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MINOR DISSERTATION - LLM

THE APPLICATION OF THE BILL OF RIGHTS.

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CHAPTER 1

INTRODUCTION

For centuries South Africa has been embroiled in racial conflict with human rights as one of the tragic casualties.[1] With the adoption of the Interim[2] and Final[3] Constitutions a decisive break was made with the past. One of the foundations laid to forge our new society based on equality and human dignity was the adoption of a Bill of Rights. Embodied in the clauses of the Bill of Rights are the values by which the people should guide their conduct in the future.

That transformation is envisaged is clear from the pre- and postambles[4] to the Interim Constitution. Anxiously we fret whether this transformation will be successful. That the Bill of Rights and the Constitutional Court's interpretation and application thereof will be crucial for transformation is beyond question. From this flows the all important question: " Who is bound by the Bill of Rights and, if so, under what circumstances?"

The debate surrounding the above question is sometimes characterised as a debate between the horizontal and vertical application of the Bill of Rights. In my view these

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1 In AZAPO v the President of the Republic of South Africa 1996(4) SA 671 (CC) at p 676 Justice Mahomed DP said the following " For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and the majority who sought to resist that domination. Fundamental rights became a major casualty of this conflict as the resistance of those punished by their denial was met by laws designed to counter the effectiveness of such resistance."

2 The Constitution of the Republic of South Africa , Act no 200 of 1993.

3 The Constitution of the Republic of South Africa , Act no 108 of 1996.

4 The Preamble is found in the Interim Constitution before the first chapter while the Postamble appears just after clause 251 under the heading "National Unity and Reconciliation".

concepts do not do true justice to the nature of the debate. I believe that more specific questions should be posed, such as:

1.1 Is the state bound to respect the rights embodied in the Bill of Rights?

1.2 Is the judiciary bound by the Bill of Rights?

1.3 Is the state bound when it relies on the common law as justification for its actions and the actions are in conflict with the Bill of Rights?

1.4 Is a private person bound by the Bill of Rights if his actions are infringing on someone's rights?

1.5 What should happen to common law rules if they are in conflict with the Bill of Rights?

It is instructive to note at the outset that the debate surrounding the application issue is settled as far as the following are concerned:

a. The executive and legislative organs of the state are bound by the Bill of Rights.

b Statutes, in a dispute between private parties and when one of the parties relies on them, are subject to the Bill of Rights.

c The common law, when relied on by the state in a dispute with a private citizen, is subject to constitutional review[5].

d The common law must, even in disputes between private parties, be developed to conform with the values of the Bill of Rights[6]. In this regard Judge Cameron said in **Holomisa v Argus Newspaper Ltd** that... " The directive in section 35(3) in my view requires the

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5 Matthew Chaskalson et al Constitutional Law of South Africa 1ed Juta & Co Ltd (1996) on p10-1.

6 See section 35(3) of the Interim Constitution.

> fundamental reconsideration of any common law rule that trenches on a fundamental right."[7]

From the above it is clear that at the heart of the application debate is the dispute as to the manner in which the Bill of Rights should apply to a private person in a dispute with another private person where the state is in no manifestation involved.[8] Does the Bill of Rights govern the relationships between private persons by providing the aggrieved party a cause of action?[9]

In this thesis I will formulate a theory that can be used as a working legal tool to determine whether a fundamental right applies in a given situation. I will firstly examine the Interim Bill of Rights and thereafter I will formulate my theory. I will then examine the position in the United States of America and Canada and extract from their jurisprudence principles that can be used in South Africa. I will thereafter test this theory against the decisions of the South African courts and academic opinion. Finally, I will examine the Bill of Rights in the Final Constitution to determine to what extent the theory is supported by the Final Constitution.

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7 Holomisa v Argus Newspaper Ltd 1996 (6) BCLR 836 (W) at p 850 C.

8 Chaskalson p 10-1.

9 In Du Plessis and Others v De Klerk and Another 1996(3) SA 850 (CC) at p 891 I, Justice Mahomed remarked as follows: "The only residual area of potential disagreement arises in the case where what is sought to be attacked is some or other rule of the common law in litigation between private parties not involving any legislative or executive authority".

