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Fundamental Rights in the Private Sphere

A study of South African Constitutional Law with comparative Analysis of German, US-American and Canadian Law

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I. INTRODUCTION

The Constitution of the Republic of South Africa of 1996 (Final Constitution, FC)[1] deals with the relationship between the Bill of Rights and non-constitutional law in two particular sections. Section 8 FC provides in subsection 2 the general notion that

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

while section 39 (2) FC, the interpretation clause requires that

> „(w)hen 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."

The interference of constitutional law with other legal rules, particularly those of the private law, is a phenomenon of several constitutional law systems today. Nevertheless it is still a field of much debate, concerning the admissibility and the modes of such interference. In all modern constitutional systems, nobody questions that fundamental rights[2] are significant for the relations of private persons in certain ways. They are the limits beyond which the state may not go in regulating these relations, and the values they express are to made fruitful by the legislator so as to protect private persons from one another.[3]

Statutes, for example, are universally considered to be revisable for compatibility with the law on fundamental rights, providing there is such a protection. This becomes relevant, when in disputes with two private parties one seeks to rely on legislation and the other challenges its compatibility with fundamental rights norms. In this way, some degree of connection between private and public law is inevitably achieved in private disputes. Similarly, the state itself may rely on private law statutes or common law, for example, when it sues or is sued as a landowner or employer, and in such cases it is again generally accepted that the state's reliance on such law must be compatible with the law protecting fundamental rights.[4]

The more difficult question is the relevance of fundamental rights in a purely private dispute between private parties which is governed by private law alone, in which the only public

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1 Act 108 of 1996

2 The terms „fundamental rights", „human rights" or „basic rights" are used interchangeably in this thesis. There is no relation to theories that distinguish between political or socio-economic rights or between different generations of fundamental rights.

3 Cf. Art 1(1) 2 of the German Basic Law (GG).

authority present is the court itself as the state actor charged with the quest for an appropriate cause of action, that-being the applicable principle of the common law or the interpretation of the statutory provision. Could the Bill of Rights clauses be regarded as higher private law rules in the sense that they are to be applied to relations between private parties? And if this is the case, how do they operate in the private sphere?

Three different ways of horizontal application are possible: Firstly, can a separate cause of action be founded on them, leaving aside or passing all the existing common law rules or statutory body? Or, secondly, would the existing rules still form the causes of action but with maybe fundamental rights then changing or overruling existing statutes or common law? The alternative to that extremely strong influence of constitutional norms over the existing private law would, thirdly, be a more indirect way by means of interpretation of undetermined common law and the statutes in the light of fundamental rights or their values and purpose. In my opinion, these three different modes of horizontal application are to be distinguished. I will show that the South African Constitution deals differently with these three possibilities. It is this differentiation that in fact determines the debate.

This thesis is not the place to dispute either the desirability of the legal concept of basic values as fundamental rights or the philosophical concept of their permeability in the legal relation of private persons.[5] The question is rather, since the South African constitution explicitly demands that natural or juristic persons are bound by fundamental rights in general, what does that mean for both the understanding and application of constitutional law? How do the courts apply the application clause, what is the scope of the doctrine as provided in ss. 8 and 36 FC? Furthermore, what does this constitutional imperative mean for the application of the established private law doctrines?

The idea that even private law relationships should be in some way guided by the Constitution and thus by the founding values of a society is not a South African invention. The whole process of adopting both the Interim and later the Final South African Constitution profited much from the advice of international experts in constitutional law. The construction of the Bill of Rights with regard to „ordinary" legal disputes reflects the development of the understanding of fundamental rights in the international legal community. Dogmatic problems in South Africa may be solved with reference to international comparison.[6] That is why I believe that it helps to

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4 Hunt, Public Law 1998, p 423 (426).

5 For the legal-philosophical background, cf. Leigh, 48 ICLQ (1999), 57 (59ff).

6 Cf. s. 39(1) FC: When interpreting the Bill of Rights, a court, tribunal or forum (...) may consider foreign law.

see how the concept of human rights in the private sphere found its way into South African legal doctrine and which legal systems served as examples in this regard.

This text tries to show the main legal doctrines that promoted the idea of horizontality (Germany, USA and Canada). I use this part of the thesis to set out the basic principles of the doctrine of horizontality in general. Although they are here discussed with reference to foreign jurisprudence, this should be read as a „general part". The problem of horizontal application is, in many regards, independent of a specific legal system, the particular jurisdiction is here of secondary importance only. Rather the different systems deal differently with the questions, whether a cause of action is possibly based on a constitutional norm.

I will then deal with the development of the doctrine in South Africa, both under the Interim and the Final Constitution and the normative effect of the doctrine in the constitutional scholarship today. It is mainly in this part that I will point out the different approaches to the use of fundamental rights in the private sphere (cause of action, overruling the common law, mere interpretation). Finally, I will point out some problems that concern matters of jurisdiction as a consequence of the horizontal application of fundamental rights.

II. COMPARATIVE VIEW

A lot of actual South African constitutional law is influenced by foreign legal doctrines.[7] It goes without saying that the Constitutional Assembly was not interested in simply copying foreign constitutional texts, but rather used their experience and authority as examples for the solution of legal problems that could occur in the South African context as well.

This chapter serves as an introduction into the doctrine of horizontal application and shows the different approaches to the problems arising in this context. The distinction between the different forms of horizontality in the German context is not necessarily the same as in the Canadian context. But it is necessary to point these out to see where the South African solutions fit in.

A. GERMANY

In Germany the traditional view was that human rights could indeed only govern the relation between the individual and the public authorities, the state. While even this was disputed under the Weimar Constitution (1919 - 1933), the primary function of the fundamental rights in terms

[7] Cf. de Waal, A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights, SAJHR 11 (1995), 1.

of the *Grundgesetz* (Basic Law, GG) was beyond doubt: they are legally binding upon the State, they must be recognised by the legislator, the executive and the judiciary.[8]

The meaning of the basic rights as regards relations between private persons, however, has been the subject of lively debate by German legal scholars, and the courts have taken sides in some remarkable decisions. As I will point out, the German model is the leading one in terms of interpretative influence of fundamental rights to the private law.

1. The traditional view and definitions

As in other legal systems[9], human rights were traditionally regarded as rights of the individual against society as represented by government and its officials. Although all individuals can be bearers of these rights, the obligations corresponding to a person's right lie only in his or her own government, but not in other individuals.[10] That was described with the term of „vertical application", regarding the metaphorical assumption, that the state was somehow above the ordinary citizen. Thus, the courts in Germany were expected to hold or at least exercise fundamental rights primarily in relation to the state.

As long as the state seemed to be the only actor that could sustainably interfere with private interests, the demand for constitutional protection of individuals' interest from private infringements was low. But the ever-increasing threats from non-state actors to the individuals' interests parallel to the development of the industrialised society gave rise to the development of theories that adopted an understanding of fundamental rights that would include the notion of infringements by private parties. Although the Weimar Constitution of 1919 had already ensured the right to free speech in private occupational relations (Art. 118(1) 2 WRV), it was not before the middle of the 20th century that the question arose whether human rights should be invoked to protect individuals in their relationships with one another. Hans Nipperdey, the first president of the Federal Labour Court, described that reason as the „inability of private law to protect the individual against social power".[11]

The drafters of the Basic Law did not provide the text with a clear statement against or in favour of a general horizontal application. They only stated that the right to form associations should have direct significance, Art. 9(3) 2 GG: „Agreements that restrict or seek to impair this

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[8] Art. 1 (3) GG: The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

[9] Cf. Clapham, Human Rights in the Private Sphere, 4.1, p 89ff.

[10] For this general approach see Stern, Staatsrecht III/1, § 76 I 1, S. 1511ff.

[11] Nipperdey, Grundrechte, Vol. IV/2, p 752.

right shall be null and void; measures directed to this end shall be unlawful". This term was used to argue both in favour of and against a general notion of horizontality, with respect to its direct or indirect distinction.[12] Today, the research of both protocols and earlier drafts leads primarily to the conclusion that it was the aim of the drafters to reduce the power of the state in favour of the individual only.[13]

The German term *Drittwirkung* is more accurately *Drittwirkung der Grundrechte*, the third-party effect of fundamental rights. Already in the first writings about the possible horizontal effect of the Basic Law[14], the authors realise the difference between a possible *unmittelbare* - direct - and *mittelbare* - indirect - *Drittwirkung*. The former means that the rights themselves can be directly applied against private bodies by the courts. Fundamental rights are no longer applied in „their" traditional sphere only, in relations state - citizen, but can be used as sources of the law in private law disputes. I will elaborate on the mode of this application later. The latter means that not the rights as such, but rather the values and principles surrounding or underlying constitutional fundamental rights, are to be considered by the courts when they are deciding private law cases.

2. Comprehensive clauses as the port of entry of constitutional values

It was particularly the concept of *indirect* horizontal application that was promoted by courts and writers. Established in its general cognisance by Günter Dürig[15], the doctrine at the same time fulfilled the requests for a higher influence of constitutional law in the private law field and adopted the traditional dichotomy between public and private law in a continental law system. Dürig argued that the best way of taking into account the significance of the then still quite new fundamental rights clauses in the established private law system would be to use them to fill out the general clauses and concepts of private law.

In German legal doctrine, *Generalklauseln* are sections of statutes in which the legislator either refrains from narrowly specifying the factual situations to which a clause applies, or does so, but also gives a general direction with which judges are to determine the specific factual situations to which the clause applies. Although the most popular examples of such comprehensive or blank clauses are sections of private law statutes such as the Civil Code (*Bürgerliches Ge-*

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[12] This discussion is shown at Lewan, 17 ICQL (1968), p 571 (573ff).
[13] Stern, Staatsrecht III/1, § 76 I 4, S. 1520f.
[14] See for example Nipperdey (note 11) or W. Leisner, Grundrechte und Privatrecht, 1960.
[15] Dürig, Grundrechte und Zivilrechtssprechung, in: Festschrift für Hans Nawiasky, 1956.

setzbuch, BGB) or the Code of Commercial Transactions (*Handelsgesetzbuch*, HGB), they nevertheless appear in many statutes of both public and private law.

The strategy, to use this „left-open legislation" to promote certain values and ideas, has been used before. The drafters of the BGB intended to give the values and leitmotifs of the 19th century patriarchal society an anchor in the legal system while later the National Socialists provided the most radical example. They used these sections to introduce their value system, based on racism and oppression in the German legal system.[16]

According to this concept, human rights could be applied where statutes were abstract and general in their wording and the courts consequently had a broad latitude in statute based decisions. These clauses, the „open windows"[17] through which social values and ideas may pass into private law are by and large obvious. Just to mention a few of these clauses: § 826 BGB grants compensation for damages suffered as a result of a conduct which could be regarded as being „*contra bonos mores*", § 242 BGB requires obligations to be fulfilled according to the „fair standards of good faith", § 626 BGB allows an employer immediately to discharge an employee on an „important ground". *Boni mores* or good faith are such comprehensive clauses where a judge has to take factors of social norms and values, apart from legal reasoning, into consideration to decide the case.

The promotion of fundamental rights through these clauses was only the starting point of the idea of indirect horizontal application. To secure constitutional freedoms when the private law, uninfiltrated by constitutional values, proved to be of no use, was only one of the purposes for the development of that doctrine. It was rather the extension and interpretation of existing private rights „in the light of the Basic Law" with different methodical instruments that would finally fulfil this function properly.[18]

Different scholars criticised and promoted Dürig's ideas.[19] But his ideas were generally recognised as forming a dogmatically well chosen and substantial basis on which the connection between private and constitutional law could operate.

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[16] Cf. to this process and its handling by German Courts: B. Rüthers, Die unbegrenzte Auslegung - Zum Wandel der Privatrechtsordnung im Nationalsozialismus, 5th ed. Heidelberg 1997.

[17] This metaphor is equivalent of the „port of entry"-idiom in english terminology. Cf. Rüthers, op. cit. note 16.

[18] see below II. A. 4. ((2)), p 10f.

[19] Cf. Stern, Staatsrecht III/1, § 76 I 4, p 1528ff;
Lewan, 17 ICLQ (1968), p 573ff.

3. Development in the courts

Parallel to the development of the different doctrines by legal writers, German courts started their own recognisance of the interference between private law and the fundamental rights within the Basic Law.

The first decision in this regard was held in 1954 by the Federal Supreme Court (*Bundesgerichtshof*, BGH)[20] in a decision concerning the possibility of claiming delictual damages for the violation of one's right to personality.[21] Although neither copyright nor reputation nor any other established protected interest of personality in terms of § 823(1) BGB was infringed, the court relied on this section of delictual damages. Its method of achieving this extension of the right was not the traditional one of finding analogies from other sections or from relevant cases. Instead, it recognised a general right to personality, one which protected the personal integrity in all its areas or manifestations. Under this exclusive right all specific rights of personality, whether existing or future, were to be subsumed.

The Supreme Court reached this extensive interpretation by reference to Articles 1 and 2 of the Basic Law[22]: the provisions recognise the right of a human being to have his dignity respected and the right to free development of his personality as a private right. This general right to personality must be regarded as a constitutional guaranteed fundamental right, even in a purely private dispute.

Some years later, the same court explicitly stated that it was the Constitution *itself*, which created a private sphere for every citizen that had to be respected by any other individual.[23] Furthermore, this constitutional imperative demanded the private law courts to grant damages in the case of an infringement to this right.[24] This was the foundation of the granting of damages for non-economic suffrage, which was partly criticised at the time, but was later confirmed by the Constitutional Court, and is a well established principle today.[25]

But it was in 1958, when the Federal Constitutional Court held that the Basic Law, just 9 years in force, had generally established a new „objective order of values" that would require the courts to ensure that in *every* civil law issue the values of the Basic Law would be applied properly.[26]

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[20] This is the highest German court in civil and criminal law matters.
[21] BGH, Judgement of 25 May 1954 - I ZR 211/53 - in BGHZ 13, 334 - Schacht.
[22] Art 1 GG: The Right to human dignity; Art 2 GG: The Right to personal freedom.
[23] BGH, Judgement of 14 February 1958 - I ZR 151/56 - in BGHZ 26, 349 - Herrenreiter; emphasis added.
[24] BGH, ibid, p. 357.
[25] BVerfG, Judgement of 14 February 1973 - 1 BvR 112/65 - in BVerfGE 34, 269 - Soraya.
[26] BVerfG, Judgement of 15 January 1958 - 1 BvR 400/51 - in BVerfGE 7, 198 - Lüth; emphasis added.

The defendant in that case, Hans Lüth, was the president of the private Press Club Hamburg. He urged film distributors to boycott a film („*Unsterbliche Geliebte*") because the director of that film, Veit Harlan, had an infamous reputation as one of the leading Nazi directors. In the 30s, Harlan had directed such offensive films as „*Jud Süss*", a propaganda-film that showed Jews as the source of all evil and a menace to the German Volk. Therefore, so Lüth, German films ought not be influenced by that director, and their reputation should not depend upon him. The producer of the film, the plaintiff, sought a prohibitory injunction from Lüth, based on § 826 BGB.[27] The Hamburg District Court (*Landgericht*) granted the injunction, but its decision was reversed by the Federal Constitutional Court.

