bona fides* are abstract values rather than legal rules and courts cannot and should not apply such values instead of crystallized legal rules.⁹⁴

According to *Le Roux & Van Marle*, the court in *Afrox* (as well as in *Brisley*) focused solely on the traditional benefits offered by sanctity of contract and its established position in the law and ignored its potentially unjust consequences.⁹⁵ Similarly, *Liebenberg* has argued that the court's reasoning in *Afrox* was based on a particularly formalistic and impoverished interpretation of section 27(1)(a) (on the right to access to healthcare) and the values and interests it protects.⁹⁶ In her view, the court fails to provide substantive reasoning as to why the doctrine of *pacta sunt servanda* should be preferred in the specific circumstances of the case over the value of ensuring a remedy to those who suffer damage as a result of negligent medical care.

c) *Barkhuizen vs. Napier* ('*Barkhuizen*')⁹⁷

The case of *Barkhuizen* involved a constitutional challenge to a time limitation clause in a short-term insurance contract. The clause in question required the claimant to institute court proceedings within 90 days after the insurance company had rejected the claim. However, the applicant only did so two years later and sought to challenge the limitation clause relied upon by the insurance company on grounds that it violated section 34 of the Bill of Rights which guaranteed the right to approach a court for redress as well as public policy which also protected this right. The Court found that while section 34 of the SA Constitution did not give it a general power to refrain from enforcing contractual terms on the basis of its own perceptions of justice or imprecise notions of good faith, they were obliged to invalidate contractual terms that were

⁹²*Afrox Health Care Bpk vs. Strydom* supra (n88) at para 8, see also *Liebenberg* op cit (n43) 361.

⁹³*Afrox Health Care Bpk vs. Strydom* supra (n88) at para 22,23, see also *Liebenberg* op cit (n43) 362,363.

⁹⁴*Bhana & Pieterse* op cit (n40) 876.

⁹⁵*W Le Roux & K Van Marle Ten Years after AZAPO vs. The President of South Africa* 40.

⁹⁶Section 27(1)(a) of the SA Constitution provides for the right to healthcare.

⁹⁷*Barkhuizen vs. Napier* ('*Barkhuizen*') CCT72/05 [2007] ZACC 5.

offensive to public policy.⁹⁸ The content of public policy was in turn, supposed to be determined having regard to the founding constitutional values of human dignity, the achievement of equality, and the advancement of human rights and freedoms, non-racialism and non-sexism.⁹⁹ *Cameron J* reiterated the views expressed in *Brisley* that:

'...the liberty to regulate one's life by freely engaged contractual arrangements gave expression in appropriate circumstances to the constitutional values of autonomy and dignity. This required courts to be generally cautious in intruding on apparently voluntarily concluded arrangements. An important factor in determining whether constitutional values of dignity and equality required the court to develop the common law of contracts so as to invalidate the term was the relative bargaining position of the parties...'

On appeal to the Constitutional Court, it was held that there was no evidence to suggest that the contract was not freely concluded between parties with equal bargaining power or that the applicant was not aware of the clause.¹⁰⁰ The court confirmed that the current law as interpreted in *Briskley*, envisaged a *limited role for good faith, not as a self-standing rule but as an underlying value that is given expression through existing rules of law.*¹⁰¹ *Ncobo J* noted that:

*'Pacta sunt servanda...as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.'*¹⁰²

Cheadle, Haysom & Davis have argued that *Barkhuizen* represents a lost opportunity for the courts to engage with the spirit purport and objects of the Constitution and thereby to imbue South Africa's law of contract with conceptions of justice, and equality as opposed to the adoption of abstract liberalism and non contextualism.¹⁰³

d) *Maphango v Aengus Lifestyle Properties (Pty) Limited ('Maphango')*¹⁰⁴

Finally, in the more recent decision of *Maphango*, the minority of the court, found that parties who freely and voluntarily enter into a lease containing clauses that

⁹⁸*Barkhuizen vs. Napier ('Barkhuizen')* supra (n97) at para 7.

⁹⁹*Barkhuizen vs. Napier ('Barkhuizen')* supra (n97) at para 7, see also Liebenberg op cit (n43) 367.

¹⁰⁰*Barkhuizen vs. Napier ('Barkhuizen')* supra (n97) at para 66, see also Liebenberg op cit (n43) 368.

¹⁰¹*Barkhuizen vs. Napier ('Barkhuizen')* supra (n97) at para 82, see also Liebenberg op cit (n43) 368.

¹⁰²*Barkhuizen vs. Napier ('Barkhuizen')* supra (n97) at para 57, see also Liebenberg op cit (n43) 372.

¹⁰³*Cheadle, Davis & Haysom* op cit (n20) 33-13, 33-14.

¹⁰⁴*Maphango v Aengus Lifestyle Properties (Pty) Limited* 2012 (5) BCLR 449 (CC).

allow either party to terminate them on notice do not qualify the right of a party to so terminate a lease and cannot seek judicial interference with these contractual arrangements on the basis of the provisions of fairness.¹⁰⁵

Cheadle, Haysom & Davis have argued that the minority decision of *Maphango* represents a regrettable omission to give any tangible content to the concept of fairness within the enquiry as to the enforcement of a contractual term. They also argue that the minority turned its face on any engagement with a party who manifestly had far less contractual power.¹⁰⁶

In summary, the above cases illustrate that the courts preference for a 'restrained' or 'formal' approach to the application of fundamental rights to contractual disputes between private parties. In other words, the courts appear to be hesitant to interfere too readily with the common law tradition of *pacta sunt servanda*. As stated above, the main purpose and justification for the intervention of fundamental rights in the private sphere is to protect the interests of the weaker party. So far, the approach adopted by the courts in South Africa since the advent of the constitutional era significantly limits the ability of fundamental rights to achieve this objective.

¹⁰⁵*Maphango v Aengus Lifestyle Properties (Pty) Limited* supra supra (n104) para 126.

¹⁰⁶*Cheadle, Haysom & Davis* op cit (n20) 33-21.

CHAPTER 3

Direct and Indirect Applications of Fundamental Rights to Private Relations

"...I would lay down the principle that where it is possible to decide any case, civil or criminal without reaching a constitutional issue, that is the course which should be followed."

*Kentridge AJ*¹⁰⁷

This chapter begins by tracing the changing views and opinions of Kenyan judges on the question of the application of fundamental rights in the private sphere. This is followed by an evaluation of various provisions of the Kenyan Constitution with a view to establishing whether they support the application of fundamental rights to private relations. This chapter will also conduct a comparative study of how various countries such as South Africa, Germany, Ireland, Canada and the United States have sought to enforce fundamental rights against private actors. Finally, the chapter concludes with a discussion on the merits and demerits of a direct and indirect horizontal approach in bid to establish which approach is best suited for Kenya's legal system.

I The Changing (and Conflicting) Views on 'Horizontality' in Kenya

All constitutions operate in a vertical manner. Most however, are restricted to a vertical operation. This is seldom deliberately done and fixed in the text. It is almost always effected by the courts with some or little justification from the text and based on the liberal distinction between the public and private sphere and the proposition that the purpose of entrenching fundamental rights is to protect the private sphere from interference from the state.¹⁰⁸ This view is probably true in the case of Kenya.

The Kenyan Constitution came into effect on 27th August 2010.¹⁰⁹ Prior to this, constitutional claims were made pursuant to the former constitution of Kenya (hereinafter "**the Repealed Constitution**"). The impact of fundamental rights on private law in Kenya can therefore be examined from two perspectives, namely; before, and after, the coming into effect of the Kenyan Constitution. A review of the cases that were determined under the Repealed Constitution reveal that Kenyan judges tended to favour the view that fundamental rights could only be enforced against the state or state

¹⁰⁷S vs. *Mhlungu* 1995 (3) SA 876 (CC).

¹⁰⁸Cheadle, Davis & Haysom op cit (n20)3-3.

¹⁰⁹The Constitution of Kenya Review Act No. 9 of 2008.

organs. The fact that the Repealed Constitution did not contain any provisions that expressly or impliedly suggested that fundamental rights could be enforced against private persons may have contributed to the reluctance of Kenyan judges to apply fundamental rights to private relations. It is therefore not surprising that attempts by litigants to enforce the fundamental rights provisions of the Repealed Constitution against private parties were almost always resisted by the courts.

In the widely quoted case of *Kenya Bus Service Limited v The Attorney General* ("**Kenya Bus**"),¹¹⁰ Nyamu J stated that:

'...fundamental rights are contained in the [Repealed] Constitution and are principally against the State because the [Repealed] Constitution's function is to define what constitutes Government and the governed as it regulates the relationship between the Government and the governed. On the other hand the rights of the individual interest are taken care of in the province of private law and are invariably redressed as such.'

Kenya Bus was among the cases relied upon by Lenaola J in reaching the conclusion that fundamental rights and freedoms were not applicable to the *Kenyatta Case* referred to in chapter 1 of the study. However, M Oduor, a law lecturer at Moi University School of Law in Kenya argues that *Kenya Bus* was decided under a restrictive framework of law and was therefore completely inapplicable in the new constitutional framework under which the *Kenyatta Case* was determined.¹¹¹

However, in the case of *Mwangi Stephen Mureithi vs. Daniel Toroitich Arap Moi*,¹¹² ("**the Moi Case**") which was also decided under the Repealed Constitution, the court took a completely different view regarding question of the applicability of fundamental rights to private relations. The Petitioner in the *Moi Case* had claimed that Mr. Moi, a former president of Kenya had unlawfully detained him in order to gain a commercial advantage over companies that the two had owned jointly. He argued that the unlawful detention was a violation of his constitutional rights under the Repealed Constitution.

¹¹⁰Nairobi High Court Miscellaneous Application No. 13 of 2005 (Unreported).

¹¹¹M Oduor 'Inconsistent Judgments in the Kenyan High Court' available at http://www.academia.edu/3530104/Inconsistent_judgments_in_the_Kenyan_High_Court.

¹¹²Petition Number 625 of 2009 [2011] eKLR.