CHAPTER 2

GUIDELINES FOR THE INTERPRETATION OF THE BILL OF RIGHTS

In this chapter I will attempt to answer the question: What guidelines should be used in interpreting the Interim Bill of Rights?[10]

Section 98 (2) of the Interim Constitution[11] states:

> "The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the **interpretation** of the provisions of this constitution."

The judgments of the Constitutional Court are the fountain from which the meaning of chapter 3 and more specifically the application of the Bill of Rights will flow. In the *Makwanyane* [12] and *Zuma* [13] cases the Constitutional Court referred with approval to the following from the case of *R v Big M Drug Mart Ltd.* [14]

> "The meaning of a right or freedom guaranteed by the Charter must be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was

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10 See generally Gilbert Marcus Interpreting the Chapter on Fundamental Rights (1994) 10 SAJHR 92. Chaskalson et al Chapter 11 by Kentridge J and Spitz D at page 11-1. Mr. Justice Brian Dickerson. The Judiciary - Law Interpreters or Law Makers. (1982-1983) 12 The Manitoba Law Journal 1.

11 Section 167(3)(a) of the Final Constitution read with section 167(7) also states that the Constitutional Court shall be the highest court in all matters involving the interpretation of the Final Constitution.

12 State v Makwanyane 1995 (3) SA 391 (CC) at p 403 C.

13 State v Zuma and Others (1995) (2) SA 642 (CC) at p 651 E.

14 R v Big M Drug Mart Ltd. (1985) 13 CRR 64 at p 103; and 18 DLR (4th) 321 at p 395 - 6.

meant to protect. In my view this analysis is to be undertaken, and the purpose of the rights or freedom in question is to be sought, by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific rights or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."

In *S v Mhlungu* [15] Justice Mahomed referred with approval to the following dictum in *Government of the Republic of Namibia and Another v Cultura 2000 and Another*.[16]

"A constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."

The tenor of these judgments is also reflected in section 35(1) of the Interim Constitution, which states

"In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have

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15 S v Mhlungu and Others 1995 (3) SA 867 (CC) at p 874 E.

16 Government of the Republic of Namibia and Another v Cultura 2000 and Another 1994 (1) SA 407 (NmS) at p 418F-G.

regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

I suggest that in interpreting the provisions relevant to the application of the Bill of Rights the same principles should be followed that are used for interpreting the rights themselves. The principles stated in the passages quoted above should therefore be used in interpreting the provision relevant to application of the Bill of Rights.

In *S v Makwanyane* [17] Justice Chaskalson further decided that the debates which took place around the drafting of the constitution could be taken into account in interpreting the Constitution.

From the above-mentioned dicta the following guidelines for interpreting the text of the Interim Constitution to find the extent of the scope of application of the Bill of Rights can be extracted:

a. The language chosen in the text of the Interim Constitution should firstly be examined.

b. The purpose of the Bill of Rights with regard to its scope of application should be determined.[18]

c. In discovering this purpose, the character and larger objects of the Bill of Rights and the Constitution should be examined to see if these can throw light on the application issue.

d The historical context of the Bill of Rights may be looked at.

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17 S v Makwanyane above at p 406 E.

18 For an instructive discussion of this approach and its problems see Nicholas Smith The Purpose Behind the Words (1996) 12 SAJHR 90 at p 96.

e. The meaning and purpose of other provisions in the Constitution which are relevant to the application issue should be looked at.

f. The interpretation of the application provisions should be generous rather than legalistic.

g. The interpretation of the application provisions should be aimed at securing for the individual the full benefit of the protection of the Bill of Rights.

h. The values which underlie our Constitution should be promoted.

In the next chapter I will use the above principles to determine the scope of the application of the Interim Bill or Rights.

CHAPTER 3

THE PROVISIONS OF THE INTERIM BILL OF RIGHTS RELEVANT TO THE APPLICATION DEBATE.[19]

In this chapter I will examine the text of the Interim Constitution for indications as to how the Bill of Rights should be applied. The textual starting point for an examination of the application issue must be section 7.