The *Bundesverfassungsgericht* stated that the clauses of the Bill of Rights in the Basic Law are indeed significant for relations between private persons, but indirectly. The Court thus adopted the concept of an indirect horizontal application: „No civil law provision may be contrary to this order of values, every provision must be interpreted in its spirit."[28] These values must consequently be considered in every interpretation of private law provisions, but „above all" in the interpretation of the general clauses such as § 826 BGB, because they make references to the current attitudes of the society as to what is appropriate, and the measure for these attitudes is primarily set forth in the Basic Law.[29] German Courts as a consequence are required to take cognisance of the provisions of the bill of rights and, as far as possible, to give civil legislation a meaning that coincides with the system of values embodied in the Basic Law.[30]

One aspect of the *Lüth* decision is often disregarded or misinterpreted: the Constitutional Court did not rule out the concept of *direct* horizontal application. It actually never did decide - until today - whether the Basic Law permits indirect horizontal application but not its direct counterpart. In 1958 the *Bundesverfassungsgericht* only held that the matter was highly debated and that it is not necessary to decide the dispute since the concept of indirect horizontal application would solve the case appropriately.

4. The doctrine of Drittwirkung today

Since the making of these fundamental decisions, German courts and writers developed and extended the guiding function and significance of the fundamental rights clauses for the inter-

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[27] Although § 826 BGB usually provides claims for damages only (cf. above), it is possible to base a claim for a prohibitory injunction on this section too.

[28] BVerfG, ibid (note 26), 205.

[29] BVerfG, ibid (note 26), 206.

[30] Van der Vyver, THRHR 57 (1994), 378 (379f).

pretation and elaboration of the private law. Today many areas of private law are significantly influenced by the interdependence of constitutional norms with the traditional private law system. These encompass the protection of the personality and human dignity[31], the area of gender equality[32], the area of freedom of speech and freedom of the press.[33]

Today the discussion deals mainly with two questions: Firstly, how or in which mode do fundamental rights operate in the private sphere (direct or indirect) and secondly, what is the dogmatic basis of this application, why do they operate in a certain manner? It is particularly this second question that is debated in legal writings today and that still leaves room for further elaboration. It is, on the other hand, exactly that question and its answers, that generate a more thoroughly understanding of the function and concept of fundamental rights in a constitutional state in a broader sense.[34] It is therefore possible to use the German experience in this regard to generate better understanding of constitutional rights in other legal systems, as well as in South Africa.

a) Direct or indirect horizontal application or just a phantom problem?

The discussion between a possible direct or the indirect horizontal application of fundamental rights was and is still pretty much the same as in South Africa.

(1) Direct horizontal application

The protagonists of a direct approach demand that fundamental rights should be applied in private litigation without any kind of medium or port of entry. Fundamental rights should not only be „objective values", but they could also modify existing rules of the private law or create new ones.[35]

German legal doctrine distinguishes between two forms of *direct* horizontal application: the one mode of operation allows the founding of a cause of action in a private law dispute on a fundamental right provision or to base a claim on it. The other form would allow the usage of fundamental rights to amend existing private law norms or to establish new conditions under which

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[31] Cf. BGH, Judgement of 5 March 1963 - VI ZR 55/62 - in BGHZ 39, 124 - Fernsehansagerin.
[32] BVerfG, Judgement of 28 February 1980 - 1 BvL 17/77 u.a. - in BVerfGE 53, 257 - Versorgungsausgleich.
[33] BGH, Judgement of 9 December 1975 - VI ZR 157/73 - in BGHZ 65, 325 - Stiftung Warentest.
[34] Alexy, Theorie der Grundrechte, p 477.
[35] Stern, Staatsrecht III/1, § 76 II 1, p 1538ff.

these private law norms could be applied.[36] This second approach is equivalent to a debated South African doctrine, where fundamental rights could be used to overrule or change the existing common law.

The practical consequence of that second approach in the private law of contract is mainly that fundamental rights would determine whether a contract could be valid or void in terms of § 134 BGB.[37] But to acknowledge the fact that both private parties can in any case rely on their right, this doctrine requires the judge to first balance the two opposing fundamental rights and then decide whether the one prevails that would render the contract void.

In the law of delict, the direct horizontal application of fundamental rights would lead to the notion of these fundamental rights as „other rights" in terms of § 823 (1) BGB. If fundamental rights are infringed in an unlawful and faulty manner, the victim could claim damages. If there is a threat of infringement, the plaintiff could demand the restraint of that infringement.

In terms of German civil law doctrine, this is *direct* horizontal application, not indirect, although the BGB still plays its part! The relevant provisions are not interpreted, as with indirect horizontal application, but connect the breach of a constitutional right with the civil law remedies. This legal construction is impossible without the prior notion that fundamental rights are directly binding for the other party in civil litigation.[38]

(2) Indirect horizontal application

The starting textual point in both doctrines is Art. 1 (1) of the Basic Law i.e. this section is the supreme blueprint of the legal order that has to be followed by private law, too.[39] The main consequence of the doctrine of indirect horizontal application has already been shown above: fundamental rights radiate into the established private law and have to be considered when interpreting it.[40]

Whether it is interpretation in the light of the fundamental right or in the light of the underlying values, is mainly a question of terminology, not doctrine. Decisive only is the fact that the fundamental right as such is not applied in the private sphere, but it is only existing (statutory,

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[36] It is very much debated and highly unlikely that the Basic Law would permit a claim directly based on a fundamental right provision. The second mode of operation is more likely to succeed in terms of the Basic Law. However, both modes are examples of direct horizontal application.

[37] § 134 BGB: A legal act (viz. a contract) which is contrary to a statutory prohibition is void, unless a contrary intention appears from the statute.

[38] Stern, Staatsrecht III/1, § 76 II 1, p 1539.

[39] Art. 1 (1) 1 GG: The human dignity is inviolable. To respect and protect it shall be the duty of all public authority.

[40] See above, II. A. 2, p 5ff.

customary or judge made) private law that sets the relevant legal rules. Only the content of the fundamental right is used to determine the meaning of the private law. This can be called the values or the purpose of the right, but it is not the right itself.

The main reason, not to apply fundamental rights directly, but rather use existing private law as the medium is the recognition that both parties in a private law dispute are entitled to rely on constitutional rights. Both are entitled to rely in particular on the right to private autonomy, to freedom of contract, to free private relations as they are protected in the Basic Law itself, in Art. 2 (1) GG.[41] Thus, the decision of the Constitution to establish that right against the state, to have such a private sphere, contains as a necessary consequence the principle that private persons are entitled to depart from fundamental norms. These norms are always binding for the state, private persons can depend on a private law system, which gives them more freedom than the state could claim for its acts.

Dürig regards this consequence as being in the „logic of law".[42] Unlawfulness in the private sphere is therefore independent from unlawfulness in terms of constitutional law. The Constitution requires the notion of private law, consequently the question of unlawfulness of a particular private conduct depends primarily on private law itself. At the same time, the imperatives of the Basic Law, as provided by Art. 1 (1) GG, have to be recognised. The possible solution can be found in the interpretation of the sections of the private law codification and the development of established private law doctrines in terms of the fundamental rights. The growing importance of fundamental rights in the post war German society should lead to a development of the private law, not to a revolution. Unconstitutional decisions of the private law should be eradicated in a manner consistent with the whole system of private law.

(3) No Drittwirkung at all?

The strongest critique of the whole discussion of horizontal application, both direct and indirect, was issued by Jochen Schwabe in his hotly debated thesis „The so-called Drittwirkung".[43] He regarded the whole idea of horizontal application as a „phantom" or „mystification". The cornerstone of his theory is that private law relations depend on fundamental rights as do public law relations; therefore every application of fundamental rights is vertical, there is no such a thing as a horizontal application.

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[41] von Münch/Kunig, Grundgesetz, Art. 2 GG, at para 16;
BVerfG, Judgement of 12 November 1958 - 2 BvL 4/56 u.a. - in BVerfGE 8, 274 (328) - Preisgesetz.

[42] Cf. Stern, Staatsrecht III/1, § 76 II 2 b), p 1545.

[43] Schwabe, Die sogenannte Drittwirkung, 1971.

Why? Because even in the private law, it is the state that sets the law, it is the legislator that demands the citizen to endure certain restrictions on his or her private autonomy. Behind every use of fundamental rights in the private law is finally the state. Secondly, it is the judge, and thus another organ of state, that ensures the application of constitutional norms in private law relations. In Schwabes view, fundamental rights do have an implication on private law relations, but this is not because of a doctrine that fundamental rights establish an objective order and therefore have binding effect on private persons. It is rather the state, which may violate the constitutional rights of the individual in the private law, and the state has to obey the fundamental rights according to Art. 1 (3) of the Basic Law.[44]

This position was rejected by a great number of legal scholars. It is necessary to deal with this critique here, not because of differences in terminology, but because it suffers from a doctrinal misconception. The constitution demands that relations between the citizen and the state have to strike a balance that is determined by the Bill of Rights. That is the vertical application of fundamental rights. As long as there is a state player involved, the vertical approach suffices in determing the rights and duties of the parties. But in terms of verticality, fundamental rights are only relevant in these citizen-state relations.

When we think it is desirable that fundamental rights should determine more legal relations, we can do this either by enlarging the number of vertical relations or we can do this by arguing that fundamental rights do not only apply in these vertical relations. It is the first way that Schwabe argues for and it is a wrong way.

Schwabe was right in his argumentation that the overwhelming majority of private law rules are set up in legislation (*viz.* the BGB) and are established by the state organ of the legislature. Indeed the legislature in every modern constitutional state is bound by the rules set up in the Constitution, be it Art. 1(3) GG or section 8(1) of the South African Constitution of 1996.[45]

But that does not mean, that every infringement of private interests that has to be faced according to the private law norms can be seen as infringements of these interests *by* the state, in which case the Bill of Rights would grant protection vertically. In relations between private individuals, personal interests are not infringed because the state allows this infringement, but because of a personal and independent decision by one of these very individuals.

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[44] Art. 1 (3) GG: The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

[45] Constitutional State in this context is meant as a state that recognises supremacy of the Constitution and does not apply the Westminster Model of Parliamentary Supremacy.

The question of whether society or the legislator regards this decision as in accordance with its principles is only the next step and thus necessarily different from the question, who is the originator of that decision. The act or conduct that creates the violation of a constitutionally protected right or freedom in the private sphere might be allowed by the legislator, but it is not attributable to him. It is attributable only to the voluntary decision of another individual.

As far as the deciding judge as part of the public authority of the state is concerned, Schwabe was again right in arguing that it is the judiciary that deals with the problem in practice. In the conflict between two individuals it is the judge only who can apply the fundamental rights, either vertically or horizontally. But again the essential applicational problem of fundamental rights in the private sphere is still not tackled or solved by this reasoning: can one citizen rely on a fundamental right in his or her relation to another individual?

The courts, too, can only apply fundamental rights if they do indeed bind on a private persons' conduct, however this is dogmatically explained. Only if the Bill of Rights is a source of law for the judge in private litigation is the judge then asked to apply it. This is not the binding force of the fundamental rights towards the judiciary, it is the binding force of any kind of law to the party concerned that the judge has to apply because it is the relevant law. It is the task of the judge to find the law applicable to the specific legal context, not the law that is binding on the judge's own conduct.

The judge has to apply the law that is there, that is valid in that moment and that is determining the content of that particular relation. It is not that the law is binding on a party because the judge decides so - it is exactly the other way around: the judge decides according to a specific rule of law because it is binding on a party, because this rule is foremost applicable. The judge is bound by the constitution to apply the applicable law, section 165 (2) FC, or Art. 19 (4) GG. This is one of the basic principles of the idea of a constitutional state, of the rule of law, of the *Rechtsstaat*. However, this constitutional law rule or legal principle does not determine *which* legal rules have to be applied.

In consequence, Schwabe was wrong in denying the problematic character of the question of horizontal application. The application of fundamental rights in disputes of private parties is not comparable to their application in the vertical relation. To do so is a misconception that can occur independently from a particular legal system. Be it on the basis of a statute, be it on the basis of customary or of common law: the fact that the legislator or a judge creates, supervises, sanctions or enforces a legal rule does not make the private law relationship a public one. It

does not make the application of fundamental rights in that legal relationship between the two individuals dependent on a particular constitutional imperative, norm or doctrine.

South African or Canadian Lawyers find no constitutional problem in cases between private parties where a statute is involved. They argue that because the legislator is bound by the Bill of Rights, every case relying on a statute allows constitutional scrutiny. By this doctrine they follow exactly this misconception. Be it statutes or be it common law, one has to determine whether or not the fundamental rights are binding on the individual, and whether or not they apply horizontally. An overbroad pseudo-vertical approach is not suitable for the conceptual problem of fundamental rights in the private sphere.

b) Why do fundamental rights apply horizontally?

As already stated, this quest for an appropriate dogmatic basis for the (indirect) horizontal application of fundamental rights is still a considerably open debate in the German legal community. Nevertheless, it seems sufficient for the purposes of this paper, to show the particular approach that at least seems to be most thoroughly founded on constitutional law reasoning and which has claimed a growing number of supporters in recent years.[46]

This approach regards the problem of horizontal application as part of the doctrine of the state's duty to protect the rights in the Bill of Rights. The state is requested to protect fundamental rights, not only to respect them in its own conduct, cf. Art. 1 (1) 2 GG or section 7 (2) FC.

This objective effect of fundamental rights, in contrast of granting „subjective" rights to the citizen against the state, was again developed for years by the Bundesverfassungsgericht in cooperation with legal scholars.[47] In earlier decisions, the Constitutional Court understood this protective „function" of fundamental rights as being based on the values or principles laid down by the Constitution.[48]

Later, the Court somehow accepted the proposition by writers that fundamental rights in general create, as part of their legal force, particular duties of the state to protect the rights as such against any kind of infringement.[49] The leading case in this regard is the *Volkszählungs* (census) decision from 15'th of December 1983.[50] In this judgment, the Constitutional Court requested

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[46] For a closer discussion of other explanatory models see Stern, Staatsrecht III/1, § 76 III, p 1550ff.

[47] Stern, Staatsrecht III/1, § 69 IV, p 931ff.

[48] Cf. BVerfG, Judgement of 20 December 1979 - 1 BvR 385/77 - in BVerfGE 53, 30 (57) - Mülheim-Kärlich; BVerfG, Judgement of 14 January 1981 - 1 BvR 612/72 - in BVerfGE 56, 54 (78) - Fluglärm.

[49] Cf. Hesse, Verfassungsrecht, at para 350.

[50] BVerfG - 1 BvR 209/83 u.a - in BVerfGE 65, 1 - Volkszählung.

the state to protect the individual's interest in his or her personal data by taking appropriate legal measures against all kinds of misuse of that data.[51]

This does not mean, however, that the protective effect of fundamental rights is as such a German invention and consequently depending on the particular German legal structure or doctrine. It was, in fact, as early as in the Virginia Bill of Rights from 1776 that it became the task of the state to protect and secure the individuals rights and freedoms from outside infringement.[52] The American Declaration of Independence regarded the protection of these interests by the state as self-evident. Since the setting of this precedent the state has thus been bound to act positively to ensure that the individual is able to enjoy his fundamental rights.