However, Mr. Moi's lawyers raised an objection to the Petitioner's action on grounds that the fundamental rights set out in the Repealed Constitution could only be enforced against the state and state organs and not private individuals such as Mr. Moi. They also contended that the Petitioner had raised issues of company law which would best be resolved by the commercial courts. In dismissing this objection, *Gacheche J* stated that:

'...the rigid position that human rights apply vertically is being overtaken by the emerging trends in the development of human rights litigation...We can no longer afford to bury our heads in the sand for we must appreciate the realities which is that private individuals and bodies such as clubs and companies wield great power over individual citizenry who should as of necessity, be protected from such non-state bodies who may for instance discriminate unfairly or cause other constitutional breaches...The major challenge to horizontal application of human rights is the fact that it (is) a novel area and courts bear great responsibility of examining individual cases so as to decide each case on its own merits as a horizontal application does not and should not cut across the board...I find that fundamental rights are applicable both vertically and horizontally save that horizontal application would not apply as a rule but it would only be an exception which would obviously demand that the court do treat (it) on a case by case basis by examining the circumstances of each case before it is legitimized.'

The *Moi Case* is currently pending before the Court of Appeal for determination.

Whilst *Gacheche J* ought to be lauded for taking a bold and progressive view on the question of horizontality, it is rather doubtful that the *Moi Case* would hold much weight in Kenya given that the judge did not refer to any legal provisions in support of her conclusion; instead, she relied entirely on the South African case of *Hoffman v South Africa Airways*¹¹³ in which the Constitutional Court of South Africa had found that the practice of South Africa Airways of not employing people living with HIV as cabin crew was unconstitutional. However, foreign case law has no binding force in Kenya and is merely of persuasive value.¹¹⁴

¹¹³*Hoffman v South Africa Airways* (CCT17/00) [2000] ZACC 17.

¹¹⁴See *RM vs. Attorney General of Kenya*, High Court of Kenya Civil Case No. 1351 of 2002 available at www.kenyalaw.org.

On the other hand, the *Kenyatta Case* and the *Cradle Case* cited in chapter 1 seem to provide slightly more guidance on the issue of the applicability of fundamental rights to private relations in Kenya despite of their conflicting findings. In both cases, each of the judges attempts to anchor their findings on various provisions of the Kenyan Constitution. In particular, the judge in the *Cradle Case* relied on Article 2(1) and Article 20(1) of the Kenyan Constitution in support of the finding that fundamental rights were enforceable between private parties. These sections stipulate that the Kenyan Constitution is '*binding on all persons*'. The judge therefore interpreted 'persons' to include individuals and private entities such as the respondent. On the other hand, the judge in the *Kenyatta Case* declined to enforce fundamental rights against a private party on grounds that Article 21(1) of the Kenyan Constitution limited the duty to '*observe, respect, promote and fulfil the rights and freedoms in the Bill of Rights*' to the state and state organs. I examine the meanings and interpretations of these provisions in the next section of this chapter.

II The Constitution Binds 'the State', 'all State Organs', 'all Persons' and 'all Law'

As previously stated, a Bill of Rights traditionally confined itself to regulating the vertical relationship between the individual and the state.¹¹⁵ However, in certain circumstances, the Bill of Rights may directly protect individuals against abuses of their rights by other individuals and private institutions.¹¹⁶ For example, in Kenya the right to protection against discrimination and the right to receive information are expressly stated as applying to the state as well as individuals and private actors. This is provided in Article 27(5) and Article 35(1) of the Kenyan Constitution respectively.

The fact that certain rights are expressly stated to be binding on private persons raises the question whether the legislators of the Kenyan Constitution intended to limit the horizontal application of fundamental rights to only those rights. It is argued that if the legislature had intended to apply the Bill of Rights to persons other than the state, it would have stated so explicitly.¹¹⁷ My own view on the matter is that it was never the intention of the legislators to accord the Kenyan Constitution such a limited interpretation or application. I attempt to show why by comparing the relevant provisions of the

¹¹⁵Currie & De Waal *The Bill of Rights Handbook* 5ed (2005) 43.

¹¹⁶Currie & De Waal *The New Constitutional & Administrative Law* 322, 323.

¹¹⁷Cheadle, Davis & Haysom op cit (n20) 3-8.

Kenyan Constitution against corresponding provisions of the Constitution of the Republic of South Africa (**‘the SA Constitution’**).

Section 8(1) of the SA Constitution provides that *‘the legislature, the executive, the judiciary and all organs of state are bound by the Bill of Rights.’* An applicant may therefore always challenge the conduct of any of these institutions for being inconsistent with the Bill of Rights.¹¹⁸ This provision is similar to Article 1(3) of the Basic Law of Germany which has been interpreted as supporting the effect of fundamental rights in the private sphere. This provision states that, *‘the following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.’*¹¹⁹ By declaring that the legislator is bound *‘by the following basic rights’* the Basic Law creates an indirect effect for private relationships since legislation enacted in the area of private law will have to comply with these constitutional principles.¹²⁰

More importantly however, is the fact that section 8(1) of the SA Constitution (as well as Article 1(3) of the Basic Law) have been interpreted to mean that when members of the judiciary act in a judicial capacity, be it in a public law or private law context, they are bound to respect the Bill of Rights.¹²¹ The South African case of *Du Plessis v De Klerk* (**“Du Plessis”**)¹²² is significant in this regard. The Court in *Du Plessis* confirmed that the Bill of Rights in the South African Interim Constitution (**‘the SA Interim Constitution’**) had no horizontal application to disputes governed by common law between private litigants principally because of the absence of the word ‘judiciary’ in section 7 of the SA Interim Constitution.

This section provided that, *‘[The Bill of Rights] shall bind all legislative and executive organs of state at all levels of governments.’* The omission of the word ‘judiciary’ from this section was interpreted by the court to mean that the Bill of Rights placed duties to uphold constitutional rights only on the legislative and executive organs of state and individuals were not directly bound by the Bill of Rights. Nor was the judiciary which had the task of adjudicating the rights and duties of individuals.¹²³ However, *Cheadle, Haysom & Davis*, disagree with this interpretation and argue that the reason for the exclusion of the judiciary was because courts are not bound in the same

¹¹⁸Currie & De Waal op cit (116)323.

¹¹⁹Fedtke op cit (n2)125.

¹²⁰Fedtke op cit (n2)131.

¹²¹Currie & De Waal op cit (n116) 323.

¹²²*Du Plessis vs. De Klerk*1996 (3) SA 850 (CC).

¹²³Currie & De Waal op cit (n115) 33.

way as the other arms of government in the sense that; if judicial conduct constituted a species of conduct that permitted constitutional review every court decision could become constitutionally reviewable.¹²⁴

While the SA Interim Bill of Rights did not apply directly to horizontal cases, it did have an indirect application. This was because it applied to '*all law in force*' including uncodified common law.¹²⁵ *Kreigler J* in a dissenting opinion in *Du Plessis* emphasized this when he observed that fundamental rights laid down in the SA Constitution governed relations between private individuals *wherever the law was involved*. He is famously quoted as stating that:

*'The Chapter (on the Bill of Rights) has nothing to do with the ordinary relationship between private persons or associations. What it does cover is all law including that applicable to private relationships. Unless and until there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as fundamental rights are concerned... a landlord is free to refuse to let a flat to someone because of race, gender or whatever... a church may close its door to mourners of a particular class or colour. But none of them can invoke the law to protect their bigotry. The whole gamut of private relationships is left undisturbed. But the state as the maker of the laws, the administrator of laws and the interpreter and applier of the law is bound to stay within the four corners of Chapter 3.'*¹²⁶

The significance of the above quote is that even if individuals were not directly bound by the Bill of Rights, the Courts had to interpret legislation and develop the common law so that the ordinary law recognized and protected the rights in the Bill of Rights. This was further recognized in section 35(3) of the SA Interim Constitution which provided that '*in the interpretation of any law and the application and development of the common law and customary law, a court shall have regard to the spirit, purports and objects of ... the Bill of Rights.*'

The concern that the *Du Plessis* decision confined the SA Interim Bill of Rights to an indirect horizontal application and thus amounted to a toleration of private violation of rights prompted the South African Constitutional Assembly to provide for direct

¹²⁴Cheadle, Davis & Haysom op cit (n20)3-16(1).

¹²⁵Currie & De Waal op cit (n115) 33.

¹²⁶*Du Plessis vs. De Klerk* supra (n122)10.

horizontal application of the SA Constitution by making two textual changes. The first was the addition of the word 'judiciary' which was missing from the application provisions of the SA Interim Constitution and the second was the imposition on individuals the obligation to uphold the rights of other individuals in section 8(2) of the SA Constitution.¹²⁷ This section provided that, '*a provision of the Bill of Rights binds a natural or juristic person, if and to the extent that it is applicable, taking into account the nature of the right and nature and duty imposed by the right.*' The result was that the controversy over the horizontal application of the SA Constitution was to some extent settled.¹²⁸

Turning now to the corresponding provisions in the Kenyan Constitution, it will be noted that Article 20(1) of the Kenyan Constitution is very similar to section 8(1) and 8(2) of the SA Constitution. This article provides that '*the Bill of Rights applies to all law and binds all state organs and all persons.*' 'Persons' is defined in Article 260 of the Kenyan Constitution to include, '*a company, association or other body of persons whether incorporated or unincorporated*' while a 'State Organ' is defined as '*a commission, office, agency or other body established under the constitution.*' A state organ in Kenya would therefore include the legislature, the executive and the judiciary, all of which are established under the Kenyan Constitution.¹²⁹

The main difference between the provisions of the Kenyan Constitution and the SA Constitution is that the latter sets out the limited circumstances under which the Bill of Rights may be applied to natural or juristic person ie, depending on the nature of the right and duty imposed by the right whereas the Kenyan Constitution is silent on the matter. Based therefore, on the South African interpretation of section 8(1) and 8(2) of the SA Constitution, it is possible to conclude that section 20(1) of the Kenyan Constitution requires that the state and state organs, as well as individuals and private entities to respect the Bill of Rights. This interpretation would be consistent with the findings of *Githua J* in the *Cradle Case* in which she found that the Kenyan Constitution has both a vertical and horizontal application.¹³⁰ Further, the fact that Article 20(1) stipulates that '*the Bill of Rights applies to all law*' means that a legal norm, irrespective of whether it is a statutory provision or a rule of common law or customary law may be

¹²⁷Currie & De Waal op cit (n115) 34.