3.1 SECTION 7

Section 7(1) states:

> "This chapter shall bind all legislative and executive organs of state at all levels of government."

Section 7(2) states:

> "This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution."

Those favouring the vertical and indirect horizontal application of the Interim Bill of Rights argue that traditionally bills of rights are intended to only protect the subject against the state. The emphatic statement in section 7(1), about who is bound, must therefore mean that **only** the parties mentioned in section 7(1) are bound[20]. If the intention was to bind persons other than those mentioned in section 7(1), Parliament

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19 The Interim Bill of Rights is contained in Chapter 3 of Act No 200 of 1993; Constitution of the Republic of South Africa. The Interim Constitution came into operation on the 27th of April 1994.

20 Du Plessis v De Klerk p 877 C

could very easily have mentioned them as well. From the aforegoing it follows that the Judiciary and private persons are not bound by the Bill of Rights.

Another argument advanced by the Verticalists is based on the exclusion of the judiciary in clause 7(1). The judiciary, they argue, was specifically excluded to ensure that court orders which deal with common law disputes between private persons are not subject to constitutional review. The purpose behind this exclusion is to ensure that purely private disputes and the law regulating such disputes should be insulated from the effect of the Bill of Rights. This being so, the intention of the legislature must have been that private persons in purely private disputes should not be subject to the Bill of Rights.

Verticalists also argue that section 7(1) qualifies 7(2). The latter states the law to which the Bill of Rights applies and the former the entities to which the Bill of Rights applies. Both hurdles must be crossed before the Bill of Rights can be relied upon [21]. After posing the question "what persons are bound by the chapter"[22], Justice Kentridge for example, in delivering the judgement for the majority of the Constitutional Court , finds that section 7(1) provides a plain answer[23] . He remarks that entrenched bills of rights are ordinarily intended to protect citizens against legislative and executive action and:

> "the emphatic statement in s7(1) must mean that chapter 3 is intended to bind only the legislative and executive organs of state. Had the intention been to give it a more extended application that could have been readily expressed".[24]

The above-mentioned interpretations of section 7(1), I submit with respect, are not the only way in which this section can be read. Nowhere is it stated in the Constitution that the Bill of Rights shall "only" apply to the entities mentioned in

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21 Martin Brassey Labour Relations under the New Constitution (1994) 10 SAJHR 179 at p 186.

22 Du Plessis v De Klerk at p 876 B.

23 Du Plessis v De Klerk at p 877 B.

24 Du Plessis v De Klerk at p.877 C

section 7(1). Secondly, the section can be interpreted as a clear rejection of the old Westminster principle that parliament and the executive are not bound in the sense that parliament can legislate on any matter it wishes to. Before the adoption of the Constitution the will of Parliament reigned supreme. This is no longer the case. This clause simply confirms this most important facet of the new order[25]. The meaning that Justice Kentridge therefore gives to this section must have its origin in other sections of the Interim Constitution. As will be shown in the rest of this chapter none of the sections in the Interim Constitution unequivocally supports the reading of "only" in section 7(1).

This section must further be read in conjunction with section 7(2). Section 7(2) makes it clear that the Bill of Rights shall apply to all law in force. As was stated by Kriegler J :

> "There is no qualification, no exception. All means all. .....The manifest intention of the drafters of this subsection was to cast the net as wide as possible."[26]

If, in terms of s7(2) all laws regulating the relationships between individuals are subject to the Bill of Rights then surely the individuals as carriers of the rights and obligations will automatically be subject to the Bill of rights in terms of s7(2) alone. From Section 7(2) it can be concluded that the intention of the framers was that the Bill should have direct horizontal application.

In conclusion I suggest that section 7(1) and 7(2) can support both the horizontal and vertical positions in this debate.

3.2 SECTION 4(1)

Section 4(1) states that:

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25 See Chaskalson at p 10-33 and also Motala v University of Natal 1995 (3) BCLR 374 (D) at p 381E.

26 Du Plessis v De Klerk p 913 F.

> "This constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force or effect."