The important consideration of that idea with regard to horizontal application is the fact that the state does not only has to protect private rights against public interference, but that the Bill of Rights demands the state to protect against any kind of infringement, for example against infringements by other private parties. So the *Bundesverfassungsgericht* in its first judgment concerning the legality of abortion held that the state was obliged to protect the *nasciturus* from possible infringements of his interests by the mother.[53]

The advantage of this dogmatic foundation of the horizontal application is that it provides explanations for the function of fundamental rights in the private sphere, where the traditional doctrine of indirect horizontal application has reached its limits.

It is the protective effect of fundamental rights that creates the duty not only to interpret the famous comprehensive clauses, but all private law provisions in conformity with the Bill of Rights. The interpretation of these clauses is only one way of transferring constitutional values into the private law. Every private law norm has to be interpreted in the light of the fundamental rights in the Basic Law as long as it is overally possible to interpret a particular norm.[54] With the growing understanding of legal interpretation, it is today established, that the vast majority of private law norms are open for interpretation.[55] The motto is no longer (only) „interpretation of the comprehensive clauses" but also „interpretation of the private law in conformity with the Constitution" (*verfassungskonforme (Privatrechts-)Auslegung*), as it is now established by the Bundesverfassungsgericht.[56] In other, English-speaking jurisdictions, this interpretative concept is sometimes known as the „reading down" of statutes, so that they can be kept in conformity

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[51] BVerfG, ibid, p 45f.
[52] Section 3.
[53] BVerfG, Judgement of 25 February 1975 - 1 BvF 1/74 u.a. - in BVerfGE 39, 1 (41) - Abtreibung I.
[54] Cf. BVerfG, Judgement of 23 April 1986 - 2 BvR 487/80 - in BVerfGE 73, 261.
[55] Cf. Lourens du Plessis, Interpretation of Statutes, 17.2, p 56f.

with the Bill of Rights.[57] Judicial self-restraint is not a question of the specific wording of a provision, but the respect of the judge towards the concept of the provisions in general.

The protective effect of an individual's fundamental rights can be ensured even in cases where interpretable provisions are missing, even where the provisions of the private law codes leave gaps or are missing altogether. In the fast changing societies of today, courts are often challenged with developments in technical or social living conditions, for which the existing legal provisions provide no solutions. Of course, the majority of decisions still rely on interpretation of the existing body of provisions and doctrines. However, occasionally even in a codified system judges create law that can hardly be based on mere interpretation of existing statutes.

The constitution requires the judge to apply the law that protects the fundamental rights of the individual. The judge has this duty when he fills statutory gaps, when he develops doctrines, when he recognises a kind of customary law. It has been well argued that in this context in the German civil law system a solution is appropriate that contends *direct* horizontal application of a fundamental right.

c) The binding of the legislature

The question as to whether or not the legislature is bound by the Bill of Rights and the implications of this to private law relations is primarily no problem of horizontal application, but rather, how an organ of state is limited in its freedom by the Bill of Rights. Nevertheless, this question does affect private individuals in their legal relationships, i.e. what effects have fundamental rights for the legislature in the area of private law and how do these rights affect the private law statutes passed by the legislature.

It is without any doubt today, that the legislature is bound by the Bill of Rights, this is evident from the wording of the Constitutions in Germany (Art. 1(3) GG) and South Africa (Sec. 8(1) FC). This provision affects the (German) legislature in its administrative functions and in its duty of law making, absolutely independent from the subject of the law, private or public.[58] This is indeed a kind of vertical application: the fundamental rights create a duty of an organ of state.[59]

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[56] BVerfG, Judgement of 26 April 1994 - 1 BvR 1299/89 u.a. - in BVerfGE 90, 263 (274f) - Anfechtung der Ehelichkeit.

[57] Cf. McDonald, Ch. 3.2.(l), p 35ff.

[58] Stern, Staatsrecht III/1, § 76 IV 3, p 1565.

[59] BVerfG, Judgement of 11 June 1958 - 1 BvR 596/56 - in BVerfGE 7, 377 (403f.) - Apotheken.

Generally, the legislature has to respect the fundamental rights in the Basic Law, when creating new private law. The fundamental rights of the Constitution prevent the legislature from legally infringing on the protected rights and freedoms of individuals, be they the rights to property or to freedom of occupation. The Constitutional Court has been asked several times to decide the constitutionality of new laws or acts in terms of the right to equality, Art. 3(1) GG. Private law norms were subject to constitutional litigation in many cases.[60]

Here it is possible to see the connection between the indirect approach to horizontal application of the Bill of Rights on the one hand, and strict scrutiny of the duties of the legislature on the other hand.

The primary task of the Court is interpretation of the Constitution and interpretation of the ordinary private law that it is in accordance with the Constitution. There is no *prima facie* assumption of the constitutionality of a private law norm. If the provision violates a constitutional right, the *Bundesverfassungsgericht* is asked to declare the provision unconstitutional and void. But the courts are asked to respect the decisions of Parliament as long as it is possible to reach conformity of the norm with the Bill of Rights by way of interpretation.

The Court in these cases often states that only with a specific interpretation, can the provision be applied according to the Basic Law: it then binds the individuals as a private law provision that is interpreted in the light of the Bill of Rights, i.e. by means of indirect horizontal application. But if the wording of the provision, at least in the opinion of the Court, is not open to interpretation, then the legislature has violated its commitment to the Constitution, the provision is therefore unconstitutional, it is consequently mostly not binding on the individual.[61]

Several „in-between" decisions have occurred in this „dual possibility" approach. Sometimes the Constitutional Court would rather appeal to the Legislature to change provision in the private law, although, so far, the provision can be regarded „only just" constitutional, otherwise the provision may be unconstitutional in the future.[62] This kind of decision is often connected with a time limit set by the court for the legislature to change the doubtful provision and a declaration that it is the duty of the legislature to reform the provision.[63]

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[60] Cf. examples cited in Stern, Staatsrecht III/1, § 76 IV 3, p 1569, Notes 316-318.

[61] The consequences of the unconstitutionality of a legal provision are extremely complex. There is, unfortunately, no room to elaborate upon the sophisticated distinctions exercised by the *Bundesverfassungsgericht*. In general, unconstitutionality is distinguished from invalidity and both holdings have their specific conditions.

[62] Cf. BVerfG, Judgement of 18 December 1968 - 1 BvL 5/64 u.a. - in BVerfGHE 25, 1 - Mühlengesetz.

[63] BVerfG, Judgement of 14 January 1981 - 1 BvR 612/72 - in BVerfGE 56, 54 (78) - Fluglärm.

d) Horizontal application and balancing of rights - a general doctrine?

Every application of fundamental rights in the private sphere has to deal with the fact that both parties are entitled to the rights in the Bill of Rights. Therefore it is the challenge of that application to balance the clashing interests of the private individuals in the context of the case, although both interests may be protected by the constitution. Wherever a balancing of the different interests is necessary in a private law case and both of the interests enjoy constitutional protection, the judge is required to adopt the „ranking" of these interests as provided by the Basic Law.[64]

Most of this kind of balancing is already done by the formulation of the private law provision as that is done by the BGB. The established private law in its codification, doctrines and jurisprudence offers a system of balanced interests that does respect the interests of the individuals in their legal affairs in a quite appropriate way. The creation of that balance was the task of the legislature and still is. It is the duty to limit the freedom of the one individual to allow the other one to enjoy its freedom. It has to be kept in mind that the legislature enjoys a broad latitude in creating private law solutions that keep this balance. Fundamental rights determine only the outer limits of the balancing process.

This balancing has to be along the lines of the particular rights that stand opposite each other in a specific case. The amount of decisions and the number of academic writings about specific problems of the constitutional influence of certain areas of the private law has led to the opinion that any general approach towards horizontal application of fundamental rights is not really helpful. Instead, the relevance of fundamental rights in the private sphere can not be generally determined but only in correlation to a specific case.[65] That explains why some scholars argue that every conclusion from a close scrutiny of the different cases could only lead to limited results. Generalisation is the wrong way, instead a more problem-based doctrine is deemed.[66] The similarity of this approach to the one advocated by Madala J in the *Du Plessis* decision of the South African Constitutional Court is unmistakable.[67]

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64 Larenz, Allgemeiner Teil des BGB, § 4 III, p 70.

65 Säcker in Münchener Kommentar, Einleitung BGB, at para 55, 59.

66 Säcker, ibid;
Stern, Staatsrecht III/1, § 76 IV 7 c), S. 1584ff.

67 *Du Plessis & others v De Klerk & another,* 1996 (3) SA 850 (CC), at para 161.

B. UNITED STATES OF AMERICA

While the Problem of *Drittwirkung* in Germany derives from the traditional continental distinction between public and private law, that is not the case in the United States of America, as there is no such distinction in this regard. However, much has been written to attack the existing gap between the application of fundamental rights in the public domain and the seemingly „undemocratic zone" of private society. For example, while in the public sphere, basic concepts of freedom, equality or democracy apply, in the private sphere, which encompasses almost all economic activity, there is only the „freedom to buy and sell".[68]

1. Vertical approach only

The human rights contained in the Bill of Rights of the South African Constitution find their counterparts in the Amendments to the United States Constitution. The Constitution specifically covers governmental action only. So the cases which come before the Supreme Court alleging a breach of the fundamental rights enshrined in the Bill of Rights have to fix responsibility on a governmental actor. The question of the influence of constitutional law in the relations between individuals is dealt with in terms of the absence of „state action".[69] The courts determine whether or not the challenged private activities involve sufficient governmental action to appropriately subject them to the values and limitations reflected in the Constitution and its amendments.

That doctrine was first enunciated in the *Civil Rights Cases*[70] of 1883, where the Supreme Court invalidated the Civil Rights Act of 1875. This act had sought to ensure equal accommodation in all inns, public conveyances, and places of amusement. The act was designated to ensure that the vestiges of slavery and racism would not stay alive in private relations and that recently liberated black Americans would not be excluded from civil society. As this legislation obviously balanced the interests of minorities with these of innkeepers, theatre owners and railway companies in a certain manner, the Supreme Court held that the businessmen must be left their autonomy to decide such matters on their own. Victims of such autonomous decisions therefore could not rely on their constitutional rights. Since that case the Supreme Court had generally held that the Fourteenth Amendment, regarding the right to non-discrimination in the

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[68] Clapham, Human Rights in the Private Sphere, 6.1, p 151.
[69] Bennett, SAJHR 10 (1994), 122 (126).
[70] 109 US 3 (1883).

US Constitution, applied only to governmental acts, not to the acts of private citizens *inter se*: „Individual invasion of individual rights is not the subject matter of the Amendment".[71]

Also the previously mentioned German concept that the State is obliged by the Constitution to protect the citizens from infringements of their rights by both public and private intruders, could not change the American approach. A hundred years later, the Supreme Court explicitly shut this argument out in the 1989 case of *De Shaney v. Winnebago County Department of Social Services*.[72] The purpose of the Fourteenth Amendment was held to be „to protect the people from the State, not to ensure that the State protected them from each other".[73] The Court takes a purely literal interpretation of the Constitution to reach that decision: „Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is [only] phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[74]

2. Quest for a state connection

However, in the United States, too, the courts occasionally saw the necessity in intervening in relationships other then between state entities or rather to demand scrutiny of conduct by a private legal subject. Therefore, particularly again the Supreme Court developed certain criteria to allow scrutiny of these private relations with regard to the imperatives of the Constitution.

a) Public funding and „entanglement"

The first strategy adopted was the declaring of *prima facie* private conduct as being somehow qualified as „state action". That could be achieved by finding a private party having to respect the principles contained in the Constitution, as for example where the private actor is in a position of a monopoly[75] or has government recourses. The private actor then was regarded as acting in a „public function": The State cannot free itself from the limitations of the Constitution by merely delegating certain functions to otherwise private individuals.[76] Consequently, if private actors assume the role of the State by engaging in these governmental functions then they

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[71] *Civil Rights* cases (1883) at II, per Bradly J.
[72] 489 US 189 (1989).
[73] *De Shaney*, ibid, at 196.
[74] *De Shaney*, ibid, at 195.
[75] *Jackson v. Metropolitan Edison Company* 419 US 345 (1974).
[76] Rotunda, Nowak & Young, Vol. II Ch. 16.2, p 163ff.

subject themselves to the same limitations on their freedom of action as would be imposed upon the state itself.

Particularly the criterion of public funding amounted to a whole variety of jurisprudence with quite inconsequent holdings. In *Kerr v. Enoch Pratt Free Library*[77], Kerr sued for damages on the grounds that the library had refused her admission to a training class because she was Black. The library was partly funded by the City of Baltimore. The Court of Appeals held that control by the state and the extent of the governmental contribution brought the action within the „state action" concept.

On the other hand, in *Dorsey v. Stuyvesant Town Corporation*[78], a split Supreme Court held that tax incentives from the City of New York to the corporation, in that particular case amounting to a 25 year tax exemption, did not mean that Stuyvesant was a state agency. Therefore, the company's conduct would not amount to state action. Finally, the Supreme Court again rejected the connection to the public authorities via funding even in cases where a „private" school was funded 99% from public funds[79] and where a „private" nursing home was entirely dependent on public Medicaid allocations.[80]

But apart from the difficult criterion of direct contribution of public funds to the private actor, the courts often find some other kind of nexus, an „entanglement" between the private actor and the state so that the activity is termed governmental. The spectrum here starts with cases where public office bearers are involved at some stage of the private relation. As for example, when the state action requirement was regarded as fulfilled because a state clerk had issued a writ.[81] It concludes quite obvious decisions holding that the running of elections is an essential state function, including the primary system, and thus activities in connection to the electoral procedures are subject to constitutional limitations regardless of who actually acted in the specific circumstances.[82]

Quite surprising, however, the finding in *Burton v. Wilmington Parking Authority*[83], where a private restaurant operated under a lease from a state authority as part of a public parking service, and the Supreme Court found that racial discrimination by the restaurant triggered state action and thus the protection of the Fourteenth Amendment. In order to strike down discrimi-

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77 326 US 721 (1945).
78 399 US 981 (1950).
79 *Rendell-Baker v. Kohn* 457 US 83 (1982).
80 *Blum v. Yaretski* 457 US 991 (1982).
81 Lugar v. Edmonton Oil Co. 457 US 922 (1982).
82 See *United States v. Classic* 313 US 299 (1941);
Smith v. Allwright 321 US 649 (1944);
Terry v. Adams 345 US 461 (1953).

natory practices in private-law relations, American courts developed a certain amount of creativity to construct „state action".[84]

b) The courts as state actors

Another category of cases where the courts finally accepted constitutional scrutiny in private relationships was established in *Shelley v Kraemer*, 1948.[85] When a state law is invoked and upheld by a state court in a dispute between private parties, or judicial relief is denied in private disputes, this action becomes „state action" revisable by the Supreme Court.