¹²⁸Cheadle, Davis & Haysom op cit (n20) 3-7.

¹²⁹See Article 93, 130 and 159 of the Kenyan Constitution on the establishment of Parliament, the Executive and the Judiciary respectively.

¹³⁰*Cradle vs. Nation Media* supra (n13) 22.

constitutionally challenged in any litigation irrespective of whether the parties to the litigation are private or public in character.¹³¹

This interpretation would however, not sit very well with the findings of *Lenaola J* in the *Kenyatta Case*. As stated above, he declined to apply the constitutional right of freedom of expression and freedom of the media to the dispute on the basis of his understanding that the duty to respect, promote, observe and fulfil fundamental rights and freedoms under Article 21(1) of the Kenyan Constitution was limited to the state and state organs. It is possible that this conclusion was informed by the judge's failure to read Article 21(1) together with Article 20(1) of the Kenyan Constitution. Had he done so, he would have found that the constitutional right of freedom of expression and freedom of the media were capable of being enforced against an individual or a private entity. Whether such an application was justified in the present case is another issue altogether.

III The Obligation of Courts in South Africa to 'Develop the Common Law'

Section 8(3) of the SA Constitution provides that, '*when applying a provision of the Bill of Rights to a natural or juristic person, a court, in order to give effect to a right in the Bill of Rights, **must** apply or if necessary, develop, the common law to the extent that legislation does not give effect to that right.*' This provision has been interpreted to mean that fundamental rights would seldom directly apply to a private dispute. The preferred manner to vindicate them in the private sphere would be by way of legislative enactment or through developing and or limiting the rules of the common law which would conceivably generate more effective remedies for private infringements.¹³²

Accordingly, a court must first consider whether there is legislation which gives adequate effect to the right. If not, the court must consider whether an existing common law rule gives effect to the right. If the existing law is deficient, the court is obliged to develop the common law to give effect to the right and may at the same time develop rules of the common law to limit the right in accordance with section 39(2) of the SA Constitution.¹³³

¹³¹Cheadle, Davis & Haysom op cit (n20) 3-13.

¹³²M Pieterse 'Indirect Horizontal Application of the Right to Have Access to Health Care Services' 23 SALJ 2007 162

¹³³Liebenberg op cit (n43) 331. See also section 39(2) of the SA Constitution provides that, 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights. See also the case of *Carmichele v Minister of Safety and*

A comparison can be drawn between section 8(3) of the SA Constitution on the one hand and Article 20(3) (a) of the Kenyan Constitution on the other. Article 20(3)(a) of the Kenyan Constitution states that, '*In applying the provisions of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom.*' Whereas the South African provision specifies that the development of common law is to be undertaken when a court is applying a fundamental right to a natural or juristic person, the Kenyan provision requires that courts develop the law when applying fundamental rights generally. Nothing seems to turn on this slight distinction; accordingly, I am persuaded that Article 20(3) of the Kenyan Constitution can be accorded a similar interpretation to that of section 8(3) of the SA Constitution, that is; rather than applying a fundamental right directly, a court must first consider whether there is legislation or common law which gives adequate effect to the right. It is only if the existing law or common is determined to be deficient or non-existent that the court would be obliged to develop the common law to give effect to the fundamental right.

The requirement for an indirect application before a direct application of the Bill of Rights is known in South African jurisprudence as 'the principle of avoidance.' According to this principle even when the Bill of Rights applies directly, a court must apply the provisions of ordinary law to resolve the dispute, especially in so far as the ordinary law is intended to give effect to fundamental rights. In South Africa, examples of statutes that are intended to give effect to fundamental rights include, the Labour Relations Act 66 of 1995, the Promotion of Administrative Justice Act 3 of 2000 among others.¹³⁴

It is probably worth noting that the judge in the *Kenyatta Case* declined to apply fundamental rights to the case mainly because he was of the view that the petitioner, Mr. Kenyatta, had an adequate remedy under the common law tort of defamation. In this regard, whilst his interpretation of Article 21(1) of the Kenyan Constitution may have been incorrect (he interpreted this section to mean that only the state and state organs were bound by the Bill of Rights), I am unable to fault the judge's ultimate decision to refuse to apply fundamental rights to the dispute on the basis that the common law of tort afforded the petitioner an adequate remedy as this determination was in conformity with the principle of avoidance.

Security 2001 (4) SA 938 the Constitutional Court enunciated the general approach to be followed when developing the common law in accordance with section 39(2) of the SA Constitution.

¹³⁴Currie & De Waal op cit (n116) 328.

It should be noted however, that the principle of avoidance is not an absolute rule. It does not dictate that litigants may only directly invoke the constitution as a last resort. As with many legal principles, its force depends on the circumstances of the case. Where the violation of the constitution is clear and directly relevant to the matter, and there is no apparent alternative form of ordinary relief, it is not necessary to waste time and effort by seeking a non-constitutional way of resolving the dispute. This will often be the case when the constitutionality of a statutory provision is placed in dispute because, apart from a reading down, there are no other remedies available to a litigant affected by law.¹³⁵

VI Direct Horizontal Effect vs. Indirect Horizontal Effect: A Comparative Analysis

When a litigant directly invokes the Bill of Rights, the purpose is to show the inconsistency between the Bill of Rights and law or conduct in order to obtain remedies prescribed by the constitution for a violation of a fundamental right.¹³⁶ Further, in disputes in which the Bill of Rights applies as directly applicable law, it overrides ordinary law and any conduct that is inconsistent with it. To the extent that ordinary legal remedies are inadequate or do not give proper effect to fundamental rights, the Bill of Rights generates its own remedies.¹³⁷ This form of application has become known as the direct application of the Bill of Rights.¹³⁸

At the same time, the Bill of Rights contains a set of values that must be respected whenever ordinary law is interpreted, developed or applied. This form of application has become known as the indirect application of the Bill of Rights. When indirectly applied, the Bill of Rights does not trump ordinary law or generate its own remedies. Rather, the Bill of Rights respects the purpose and remedies of ordinary law, but demands furtherance of the values contained in it through the operation of ordinary law.¹³⁹ It should be noted however, that there are varying degrees of direct and indirect horizontal effects which are beyond the scope of this study.¹⁴⁰

¹³⁵Currie & De Waal op cit (n116) 329.

¹³⁶Currie & De Waal op cit (n116) 325.

¹³⁷Currie & De Waal op cit (n115) 32.

¹³⁸Currie & De Waal op cit (n116) 321.

¹³⁹Currie & De Waal op cit (116) 321, See also Currie & De Waal op cit (n115) 32.

¹⁴⁰Cherednychenko op cit (n59) 54 where she draws a distinction between a 'strong direct horizontal effect' and a 'weak indirect horizontal effect.'

No significant difference in outcome between direct and indirect horizontal effect is likely to arise unless there is no available private law claim on which to found an action in the first place.¹⁴¹ *Van der Walt* argues that the distinction between direct and indirect horizontal application may in the end amount to a choice between two vocabularies, one which does not shy away from directly invoking constitutional principles within the context of common law and one that prefers to let the common law principles themselves perform the required mediation between existing law and constitutional challenges to such law.¹⁴² Similarly, in *Du Plessis*, Mohamed J stated that:

“...the true debate is effectively not whether the rights articulated in the Bill of Rights are capable of horizontal effect, but whether or not such horizontality is to arise in consequence of a direct application of the relevant ...right or through the mechanism of interpreting, applying and developing the common law by having regard to the spirit, purport and objects of the Bill of Rights pursuant to section 35(3)... the difference in the theoretical approaches ...therefore seem to me to involve no substantial practical consequences.”

Although the provisions of a Bill of Rights may ordinarily be applied directly or indirectly in a legal dispute, in practice, much of comparative constitutional law is actually characterized by the adoption of indirect horizontal approaches.¹⁴³ As the comparative study below will show, the preferred view today is that fundamental rights do not apply directly in private law but shape it; that is, every provision of private law must be interpreted in light of the values and norms that fundamental rights represent.¹⁴⁴

It is argued that the balance of interests contained in private law may be disrupted by directly effective human rights because of the great weight customarily accorded to fundamental rights in public law. This is because, ordinarily, rights prioritize the interest of individuals even if they can be subsequently modified by restrictions imposed to achieve legitimate goals and to protect the rights of others. As a result, when that strong value attached to rights is transposed to private law it is likely to unsettle rules that function to put collective interests ahead of individual rights.¹⁴⁵ An indirect horizontal effect seems superior in this respect for it insists that any claims based on

¹⁴¹Collins op cit (n27)16.

¹⁴²Liebenberg op cit (n43) 325.

¹⁴³O’Cinniede op cit (n6) 245.

¹⁴⁴Hager op cit (n75) 22.

¹⁴⁵Collins op cit (n27) 24.

rights should be integrated into the existing carefully considered settlement between competing rights in private law which has effectively been tested for generations through litigation in the courts and parliamentary debates.¹⁴⁶

Concerns also exist about the impact of the horizontal effect upon the doctrine of separation of powers.¹⁴⁷ Since private law has been developed primarily by the legislature, judicial revisions of private law doctrines are regarded as *prima facie* invasions of a sphere properly left to democratic decisions through the legislature. It is argued that the democratic legislature has devised a civil code that balances the competing interests and rights of private individuals and it is not appropriate for a court to adjust that balance by appealing to fundamental rights. For this reason, granting direct horizontal effect to constitutional and convention rights can be presented as an arrogation of power by the judiciary that undermines democratic government.¹⁴⁸ *Ackerman J* and *Sachs J* agree that a direct application of human rights would deprive the system of its necessary flexibility and infringe the separation of powers principle. They are of the view that an indirect effect of constitutional rights on the development of common law would maintain the right of the legislature to shape private relationships through the enactment of statutes.¹⁴⁹

Finally, there is a general reluctance for private parties to invoke the Bill of Rights directly because constitutional remedies for the private violation of fundamental rights are often difficult to envisage or unattractive to litigants. In most cases, common law remedies appear to be sufficiently flexible to be considered appropriate for horizontal infringement of the Bill of Rights.¹⁵⁰ Alternative and more appropriate remedies are in any event difficult to imagine for these types of infringements.¹⁵¹

The preference for an indirect horizontal effect becomes evident when one carries out a comparative analysis of the practice in various countries. In South Africa, a direct horizontal effect was initially regarded as preferable in terms of legal certainty because it rendered unnecessary the difficult distinction between public and private action.¹⁵² In practice however, the notion of directly enforceable human rights has been

¹⁴⁶Collins op cit (n27) 21.