The phrase "**any law or act** inconsistent with its provisions shall ..... be of no force or effect" suggests that the Bill of Rights should be applied in a horizontal manner. The Afrikaans text uses the word "handeling". A "handeling" can be performed by a person totally unconnected to the State. If it was the intention that only the State should be bound by the Bill of Rights, the word "act" should have been qualified by, for example, "any act of an organ of State".

This section I suggest is a further pointer in the direction that the Bill of Rights should have direct horizontal application.

3.3 SECTION 4 (2)

This section states:

> "This constitution shall bind all legislative, executive and judicial organs of state."

In direct contrast to Section 7(1) this section binds the Judiciary. This difference can be explained by acknowledging that different committees had different ideas about the direct horizontal application of the Bill of Rights. On a reading of this section alone it is clear that the Judiciary is bound by the Bill of Rights. If that is so the argument advanced by the verticalists[27] that the Judiciary was specifically excluded so that section 7(1) can have a vertical application only, loses all its merit. I submit that the intention of the Legislature whether the Judiciary should be subject to the Bill of Rights is, to say the least, uncertain and controversial. If this is so the omission of the Judiciary from section 7(1) cannot be said to be an indication that

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27 See page 9 above.

the legislature intended to insulate common law private disputes from impact of the Bill of Rights. It cannot be argued that the Judiciary was omitted to exclude a direct application of the Bill of Rights.

The verticalists however argue that the difference between 7(1) and 4(2) indicates that the Judiciary is bound by the constitution but not in the same manner as the executive and the legislature.[28] No indication is however given how the Judiciary is bound differently. I suggest that none can be given as both sections use the same word namely "bound". If "bound" in section 7 means that the executive has got a legal obligation not to infringe on a person's fundamental rights surely "bound" in section 4 must place the same obligation on the Judiciary.

I submit that the impact of this section on section 7 is that both sections support the conclusion that the Bill of Rights should have direct horizontal application.

3.4 SECTION 33(2)

This section states:

> "Save as provided for in subsection (1) or any other provision of this Constitution , no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter.

This section quite clearly states that no law shall limit any fundamental right. This must surely also include the law applicable to a purely private dispute. I suggest that this is another pointer in the direction of direct horizontal application.[29] The verticalists can however point to the words " Save as provided for in .....any other provision of this Constitution". The argument is that section 7(1) is such" another

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28 Holomisa v Argus Newspapers Ltd 1996 (6) BCLR 836 (W) at p 843 E.

29 Kriegler J proclaims in Du Plessis v De Klerk on p 914 D "If the chapter were intended to operate only vertically , or only indirectly horizontally, why was it necessary or indeed appropriate, to declaim the preservation of rights in such unqualified terms?"

provision" and therefore the common law when in operation between two private persons may limit a person's fundamental rights.

This is a circular argument as the conclusion is used to justify the conclusion i.e. that the Bill of Rights only apply in a vertical manner. In short there is no "other provision of this constitution" which unequivocally states that the Bill of Rights shall have vertical application only.

3.5 SECTION 33(4)

This section states;

> "This chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1)."

Justice Kentridge calls this clause

> "Another strong indication that a general horizontal application was not intended.....If Chapter 3 has general horizontal application who can the bodies and persons be who are not bound?"[30]

In response it can be argued that the bodies and persons not bound in terms of section 7(1) are the Judiciary, which is bound in terms of clause 4(2), and private persons, who are bound in terms of clause 7(2). In my view the purpose of this clause is to regulate the situation where the state passes a law prohibiting unfair discrimination by a private person. Such a law might find itself open to constitutional attack on the basis that the new law infringes a constitutional right. This clause will

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30 Du Plessis v De Klerk at p 877 F. Judge Cameron also sees this clause as an indication that the Bill of Rignts does not have direct horizontal application. See Holimisa v Argus Newspapers Ltd at p 843 F. See also Martin Brassey at p184.

make it more likely that the said law will pass the requirements of section 33(1) as the Constitution in 33 (4) specifically states that such measures are authorised.