In this case a white property owner attempted to sell his property to a member of a racial minority. The premises were subject to a treaty which forbade sales to racial minorities; those persons with an interest in the restrictive covenant sued to restrain the current owner from violating the treaty by selling to a black person. The Supreme Court held that any court order which would enjoin the sale and enforce the discriminatory contract would violate the Fourteenth Amendment; the state court order would be like a judicial command to the current owner - who is willing to sell to an equally willing buyer - to make a racial distinction in the sale of the property. Such a command by a court would then be a violation of the constitutional imperative. The court assumed that state intervention in private self-fulfilment is not limited to statutes but also occurs when the state intervenes by means of the common law as articulated by the judiciary.[86]

At first glance, the *Shelley* decision seems to widen the scope of the state action doctrine as almost unlimited: a test which allows a court order to constitute state action, because the court is an organ of state itself. This implies that the results of all private litigation can be potentially reviewed for conformity within the scope of the Constitution. However, it is argued that this judgement should not be taken as holding that any judicial decree which disadvantages members of a racial group violates the Fourteenth Amendment.[87] If a home owner refuses to allow persons into his home because of their race he is allowed to have that decision enforced by law. As exclusivity is an attribute of private property, the owner may use the neutral trespass laws to enforce his decision so long as he has no other connection to state action.[88]

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[83] 365 US 715 (1961).
[84] Van der Vyver, THRHR 57 (1994), 378 (381) with several examples.
[85] 334 US 1 (1948).
[86] Cockrell, Horizontal Application of the Interim Bill of Rights, p 4.
[87] Rotunda, Nowak & Young, Vol. II Ch. 16.3, p 174.
[88] Rotunda, Nowak & Young, ibid.

After several years of decisions in that manner the Supreme Court finally found a solution for one of the most relevant discriminatory reasons that is race. It was held in *Jones v Alfred H Mayer Co*[89] that the Thirteenth Amendment was free of this necessary connection to state action in any sense and could therefore be implemented in purely private relations. Although the Thirteenth Amendment only prohibits slavery and involuntary servitude, the Court subscribed to the view that its provisions could be extended to cover almost all instances of racial discrimination as manifestations of „the badges and incidents of slavery."[90]

The Court here clearly overruled its holding from the Civil Rights Cases in 1883: there it had stated that it would only review congressional legislation under the Thirteenth Amendment to ensure that it was designed to eliminate clear vestiges of slavery.[91] The Thirteenth Amendment therefore could be used as the legal basis for declaring racial discrimination practised by public authority, as well as by private persons, unconstitutional.[92]

3. Limits of the state action doctrine

It has, yet, to be kept in mind that until today under no circumstances could state action be constructed through mere omission or acquiescence in United States law.[93] This lead to a holding by the Supreme Court over the open discrimination of a private club that refused to serve Blacks.[94] Because there was no official aid or encouragement of the club's decision to restrict its membership, it would not be subjected to constitutional restraint, even if it coincided with local custom.

Some justices have taken the position that pure customs without positive legal enforcement which had become so strong as to have the force of law might establish state action.[95] However, a majority of the justices have never held that custom alone would be sufficient to turn private activities into state action.[96]

But, on the other hand, if state authority or servants are shown as having facilitated violations of private interests by other private parties, that may trigger state responsibility. Thus, the Fed-

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89 392 US 409 (1968).
90 *Jones*, ibid, at 441.
91 Cf. Rotunda, Nowak & Young, Vol II Ch. 16.1 b), p 161.
92 Van der Vyver, THRHR 57 (1994), 378 (381).
93 *Flagg Bros. v. Brooks* 436 US 149 (1978).
94 *Moose Lodge No. 107 v. Irvis* 407 US 163 (1972).
95 *Bell v. Maryland* 378 US 226 (1964).
96 Rotunda, Nowak & Young, Vol. II Ch. 16.3, p 175.

eral Court for the 5th Circuit held that it constituted denial of equal protection, where a sheriff allowed his black prisoner to be kidnapped and beaten by a member of the Ku-Klux-Klan.[97]

As a consequence, American courts are still reluctant to transfer fundamental rights or at least their values into private litigation. Clapham does not write a daring statement when he suggests that lurking behind the sophisticated doctrines lies an ideological resistance to state intrusion into a „private sphere".[98] And, indeed, everybody should feel free to relate this ideology in various ways to the idea of freedom of contract, a *laisser-faire* economy, the importance of autonomy for state organs, or continuing racism.[99] In any case, the vertical approach to fundamental rights is still the leading doctrine in the United States.

C. CANADA

The American „state action" doctrine has been rejected by the Canadian courts as inappropriate to defining the limits of the Charter. The Canadian jurisprudence is not shackled with the wording of the Fourteenth Amendment, nor with a desire to respect the original intentions of the drafters of the American Bill of Rights, nor with a history of legislative inertia concerning private racism and sexism. Nevertheless the courts have chosen their own formulation of the public / private debate.

The Canadian legal situation is, in many regards, comparable to the South African. In particular, the discussions arising from the application of fundamental rights to common law disputes are examples of the problems that are currently faced by the South African Constitutional Court.

1. Private litigation and Common Law

The question, of whether the Canadian charter of Rights and Freedoms does apply to the conduct of private persons was hotly debated from the very moment the Charter entered into force in 1982.[100] Legal academics argued both in favour and against the horizontal application of the Charter.[101]

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[97] *Lynch v. United States* 189 F. 2d 476 (5th Cir. 1951).

[98] Clapham, Human Rights in the Private Sphere, 6.1.2, p 157.

[99] Clapham, ibid.

[100] The Charter was incorporated in the Constitution Act 1982, enacted by the Canada Act 1982 (United Kingdom) and came into effect the 17th of April 1982;
Section 15, Equality Rights, came into effect three years later, the 17th of April 1985.

[101] In favour, e.g., Bayefski & Eberts, Equality Rights and the Canadian Charter of Rights and Freedoms, 1985; against, e.g., Hogg, The Constitutional Law of Canada, 1985.

a) The Dolphin Delivery case

On the 18th of December 1986 the Supreme Court of Canada gave its judgment in the case of *Retail, Wholesale & Department Store Union, Local 580 et al. v. Dolphin Delivery*, hereinafter referred to as *Dolphin Delivery*.[102] The case concerned an interlocutory injunction against a trade union to prevent it picketing business premises. The judge *a quo* held that the intended picketing was illegal since it either violated the Common Law tort of inducing breach of contract, or the Common Law tort of civil conspiracy.[103] The union appealed to the Court of Appeal and introduced a new element: the Charter provisions. It argued that the Common Law principles adopted and applied by the judge had the effect of infringing fundamental freedoms protected by the Charter, in particular, freedom of expression and freedom of association. The Court of appeal dismissed the claim, mainly because the Charter provisions could not be invoked.

In the Supreme Court, the union limited its claim to freedom of expression. One member of the Court, Justice Beetz, argued that picketing was not expression in terms of section 2(b) of the Charter.[104] But the majority of the Supreme Court, per Justice McIntyre, held that the picketing which Dolphin sought to restrain involved the exercise of the right to freedom of expression. However, the appeal was dismissed because the case involved only private litigation under the Common Law. Although the Court explicitly stated that the Charter applies to the Common Law due to section 52 of the Constitutional Act 1982[105], the Court then stated that the Charter did not apply where an individual attempted to found an action against another individual on the basis of the Charter. According to the Supreme Court, if private disputes are independent from any connection with Government due to a lack of reliance on a statute, regulation, etc. then the Charter is excluded.[106]

To reach that conclusion, McIntyre J. examined the writings to this problem in Canadian constitutional law. He then concluded that the Charter, like most other constitutions, was set up to regulate the relationship between the individual and the Government. It was not intended in the absence of some governmental action to be applied in private litigation.[107]

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[102] 33 DLR (4th) 174; [1986] 2 S.C.R. 573.
[103] *Dolphin Delivery*, 33 DLR (4th) 174, at 180f.
[104] This was the finding of the Court of Appeal, too.
[105] Section 52 (1): The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
[106] *Dolphin Delivery*, 33 DLR (4th) 174, at 191ff.
[107] ibid, at 191.

The main argument of the judgment took reference to s. 32 of the Charter.[108] The Court held that the position and inclusion of the word „government" led to the conclusion that it referred to the executive or administrative branch of Government and not to „government in its generic sense" - meaning the whole of the governmental apparatus of the state - but to a branch of government.[109] McIntyre J. continued that the Charter applies to the action of the legislative, executive and administrative branches of government in both public and private litigation.[110] Moreover, he added that the Charter applies whether or not the action depends on statute or the Common Law.[111]

This lead the Court to the question, under which circumstances can a branch of the government be regarded as involved in that sense: which element of government intervention is necessary to make the Charter applicable in an otherwise private dispute. Or, to put it in other words, which amount of state action is necessary? The American doctrine is discussed by the Court, but not directly. Instead, the Justice refers to the writing of Peter Hogg.[112] Hogg had suggested a doctrine that, basically, modified the test of *Shelley v. Kraemer*[113], i.e. when Common Law had „crystallised into a form that can be enforced by courts" then an enforcement order which would infringe a Charter right could be precluded by the Charter and the Charter would „by necessary implication modify the common law rule."[114]

The Court rejected this approach because it would involve too much a widening of the scope of the Charter - McIntyre J. found it „troublesome".[115] The courts were bound by the Charter, but to regard a court order as an element of governmental intervention would widen the scope of the Charter application to virtually all private litigation.[116] Practically all cases could end with an enforcement order. And if this could be entirely dependent on the Charter, indeed all private dispute could be subject to the Charter. Then there would be no logical stopping point.[117]

That, in the opinion of the Court, would be a clearly undesirable result. Such a consequence would not only mean a deluge of cases requiring definitive judgements from the Supreme

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[108] Section 32 (1): This Charter applies: (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[109] *Dolphin Delivery*, 33 DLR (4th) 174, at 194.

[110] Cf. *Operation Dismantle v. R.* [1985] 1 S.C.R. 441.

[111] *Dolphin Delivery*, ibid, at 195.

[112] Hogg, The Constitutional Law of Canada, 1985, p 677; cf. also 3rd ed. 1992, p 845

[113] 334 US 1 (1948), see also footnote 85, p 22.

[114] Hogg, ibid, p 678.

[115] *Dolphin Delivery*, 33 DLR (4th) 174, at 196.

[116] *Dolphin Delivery*, ibid.

[117] Cockrell, Horizontal Application of the Interim Bill of Rights, p 5.

Court, but could also throw the state of the Common Law into confusion. Every precedent and rule would be potentially susceptible to challenge and, furthermore, each application of the Common Law would be open for challenge for conformity with the Charter in terms of its section 1, the limitation clause.[118] Every Common Law decision would be appealable on grounds of proportionality.[119]

The Canadian Supreme Court states the difficulties in defining with narrow precision a connection between the element of government action and the claim advanced that will suffice to permit reliance on the Charter by private litigants in private litigation. But what the judgement makes clear is that where one party brings a case against another relying on the Common Law and no act of government is involved, the Charter is inapplicable.

The judgement does not state that the Charter is irrelevant to the Common Law. Instead, the judiciary will apply the principles of the Common Law in a manner consistent with the fundamental values enshrined in the Constitution. However, to challenge the operation of the Common Law the party needed a factor which would remove the case from the private sphere; the simple order of the court *a quo* was not enough.[120] In emphasising that the common law should develop in a manner consistent with the principles of the Charter, a distinction had to be drawn between private litigants founding a cause of action on a fundamental right, and judges exercising their inherent jurisdiction to develop the common law.

Later, the Court defined that an activity will be subject to Charter review if, even although the act was not performed by „government", it was subject to such significant government control that it may effectively be considered an act of government for Charter purposes.[121]

b) The Charter and the Common Law today

The decision in *Dolphin Delivery* immediately experienced much criticism.[122] It was a clear rejection of views that favoured a broader approach towards fundamental rights. Additionally, the Supreme Court rejected views that had adopted a modification of the German approach, i.e. that the rights in the Charter lay down certain principles that are fundamental for the Canadian

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[118] Section 1: The Canadian Charter of Rights and freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[119] Clapham, Human Rights in the Private Sphere, 6.2.1.1.1, p 168.

[120] *Dolphin Delivery*, 33 DLR (4th) 174, at 199.

[121] *Lavigne v. Ontario Public Service Employees Union* [1991] 2 S.C.R. 211, at 239f

[122] Cf. McDonald, Ch. 29.3, p 709ff.

society and that operate as standards for the conduct of private persons and public bodies alike.[123]

Ironically, it was exactly that approach of a more indirect horizontal application that finally generated from *Dolphin Delivery*.[124] The holding of McIntyre J. that the judiciary „ought to apply and develop the principles of the Common Law in a manner consistent with the fundamental values enshrined in the Constitution"[125] found its way into Canadian jurisprudence. Although generally welcoming that approach, a couple of scholars found it contradictory in terms of the holding, that principally the Charter does not apply to the Common Law.[126]

The „Charter values" approach was elaborated in *R. v. Salituro* [127], a Supreme Court case concerning the common-law rule, that a wife of an accused is not a competent witness for the prosecution. Iacobucci J., writing for the Court, agreed that the Common Law should be adapted and developed to reflect changing circumstances in society at large, and that such development should occur in the light of the societal values embodied in the Charter.[128] The direction is clearly stated: „When principles underlying a Common Law rule are out of step with the values enshrined in the Charter, the courts should scrutinise the rule closely."[129]

Furthermore, in *Hill v. Church of Scientology* [130], the Supreme Court held that the obligation to interpret common law in the light of the Charter „is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values."[131] But, again, no party could found its cause of action directly on the Charter. Here it is that the distinction between founding a cause of action and amending existing law becomes relevant. The Court does not speak about direct or indirect horizontal application but only distinguishes between these two different claims. And it is, as we will see, this distinction that may lead the future debate in South Africa.

At the same time, the Canadian Supreme Court set itself boundaries on this development of the Common Law, even in terms of the Charter. The *Salituro* judgement cautioned that courts should be reluctant to dramatically recast established rules of law, as complex matters should be left to the legislature.[132] Therefore, fundamental change of the law with uncertain ramifications

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[123] Cf. Slattery, (1985) 63 Can. Bar Rev. 148, at 161.
[124] Craig, (1997) 42 McGillLJ 355, at 370.
[125] *Dolphin Delivery*, 33 DLR (4th) 174, at 198.
[126] Stratas, Ch 2:02, p 2-3.
[127] [1991] 3 S.C.R. 654.
[128] *Salituro*, [1991] 3 S.C.R. 654, at 666.
[129] *Salituro*, ibid, at 675.
[130] [1995] 2 S.C.R. 1130, at para 91, p 1169.
[131] *Hill v. Church of Scientology*, ibid.
[132] *Salituro*, ibid, at 668.

should be avoided, however incremental change to the Common Law should exist within the purview of the courts. If it is possible for the court to change the Common Law rule so as to make it consistent with Charter values, without upsetting the proper balance between judicial and legislative action then the rule ought to be changed.[133] Courts must not go further than it is necessary when taking Charter values into account.[134] However, no test has yet been proffered in terms of what is too „dramatic" or too „complex" for judicial elaboration within the Common Law.

Craig uses the example that developing a new category of personal-tort protection (here for protection against the invasion of privacy) resembles more an incremental adjustment to the Common Law than a fundamental or dramatic shift.[135] This is provided that this new tort could be placed on the same theoretical plane as the existing personal tort categories. On the other side, the adoption of an entirely new Common Law principle would implicate the *Salituro* warning, but for Craig, the development of a new category, premised on a traditional Common Law principle, is „hardly earth shattering".[136]

2. Private litigation relying on statutory provisions

As far as the private litigants rely on statutory provisions to produce the alleged infringement of Charter rights, it seems this statute would indeed constitute a sufficient link to the legislative and thus to the application of the Charter in that dispute in terms of s. 32(1).