¹⁴⁷O’Cinniede op cit (n6) 232.

¹⁴⁸Collins op cit (n27) 20.

¹⁴⁹Fedtke op cit (n2) 366.

¹⁵⁰Currie & De Waal op cit (n115) 51.

¹⁵¹Currie & De Waal op cit (n116) 30.

¹⁵²Fedtke op cit (n2)361.

rendered practically redundant. The South African Courts have routinely tackled the problem of the application of fundamental rights to private relations through the indirect application of constitutional values to the common law.¹⁵³

Similarly, German jurisprudence adheres to an indirect or 'radiating effect' of human rights in the private sphere¹⁵⁴ The German indirect horizontal effect seems to address the problems of imprecision of fundamental rights when applied in the private sphere as well as the competence of judges to apply broad constitutional norms to intricate private disputes by acknowledging the importance of fundamental values while at the same time seeking to resolve conflicts primarily through the prism of private law.¹⁵⁵

In Ireland, the Irish courts have treated the Constitution as establishing the existence of a 'constitutional tort' action which can be brought against a private individual or organization. Through this tort action, the rights protected under the Constitution can be applied directly to regulate the conduct of private actors.¹⁵⁶ In practice however, the Irish courts will not develop the parameters of an existing tort or provide supplemental remedy under their jurisdiction to uphold constitutional rights unless the existing scope of the tort in question is basically ineffective or plainly inadequate to secure protection of the constitutional rights at issue.¹⁵⁷ As a result, the impact of the direct horizontal effect doctrine in Ireland has often been muted and even nullified by the adoption of a cautious approach by the judiciary towards developing private law remedies to reflect rights norms, in particular where existing private law rules clearly apply to the matter at issue.¹⁵⁸

Similarly, both the United States and Canada reject direct horizontal effect for constitutional rights on grounds that relationships between individuals are better regulated by the common law and specific human rights codes.¹⁵⁹

V Conclusion

One of the few instances where a direct horizontal application seems to make sense is when legislation or common law rules are challenged with the purpose of

¹⁵³Fedtke op cit (n2)375.

¹⁵⁴Fedtke op cit (n2)141.

¹⁵⁵Fedtke op cit (n2)153.

¹⁵⁶O'Cinniede op cit (n6) 221.

¹⁵⁷O'Cinniede op cit (n6) 237.

¹⁵⁸O'Cinniede op cit (n6)215.

¹⁵⁹Barendt op cit (n25) 425.

invalidating them or where the plaintiff cannot find a cause of action in the existing common law. An indirect application – that is, the development of the common law – seems impossible in such cases. Since the common law does not provide a right, it will be necessary to invoke a fundamental right directly.¹⁶⁰

Nonetheless, a comparative analysis of the different approaches to the application of fundamental rights to private relations in various jurisdictions reveals that most jurisdictions tend to favour an indirect horizontal approach. However, as was evident from the cases discussed in chapter 2 of the study, the use of the method of indirect horizontal effect may not prevent the risk of the courts making decisions that undermine human rights enforcement in the private sphere but it may assist the court in recognizing that whilst it is in general important for everyone to respect the dignity of others, there is also a value, emphasized strongly in private law, of permitting individuals wide scope for unsupervised private autonomy.¹⁶¹

The findings of this study suggest that an indirect horizontal effect offers the best approach to the issue of horizontality in Kenya. This conclusion is reinforced by the fact that Article 20(3)(a) of the Kenyan Constitution mandates the application of an indirect horizontal effect by requiring the courts to develop the law to the extent that such law does not give effect to the fundamental right in question. I should however point out while the methodological logic of indirect horizontal application appears to be best suited for engagement with private law, there still remains a limited scope for the application of a direct horizontal effect. As *Madla J* has suggested, the question of direct or indirect effect should be reviewed on a case by case basis with a view to the particular constitutional right involved.¹⁶²

¹⁶⁰Currie & De Waal op cit (n115) 75.

¹⁶¹Collins op cit (n27) 35.

¹⁶²Fedtke op cit (n2) 366.

CHAPTER 4

Horizontality in Kenya: The Proportionality Test and Other Considerations

'... courts should not anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied...' – Chaskalson J¹⁶³

The Kenyan legal system tends to have different perceptions of the role that judges should play in giving effect to fundamental rights in private law.¹⁶⁴ In this regard, the extent to which a judge may apply fundamental rights in private law disputes might not be easy to pinpoint.¹⁶⁵ Unfortunately, neither the Kenyan Constitution nor Kenyan case law offers any guidance on the matter. The result is a general lack of conceptual clarity as to *when* and *how* fundamental rights should be given horizontal effect in Kenya. The objective of this chapter is therefore to consider the various factors that should be taken into account when applying fundamental rights in the private sphere. The study also examines the adequacy of 'limitation clauses' or 'the proportionality test' as a formula for resolving disputes between private parties in which fundamental rights are implicated.

I Factors to Consider when Applying Fundamental Rights to Private Relations

Unlike the SA Constitution, the Kenyan Constitution does not set out the circumstances or conditions under which a fundamental right can be applied horizontally. Article 2(1) and 20(1) of the Kenyan Constitution simply states that the provisions of the Kenyan Constitution '*bind all persons*'. The only attempt made at explaining the meaning of these provisions is found in Article 160 of the Kenyan Constitution which defines 'persons' to include 'corporations' and 'other unincorporated bodies'. However, this does not assist one to know how the courts are expected to apply fundamental rights to natural or juristic persons.

As is evident from the *Cradle Case* and the *Kenyatta Case*, the uncertainty as to when and how fundamental rights will be given horizontal effect in Kenya continues to generate considerable confusion. It could also impact upon contractual autonomy as

¹⁶³*Zantsi vs. Council of State, Ciskei & Others* (CCT24/94) [1995] ZACC 1.

¹⁶⁴Mak op cit (n5) 52.

¹⁶⁵Mak op cit (n5) 51.

private individuals and bodies may be unsure or unaware of the constitutional obligations that may be imposed on them. Such uncertainty also raises concerns about the possibility of *ad hoc* unstructured judicial law making.¹⁶⁶ It is therefore desirable that the Kenyan courts adopt a coherent and consistent method of judicial analysis when applying fundamental rights horizontally.¹⁶⁷ Given however, the glaring absence of Kenyan jurisprudence on the matter, I propose to refer to the more developed jurisprudence of South Africa as a guide for the discussion on the matter.

In South Africa, the determination of the applicability of fundamental rights to natural and juristic persons is subject to a special formula contained in section 8(2) of the SA Constitution which states that:

'A provision of the Bill of Rights binds a natural or 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.'

It is contended that this section points to an interpretative process that goes beyond the strict construction of the text alone as to whether the right is capable or suitable for horizontal application.¹⁶⁸ This provision also acknowledges that not every right and not all obligations imposed by a particular right are capable of horizontal application rather; each right needs to be examined in order to determine whether it can be sensibly applied to the private domain.

Currie & De Waal have argued that the question whether a particular provision in the Bill of Rights is horizontally applicable cannot be determined a priori and in the abstract.¹⁶⁹ In other words, the application of fundamental rights to a private party must be a context sensitive determination taking into account the appropriateness of imposing the particular duty on the particular private party concerned.¹⁷⁰ They however caution that a resort to context or the circumstances of a particular case should not be used to frustrate the clear intention of the drafters of the constitution. It is not permissible for example to argue that it is only when private persons find themselves in a position

¹⁶⁶O'Cinniede op cit (n6) 230.

¹⁶⁷See O'Cinniede op cit (n6) at 229 where he observes that in Ireland, there is a completely undeveloped judicial analysis of whether all constitutionally protected rights are enforceable against the state and against individuals without discrimination. He argues that the case by case basis in which the Supreme Court of Ireland has adjudicated constitutional claims has meant that no overarching test has been established to determine whether a constitutional right will be given horizontal effect and if so to what degree and extent.

¹⁶⁸H Cheadle & DM Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) *SALJ* 57.

¹⁶⁹*Currie & De Waal* op cit (n115) 53.

¹⁷⁰Liebenberg op cit (n43) 322.

comparable to the powerful state that they should be bound to the Bill of Rights.¹⁷¹ As we shall see later, this may well be *relevant* to such an inquiry but is certainly not *decisive* of it.

A factor that is clearly relevant to a judicial decision on whether to allow for the horizontal application of a particular right is the nature and identity of the person or entity against whom the right is to be applied. The obvious reason for this is that not everyone has an equal capacity to comply with the various obligations imposed by rights.¹⁷² In the context of relations between citizens, (as opposed to a relationship between the state and a citizen), the detailed conception of these rights may need to be adjusted to accommodate the issues presented in a horizontal relationship.¹⁷³ How a public institution should respect a fundamental right may therefore differ considerably from how a private body or individual might be expected to respect the same right. Big differences might also exist between the obligations imposed on different private bodies to respect the same right.¹⁷⁴

For instance, it would be a mistake for a court to simply take the meanings of a concept such as freedom of speech or privacy that have been established in disputes between the state and citizens and then apply them to the different context of private law disputes. The need for translation of concepts occurs because the idea of fundamental rights and freedoms differs between the context of public law and private law.¹⁷⁵ As stated in chapter 2 of this study, it is important that the distinctions that exist between public and private bodies be taken into account when giving horizontal effect to fundamental rights.