3.6 SECTION 35 (3)

This Section states:

> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter."

The verticalists see this clause as very convincing support for their cause that the fundamental rights should not have direct horizontal application. They argue that if the fundamental rights have direct horizontal application this clause would be superfluous.[31]

The above reading of this clause is however not the only one. This clause can also be read to mean that the courts must also have regard to the spirit and objects of Chapter 3 in interpreting and developing the common law in disputes in which no constitutional right is raised.[32]

Verticalists further argue that this clause bears such an uncanny resemblance to the German principle of mittelbare Drittwirkung that the insertion could not have been coincidental. The intention of the legislature is thus clear. The position in Germany regarding the application of their Bill of Rights should be replicated here. Therefore there should be no direct application of the fundamental rights in disputes between private persons.

At first glance I agree that this clause is a very strong pointer to a mittelbare Drittwirkung interpretation only. The argument that this section was inserted by the drafters to allow for the radiation of the values embodied in the Bill into the legal

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31 Justice Kentridge in Du Plessis v De Klerk at p 877 G.
32 Justice Kriegler in Du Plessis v De Klerk at p 916 A-C.

relationship between private people to my mind does not adequately take into account the purpose of the Constitution as expressed in the Preamble and Declaration. These sections call for a transformation of a society. I doubt whether this transformation can be achieved by infusing the values of the Constitution into the open-ended concepts of the common law. At least the direct horizontal application of the fundamental rights has a greater chance of effecting the transformation that the Constitution desires.

3.7 SECTION 35(1)

This section reads as follows:

> "In interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall where applicable have regard to public international law applicable to the protection of rights entrenched in this chapter and may have regard to comparable foreign case law."

I suggested in chapter 2 that this clause instructs the court to follow the purposive approach when interpreting the provision of the Constitution relevant to the application debate. This clause should be applied in conjunction with the principles of interpretation as set out in chapter 2.

The larger objects and character of the Interim Constitution is to transform the whole of the South African society, not just the State. With these in mind the provision relevant to the application of the Bill of Rights should be given an interpretation that favours a transformation of society. For example racism wherever it manifests itself in the society should be eradicated. The direct horizontal application of the Bill of Rights is much more likely to have that effect than the vertical or indirect horizontal application of the fundamental rights.

The historical context of the Bill of Rights may also be looked at. How does this impact on the relevant application provisions? Justice Kriegler says the following;

> "Our past is not merely one of repressive use of State power. It is one of persistent institutionalised subjugation and exploitation of a voiceless and largely defenceless majority by a determined and privileged minority. The untold suffering and injustice of which the postscript speaks do not refer only to the previous years, not only to Bantu education, group areas, security and the similar legislative tools used by the previous government."

The historical context of the Bill of Rights implores us to interpret the relevant application provision in such a manner that the subjugation and exploitation of the Black people be addressed. This, in my view favours an interpretation that the Bill of Rights should have direct horizontal application.

The interpretation of the application provisions must also be aimed at securing for the individual the full benefit of the protection of the Bill of Rights. Thus, where section 13 states that every person shall have the right to personal privacy, the full benefit of protection of this right means that both the state and private persons have the legal obligation to respect that right.

In interpreting the relevant application clauses the values which underlie the Interim Constitution should also be promoted. What are these values? These include, in my view, dignity, equality, democracy, pluralism and liberty . Once again I suggest that a direct horizontal application will give a fuller expression to these avowed purposes of the Interim Constitution than the interpretation that the verticalists propose.

3.8 SECTION 232 (4)

Section 232 (4) provides:

> "In interpreting this constitution a provision in any schedule, including the provisions under the heading "National unity and Reconciliation", to this constitution shall not by reason only of the fact that it is contained in a schedule, have a lesser status than any other provision of this constitution which is not contained in a schedule, and such a provision shall for all purposes be deemed to form part of the substance of this constitution."