Thus already in *Dolphin Delivery*, McIntyre J. cites the decision of the case in *Re Blainey and Ontario Hockey Association* of the Ontario Court of Appeal.[137] In this case, a 12 years old girl was denied membership in an all boys (ice-)hockey team. The case was governed by the Ontario Human Rights Code that indeed did provide in its s. 19 (1) that every person should enjoy equal treatment without discrimination because of sex, but stated in subsection (2) that this right was not infringed „where membership in an athletic organisation or participation in an athletic activity is restricted to persons of the same sex."[138]

The deciding Court approved the challenge to the constitutionality of this subsection. The Court had to consider whether section 19 (2) was justifiable pursuant to section 1 of the Char-

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[133] *Salituro*, ibid, at 675.
[134] *Hill v. Church of Scientology*, ibid, at para 96, p 1171.
[135] Craig, (1997) 42 McGillLJ 355, at 374.
[136] Craig, ibid.
[137] (1986) 26 DLR (4th) 728, leave to appeal to the Supreme Court of Canada refused.
[138] The Code came into force before section 15 of the Charter and so it was within the jurisdiction of Ontario to enact it.

ter, the limitation clause. The majority of the Court of Appeal could not find enough reasonable objectives to justify the exclusion of girls from sports teams.

As the Supreme Court now stated in *Dolphin Delivery*, it was that statute, that act of a legislature, which removed the case from the private sphere. *Blainey* afforded an illustration of the manner in which Charter rights of private individuals may be enforced and protected by the courts, that is, by measuring legislation - government action - against the Charter.[139]

In the following years the courts then steadily developed the notion of statutes as governmental action in certain areas of statutory relevance. The applicability of the Charter to delegated legislation is illustrated by the decision of the Ontario Divisional Court in *Klein v. Law Society of Upper Canada*.[140] The Divisional Court held that the Rules of Professional Conduct of the Law Society and the commentaries to those rules should form part of the Legislature's regulatory scheme to govern the affairs and activities of the legal profession pursuant to the Law Society Act of 1980. As the Law Society was deemed a statutory authority exercising its jurisdiction in the public interest, the court concluded that the rules and commentaries constituted a regulatory function on behalf of the „Legislature and government" of Ontario within the means of s. 32(1) of the Charter.

On the other side, a court held that the Charter would not apply to private contracts such as collective agreements.[141] Although in that case the disputed provision in the agreement between a union and a theatre chain was based on a section in the provincial Labour Code, the Court stated that the mere fact that the provincial legislature authorised the usage of that provision (a closed-shop policy of the theatre) falls short in transforming the provision in the agreement into governmental action. It was not mandated by the Legislature. It was entered into by two parties to a contract. The Union and the employer are performing no public role in ordering their affairs through their private contract, the collective agreement. The Labour Code neither mandates nor encourages the parties to include a closed-shop provision, it merely recognises it as one of the possible varieties of contractual terms in collective bargaining.[142]

The acts of private juristic persons are *per se* not considered as governmental action and thus not subjected to Charter scrutiny although the legal form and structure of the juristic person may be regulated by the Legislature.[143]

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[139] *Dolphin Delivery*, 33 DLR (4th) 174, at 197.
[140] (1985) 16 DLR (4th) 489.
[141] *Bhindi v. British Columbia Projectionists' Local 348 of International Alliance of Picture Machine Operators of the United States and Canada* (1986) 29 DLR (4th) 47.
[142] *Bhindi*, ibid, at 56.
[143] Cf. *Madisso v. Bell Canada* (1985) 22 CRR 162.

The consequences of *Dolphin Delivery* for private law relationships that were governed by statutes were hotly debated, particularly with reference to the civil law of Quebec that is regulated by the Civil Code of Lower Canada or other statutes.[144] The Supreme Court answered that question in 1988 with regard to legislation in general[145], and in 1992 with regard to the Civil Code of Quebec.[146] The Court has now held that the rules of the civil law governing relations between private parties are also exempt from the Charter.[147] This removes the „intolerable anomaly" of the Charter having a far more extensive application in Quebec than it has in the nine common law provinces.[148]

However, when the proper interpretation of a statute is an issue, the values embodied in the Charter must be given preference over an interpretation which would run contrary to them. If there are two possible interpretations of a statutory provision, one of which embodies the Charter values and the other which does not, that which embodies the Charter values should be adopted.

But this technique of reading legislation in the light of the values and the principles expressed in the Charter cannot be used by a court to create an entire new enactment.[149] Thus, the practical problem, as when is it up to the Legislature to change the statutory provision and when are the courts entitled to change the meaning of a provision by means of interpretation remains the same as with the development of Common Law rules.

But, of course, one major difference to the development of the Common Law is the case that a statute is not ambiguous and provides only one interpretation: where legislation is clear, the Charter should not be used to interpret the legislation but to asses whether or not it is valid.[150] This is, as I have pointed out above, the moment where the horizontal application of a fundamental right changes to its vertical counterpart that is the binding of the Legislature rather than the individual.[151] Instead, clear and unambiguous Common Law rules are free to become developed by the courts according to Charter principles as long as the courts employ their distinction between minor and major changes and, thus, respect the supreme law-making power of the Legislature.

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[144] Cf. Slattery, (1987) 32 McGill LJ, 905.
[145] *Hills v. Canada (A. G.)* [1988] 1 S.C.R. 513, at 558.
[146] *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.* [1992] 2 S.C.R. 1065.
[147] *Tremblay v. Daigle* [1989] 2 S.C.R. 530, at 571.
[148] Hogg, The Constitutional Law of Canada 1992, p 846 note 84.
[149] *R. v. Zundel* [1992] 2 S.C.R. 731.
[150] *Symes v. Canada* [1993] 4 S.C.R. 695, at 752.
[151] See with reference to the German doctrine above, II. A. 4. c), p 16f.

I would therefore suggest that the application of the Charter in private litigation depends on the interpretation of Common Law and statutes almost as much as it does in public law cases, i.e. the principles of the Charter are to be applied.

3. Balancing of the individuals' interests

As already mentioned in the German context, when applying fundamental rights to private litigation, courts have to face the problem that both parties are entitled to the Bill of Rights. The Canadian Supreme Court deals with the necessary process of balancing in applying the limitation clause of the Charter, section 1.[152]

Although the Charter can apply to private litigation where „governmental action" is present, by no means will the Charter necessarily apply *with the same force* as in circumstances, where „government" is present. In the latter case, the regular situation is that there is a direct contest between an individual and government. The Court has stated that in such cases a rather strict justification test (also referred to as the *Oakes* test[153]) will be applied against the government.[154] In cases where private parties are exclusively involved in litigation and where reliance upon „governmental action", for example a statute, is being challenged, it is more likely that the legislation is aimed at mediating between two competing social groups.[155] In such circumstances the Court will probably apply a weaker justification test: the government then need only show that it had a reasonable basis for enacting that provision.[156]

Interestingly, in *Salituro* the Court did not undertake an analysis similar to the *Oakes* test to determine if the Charter breach was justifiable. Rather, it proceeded to balance the conflicting values in a broad and flexible manner. The judgment examined the origins of the impugned common law rule and the justifications which had been raised for upholding it. Later in *Hill v. Scientology* the Supreme Court even rejected the application of section 1 for the purpose of balancing rights of individuals. According to the Court, the proportionality test of section 1 would not be appropriate to balance different rights of individuals who are both equally entitled to them.[157]

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[152] See above, note 118, p 27.
[153] Cf. *R. v. Oakes* [1986] 1 S.C.R. 103.
[154] *Irwin Toy Ltd. v. Quebec (A.G.)* [1989] 1b S.C.R. 927, at 992ff.
[155] Stratas, Ch. 2:02, p 2-4.
[156] Cf. *Irwin Toy*, ibid.
[157] [1995] 2 S.C.R. 1130, at para 96, p 1171.

Stratas suggests that it is „more likely than not" that it will be easier for a Charter violation to be justified in such circumstances; in other words, the Charter will apply with less force.[158] This concept is founded on the assumption that the existing body of private law (both Common Law rules and statutory provisions) are examples for a balance that, in many cases, will mirror the principles of the Charter. The one individual has to accept a reduction of his rights in respect of the rights of another. Thus the practical main difference is, in my opinion, only a different measure towards the limitations of fundamental rights when applying these rights horizontally.

That does not mean, however, that there is no conceptual difference between the (horizontal) application of the Charter via the medium of interpretation to the private sphere and the traditional application to the acts of government, in its broadest sense. The reason for the application to the government is clearly the constitutional command in s. 32(1) of the Charter. But what is the reason, why should courts interpret legislation or develop the Common Law differently now compared to the time, before the Charter had been enacted? The Supreme Court never provided an answer to this question. As I pointed out in the German context above, the mere fact that legislature makes the law and is bound to the Constitution itself is not sufficient, nor is the application of the law by a judge.

The reason is, I suggest, exactly the same „objective" function of fundamental rights that was formulated by German scholarship after almost 30 years of constitutional litigation: the principles in the Charter themselves. Fundamental rights do create a system that permeates every legal relationship. They do influence the ordinary law because of this inherent power. They do create an obligation towards the judiciary to protect their infringement from all sides, not only from state violation. This consequence belongs to the notion of fundamental rights as much as, among other things, their enforceability against the Executive. The Canadian Supreme Court did not formulate this concept, but it did enough little steps in its Charter judgements to justify this giant leap for constitutional law.

[158] Stratas, ibid.

III. THE DEVELOPMENT OF THE DOCTRINE OF HORIZONTALITY IN SOUTH AFRICA

Having so much said about the notion of horizontal application in other jurisdictions, it is now necessary to turn towards South Africa There are some major differences from the other legal systems, mainly dealing with the conceptual means of horizontal application. That is why it seems necessary to quickly point out the development of this doctrine in recent years until the final South African Constitution of 1996 came into force.

A. PROPOSALS CONCERNING HORIZONTAL APPLICATION

The only notion of something similar to horizontal application of fundamental rights before the CODESA negotiations was the doctrine of administrative review. That principle subjected public bodies to a judicial review in terms of procedure and substance, private bodies could not be measured against it. Although this concept is founded in a rather vertical binding of state authority, the courts already held that administrative law recognised the fact that bodies which are institutionally „private" might nevertheless exercise a power that could be seen as „public".[159] This approach shows similarities to the American doctrine, that private bodies are subject to constitutional scrutiny if there is some kind of state actor or state involvement behind their action.

During the drafting of the first democratic South African Constitution, the Interim Constitution of 1993[160], several different approaches were construed to deal with the binding force of the bill of rights toward either the judiciary or private individuals. The proposal of the South African Law Commission denied any kind of horizontal application of the bill of rights in the constitution and thus left the task to the legislator to enact specific laws in various fields that influence relations between individuals.[161] The proposal of the African National Congress, on the other hand, generally accepted horizontal application at least in the field of discrimination.[162]

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[159] *Dawnlaan Beleggings v JSE* 1983 (3) SA 344 (W).
[160] Act 200 of 1993.
[161] SALC, Interim report on group and human rights (Project 58) 1991, par 8.91, p 493.
[162] Cf. ANC Constitutional Committee, Bill of Rights draft, Art 14 par 3.

B. THE SITUATION UNDER THE INTERIM CONSTITUTION

The Interim Constitution itself did not settle that debate. But the question upon whom the burdens of the Bill of Rights would fall (then Chapter 3 of the Constitution) did occur almost simultaneously with the enactment of the Interim Constitution.

The Interim Constitution provided a textual basis in many regards similar to the Canadian Charter. Section 7 IC was designed as an explicit application clause that bound the Legislature and the executive spheres of the state.[163] The German (and Canadian) approach to an indirect horizontal application was ostensibly supported by s. 35(3) IC.[164] The Interim Constitution, however, did not provide enough support to apply the fundamental rights directly to the Common Law.

*1. The pre-*Du Plessis *time*

It seems useful to stress the general terms of the different arguments prior to the settling *Du Plessis* decision of the Constitutional Court. This decision provided the different approaches towards horizontal application and the arguments for these. The Court dealt with them in the later judgment.

The main lines of the discussion went along the difference between the vertical application of fundamental rights only, and an approach more open towards the recognition of the Constitution being applied in the private sphere, too. It was pointed out that the intention of the drafters denied the possibility of a horizontal application of the Bill of Rights beyond the „seepage" of indirect interpretation in s 35(3).[165] Both opinions agreed on the fact, that legislation as such could be subjected to constitutional scrutiny: the binding of the Legislature. With regard to the established Canadian distinction between statute review (always possible) and Common Law review (looking for sustainable governmental action), South African scholars criticised the possible arbitrariness of that distinction. It seems to be pure coincidence whether or not a claim can be based on a Common Law rule or a statute.[166]

The courts had their problems with the doctrines too. One court decided authoritatively that the Bill of Rights would apply horizontally[167], while the court *a quo* of the Du Plessis decision de-

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

[164] Section 35(3) IC: In the interpretation of any law and the application and development of common law and customary law, a court shall have due regard to the spirit, purport and objectives of this Chapter.

[165] Cf. Du Plessis, 1994-4 TSAR 706.

[166] Cockrell, Horizontal Application of the Interim Bill of Rights, p 6.

[167] Mandela v Falati 1995 (1) SA 251 (W).

cided with equal authority that the fundamental rights would not have horizontal operation at all.[168]

2. *The* Du Plessis *Judgement of the Constitutional Court in 1996*

That debate was (in the large part) finally settled on 15 May 1996 by the Constitutional Court in its famous decision *Du Plessis & others v De Klerk & another*.[169]

a) The facts and the case history

In February and March 1993, the *Pretoria News* published a series of articles dealing with the supply by air of arms and other material to the Angolan rebel movement, UNITA. The tenor of these articles was that South African citizens were engaged in these flight-operations and that these operations were covert. The flights were then described as „illegal" and as „pirate-flights". The articles suggested that those responsible for the flights were „fuelling the war in Angola" and did so for reasons of personal gain, notwithstanding the disastrous effect of the civil war on the Angolan population. One of the articles mentioned the name of Mr. Gerd de Klerk, the first defendant, and his private aviation company, the second defendant. Mr. de Klerk instituted a defamatory action in May 1993. The newspaper filed pleas denying that the articles suggested malfeasance by the plaintiffs or were defamatory. In October 1994 - after the Interim Constitution came into effect - the newspaper asked to amend their plea in order to claim the right to freedom of expression, s 15 IC, as an additional defence.

In the court *a quo*, Van Dijkhorst J refused the newspaper's - then defendant - application to amend their plea on two grounds: first, the Interim Constitution itself precludes retrospective application of the constitution, s 241(8) IC; second, the right to freedom of expression as provided by the Interim Constitution does not apply horizontally and thus cannot be invoked as a defence in a civil action for defamation.[170]

In March 1995, Van Dijkhorst J referred the issues of retrospectivity and the horizontal application of Chapter 3 - the Bill of Rights - of the Interim Constitution to the Constitutional Court. The Constitutional Court requested argument on two points. First, were the defendants entitled to invoke the Constitution, notwithstanding that publication of offending material had already occurred, action was instituted and all relevant facts had occurred before the Constitu-

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[168] *De Klerk & Another v Du Plessis & Others*, 1995 (2) SA 40 (T) - 6472/93
[169] 1996 (3) SA 850 (CC) - CCT 8/95.
[170] *De Klerk & Another v Du Plessis & Others*, 1995 (2) SA 40 (T) - 6472/93.

tion came into operation? Second, are provisions of the Bill of Rights of the Interim Constitution, and particularly s 15, capable of application to any relationship other than that between persons and legislative and executive organs of state at all levels of government?

b) The order of the Constitutional Court

With respect to the question of retrospectivity, the Court held by 9 to 2 that the newspaper was not entitled to invoke the provisions of the Interim Constitution.[171]

With respect to the application of the provisions of Chapter 3, the Court held - split by 8 to 3 - that the fundamental rights as provided therein are not in general capable of application to any relationship other than that between persons and organs of state at all levels of government. Legal relationships between individuals are meant to be beyond the reach of the Interim Constitution. This was meant particularly as far as s 15 IC was concerned, the right to freedom of expression.