One must also take into account the fact that private persons are primarily driven by concern for themselves whereas the state is supposed to be motivated by concern for the wellbeing of society as a whole.¹⁷⁶ In addition, respect for the liberty and the privacy of the individual necessitates that private individuals acting in a sphere of private activity should not be held to the same standards of probity or correctness in

¹⁷¹Currie & De Waal op cit (n115)(2005) 53.

¹⁷²M Pieterse 'Indirect Horizontal Application of the Right to Have Access to Health Care Services' (2207) 23 SALJ 161.

¹⁷³Collins op cit (n27) 26.

¹⁷⁴O'Cinniede op cit (n6) 229

¹⁷⁵Collins op cit (n27) 42.

¹⁷⁶Currie & De Waal op cit (n115)54.

conduct as will be required from state agencies.¹⁷⁷Care must therefore be taken to ensure that the application of the fundamental rights to private conduct does not undermine private autonomy to the same extent that it places restrictions on the sovereignty of government.¹⁷⁸

Secondly, the court should consider whether the right is capable of application to natural or juristic persons.¹⁷⁹The *nature* of the right might reveal that it is a right capable of being applied to private persons such as the right to dignity (*injuria*, defamation), the right to freedom and security of person (tort), the right to privacy, the right to an environment that is not harmful to health or wellbeing (nuisance), the right to property, and children's rights. As is evident, most of these rights are already recognized in the common law and are therefore illustrative of an imminent horizontality.¹⁸⁰

The common law recognition does not 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. In other words, the fact that certain of the rights find horizontal expression in the common law and in statute gives a clue as to the suitability of a right for horizontal application.¹⁸¹However, *Fedtke* cautions against the dangers of compiling a formal list of rights and duties that can have effect in the private sphere and those that cannot. He argues that the circumstances and details of the particular case under consideration should always be taken into account.¹⁸²

A horizontal application of fundamental rights would therefore need to analyse the scope and nature of the right at issue and the extent to which it is capable and appropriate to utilize it to alter legal rights and obligations of individuals. Rights that are not suitable for being applied to private individuals or bodies within the relevant context should be deployed very cautiously, if used to modify existing private law. At the least it is imperative that a court engages in an analysis of the content and scope of the right in question and not gloss over the issue.¹⁸³*Liebenberg* emphasizes that a methodology for horizontal application which avoids engagement with the substantive content of the

¹⁷⁷Collins op cit (n27) 32.

¹⁷⁸Ibid.

¹⁷⁹Cheadle, Davis & Haysom op cit (n20)3-16(3).

¹⁸⁰Cheadle & Davis op cit (n168) 58.

¹⁸¹Ibid.

¹⁸²Fedtke op cit (n2) 374.

¹⁸³O'Cinniede op cit (n6) 249.

various rights in the Bill of Rights runs the risk of undermining the transformative goals of the Constitution.

Thirdly, if the fundamental right is *capable* of application to private persons the courts must also consider whether it is *suitable* (in the circumstances of the case) for application.¹⁸⁴ Accordingly, quite apart from the nature of the *right*, the nature of the *duty* imposed by the right must be taken into account. In some instances, the duty imposed by a right would be particularly onerous on a private person.¹⁸⁵ This consideration is of particular importance when it comes to the imposition of duties which are likely to have financial implications for the parties. The conduct of private parties has to be funded from their own pockets and for this reason the same duties imposed on an organ of state which relies on public funds may not be imposed on them.¹⁸⁶ Such an issue arose in the *Cradle Case* where the respondent, *Nation Media* argued that the fulfilment of the rights sought by *Cradle* requiring that *Nation Media* install a sign language inset or subtitles in all its newscasts would be financially onerous to *Nation Media*. Responding to this argument, the judge in the *Cradle Case* stated that;

*'...While the Court appreciates that costs will go with compliance with the requirement of the law, it is my humble view that such costs should not be an inhibition or restriction on the court to play its rightful role in the advancement and protection of the rights of marginalized communities within our society. The point I am making is that money cannot be a substitute to the enjoyment of the rights bestowed constitutionally and statutorily to persons with hearing disability... the Respondent and other television broadcasters have no option but to comply.'*¹⁸⁷

It is doubtful that the approach adopted by the judge in the *Cradle Case* would be appropriate for all cases concerning a horizontal enforcement of fundamental rights although in the particular circumstances of the *Cradle Case* the judges' conclusion appears to be sound. It would be incorrect to dismiss the financial impact of a horizontal enforcement of fundamental rights in the manner suggested in the *Cradle Case*. Perhaps a better approach would have been for the judge to conduct an analysis of the nature of the duty sought to be imposed on *Nation Media* and consider whether having

¹⁸⁴Cheadle, Davis & Haysom op cit (n20) 3-16(3).

¹⁸⁵Cheadle, Davis & Haysom op cit (n20) 3-18.

¹⁸⁶Currie & De Waal op cit (n116) 324.

¹⁸⁷*Cradle vs. Nation Media* supra (n13) 25,26.

had due regard to the circumstance of the case and the importance of the right, the need for *Nation Media* to fulfil the duty imposed by the right in question outweighed the attendant financial implications.

Fourthly, it has been suggested that the extent to which a private entity may be held accountable for infringements of fundamental rights must depend on the nature and extent of the power exercised by the entity, the degree to which the poser emulates state powers and the impact of the power on the enjoyment of the right.¹⁸⁸ The case of *Khumalo vs. Homolisa* (“*Khumalo*”)¹⁸⁹ is significant in this regard. *O’Regan J* is quoted as stating that:

*“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 state organs ... it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated in section 8(2) of the Constitution.”*¹⁹⁰

Liebenberg has argued that the above findings of *O’Regan J* suggest that the application of any right in the Bill of Rights to a private party should depend on the power of the private party concerned to undermine the interests and values protected by the particular right.¹⁹¹

Fifthly, the objective of a fundamental right and the interest that it seeks to protect is also an important consideration in determining whether the right is applicable to private conduct or not. For instance the purpose of the right to reside anywhere in the country in South Africa is aimed at preventing the state from introducing legislation that divides the country into racial zones. It follows that this right is strictly speaking, not intended to have a general horizontal application.¹⁹²

Other factors that the court should take into account when applying fundamental rights to private relations is the fact that the infringement (or danger) must be substantial and affect a right of sufficient importance, and there must also be a high probability that the individual will actually suffer damage.¹⁹³ Finally the court should also consider the

¹⁸⁸Pieterse op cit (n172) 161.

¹⁸⁹CCT53/01 [2002] ZACC 12.

¹⁹⁰Ibid.

¹⁹¹Liebenberg op cit (n43) 33.

¹⁹²Currie & De Waal op cit (n115) 54.

¹⁹³Ibid.

scope of existing legislation in the given area as well as competing rights of other private parties.¹⁹⁴ These latter considerations are examined in greater detail in the next section of this chapter.

II 'Balancing Rights' and the (In)adequacy of the Proportionality Test

It has been argued that application of limitation clauses which regulate the manner in which certain fundamental rights may be restricted in disputes between the state and a citizen may be difficult to transplant disputes between private parties.¹⁹⁵ This section of the study attempts to evaluate the cogency of this assertion.

Vertical constitutional disputes pit individual rights against the state, while horizontal constitutional disputes pit rights against one another.¹⁹⁶ While the state can under no circumstances invoke human rights protection, the opposite is true in the case of its counterpart in horizontal disputes between stronger and weaker private entities. Both sides to a private legal conflict (be they employers and employees, companies and customers, landlords and tenants, or reporting media and the objects of its interest) can invoke the protection of human rights.¹⁹⁷

In many horizontal disputes, what is at stake in the first stage of the analysis is not simply whether a right has been violated; the important question to be answered is *which party's right should prevail*.¹⁹⁸ A court will therefore have to figure out a way to rank these rights, that is, it must come up with a method whereby one right can be preferred over another. Unfortunately, no persuasive method for ranking rights is to be found in the text of the Kenyan Constitution. The fact that it recognizes certain national values as being fundamental does not tell us whether, for instance, the right to liberty should prevail over the right to equality.¹⁹⁹ In fact, Article 10(2) (b) of the Kenyan Constitution simply recognizes all fundamental rights as a constitutional value, thereby implying that all fundamental rights are of equal importance.²⁰⁰

¹⁹⁴Fedtke op cit (n2)149.

¹⁹⁵Mak op cit (n5)48 .

¹⁹⁶C Springman & M Osborne 'Du Plessis is not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' (1999) SALJ 42.

¹⁹⁷Fedtke op cit (n2)130.

¹⁹⁸Ibid.

¹⁹⁹Springman & Osborne op cit (n196) 43.

²⁰⁰See Cheadle, Davis & Haysom op cit (n20) 1-10 where they observe that the absence of a hierarchy of rights or any mention of the importance of a particular right in the South African Constitution is indicative of the fact that all rights are of equal importance.

In public law, many fundamental rights can be qualified or modified on grounds of public policy according to some version of a test of proportionality. The test of proportionality can be formulated in slightly different ways but its focus is on the issue of whether the policy reason for an interference with a protected fundamental right is of sufficient strength to justify the interference.²⁰¹ To balance these interests against each other is far from straightforward. In truth, the test of proportionality provides a useful structure for a legal analysis of the justifiability of interferences by the state with fundamental rights but ultimately it requires a court to engage in a difficult balancing exercise between incommensurable values.²⁰²

In the context of private law, contractual disputes will always have competing rights, values and policy considerations that are at stake. The courts therefore have an exacting task of balancing and attempting to achieve an optimal reconciliation of these values and rights.²⁰³ It is argued that the existence of rights and policy considerations on both sides of the argument prevents the application of the familiar test of proportionality because this transplant will not function to provide a procedure by which all the different relevant considerations are measured against each other.²⁰⁴

According to *Fedtke*, whereas state intervention in human rights protection must undoubtedly adhere to the strict requirements of proportionality, this is not the case where the legislator is not restricting rights for the sake of the public will but rather identifying conflicting private interests and balancing these in the light of constitutional values when enacting rules of private law.²⁰⁵ In the absence therefore, of a clear workable criteria for dealing with competing fundamental rights in private disputes, the matter solely depends on the subjective view of judges. As a consequence there is a danger of arbitrary choices between fundamental rights being made by judges guided primarily by their own views.²⁰⁶ It has therefore been argued that in order to find the right balance between conflicting positions of individuals in horizontal relationships; the traditional concepts applied to the limitation of constitutional rights including the principle of proportionality would at the very least require substantial modification.²⁰⁷

²⁰¹Collins op cit (n27) 29.