One of the principles of interpreting a bill of rights is that the purpose of the rights and the purpose of the application of those rights as intended by the legislature should be taken into account. These purposes can be discovered by examining the character and larger objects of the bill of rights. These larger objects and purposes are set out in the pre- and post-ambles. This section therefore gives constitutional authority that the above-mentioned approach should be followed. When the declaration therefore states that the Constitution provides a historic bridge between the past of a deeply divided society of untold suffering and a future founded on human rights, such a statement carries the same weight as the statement in, for example, section 9 which states that every person shall have the right to life. It further indicates that the purpose of the Bill of Rights should be understood in the context of the other relevant provisions of the Bill like the Preamble and the Declaration of National Unity and Reconciliation.[33]

3.9 DECLARATION OF NATIONAL UNITY AND RECONCILIATION

The declaration states the following:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and

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33 In this thesis the declaration of national unity and reconciliation appearing after section 251 in the Interim Constitution will be referred to as "the Declaration" or "postamble".

peaceful coexistence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex."

This declaration speaks of a historic bridge between the past of a deeply divided **society** and a society based on human dignity. It speaks of the "reconstruction of **society**". This is an express indication that the Bill of Rights should also have a horizontal application. The declaration addresses the whole society and not just the state. The declaration speaks of the reconstruction of society. The intention clearly is to redefine the relationship not only between the state and its citizens but also between citizens.

The declaration further states that the Bill of Rights should have horizontal application when in no unclear terms it states as follows:

> "The adoption of this constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge."

These aims speak profoundly of a vision of a changed society not just of a modified state. The declaration therefore supports the view that the Bill should have direct horizontal application.

3.10 THE PREAMBLE

In *S v Mhlungu* , Justice Sachs said the following about the preamble:

> "The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicates its fundamental purpose. (See the concluding passage.) This is not a case of making the Constitution mean

what we like, but mean what our framers wanted it to mean; We gather their intention not from our subjective wishes, but from looking at the document as a whole." [34]

This preamble states:

"Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state, in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedom."

These words point to a new order. The purpose of the Bill of Rights is to bring about a new society with values different from the old one. The preamble desires that there be equality of people, of all races, and between men and women. The purpose that can be learned from this preamble is clearly that all people should be bound by the constitution and not just the organs of the state.

3.11. THE HISTORY OF SECTION 7

The discussions by Du Plessis & Corder as well as the South African Law Commission[35] as to the genesis of this section, show that it was produced after extensive negotiation and debate. This Section became the focal point of the "application debate" between the drafters. Obviously all the other provisions could not be changed to reflect each cut and thrust in the application debate. It emerges that the people who drafted and participated in the application debate settled for a vertical application with provision for value radiation into the private sphere. To conclude, the history of this section points clearly in favour of a vertical application of the Bill of Rights.

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34 S v Mhlungu and Others at p 874 E.

35 Du Plessis & Corder Understanding South Africa's Transitional Bill of Rights 1ed Juta & Co Ltd (1994) at p 111. The South African Law Commission Final Report on Group and Human Rights Project 58 (1994) at p 120.

However these drafters were not the persons who passed the Constitution in parliament. Their intentions could never be the intention of the legislature. I therefore feel that although the historical argument is very convincing in favour of verticalism, the history of sections 7 and 35 can never be conclusive proof of the intention of the legislature.

3.12 CONCLUSION

I am of the view that the text points in different directions at the same time.[36] Some sections read by themselves or in conjunction with others clearly support the direct horizontal application of the Bill of Rights. Others again the vertical application. The text as a whole however interpreted in the light of the guidelines set out in chapter 2 to my mind favours a direct horizontal application. This "either-or" approach however is not the only one. In the next chapter I will examine non textual argument for and against the different application approaches and suggest a method by which the textual conflict may be resolved.

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36 Cheadle H and Davis D The Application of the 1996 Constitution in the Private Sphere. (1997) 13 SAJHR 44 at p 50 states " The fact is that the political compromise, left the language open to differing interpretations."

CHAPTER 4

RESOLUTION OF THE TEXTUAL CONFLICT

In this chapter I will suggest a method by which the textual conflict of the provisions relevant to the application of the Interim Bill of Rights can be resolved. As concluded in the previous chapter the text of the Interim Constitution does not without any doubt favour either the horizontal or vertical application of the Bill of Rights. I will first, however, explore whether non textual arguments can lead one to conclude that a particular application theory should prevail.