The leading judgment and the Court's order was written by Acting Justice Kentridge and concurred in by President Chaskalson and the Justices Langa, O'Regan, and Ackermann. Most of the other justices and Deputy President Mahomed concurred in the order but formulated their own points concerning the reasoning.[172] Justice Kriegler dissented from the majority's judgment and order regarding horizontal application of the Interim Constitution. He was joined in his dissent by Justice Didcott. Justice Madala dissented from the majority's judgment, too, but formulated own reasons for his dissent.

c) The reasoning of the majority judgement

With regard to the application issue, the judgment is based on two main pillars. The first is that it is still the general rule that a Bill of Rights is *per se* primarily intended to govern relationships between individuals and legislative or executive organs of the state.[173] The second rationale for not applying the fundamental rights between the parties of a civil litigation is that the initial development of the common law falls primarily within the jurisdiction of other courts, ultimately the Supreme Court of Appeal (then called the Appellate Division of the Supreme Court).[174]

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[171] Concerning the issue of retrospective effect of both the Interim and the Final Constitution see Loots & Marcus in Chaskalson & oth., Ch 6.2(e), p 6-14f.

[172] For a comparative view on the different reasons see Woolman & Davis, (1996) 12 SAJHR 361, Fn 4.

[173] *Du Plessis v De Klerk*, at para 42ff (45).

[174] *Du Plessis v De Klerk*, at para 63ff.

Both arguments are surrounded by several other holdings. These mainly withdraw a little bit from the above mentioned main arguments, leaving some latitude for future decisions and determine a more flexible way for the Court to deal with the matter.

The statement concerning the general notion of fundamental rights as legal rules guiding only the vertical relationship does not mean that there is no possibility to invoke these rights in private disputes at all: a litigant may argue that a certain private law provision in itself may be inconsistent with the Bill of Rights, which opens the door for a judicial review of that provision in terms of the constitution.[175] As far as the application of constitutional norms to common law is concerned, Kentridge AJ recalls that the Court already declared State Action relying on common law unconstitutional.[176] But, at the same time, the question as to what range this rule of state activity applies is left open.[177] Furthermore, the Court acknowledges that a party of some future case is not generally barred from arguing that a particular provision of the Bill of Rights should be directly applied horizontally.[178] Finally, although common-law rules governing private disputes may not be subject to direct attack under Chapter 3, s 35(3) of the Interim Constitution provides for the development of common law rules in light of the „spirit, purport and objectives of the Chapter".[179]

It is particularly that last argument that leads the majority of the Court to the conclusion that a general notion of a direct horizontal application of the fundamental rights would not be adequate. Instead, via the development of the common law in terms of the underlying principles of the Bill of Rights, a proper balance between the conflicting rights and interests of individuals could be reached.

Apart from this, the majority relies on another textual argument which supports the view that there is no ordinary intention of Bills of Rights as such, either from their philosophical background or in the international comparison, that can be applied vertically only, and that the South African one in particular relies on that principle. However, since Section 7 IC - the Application Clause - provides in subsection (1) that the Bill of Rights shall „bind all legislative and executive organs of state at all levels of government", this section should be read as binding

[175] *Du Plessis v De Klerk*, at para 47.
[176] *Du Plessis v De Klerk*, at para 49, with reference to *Shabalala v The Attorney-General of the Transvaal* 1996 (1) SA 725 (CC).
[177] *Du Plessis v De Klerk*, ibid.; discussed below.
[178] *Du Plessis v De Klerk*, at para 62.
[179] *Du Plessis v De Klerk*, at para 60.

these two branches of government *only*.[180] Had the intention of the drafters been to give the Bill of Rights a more extended application, that could have been easily expressed.[181]

Finally, the Constitutional Court deals with the jurisdictional argument. Conceding that the development of the common law is primarily the task of the lower courts, the Constitutional Court retains jurisdiction to determine what the „spirit, purport and objectives" of Chapter 3 are. In consequence, the Constitutional will ensure that the other courts in their practice of developing the common law will have due regard thereto.[182] However, the exact boundaries of such limited appellate jurisdiction were left open to future cases.

d) The reasoning of the dissenting judgements

The dissenting judgement of Justice Kriegler is formally based on different interpretation of the relevant passages of the Interim Constitution, particularly s. 7 IC, the application clause. Section 7 should be read as applying to the judiciary, too.[183] That view finds support in s 4 IC. Section 7(2) applies Chapter 3's rights to all law, common law included.[184] Section 33 IC - the limitation clause - in its subsections (1) and (2) makes plain that any law of general application, independent from its source, must satisfy its test for justification, if the law has just been judged to be an infringement of one of the rights in the Bill of Rights.[185]

Apart from this classical interpretation of the constitutional text with the established tools, Kriegler J fundamentally differs from the persuasion of the majority that the direct horizontal application of the fundamental rights would have any negative effect. Instead, he suggests that it is rather the acknowledgement of horizontality that would ensure an application of fundamental rights in accordance with the spirit of freedom, equality and justice which pervades chapter 3.[186]

The other dissenting judgement, by Madala J, relies mainly on the point, that it is improbable to compare the constitutional situation of developed advanced and stable western democracies like Germany, the United States or Canada, but in the specific historical context of South Africa.[187]

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[180] *Du Plessis v De Klerk*, at para 45, emphasis in the text.
[181] *Du Plessis v De Klerk*, ibid.
[182] *Du Plessis v De Klerk*, at para 63.
[183] *Du Plessis v De Klerk*, at para 128f.
[184] *Du Plessis v De Klerk*, at para 130.
[185] *Du Plessis v De Klerk*, at para 136.
[186] *Du Plessis v De Klerk*, at para 123.
[187] *Du Plessis v De Klerk*, at para 162ff

The widening of the scope of the operation of fundamental rights would better address the consequences of the South African situation and thus be the appropriate interpretation.[188]

3. The discussion after the Du Plessis Judgement

Most of the writings that appeared after the actual decision of the Constitutional Court either supported the majority's view of a generally vertical approach with only limited indirect horizontal application or, they sympathised with the dissenting judges.

The discussion focused around the point what was the appropriate way of interpreting section 7 IC. Should s. 7(1) that clearly excluded the judiciary be read together with s. 7(2) - the Bill of Rights applies to all law in force - as to exclude the Common Law out of the latter provision. Or should these two subsections rather be read sequentially: s. 7(2) could then be constructed to support the horizontal position that „all law" is potentially subject to constitutional review. Chapter 3 would therefore apply to Common Law rules governing purely private disputes.

And if it could be shown that the drafters of the Interim Constitution really did not want to include the judiciary in section 7 IC, can the drafters intent provide an appropriate device on which to anchor constitutional interpretation?

Many commentators adopted the opinion that the existing private law body could not stand a scrutiny that took the actual social South African situation into account. Such factors as the uneven distribution of wealth and power, and the inbuilt protection of existing economic barriers in society, would demand an application of the Bill of Rights that would allow these parameters to be changed.

But the decision of the Constitutional Court in *Du Plessis* was only one part of the discussion of the application problem. Despite the large amount of criticism this ruling experienced, it nevertheless was in many regards the „final word" to this matter in terms of the Interim Constitution. But some further questions needed to be discussed. If, for example, executive acts are subjected to constitutional review, are executive enforcements of common law rules in private law disputes also to be included?[189] Woolman suggests in that case, that the *Du Plessis* interpretation of s. 7 IC indeed provides that only the enforcement of statutory regulations are revisable in terms of the Bill of Rights while enforcement of Common Law rules is not, a result that is truly absurd.[190]

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[188] *Du Plessis v De Klerk*, at para 154.
[189] Cf. Woolman in Chaskalson & oth., Ch. 10.3.a)(iv)(bb), p 10-34.
[190] Woolman, ibid., at p 10-35.

Other questions were raised according to the problem of what serves as an organ of state in terms of s. 7(1) IC. Here the Canadian and American jurisprudence mainly supplied the solutions for this problem in the South African context too: it is not enough, that a private entity was created by statute, nor is it sufficient that the State adds to the funding of the private institution.

However, although there are still cases where the Interim Constitution determines the constitutionality of laws or conduct, it is now the Final Constitution that sets the legal framework for the problems of application. Therefore, I will discuss these and other specific problems in their context below.

C. The drafting of the Final Constitution

The Final Constitution differs from the Interim Constitution in a whole number of legal aspects. It does so with particular regard to the concept of horizontal application. Since the leading *Du Plessis* decision of the Constitutional Court was ruled at a time when the drafting of the Final Constitution was already in progress, and the problems arising from that judgement were already widely discussed in academia, the drafters of the Final Constitution were much more able to form the text in the light of their actual political expectations concerning the application of a Bill of Rights. In addition, they had the historic opportunity to correct developments in the jurisprudence of a court on a constitutional level and correct earlier „mistakes" in the formulation of textual provisions that lead the courts to the decisions that they made.

The central comment about the relation between the drafting committee of the Final Constitution and the Constitutional Court was formulated by a court, the Witwatersrand Local Division of the High Court: „The text [of the new application clause] differs radically from that of Act 200 of 1993 [the Interim Constitution]. In particular, many of the textual indicators relied upon by Kentridge AJ in the majority judgement of *Du Plessis v De Klerk* ... have been superseded, indicative of a change in legislative intention."[191]

The invocation of the Bill of Rights when it comes to interpreting other legal provisions is now provided by section 39(2) FC.[192] The more general question of the application of the Bill of

[191] *Protea Technology Ltd v Wainer* 1997 (9) BCLR 1225, at 1238.
[192] This section is cited at page 1.

Rights is now provided by section 8 FC.[193] Section 8(1) FC widely resembles the former sections 7(1) and 7(2) IC, the binding of the judiciary was added as a response to the discussion under the Interim Constitution and in the *Du Plessis* decision.[194]

IV. THE BILL OF RIGHTS IN THE PRIVATE SPHERE UNDER THE FINAL CONSTITUTION

As I have pointed out the development of the problem of application of fundamental rights in South Africa, the question now remaining is, what impact does the new Bill of Rights have on the existing body of rules regulating the legal relations between individuals.

This normative analysis is mainly based on academic writings. There was a considerable fear that the opening of private relations to constitutional scrutiny would swamp the courts, and particularly the Constitutional Court with claims in entirely private law matters and demand for reviewing of their cases on the basis of the new constitutional norms. However, a *„Du Plessis II"* judgement has not happened to date.

The text of the Final Constitution supports the assumption that the application doctrine of the new Bill of Rights is dramatically different from its predecessor.

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[193] The application clause now reads:
(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty im-posed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1).
(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

[194] Cf. Woolman in Chaskalson & oth., Ch. 10.8, p 10-57.

A. THE SITUATIONS OF HORIZONTAL APPLICATION

It seems useful to remember the specific situations in which the question of (direct) horizontal application can occur.

1. Statutory relations

The legal relation between two private individuals can be governed by a statute. As long as a provision can be interpreted, the horizontal application of fundamental rights would be used indirectly, through the method of interpretation. As long as the statute demands or allows only one specific conduct, the validity of that imperative could be reviewed in terms of the Bill of Rights by means of vertical application as the legislature itself is bound.

Direct horizontal application in statutory relations would mean that fundamental rights serve as limitations to the scope of a statutory right or duty. The statutory provision is not unconstitutional. It still has its area of the law where it is applicable, but its limits are set by the Bill of Rights. Fundamental rights would be applied as if they were (higher) private law norms.

In Canadian law, the tendency has been to regard this situation as a vertical application, too.[195] As long as fundamental rights deal with statutes, it is the legislator that is bound. The South African Constitutional Court also agreed on that point, that statutes can be challenged as being inconsistent with the Bill of Rights.[196] The two courts seem not to have distinguished between these situations. Not every private law dispute relying on a statute is solved by simply contesting the constitutionality of the statute. The statute may be neutral on the face of it or just perfectly valid as long as it is not applied in an unconstitutional manner.

I have argued that it is a misconception of the relation between vertical and horizontal application to regard every relation that is governed by statute as a case of vertical application, simply because the statute is enacted by the legislature.[197]

If one of the parties does not challenge the validity of the provision (or a part of it) as it stands, but rather questions the applicability of the provision in the context of the case, that still raises the question as to whether or not the judge has to apply fundamental rights as rights that govern that very dispute. As long as it is possible to solve that question by means of interpretation, indirect horizontal application is sufficient, it will get the judge there. But if interpretation offers no solution and the provision as such can well survive constitutional scrutiny, it is finally direct

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[195] Cf. *Dolphin Delivery*, (1987) 3 DLR (4th) 174, above.
[196] Cf. *Du Plessis v De Klerk*, at para 49.
[197] Cf. above II.A.4.a)(3), p 11f.

horizontal application that must be practised. This is the situation in which direct horizontal application can occur in the context of statutory provisions.

Finally, in a case where a positive right as formulated in the Bill of Rights finds no notion in statutory provisions to date, the question arises as to whether or not the right as provided in the Constitution can serve as a cause of action or create a new remedy. This situation is a borderline case to the application of fundamental rights in the common law context. The question is, however, primarily a matter of definition. Whether or not fundamental right norms can be regarded as a cause of action in terms of common law or as a statute makes no difference. I would suggest that as part of a statute, *viz.* the Constitution, this application should come under this heading, but, more important, is the question whether or not they actually can serve as a cause of action, rather than whether or not this would now be a common or a civil law cause.

2. Common law relations

The legal relation between two individuals can be governed by common law rules. As I am dealing with fundamental rights in the private sphere, it is no need to discuss the notion that common law rules are obviously subject of constitutional review when the state is relying on them in its actions.

Common law rules can be undetermined in their wording, they can be formulated with regard to the same comprehensive clauses that statutes may be formulated with. Then the influx of fundamental rights can be reached with interpretation, indirect horizontal application would be sufficient.

But the question that both *Dolphin Delivery* in Canada and *Du Plessis v De Klerk* in South Africa dealt with, was whether common law rules upon which a private party in a dispute with another private party relied could be challenged for their constitutionality. A common law rule can be determined and is so not suitable for interpretation. It is then to the judge to develop and eventually change the common law in its principles and rules to affirm them to the constitutional standards.

On a first glance this seems to point very much in the same direction as the horizontal application in the context of statutory provisions does: is the principle clear and unambiguous, fundamental rights apply vertically as they bind the law-making judge as much as the law-making legislator. This is a clear consequence of the inclusion of the judiciary in s. 8(1) FC. The common law, however, can as well be neutral on its face and only in a particular application inter-

fere with a fundamental right. Again, it is then the judge to decide whether that particular rule will be limited in terms of the Constitution.[198]

The common law would find its limits where it interferes with these fundamental rights that bind the private party as much as the common law rule itself. Fundamental rights therefore not only function as higher statutory provisions but at the same time as higher common law principles.