²⁰²Ibid.

²⁰³Liebenberg op cit (n43) 358.

²⁰⁴Fedtke op cit (n2) 149.

²⁰⁵Fedtke op cit (n2) 149

²⁰⁶Cherednychenko op cit (n59) 43

²⁰⁷Fedtke op cit (n2) 130.

If the test of proportionality developed in public law is inappropriate in those cases where both parties to a private law dispute are protesting about an interference with their rights what is the correct formulation of the test? One school of thought proposes that since the case is a contest between two rights, a court ought to determine whether the interference with the former is justifiable by reference to the latter.²⁰⁸ Thus, decisions by the stronger party are subjected to a proportionality test.²⁰⁹

However, there is a second school of thought that proposes the adoption of a 'double proportionality test'. This test proposes that the separate rights of each party need to be assessed separately according to a test of proportionality.²¹⁰ For example, in a case concerning a clash of the right to freedom of expression and the right to protection of a persons' privacy under Article 8 and 10 of the European Convention of Human Rights, *Lord Steyn* explained this approach in the following manner:

*"First, neither Article has as such precedence over the other. Secondly, where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test."*²¹¹

I need not provide an illustration of the application of the 'double proportionality test' for the reader to appreciate just how challenging and complex an exercise it can be.

III Indirect Horizontal Effect as a Solution to the 'Balancing' Problem

A dispute between private parties may be determined both on the level of contracts and on the level of fundamental rights. At the level of fundamental rights, the question to be answered, both at a substantive and procedural level is which fundamental right ultimately prevails. In contrast, on the level of private law, in this case, contract law, the question to be answered in such a debate is whether on the one hand a particularly risky transaction is prohibited or prevented in practice from occurring or whether on the other hand, the conclusions of the transaction should be allowed provided that the stronger party has taken reasonable steps to explain the inherent risk of the transaction to the weaker party so that the weaker party's consent can be

²⁰⁸Collins op cit (n27) 37.

²⁰⁹Hunter-Hein op cit (n56)106.

²¹⁰Collins op cit (n27) 30,31.

²¹¹Ibid.

presumed not to have been vitiated as a result of mistake, fraud or undue influence.²¹² In both cases, the question of whether an infringement amounts to liability seems to boil down to a balance of the parties interests. In the case of an indirect effect approach, the balance takes place within the framework of the rules of private law whereas in the case of direct effect approach a balance has to be struck between the parties opposing fundamental rights²¹³

A number of legal critics have expressed their disapproval with the idea of 'balancing' fundamental rights as a way of resolving disputes concerning fundamental between private parties. *Cherednychenko* is opposed to an approach that seeks to resolve a dispute between private parties at a constitutional level and argues that private law courts should not complicate legal discourse by resorting to fundamental rights arguments in cases where the values enshrined in fundamental rights are already recognized by private law.²¹⁴

Similarly, *Cheadle Haysom & D Davis*, argue that the conduct of a person is always tested against a statutory or common law rule and only rules (rather than conduct) should be the subject of a constitutional inquiry. They further argue that the Bill of Rights only reaches into the exercise of private power through ordinary legislation or the medium of a common law rule.²¹⁵ They are of the view that it is more appropriate that competing claims arising from the overlap of rights be resolved by law rather than by an abstract balancing of rights to determine common and impermeable boundaries.²¹⁶

What *Cheadle, Davis & Haysom* and *Cherednychenko* appear to be expressing is a preference for an indirect horizontal effect as a method of resolving disputes concerning fundamental rights between private parties. In other words, rather than relying on their own subjective judgment to resolve conflicting constitutional rights, judges may rely on ordinary legislations and common law to carry out this balancing exercise because they address problems of conflicting rights and interests through a system of balancing. Indeed, English jurisprudence appears to have deliberately avoided the question of balancing fundamental rights and have for the most part confined the balance of parties' interests within the sphere of private law even where

²¹²*Cherednychenko* op cit (n59) 46, 47.

²¹³*Mak* op cit (n5) 167.

²¹⁴*Cherednychenko* op cit (n59) 52.

²¹⁵*ibid.*

²¹⁶*Cheadle, Davis & Haysom* op cit (n20)30-7.

fundamental rights are implicated.²¹⁷ Similarly, in the case of *McDonnell vs. Ireland*, *Barrington J* stated that:

*'The general problem of resolving how constitutional rights are to be balanced against each other and reconciled with the exigencies of the common good is in the first instance a matter for the legislature. It is only when the legislature has failed in its constitutional duty to defend or vindicate a particular right that this court will feel obliged to fashion its own remedy. If however a practical method of defending or vindicating the right already exist at common law or by statute, there will be no need for this court to intervene...constitutional rights should not be regarded as wild cards which can be played at any time to defeat all existing rules.'*²¹⁸

Indeed, an analysis of the *Cradle Case* reveals that that section 39 of the Persons with Disabilities Act had already addressed the question of whether *Nation Media* was obliged to provide inset sign language broadcast or subtitles for its newscasts. It is therefore arguable that the judge's attempt to balance the competing fundamental rights asserted by the parties was wholly unnecessary as the relevant statute had already struck the balance for her. The fact that both parties chose to invoke fundamental rights was in my view, immaterial.

However, not all private law disputes involving a conflict of fundamental rights will be capable of being resolved through common law or legislation. There will be cases when common law or ordinary legislation will be inconsistent with constitutional norms and values or inadequate or altogether non-existent. In such cases, the court should be free to decide to what extent the right in question should have an impact on private relations.²¹⁹ It is however, hoped that with the adoption of the indirect horizontal effect, cases in which judges will be required to engage in a complex exercise of 'balancing' fundamental rights will be the exception rather than the norm.

²¹⁷Mak op cit (n5)135.

²¹⁸[1998] 1 IR 134.

²¹⁹Cherednychenko op cit (n59) 51.

CHAPTER 5

The Way Forward: Challenges and Recommendations

‘.Legislation and common law are the primary vehicles for giving effect to the horizontal application of the Bill of Rights...’ – Professor Sandra Liebenberg²²⁰

This chapter seeks to highlight some of the challenges that the Kenyan courts are likely to encounter when applying fundamental rights to private relations. The study does not purport to provide solutions to these problems; that is clearly beyond its scope. Rather, the objective is to create a certain level of awareness in order to provoke debates and discussions within Kenya’s legal circles on how these issues may be resolved.

While the application of fundamental rights to private relations may be affected by a wide range of difficulties; this chapter only seeks to address two .i.e. contractual waiver, and legal culture. The study makes various recommendations and proposals for reform in respect of the application of fundamental rights in the private sphere in Kenya. It concludes by making a case for the need for Parliament to formulate legislation aimed at giving effect to fundamental rights as a solution to the difficulties that bedevil the notion of horizontality in Kenya.

I **Contractual Waiver**

In public law, it is usually no defence for a state to allege that an interference with a right was justifiable on the ground that the individual concerned had consented to the interference. The state must defend its interferences with rights according to a strict test of proportionality under which it must demonstrate that it has a legitimate aim and has acted appropriately and only where necessary.²²¹

In contrast, in the private sphere, it is normal for fundamental rights to be sacrificed by agreement.²²² While there are limits to the power of individuals to consent to the abrogation of rights such as the invalidity of a contract of slavery, these outer boundaries leave a wide range of choices for the exercise of individual discretion to

²²⁰Liebenberg op cit (n43) 323.

²²¹Collins op cit (n27) 36.

²²²Collins op cit (n27) 13.

qualify or forfeit individual rights.²²³ For example, alienation of property and therefore the loss of property rights is usually achieved through a consensual transaction. Similarly, the right to keep information private under the right to respect for private life can be lost by agreement where an author agrees to publish memoirs about his or her scurrilous life.²²⁴

The possibility for parties to agree on a contractual waiver of an interest protected by fundamental rights therefore forms a specific example of the way a balance may be struck between freedom of contract and fundamental rights.²²⁵ The important question then becomes to what extent should the courts enforce fundamental rights in a private law context in order to protect the individual against him or herself?

In principle, many of the freedom rights may be waived as long as the subject does so clearly and freely and without being placed under duress or labouring under a misapprehension. The effect of such a waiver firstly depends on the nature and purpose of the fundamental right in question. This means that in order for a waiver to be enforceable, there would have to be a fully informed consent showing that the applicant was aware of the exact nature and extent to the rights being waived in consequence of such consent.²²⁶

According to *Cherednychenko*, in the absence of specific legislation of a mandatory character containing specific rules, implementing these rights into horizontal relationships between private parties, private law courts should be free to decide the extent that these rights are to have an impact on contract law. In this regard, she argues that it may be possible to enforce a contract which obliges the employee to work more than forty hours per week on the basis of contract law subject to the condition that the employee had freely contracted away his right to a limitation on maximum working hours.²²⁷

A study of the practice in Germany reveals that courts have drawn a distinction between rules of private law which parties are free to adopt, change or ignore when establishing contractual relationships and rules which are enforced regardless of the parties' intentions. Ordinarily, the effect of human rights considerations will be most

²²³*Ibid.*

²²⁴*Ibid.*

²²⁵Mak op cit (n5) 70.

²²⁶ Currie & De Waal op cit (n115) 41.