4.1 THE HISTORICAL ARGUMENT

Verticalists argue that from a historical perspective most constitutions only protect the individual against infringement of its constitutional rights by the state. Why should we have a different approach in the absence of clear textual indicators?

The horizontalists can argue that this statement is no longer valid. Woolman points out that direct horizontal application has taken place in Ireland and New Zealand.[37] According to De Wet the Italian Constitution guarantees a wage right which has direct horizontal application[38]. Woolman and Davis[39] also point out that constitutional and international instruments address the abuse of private power as

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37 Stuart Woolman Defamation, Application and the Interim Constitution (1996) 113 SALJ 428 at pages 441 to 443.

38 Erika De Wet Indirect Drittwirkung and the Application clause: A reply to Johan De Waal by Erika de Wet (1995) 11 SAJHR 610 at pages 617 and 618.

39 Woolman S and Davis D The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions. (1996) 12 SAJHR 361 at p 374.

well as state power. The pre- and post amble further provide clear textual indicators that some rights should have direct horizontal application.

4.2 THE POLITICAL PHILOSOPHY ARGUMENT

The verticalists advance the argument that the preferred political theory to express human fulfilment and ultimately human dignity is Classical Liberalism. This theory teaches that individuals have natural inalienable rights which the state may not violate. The state should refrain from intruding in the private sphere of individuals.

Woolman and Davis[40] point out that the Classical Liberal theory does not take into account the preconditions necessary for a life of human dignity and that our life is largely constructed for us by the communities we live in as well as by the institutions we are part of. I agree with this approach. My view is that freedom can never by itself provide a life of dignity. What is required is a free private sphere infused with value judgements. To provide a life of human dignity the values underlying the Bill of Right should become part of the fabric of our society and should infuse the decisions we make every day.

4.3 THE WORKLOAD ARGUMENT

Verticalists further argue that if we have direct horizontal application the Constitutional Court will be flooded with litigation. This kind of argument is in my view nothing more than speculation. Once the court has ruled on a specific issue and the common law is clarified, the workload will be the same as with any other common law rule. Any system of human endeavour, including judicial review, should be organic and flexible. Even if there is a flood of litigation in the beginning a way will be found to deal with it. In my view this can never be a valid argument why the Bill of Rights should not have direct horizontal application.

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40 Woolman S and Davis D The Last Laugh at pages 382 - 400.

4.4 THE COINCIDENTAL ARGUMENT

Horizontalists argue that if the Bill of rights applies in a vertical manner it will be purely coincidental whether a fundamental right applies in a dispute between two litigants. If the relationship has been legislated upon then the fundamental right will apply . If not, and only the common law applies, then the fundamental right will not apply. The horizontalists further criticise that in any event the common law will be subject to constitutional review if the state is a party to the dispute and relies on it. This will lead to one common law for the state and another for the rest of us.

4.5 THE STATE ACTION ARGUMENT

Horizontalists point out that it is in the nature of constitutional review to weigh up competing values and in doing so draw the boundaries between the different competing fundamental rights. This approach also ventilates a discussion of the values and interests fundamental rights protect or do not protect . In an open and democratic society this discussion is crucial. If the vertical approach is followed this debate will not take place as far as the relationship between private individuals is concerned. All the courts will do is to try and find if the state is present in what is really the private sphere, thus completely bypassing the above mentioned debate.

4.6 COUNTER MAJORITARIANISM ARGUMENT

Verticalists point out that there is a contradiction between a democratic system of government and the institution of constitutional review. Judges are not elected by the majority of the people. Because the concepts used to describe fundamental rights are open ended and capable of different interpretations, Judges are able to regulate the relationships between private people according to their own ideas of what is right. We will, basically speaking, have philosopher kings. This is a complex issue which cannot be properly discussed here. I must however point out that the same argument can be levelled against the vertical approach as well. In terms of the

vertical theory the legislature and the executive will also be subject to constitutional review.