If the consequence of such a clash between an established common law principle and a basic right in the Bill of Rights can only be solved in a way that renders the entire common law principle void, that demands the clear overruling of established case law, then indeed, the application of fundamental rights in that context rather seems to resemble the vertical application towards the legislator. Then the judge has to accept the binding of the judiciary and overrule the existing principle, in other words: declare the former common law principle unconstitutional and void.

If it is possible to keep the established precedent, to preserve the existing principles by means of interpretation of the common law, as I stated above, indirect horizontal application is an appropriate method. If, finally, it is necessary for the judiciary to change the common law in certain aspects, to limit a principle to certain cases or to create further conditions, then I would argue that this is nothing more as to balance the one (established) common law principle with another one. The second principle is the one derived from the constitution, the fundamental right as it is binding on the individual as much as any common law rule. So the rights in the Bill of Rights formulate new common law rules and are directly binding for private parties.

B. DIRECT HORIZONTAL APPLICATION

The greatest difference between the text of the Interim and the Final Constitution is the difference in the wording of the application clause, then section 7 (IC), now section 8 (FC). The Constitutional Assembly has conceived a series of provisions that give the South African application doctrine a clarity it did not previously possess.

It is now a majority of authors who argue that the direct horizontal application of the Bill of Rights in the 1996 Constitution is beyond doubt.[199]

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[198] This is in a way the concept adopted by the Irish Supreme Court that subjects every common law principle to constitutional scrutiny because it is maintained by the courts as state organs. Cf. Butler, (1999) 116 SALJ 77, at 81ff.

1. Horizontal application in terms of section 8 FC

Section 8(1) FC was, as I pointed out, formulated in response to the *Du Plessis v De Klerk* decision of the Constitutional Court. The new application clause subjects all law, including the common law[200], to direct constitutional review and declares its binding force to the legislature, the executive and the judiciary.

a) The general principle: in favour of direct horizontal application

The application clause now demands that every common law dispute can be reviewed in terms of the Bill of Rights: that is that every judicial decision, and every existing common law rule is subject to that review.

This also implies the very basic rule of the common law: everything that is not proscribed is permitted. This general permit itself is then again limited in terms of the Constitution. Even when in a case no existing common law rule governs the actual private dispute, the courts must apply the Bill of Rights and resolve the dispute. The court must, if necessary, formulate and articulate a new rule of common law consistent with the Bill of Rights if none currently exists. In this regard, section 8(1) concurs with section 165 (2) FC: both sections require the judge to apply the applicable law: that is mainly the common law, but now it is the body of common law with the fundamental rights of the Constitution on their side.

In terms of the common law, subsection (1) mainly solves the problems that were raised with regard to the horizontal application of fundamental rights. It takes away the obstacles of such an application that were formulated in the *Du Plessis v De Klerk* decision. The judiciary is bound, precedence is to be changed if necessary, cases are to be overruled, the Bill of Rights now determines the limits of the common law. Even in the absence of any other government action or entanglement, a common law rule, and a court's order relying on it, is now subject to constitutional review. The rights in the Bill of Rights act as common law principles, they apply directly and burden private persons.

As far as the horizontal application of fundamental rights to statutory provisions is concerned, subsection (1) is no improvement on the Interim Constitution. The legislature was bound before, as it is the relevant conditions for such an application in terms of South African doctrine. However, as I have argued, only with regard to the pure declaration of statutory norms as unconstitutional, is there a case of binding of the legislature and thus vertical application.

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[199] Cf. Woolman in Chaskalson & oth., Ch. 10.8, p 10-57.
[200] Woolman in Chaskalson & oth., Ch. 10.8(a)(i), p 10-57.

But here it is subsection (2) that sets the principle: the Bill of Rights now binds every individual (I will deal with the limits of that binding force below). The Bill of Rights now is part of the statutory body of the existing private law. It is as binding as a civil law codification, which could also commence with the provision that its rights and duties are binding on every natural and juristic person.

b) Limits of horizontal application: the nature of the right and the nature of the duty

The drafters of the Final Constitution limited the ambit of the entire horizontal application of the fundamental rights in the Bill of Rights for a certain amount. That is why the subsection (2) of section 8 FC makes the horizontal application of a right dependent on the nature of the right and the nature of the duty imposed by the right.

Subsection (2) does in no way infringe or deny the general notion that the Bill of Rights binds the individual. The only fact concerning the general notion of horizontality that is deductible from that subsection is again the notion that a provision of the Bill of Rights can generally bind a natural person, otherwise it would be useless.

But this provision determines the scope of the principle. The fundamental rights apply horizontally *only* if that application is not contrary to the scope of that particular right. So the principle of horizontal application is both approved in general and limited in its ambit. It is dependent on the purpose of every right in the Bill of Rights. The subsection does not only imply a threshold test of whether or not a right has a function in the private sphere at all. It also takes reference to the extent that a right may be applicable in the private sphere. Some rights may have implications that, per definition, can only be applied against the state, while other aspects may as well bind natural or juristic persons, too.

Some rights, and aspects thereof, seem to preclude applications to private relationships. Although the common law appears to have *lacunae* in the governing of private relationships, the following rights could not be invoked to fill these gaps: the right to property, access to housing, health care, food or water, the right to social security, education, just administrative action, the political rights and the rights of children as well as the rights of arrested, detained and accused persons. All these rights contain wording which limits the ambit of the right, be it entirely or partly, to the relationship between the state and the individual.

Woolman argues that some private relations may require the extension of the scope of these rights into the private sphere.[201] I do agree to the fact that there may be a need to ascertain private conduct to some constitutional standard, even if this standard is provided in one of the mentioned rights that apply (primarily) vertically. If this, however, is possible by means of interpretation or development of the common law, as it is provided in s 39(2) FC, then there is a clear constitutional basis for this approach. The objectives and principles of the constitution are sufficient, there is no need for finding or creating a horizontal aspect in, for example, the right to just administrative action.

And I agree with Woolman's assumption that a court is free to hold that because the values underlying a particular right do not serve the practices and activities which the petitioner is trying to have constitutionally protected, the right does not apply.[202] But I cannot find a reason why the same argument should not occur in constitutional systems that only state the general notions that rights can apply horizontally. The specific wording of s 8(2) FC does not lead exclusively to that conclusion.

The subsection requires that both the nature of the right and the duty imposed by the right is taken into account. I have stated that it is possible to limit the scope of the horizontal application doctrine primarily with regard to the first criterion, the nature of the right, a rather abstract view. But the limitation goes further: even in cases where the relevant fundamental right is open to application in private litigation, the actual burden in that particular case may be so heavy that the right cannot be invoked. That requires the courts to start with the right but to decide from case to case whether it is possible to determine private relationships with constitutional provisions.

[201] Woolman in Chaskalson & oth., Ch. 10.8(a)(ii), p 10-59.
[202] Woolman, ibid.

c) Section 8(3) FC: The common law as starting or final point of horizontal application?

Unclear is the purpose of subsection (3).[203] If a court has to use the common law, to develop and to limit it to give effect to the fundamental rights, then the possibility of direct horizontal application seems almost to have vanished. The question therefore raises what the relation is of this subsection in comparison to subsections (1) and (2).

On a first reading it appears that the provision determines the limits of direct horizontal application. Whenever the existing private law is challenged by interference of the Constitution, a court should use the common law to find protection that is beyond the reach of existing legislation. The common law therefore is to be developed. But the section prohibits courts from major changes in the common law, i.e. where an appropriate protection of fundamental rights is not possible by way of interpretation or development only, the courts should leave it to the legislator to change the common law in this regard.

It seems that the courts now have *carte blanche* in determining which common law provisions can be influenced by the Constitution and which, again, are beyond the influence of the Bill of Rights. That seems to resemble the concerns the Canadian Supreme Court expressed in *R. v. Salituro*[204]; that is that courts should be reluctant to interfere with the function of the legislator and therefore only cautiously develop the common law in incremental changes.

The provision has in this case no further function than section 39(2) FC, that deals with exactly that indirect horizontal application where the courts have to develop the common law in accordance with the Bill of Right's objectives. That reading of the provision would take the common law as the limit of the horizontal application of the Bill of Rights. The common law would serve as the final point of application. The language of the provision is consistent with an attempt to give the courts the kind of room that would enable them to immunise at least some of the existing body of the common law from any reform in terms of the Bill of Rights.

That was clearly not the intention of the Constitutional assembly. The history of the drafting process shows expressly that all parties supported unqualified direct horizontal application. But there was much discussion as to how to make such an intent manifest. Since this goal was obviously not achieved, the wording of the provision is ambiguous, and it is therefore necessary to

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[203] Section 8(3)FC: When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with Section 36(1).

[204] [1991] 3 S.C.R. 654, cf. above II.C.1.b), p 27f.

find another reading that is more supportive of a direct horizontal application that would permeate every part of the common law.

The approach suggested by Woolman asks the Constitutional Court to square this provision with subsections (1) and (2) of section 8 FC.[205] Indeed, much of the unbalancing potential of subsection (3) diminishes if it is read in the proper context. Subsection (1) sets out the principle, subsection (2) limits the scope of the principle and the doctrine, but, at the same time, reassures its existence. Subsection (3) is rather a conceptual addition, i.e. the courts should fill the *lacunae* in the common law by using their traditional common law instruments. The court should indeed formulate common law rules, but it is the Constitution that determines their spectrum of jurisdiction in common law matters, not the other way around. That view is supported by the Constitutional Court itself in *S v Zuma*.[206] Here the Court held to the fundamental principle in the case of a conflict between existing common law and the Constitution, i.e. fundamental rights should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.[207]

In consequence, the courts are at least required to change the existing common law in terms of the Bill of Rights. Old common law rules are to be overruled, this mode of direct horizontal application is clearly envisaged by the 1996 Constitution.

The second mode of operation is more difficult to establish. Should a fundamental right serve as a cause of action? It seems to me that s 8(3) FC requires the courts to refrain from that use of fundamental rights. They should rather develop the common law than create new remedies. The concerns of judicial self-restraint and the right relation to the legislature are not easily tackled. But here the Constitution dealt with common law, where it was always the case that the courts developed the legal body in their own responsibility, sometimes slowly, sometimes in bigger steps. And it was always the legislature that adopted the principles of the courts or enacted the appropriate legislation. Therefore the courts cannot be too easily allowed to escape from their responsibility towards the Bill of Rights.

The fundamental rights in the 1996 Constitution do bind private individuals. The courts have to take the common law as a starting point to a solution in private law disputes that takes this notion into account. The common law is only the beginning of the existing protection of constitutionally protected interest, not the terminus. I suggest that this may indeed require a court to create a new remedy, to found a cause of action directly on a constitutional norm. The main

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[205] Woolman in Chaskalson & oth., Ch. 10.8(a)(iii), p 10-60.
[206] 1995 (2) SA 642.
[207] *S v Zuma*, ibid, at 651.

task is ultimately to give effective protection to the fundamental rights, not to stay in the traditional lane. If the existing common law is not sufficient to fulfil the commitments in the Bill of Rights, the courts have either to create new common law remedies or base such a remedy directly on the constitutional norm. Overruling existing common law is only one aspect of a horizontal application as envisaged by the Final Constitution.

2. Explicit direct horizontal application of sections 9(4) and 29(3)(a) FC

Apart from the general principle in section 8 FC, some fundamental rights explicitly demand horizontal application. These are section 9(4) with regard to the right to non-discrimination[208] and section 29(3)(a) that binds private schools to the same commitment.[209]

There will be no doubt that the nature of the right to non discrimination is such that it could apply in private relations. Nevertheless one could ask whether the right to non-discrimination applies only on the proviso that the actual burden posed on the discriminating person in a particular case may not be found too hard.

This question is, however, to be answered in the negative. Section 9(4) of the Final Constitution puts it beyond question that the prohibition of unfair discrimination binds not only the state and its organs but applies to all persons under all circumstances. The formulation of this section indicates that the right will always apply to private conduct.[210] Although section 8(2) provides that the question of horizontal application is to be determined with reference to the right and its correlative duty, no such enquiry is needed with regard to the prohibition of discrimination, which is explicitly stated to extend to all persons.[211]

Both section 9(4) and 29(3)(a) FC are a clear *lex specialis* provision to the general horizontal application clause in section 8(2). The latter is thus blocked from coming into effect, the moment the former is invoked. The only way of limiting the outcome of such a strict provision will therefore be manifested in the balance of the different and conflicting rights and interests of the parties with regard to the limitation clause in section 36. That horizontal approach then ensures

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[208] Section 9(4) FC: No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

[209] Section 29(3) FC: Everyone has the right to establish and maintain, at their own expense, independent educational institutions that - (a) do not discriminate on the basis of race; (b) are registered with the state; and (c) maintain standards that are not inferior to standards at comparable public educational institutions.

[210] De Waal, Currie, Erasmus, Ch 3.4.(b), p 45.

[211] Kentridge in Chaskalson & oth., Ch. 14.11, p 14-54.

that such an exercise in justification takes place, instead of suppressing the inquiry by arbitrarily limiting the scope of application of fundamental rights.[212]

It is not even necessary that first national legislation to prevent or prohibit unfair discrimination - Cf. s 9(4)sent.2 - must be enacted before individual persons are bound by the section.[213] It is here, in section 9(4) itself, where one sees the establishment of a constitutional right which carries within it, its own right to a remedy for the enforcement of it.

C. INDIRECT HORIZONTAL APPLICATION

The section 35(3) of the Interim Constitution is now section 39(2) of the Final Constitution. The courts are still required to take the spirit, purport and the objects of the Bill of Rights into account when dealing with other rules of law.

1. Difference in the wording

A main textual difference derives from the replacement of the actual obligation of the courts. While s. 35(3) IC required the judges to „have due regard" to the fundamental rights in the process of interpretation, the Final Constitution now demands that the courts „must promote" these rights, respectively with regard to their underlying values. This can be regarded as being more then just another wording for the very same effect. Instead it can be read as a shift in emphasis.[214] Woolman goes even further in suggesting that „what was once permissive is now imperative".[215] While the wording in the Interim Constitution could previously be regarded as a potentially weak injunction, that is now not possible any more.

Courts that have dealt with the matter also commented on the new wording in this regard: the new Constitution enlarged the responsibility of the courts to make reference to the Bill of Rights. This step forward in the duty of the courts with regard to the Bill of Rights was explicitly recognised by the Witwatersrand Local Division of the High Court in *S. v. Letaoana*.[216] The Court first compared the two provisions and then concluded: „to 'promote', in this context, means to further or advance [the spirit, purport and objectives of the Bill of Rights]. It means *more* than taking into proper account."[217]

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[212] Hunt, Public Law 1998, p 423 (425).
[213] Kentridge in Chaskalson & oth., Ch. 14.16, p 14-57f
[214] Woolman in Chaskalson & oth., Ch. 10.8.a)(iv), p 10-61.
[215] Woolman, ibid.
[216] 1997 (11) BCLR 1581.
[217] *S. v Letoana*, ibid., at 1591; emphasis added.