²²⁷Cherednychenko op cit (n59) 51.

intensive in the case of (but not restricted to) those rules of private law which are deemed so important for the protection of the general interest that they are not left to the disposition of private parties.²²⁸

For instance, the German courts have given direct effect to the right to marry in a judgment concerning a student nurse whose training contract stipulated that she would be laid off if she marries (a so called celibacy clause' or non-marriage clause). Similarly, the *Cour D'Appel of Paris* has held that the stipulation that Air France stewardesses must remain unmarried was void as the freedom to marry could not in principle be contractually limited or waived.²²⁹ However, the fact that some rights may not be waived does not mean that the fact of waiver then becomes legally irrelevant. Waiver may be relevant when considering the remedy to be awarded for the violation of the fundamental right.²³⁰

Further, courts will not enforce contracts in which the parties have undertaken to behave unconstitutionally. Two people cannot undertake for example, that the law of defamation must be applied in future disputes between them without any reference to the Bill of Rights. The reason for this is that the constitution requires courts to promote the Bill of Rights when developing common law and individuals may not prevent the courts from fulfilling its constitutional obligations.²³¹ What individuals may do is waive the right to exercise a fundamental right. For instance, an individual may undertake not to exercise the invalidity of state or private conduct. From a constitutional point of view however, such waiver is seldom decisive of an issue.²³²

In the case of *Wittman vs. Deustscher Schulverein, Pretoria*, the Court found that the applicant had waived her constitutional right to freedom of religion by subjecting herself and her daughter to a private school's constitution and regulations.²³³ *Currie & De Waal* support this decision particularly because of the fact that that there was nothing to prevent the applicant from enrolling in a school where there was no religious instruction for a certain period of time or to leave the school.²³⁴

²²⁸Fedtke op cit (n2) 143.

²²⁹Mak op cit (n5) 52.

²³⁰Currie & De Waal op cit (n115) 41,42.

²³¹Currie & De Waal op cit (n115) 40,41.

²³²Ibid.

²³³1998 (4) SA 423 (T).

²³⁴Currie & De Waal op cit (n115) 42.

In summary therefore, when dealing with a case of contractual waiver of fundamental rights, the recommended approach is for the court to; a) establish the fundamental right at stake and how it interacts with freedom of contract and b) carry out a balance of interests based on the extent to which the 'weaker' party has been able to freely determine its contractual position. Courts may ultimately declare null and void or leave without effect a contract clause that excessively limits the weaker party's fundamental right.²³⁵

Finally, it has also been recommended that the court adopt an indirect horizontal approach in the case of a contractual waiver. It is argued that permitting directly effective human rights to determine the outcome of private law disputes will ignore the traditional and liberal respect paid to informed consent. On the other hand, the method of indirect horizontal effect will not avoid this risk but it may force the court to explain more carefully why it proposes to ignore the consensual nature of the activity just because it regards it as undignified, distasteful or perverse.²³⁶

II Legal Culture, Constitutional Tradition & Other Constraints

Although Kenya has a common law tradition, it is in some aspects similar to the continental systems in the sense that it instinctively places a lot of emphasis on the legislator as the most legitimate source of law (while accepting that many including constitutional development are in fact strongly affected and sometimes driven by judges).²³⁷

Therefore, unlike his or her South African counterpart, a Kenyan judge will not be easily persuaded to 'create law' by means of developing the common law. There is also no legal culture of 'reading in' or 'reading down' statutes in Kenya. Nor do the judiciary go so far as to order the legislature to amend certain laws within prescribed time lines failing which such provision would stand invalid. Rather, one is likely to come across statements to the effect that; '*until Parliament deems it fit to amend*' the impugned law the judge's '*hands are tied*.'

This does not mean that Kenyan judges do not strike down legislation that is proven to be unconstitutional; they do so regularly. What they will not do, however, is to go a step further and spell out the court's version of a constitutionally acceptable

²³⁵Mak op cit (n5) 83.

²³⁶Collins op cit (n27) 37.

²³⁷Fedtke op cit (n2) 356.

approach with which the legislature would have to comply and set time limits for Parliament to amend the law.²³⁸ This understanding regarding the respective roles of the judiciary and the legislature is a reflection of Kenya's legal culture and constitutional tradition which continue to influence the extent to which judges are ready to invoke fundamental rights to develop various spheres of private law.²³⁹

According to *Froneman J*, the conventional wisdom of deferring to legislative choices to avoid considering whether long standing private law rules require significant reform (in order to conform to constitutional norms and values) prevents courts from doing their bit in eradicating distorting patterns of interpersonal, social and economic domination. He argues that this type of '*judicial minimalism*' in areas regulated by private law will tend to assist only a transfer of power between elites not the substantive transformation of the character of our society as the best reading of the constitution requires.²⁴⁰

Similarly, *Klare* argues that legal culture and socialization constrain legal outcomes irrespective of the substantive mandates entrenched in constitutions and legislation.²⁴¹ He describes legal culture to mean professional sensibilities, habits of mind and intellectual reflexes.²⁴² He further states that legal culture has a powerful filtering effect on interpretative practices and therefore on adjudication and substantive legal development. He is of the view that the unconscious and unreflective reliance on the culturally available intellectual tools and instincts handed down from earlier times may exercise a drag on constitutional interpretation weighing down and limiting its ambition and achievements in democratic transformation.²⁴³

The continued reluctance of Kenyan judges to infuse constitutional norms and values into private contractual disputes is therefore not only inconsistent with the aims and objectives of the Kenyan Constitution but is also retrogressive. With particular reference to the court's attitude towards the doctrine of freedom of contract, *Pound* observed that:

²³⁸The same can be said of the German legal system, see *Fedtke op cit* (n2) 146.

²³⁹A similar observation if made regarding South Africa by *Liebenberg op cit* (n43) 340.

²⁴⁰*Liebenberg op cit* (n43) 334.

²⁴¹*K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 SALJ151.*

²⁴²*Klare op cit* (n241)166.

²⁴³*Klare op cit* (n241)168.

“The attitude of many of our courts on the subject of liberty of contract is so certain to be misapprehended, is so out of the range of ordinary understanding, the decisions themselves are so academic and so artificial...”

Another major factor that has been said to constrain the development of the role of fundamental rights in the private sphere is the legal culture of privileging negative rights and liberties. Kenya’s private law, like that of South Africa, provides strong protection to vested property rights and the negative freedom to contract freely without undue judicial intervention.²⁴⁴ Indeed, it is not unusual to come across a decision where a Kenyan judge reaffirms that *‘it is not the place of the courts to re-write a contract for the parties’*.²⁴⁵ This means that traditional notions of sanctity of contract and judicial restraint are likely to prevail over any transformation of existing doctrines inspired by fundamental rights and their underlying purpose and values.²⁴⁶

Liebenberg argues that the privileging of negative rights and liberty in constitutional adjudication is not merely a question of the methodology of applying the constitution to private law but a substantive ideological choice.²⁴⁷ She is of the view that these trends will continue unless the classic liberal ideology of minimizing state and judicial interference in private relationships in our legal culture is loosened.²⁴⁸ With particular regard to the horizontal enforcement of socio economic rights, *Liebenberg* correctly points out that socio-economic rights did not originally form part of private law tradition and the constitutional recognition of socio-economic rights require a fundamental transformation of private law to give proper effect these rights. She therefore argues that the horizontal application of socio-economic rights requires a radical break with conventional patterns of thought about the way in which the law should regulate relationships between non-state actors.²⁴⁹

The concept of horizontality in a constitution seeks to irradiate democratic norms and values into the so called private sphere, particularly the market, the workplace and the family.²⁵⁰ It is evident that legal culture plays a major role on whether this objective will be achieved. In order for fundamental rights to play any meaningful

²⁴⁴Liebenberg op cit (n43) 341.

²⁴⁵See the case of *Kenya Revenue Authority vs. Menginya Salim Murangui* H.C.C.C No. 1139 of 2002 [2010] eKl.

²⁴⁶Liebenberg op cit (n43) 375.

²⁴⁷Ibid.

²⁴⁸Ibid.

²⁴⁹Liebenberg op cit (n43) 335.

²⁵⁰Klare op cit (n241) 151.

role in the private sphere, there will be a need for judges to shift their intellectual focus from a highly structured, technist, and rule bound approach to adjudication to a more policy based and consequentialist approach.²⁵¹

III Enabling Legislation

Whilst it is not doubted that the state has a positive constitutional duty to intervene in certain private relationships for the benefit of a particular party, the point to be made is that the focus of such intervention ought to be on legislation designed and necessary to give effect to constitutional values.²⁵² The most fundamental value of the constitution – popular sovereignty – requires that an individual's rights must be protected against private violation is in the first instance through legislation. It is the legislatures' task to enact legislation to vindicate the rights of all persons by balancing the rights of groups and individuals with competing interests.²⁵³

Article 21(1) of the Kenyan Constitution imposes a duty on the state and state organs to '*observe, respect, protect, promote and fulfil*' the fundamental rights in the Bill of Rights. It has been argued that the duty to 'protect' places an obligation on the state to enact and enforce necessary legislation to regulate and enable private actors fulfil their duties with regard to fundamental rights. Indeed some provisions of the constitution expressly require the state to enact legislation to give effect to certain fundamental rights.²⁵⁴

The legislator would thus be obliged to create a system of private law which balances competing private interests and ensures that individual freedom is adequately protected in private relationships.²⁵⁵ *Springman & Osborne* have argued that courts have no business deciding which right ought to be preferred to another and recommend that this balancing exercise be left to the legislature which has the democratic legitimacy to decide such matters because it is in the legislature that such choices will be subject to exhaustive investigation, committee deliberation, publicity, debate, negotiation and if necessary, amendment by ordinary procedures. They further argue that it is these characteristics of the legislative process that bestow upon legislative value choices a

²⁵¹Klare op cit (n241) 168.

²⁵²Ibid.

²⁵³Springman & Osborne op cit (n196) 49.

²⁵⁴Liebenberg op cit (n43) 333.