2. Section 39(2) FC and direct horizontal application

Woolman suggests that it is exactly that provision, that reinforces the proposition that the Bill of Rights clearly has direct horizontal application.[218] He does so by comparing this provision with the new application clause in s. 8 FC. The openness of the 1996 Constitution to direct horizontal application will be discussed below, but I clearly see no sign, how that particular section 39(2) FC could serve as promoting *direct* horizontal application.

Direct horizontal application must, according to international custom, be defined as the application of fundamental rights *not* via the medium of established non-constitutional law, but exactly as the usage of the fundamental rights provisions without such an instrument.[219] Direct horizontal application will have the effect that it eventually changes the existing private law, insofar, as indeed every private law doctrine is eventually developed; as it is mentioned in s 39(2) FC. But, to make that clear, the difference between direct and indirect horizontal application is not necessarily a different amount of impact on the private law as such, it is mainly the methodical instrument, by which the private law is influenced in terms of the constitutional imperatives.

Secondly, as stated above[220], *direct* horizontal application takes reference not to the values, the spirit or the purpose of the fundamental right, but to the right as such. Woolman does refer to the difference of direct and indirect horizontal application[221], but he draws no conclusion from that reference. Section 39(2) FC mentions the method of „interpretation" not application. Even if one wants to distinguish between the method of dealing with statutory provisions, respectively legislation („interpretation") and dealing with the common law („developing"), then still the emphasis in this subsection lies clearly on the underlying values, the spirit, and on the purpose of the fundamental rights. That is simply not the idea of *direct* horizontality, but of *indirect* horizontality.

Chapter 2 of the Final Constitution may be applied directly to private law disputes. But this is definitely not envisaged by s 39(2) FC. Finally, Woolman himself offers another „equally plau-

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[218] Woolman in Chaskalson & oth., Ch. 10.8.a)(iv), p 10-61.

[219] Cf. above, II. A. 4. a) (1), p 9f;
It has to be noted, that the distinction between direct and indirect horizontal application is not a particular German notion. This emphasis on interpretation on the one side, and the pure application as quasi higher private law norms on the other side has been adopted in the international context to distinguish these two ways of influencing private law.

[220] Cf. ibid.

[221] But only with regard to the German context: in Chaskalson & oth., Ch. 10.3.a)(iii)(bb), p 10-23.

sible" reading of that subsection.[222] The provision could be understood to mean that in the interpretation of any law as well as in the development of common law and customary law in a context in which constitutional rights are not being asserted expressly, a court must still attempt to infuse the values of the Bill of Rights into the interpretation and development of the law.

This reading of the provision is to be preferred. Section 39(2) FC deals with indirect horizontal application. Nothing more, nothing less. The Bill of Rights established a core set of values that permeate the entire South African legal system. It is the very idea of indirect horizontality, that even in those cases where there is no constitutional entanglement visible at first glance, the Bill of Rights still plays its role. The Labour Appeal Court, for example, did adopt this reading with regard to s. 35(3) IC: the provision is an interpretative injunction that requires that the Labour Relations Act[223] *must* be interpreted in accordance with the spirit, purport and object of Chapter 3 of the Interim Constitution.[224]

D. THE CONSEQUENCES: BALANCING RIGHTS OF INDIVIDUALS

In previous sections I have already stated the consequences of such a horizontal application of fundamental rights in the German and Canadian context. In every case the Bill of Rights is used to determine rights of private persons, either against the state or against other individuals, these rights can be limited, indeed have to be limited according to s 36, the limitation clause.[225]

I suggest that at the end of the day here lay the main consequence of a wide horizontal application as it is provided in the 1996 South African Constitution. The limitation clause will have to be applied differently in contexts where the state is involved to where any two individuals are involved. The state cannot rely on fundamental rights. The state is the all powerful *Leviathan*, whose power has to be limited.

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[222] Woolman in Chaskalson & oth., Ch. 10.8.a)(iv), p 10-61.

[223] Act 28 of 1956.

[224] *Concorde Plastics Pty Ltd. v NUMSA and oth.* 1997 (11) BCLR 1624 (LAC), at 1644.

[225] Section 36 FC: the limitation clause

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The one individual has to take into account that his or her rights find their limits where they intervene with the rights of another individual, who is as equally entitled to the benefits of the Bill of Rights as he himself is. The courts, in applying the Bill of Rights to such a dispute will have to find such a difference between the competing rights that as much as possible of both individuals' rights can be preserved. Sometimes one right for higher interests will be allowed to trump the other right. This happens in state - citizen relations as well, but the measure is different.

The existing private law, common law rules and statutes do indeed resemble such a balance that is in wide parts equivalent to the demands in the Constitution. Where such a balance, however, does not strike the balance as it is determined by the Bill of Rights, the private law has to be changed. The law of defamation provides several examples of the balance between the right to dignity, that is reputation, and the right to freedom of speech.

This concept of different standards in the limitation process of rights also allows for the adoption circumstances, wherein a private player accumulates so much social power in his sphere that it can be justified to adopt another standard than the one used in relationships between other individuals. The equilibrium in such cases can be different from the one that is to be found in cases where the state is involved, but it can come very close to it.

South African courts will develop their own way in dealing with matter but I suggest that this is a way that is most in accordance with both text and the spirit and purpose of the Bill of Rights.

E. JURISDICTIONAL CONCERNS OF HORIZONTAL APPLICATION

A couple of jurisdictional questions are raised by a general notion of horizontal application. These concern mainly the jurisdiction of the Constitutional Court in comparison to the ordinary courts, primarily the Supreme Court of Appeal, and the question of whether or not lower courts are bound by precedence even though the common law rule seems to be unconstitutional.

1. The balance of responsibilities

The Constitutional Court in the *Du Plessis v De Klerk* judgement pointed out that it is primarily the task of the ordinary judiciary to decide private law disputes.[226] Consequently, the civil law

[226] *Du Plessis v De Klerk*, 1996 (3) SA 850 (CC), at para 63ff;
Cf. also above, III.B.2.c), p 37f.

courts, and eventually the Supreme Court of Appeal, will apply the fundamental rights in private law disputes as required in section 8(1) FC and develop them in the light of the Bill of Rights as provided in section 39(2) FC.

However, the Constitutional Court has also made it clear that it will guard the limits of this operation: it assures itself with jurisdiction „to determine what the spirit, purport and objects of chapter 3 [the Bill of Rights] are and to ensure that, in developing the common law, the other courts have had due regard thereto.[227]

How can such a „sharing of the workload" be practised? The *Du Plessis* decision left open to future cases, the question of how to determine the boundaries of an appropriate notion of the Bill of Rights in the common law. The American and Canadian Supreme Courts do not face that problem because they are the highest authorities in both civil and constitutional law matters.

The comparison to the German model is at hand: there a court that is dealing with constitutional matters only, had and has to determine its function in comparison with the other courts, particularly the Federal Supreme Court.[228] The *Bundesverfassungsgericht* will exercise, if necessary, a power of review, but it will do so with certain restraint, that being when it is satisfied that the ordinary courts have proceeded on a seriously wrong interpretation of the basic constitutional rights under the *Grundgesetz*.

The Starting point of that scrutiny is usually the affirmation that the Court sees the dangers of deciding questions of the „ordinary" law, that is statutes different from the basic law. The Court makes it usually clear that it is no „Super Supreme Court".[229] Judgements of other courts are not revisable simply because they may infringe on the constitutionally protected interests of the plaintiff. The Constitutional Court only has jurisdiction if the other courts violate „specific constitutional law" (*spezifisches Verfassungsrecht*).[230] The very failure of the challenged decision must be based on the ignorance of fundamental rights and their effects. The *Bundesverfassungsgericht* acknowledges jurisdiction and thus such a violation in 3 typical cases:

1. When the lower court has the wrong notion of the purpose and scope of a fundamental right and that right is of some importance in the pending case;
2. When the lower court's application and interpretation of ordinary law is not understandable and *prima facie* arbitrary.

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[227] *Du Plessis v De Klerk*, ibid.

[228] Cf. Kentridge AJ's reference to the German doctrine and its potential in the South African context: *Du Plessis v De Klerk*, ibid, at para 40.

[229] „keine Superrevisionsinstanz": Cf. Stern, Staatsrecht II, § 44 II 3, p 963.

3. When the lower court has used a kind of reasoning that is incompatible with the constitutionally required methodical instruments provided by the principle of *Rechtsstaat*.[231]

Consequently, the Court is denied its jurisdiction in most of the cases concerning the classical sphere of the civil law courts. The ascertaining of the facts of the case, the balance of the arguments and the interpretation and application of the law is primarily the task of the normal courts. The procedure of the case is then determined by the courts in the normal way.

Is this way of determining the jurisdiction of the Constitutional Court in comparison to other courts transferable to the South African context? A simplistic copying of foreign doctrines can't be the answer. But some arguments may point in that direction. As in South Africa, the German Constitutional Court was created to serve a specific function in addition to established jurisdictional bodies with long traditions and a highly developed self-consciousness. The new court had to find its place in the judicial society without infringing too much on the established territories of other courts on the one hand, but also without denying the responsibility given to it by the legislature and without losing the hopes invested in it by the society at large either.

Both courts have jurisdiction with regard to one legal body only: the Constitution, Section 167(3)(b) FC and Art. 93(1) GG.

Much of that balance between the Constitutional Court and other courts will depend on the way the other courts will adopt, apply or encourage the purposes and objectives of the Bill of Rights. As long as the general direction is in accordance with the leitmotifs of the Constitution, it is unlikely that the Constitutional Court will interfere with the jurisdiction of other courts, even if the Bill of Rights is not the formal basis of the decision nor the formal reason for a change in the common law.[232]

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[230] BVerfG, Judgement of 25 July 1979 - 2 BvR 878/74 - in BVerfGE 52, 131 (157) - Arzthaftung

[231] BVerfG, Judgement of 11 October 1978 - 1 BvR 84/74 - in BVerfGE 49, 304 (314) - Sachverständiger

[232] Cf. the approach of the Supreme Court of Appeal in the recent decision of *National Media Ltd & others v Bogoshi* 1998 (4) SA 1196: the Constitution did not serve as the measure of the development of the common law or as the basis of the decision, but clearly functioned as a background guideline for that very development.

2. *Promoting the Bill of Rights and precedence*

Already under the Interim Constitution, courts struggled with the relation of the application and interpretation clauses to the doctrine of *stare decisis*. Here the problem that the Canadian courts faced - when is the „development" of the common law to be left to the legislator - becomes relevant in another constellation: when is a judge or a bench required to change common law rules due to the Bill of Rights although the precedence requires otherwise? Or, to put it the other way around, when is a court barred from developing the common law in the light of the Constitution because of existing precedence?

This problem has already occurred under the Interim Constitution. The courts which faced that dilemma, relied primarily on the established principle: unless a case is clearly overruled by the Court that is entitled to do so, it remains binding to the judiciary. The Courts are bound to precedent. It was even argued that section 39(2) FC, resp. s. 35(3) IC, requires that reluctant approach. „Application" and „development" imply that what must be applied and developed must be left intact at the outset. Authorities ordinarily considered binding may only be deviated from if it can truly be said that they no longer constitute precedent.[233]

It seems indeed difficult to find a way between the appropriate promotion of the Bill of Rights and the interest in the certainty of the law. The individual judge is not empowered to overturn „decades of precedence developed by the Appellate Division".[234] Nonetheless, the [Interim] Constitution mandates each court to examine the common law rules afresh and if necessary to ensure that the content thereof accords with the principles thereof.[235]

The principles of precedence are most important for the functioning of a common law system, like the South African one. They are not easy to sweep away. However, now, every court, tribunal or forum must react according to the subsection. It is not all left to the Supreme Court of Appeal to develop the common law.

A fresh examination of an established common law rule by a High Court could lead to a development of that rule that is clearly a breach with established precedent. The judge could react to such a result in two ways: he could change the common law and leave it to the parties whether they want to appeal against that breach of the rule of precedence, or he could rely on the old principle and indicate to the parties, that they might succeed with an appeal because the approved rule seems to clash with the values of the Bill of Rights.

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[233] *McNally v Mail & Guardian Media* 1997 (6) BCLR 818 (W), at 824.
[234] *Rivett-Carnac v Wiggins* 1997 (4) BCLR 562 (W), at 569.
[235] *Rivett-Carnac v Wiggins*, ibid.

Both ways leave it to the parties to seek further clearing by way of appeal. But by applying the first way, the judges promote the spirit, purposes and objectives of the Bill of Rights in a more effective way than in the latter way. It does not seem to be unlikely that the voluntary breach of precedence, well founded on fundamental rights reasoning, maybe even on fundamental rights interpretation established by the Constitutional Court, may sometimes convince the litigating parties so that they can save the costs and do without further appeal.

I do not argue that lower courts are obliged to breach the rules of precedent. But in the interest of an *effective* application of section 39(2) FC, I would indeed suggest that courts are allowed in a higher degree to differ from common law precedence than it was possible before the enactment of the Constitution. Precedence does not become obsolete, it becomes less rigid. The individual's rights are not infringed upon because it is still possible to appeal against the ruling of the lower court and it still requires a decision that takes costs and duration of litigation into account as it did before.

V. CONCLUSION

Fundamental rights in South African constitutional law have a strong influence not only on the relationship between the state and the citizen but also on legal relations between private individuals. The so called horizontal application of fundamental rights to these relations is provided for in the 1996 (Final) South African Constitution as it was, to a lesser extent, in the 1993 Interim Constitution.

The doctrine of horizontal application of the Bill of Rights in South African constitutional law was, in its development, influenced by the German and the Canadian experience with that doctrine and, to a lesser extent, by the notion of the state action concept in the United States. These three different jurisdictions provided a solid dogmatic and conceptual basis for the development of a doctrine in South Africa. However, the South African scholarship did use the foreign experience to go even further and leaves the limits the other jurisdictions have established to reach a superior goal, i.e. the appropriate notion of civil rights in every legal relation.

The doctrine developed from a purely indirect approach under the Interim Constitution to a notion under the Final Constitution that the Bill of Rights is generally open to both direct and indirect horizontal application.

Direct horizontal application is primarily established by an appropriate development of the common law. The courts are authorised and required to change the existing common law to

overrule precedent. They are additionally not blocked from creating new remedies that found a cause of action directly on a fundamental right.

Fundamental rights in the private sphere require the same concept of limiting rights as the notion of these rights in citizen – state relations does. The main difference can be seen in the standard that is to be applied. The practical difference between the horizontal and the vertical application of the Bill of Rights is primarily these different standards in the process of limitation of the rights in terms of s 36 FC. The standard may even vary depending of the nature of the private parties involved in a legal dispute.

The Constitutional Court will have to develop criteria that determine its jurisdiction in constitutional affairs with regard to the jurisdiction of lower courts. The enhanced doctrine of horizontal application, as it is provided in the Final Constitution, will eventually change the existing doctrine of precedence as it was established by the courts before.

The South African doctrine of application of fundamental rights is in many regards the most comprehensive of all westernised constitutional orders. It tries to ensure that the legal ideas of the Bill of Rights will guide the development of all areas of the law as much as possible. It is this openness towards every legal relation that could finally help making the constitutional order of South Africa a tool of creating a society that is envisaged in the Preamble: democratic and open, and where every citizen is equally protected by law.