²⁵⁵Fedtke op cit (n2) 148.

democratic legitimacy that can never be yielded by judicial value selection.²⁵⁶ Similarly, *Cheadle & Davis* observe that:

“Legitimate concerns about private power aside; we should not shy away from the dangers and the difficulties that s 8(2) and (3) raise. It appears to hand to an unelected elite the power to develop rules to govern the conduct of citizens – a power that in any conception of democracy is the preserve of the democratically elected legislature. It is then a provision that on the face of it is at odds with the deepest commitments of our constitution. It seems to reflect a distrust of the legislature and a muddling function.”

In summary, the balancing of constitutional rights against individual common law freedom is more appropriately done in legislation than by judicial decision. This is because relationships between individuals are better regulated by the common law and specific human rights codes.²⁵⁷ Where adequate and effective regulatory legislation exists, litigants will be required to rely on such legislation to protect their rights against infringement by private parties. The advantages of this is that a) it avoids a tendency of judges to create law and as a result breach of the separation of powers doctrine, b) the application of the Bill of Rights will be more precisely expressed in statute and c) it will eliminate the uncertainty that is associated with broad constitutional provisions.²⁵⁸

In determining whether to require reliance on legislative measures for giving effect to the horizontal application of fundamental rights, courts must however, be cognizant to the very real limitations and constraints of legislatures in ensuring effective protection of constitutional rights. Modern legislatures are subject to the constraints of time and resource pressures, they are at a relative disadvantage to the executive in relation to technical expertise and resources and subject to the capture of powerful business and interest groups in society. This situation results in imperfect legislation which may disregard or neglect the rights of particular groups frequently those who are politically, economically and socially marginalized. In such cases, litigants must still look to the courts to find a remedy in terms of the existing common law or where necessary, to develop new common laws remedy to give effect to the relevant constitutional

²⁵⁶Springman & Osborne op cit (n196) 43,44 on judicial deference to legislative balancing.

²⁵⁷Barendt op cit (n25) 425.

²⁵⁸Liebenberg op cit (n43) 333.

right.²⁵⁹In other words, where the state has failed to provide any protection at all or if the measures taken were clearly insufficient the court has a duty to intervene.²⁶⁰

Finally, while there is no doubt that the indirect horizontal effect can provide protection in many situations, experience has also shown that the approach will need to be bolstered by the enactment of specific statutes designed to safeguard constitutional values in the private sphere. The indirect constitutional route is, on its own, simply not effective enough.²⁶¹

IV Conclusion - Are we Back Where we Started?

When I retrace my steps to the beginning of this discussion in chapter 1 and 2 of this study, I cannot help but to wonder whether having 'gone full circle', 'we are back where we started'; that is to say, we are back to the traditional view that only recognizes the vertical application of fundamental rights. Upon further reflection however, I find that this is perhaps a one dimensional assessment of the matter.

There is no doubt that Kenyan Constitution, offers protections that go well beyond the vertical application of fundamental rights. Indeed, the study makes it clear that traditional barriers to the application of fundamental rights in the private sphere such as the private/public law divide or the notion of an unlimited doctrine of freedom of contract no longer hold sway and are out of step with the realities of modern day commercial transactions.

However, Article 20(1) (a) of the Kenyan Constitution requires that a horizontal application of the fundamental rights take place indirectly; that is, within the limits of common law rules and ordinary legislation tailored specifically to give effect to the various rights. Further, legal critics have discouraged the practice of attempting to resolve disputes by 'balancing' various the rights that come into conflict when applied to private relations. Instead, they recommend that this analysis be carried out through the medium of ordinary legislation and common law. Comparative studies support this approach and there is really no reason why Kenya should depart from it.

Whereas the study appreciates the importance of contractual autonomy in private relations, it requires courts to engage in a deeper analysis of such relationships in order to establish whether they represent a genuine equality of bargaining power, as

²⁵⁹Liebenberg op cit (n43) 334.

²⁶⁰Fedtke op cit (n2)150.

²⁶¹Fedtke op cit (n2)155.

opposed to a merely formal equality. In the event that it is determined that a transaction does not represent a genuine equality of bargaining power, the court should consider whether such a case warrants the intervention of fundamental rights so as to protect the interests of a weaker party. It is contended that such an approach would enable courts to strike a balance between the need to protect fundamental rights on the one hand and the need to protect the contractual autonomy of private persons on the other.

Further, in view of the existing confusion and apparent lack of conceptual clarity on the question of horizontality in Kenya, the study attempts to propose a methodology of judicial analysis that may be useful in understanding when and how fundamental rights should be applied to private relations. This analysis involves a consideration of the nature of the right in question, the duty imposed by the right, the identity of the party against whom it is sought to impose the duty and whether the parties have a special relationship in which one of them would ordinarily have significant control among other factors. The difficulties posed by the horizontal application of fundamental rights such as contractual waiver and an inflexible legal culture and constitutional tradition are identified and left open for further discussion and analysis.

The study concludes that whilst an indirect horizontal approach appears to offer the most appropriate method of applying fundamental rights in the private sphere in Kenya, it is an insufficient mechanism for ensuring the infusion of constitutional norms and values in the private sphere. More would be required in the form of legislation specifically aimed to give effect to the various fundamental rights. In the context of the law of contract, legislation such as the Consumer Protection Act and the Employment Act are of particular significance.

An indirect horizontal approach that is complemented by legislation specifically aimed at giving effect to fundamental rights may well prevent us from 'going back where we started.'

BIBLIOGRAPHY

Cases

- Afrox Health Care Bpk vs. Strydom* 2002 (6) SA 21 (SCA).
- Barkhuizen vs. Napier* ('Barkhuizen') CCT72/05 [2007] ZACC 5.
- Brisley vs. Drotsky* 432/2000 [2002] ZASCA 35.
- Carmichele v Minister of Safety and Security* 2001 (4) SA 938
- Cradle (The Children Foundation) suing as trustee through Geoffrey Maganya vs. Nation Media Group Limited*, High Court JR. Misc. App. No. 217 of 2011.
- Du Plessis vs. De Klerk* 1996 (3) SA 850 (CC).
- Everfresh Market Virginia (Pty) Limited v Shoprite Checkers (Pty) Limited* [2011] ZACC 30.
- Hoffman v South Africa Airways* 2000 (CCT17/00) [2000] ZACC 17
- Kenyatta vs. Nairobi Star Publications Limited* High Court Petition No. 187 of 2012.
- Kenya Bus Service Limited v The Attorney General Nairobi* High Court Miscellaneous Application No. 13 of 2005 (Unreported).
- Kenya Revenue Authority vs. Menginya Salim Murangui* H.C.C.C No. 1139 of 2002 [2010] eKlr.
- Khumalo vs. Homolisa* CCT53/01 [2002] ZACC 12.
- Maphango v Aengus Lifestyle Properties (Pty) Limited* 2012 (5) BCLR 449 (CC).
- Mwangi Stephen Mureithi vs. Daniel Toroitich Arap Moi* Petition Number 625 of 2009 [2011] eKLR.
- RM vs. Attorney General of Kenya*, High Court of Kenya Civil Case No. 1351 of 2002
- Teitiwinnang and Ariong & Others* [1987] L.R.C. Const. 517.
- Vernon v Bethel*, 2 Eden 110.
- Zantsi vs. Council of State, Ciskei & Others* (CCT24/94) [1995] ZACC 1.

Statutes

- The Constitution of the Republic of Kenya (2010).
- The Constitution of Kenya Review Act No. 9 of 2008.
- The Constitution of the Republic of Kenya (1963) (Repealed).
- The Constitution of the Republic of South Africa.

Books

- Allen *Constitutional Protection of Private Property and Freedom of Contract* (2000).

Barendt 'The United States and Canada: State Action, Constitutional Rights and Private Actors' in *Human Rights and the Private Sphere: A Comparative Study*.

Cheadle, Davis & Haysom in *South African Constitutional Law: the Bill of Rights*.

Cherednychenko, 'Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or Towards Walking in Circles?' in *Constitutional Values & European Contract Law (2008)*.

Currie & De Waal *The New Constitutional & Administrative Law*

Currie & De Waal *The Bill of Rights Handbook 5ed (2005)*.

Fedtko 'Drittwirkung in Germany' in *Human Rights and the Private Sphere: A Comparative Study*.

Hager, 'Fundamental Rights in National (Namely) German Contract Law' in *Constitutional Values & European Contract Law* (2008).

Hunter-Hein 'Horizontal Application and the Triumph of the European Convention on Human Rights' in *Human Rights & the Private Sphere: A Comparative Study*.

Le Roux, Van Marle *Ten Years after AZAPO vs. The President of South Africa*.

Liebenberg *Socio-Economic: Adjudication under a Transformative Constitution*.

Mak 'Interactions between Contract Law and Fundamental Rights' in *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy, England*.

O'Cinniede 'Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment' in *Human Rights & the Private Sphere: A Comparative Study*.

Journals

Bhana, Pieterse 'Toward a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' *SAHRLJ* (2005) 876.

Cheadle, Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) *SALJ* 57.

Cockrell 'Can You Paradigm? – Another Perspective on the Public Law/Private Law Divide' (1993) *Acta Juridica* 227.

Chirwa 'The Horizontal Application of Constitutional Rights in a Comparative Perspective' available at [http:// www.saflii.org/za/journals/LDD/2006/9.pdf](http://www.saflii.org/za/journals/LDD/2006/9.pdf).

Collins 'On the (In)compatibility of Human Rights Discourse and Private Law' in *LSE Law Society & Economy Working Papers* 7/2012.

Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SALJ* 151.

Knox 'Horizontal Human Rights Law' available at http://www.asil.org/pdfs/ajil_horizontal_human_rights_law.pdf.

Oduor 'Inconsistent Judgments in the Kenyan High Court' available at http://www.academia.edu/3530104/Inconsistent_judgments_in_the_Kenyan_High_Court.

Pieterse 'Indirect Horizontal Application of the Right to Have Access to Health Care Services' (2207) 23 SALJ 161.

Pound 'Liberty of Contract' Volume 18 of the Yale LJ 17.

Springman, Osborne 'Du Plessis is not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' (1999) SALJ 42.

University of Cape Town