After listing the above argument I must conclude that both schools of thought offer convincing arguments for their specific application theory. In my opinion the arguments in favour of direct horizontal application outweighs the ones in favour of vertical application.

4.7 RESOLUTION OF THE TEXTUAL CONFLICT

An important point not to lose sight of in the application debate is that the debate is not so much a debate about horizontal versus vertical application but more about the manner in which the fundamental right should be applied between private persons. The conflict is between whether a person in a private dispute can rely on the Bill of Rights for a cause of action or a defence or whether he can only argue that the values underlying the Bill of Rights have so infused the open-ended concepts of the common law, that the common law should be developed by the courts so as to provide him with a remedy or a defence. The conflict is therefore not so stark and I feel one can return to the text of the Constitution and tools of interpretation for an answer.

This conflict may be resolved in the same manner that Justice Sachs resolved the conflict in the **State v Mhlungu** case between section 241(8) of the Interim Constitution and its Chapter 3 rights. He stated in that case:

> "This means that the two sets of provisions must be read together as part of the total constitutional scheme, not separately as autonomous free standing clauses. If there is overlap and collision of material between the two provisions, the **essential** purpose of each must be discussed and weighted so that an appropriate resolution based on balance between the two can be achieved. This involves a species of interactive proportionality. It moves the nature of the enquiry from the so-called plain meaning of the words looked at on their own or even in

context, to the **interactive purpose** of different provisions read together." [41]

From the discussion in chapter 3 it is clear that there is a collision and overlap of material amongst the provisions impacting on the application of the Bill of Rights. Section 7(1) read with section 35(3) pull in the direction of vertical application supplemented by indirect horizontal application. The Declaration, Preamble, and the other provisions discussed in chapter 3 point towards a direct horizontal application of the Bill of Rights. This requires that the essential purpose of each be discussed and weighted.

The **essential purpose** of Section 7(1) read with section 35(3) is to protect the citizen against oppressive state intervention and to create a sphere of private conduct where persons may act unrestrained by the values imposed by non-elected judges in their interpretation of the Bill of Rights.

The **essential purpose** of the Declaration, Preamble, Schedule 4 and the other provisions discussed in chapter 3 is to bring about the transformation of the old order and to create a new society with values based on human dignity, equality and democracy.

What is then the **interactive purpose** of the different provisions read together? The interactive purpose will be a purpose that will, while infringing to some extent on the essential purpose of each set of provisions, still give expression to the essential aims of each set of provisions. The interactive purpose will be one that gives recognition to essential aims of Parliament to create a new society as well as the essential aims of Parliament to create private sphere for person to live in.

Can transformation be achieved whilst still maintaining a free private sphere? I do believe it can and in the following manner.

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41 S v Mhlungu at p 912 A.

Locked in the concept of a transformed society is the notion of a society with values different from the old one. However not all the values of the new order should be different from the values in the old one. There will be a set of values that will be the same in both orders. These values are not essential for transformation. The values however that were absent from the old order and envisaged for the new one will be essential for transformation. These values I will call **essential values.**

Fundamental rights that can advance and promote essential values will assist the envisaged transformation. These rights only should therefore have direct horizontal application. Rights which only promote values that are not essential for transformation should have vertical application only.

On a careful reading of the Preamble, Declaration and Schedule 4 it is clear that Section 8 of the Bill of Rights for example will promote essential values and should therefore have direct horizontal application.

The above then is the interactive purpose of all the clauses impacting on the application of the bill of rights. This test I will call **the Values Test** and it is set out below.

4.8 THE VALUES TEST

The following are the principles that make up the Values Test:

(a) The values which the Constitution and more specifically the Bill of Rights, Preamble and Declaration desire for the new order should be identified.

(b) It should then be determined whether those values were absent in the old order. If they were absent then the values are ones

that can transform our society. These I will call the essential values.[42]

(c) Next it should be determined whether the right in question can promote the essential values in the factual context of the case.

(d) If the right can promote essential values then it becomes an right essential for transformation and for the society envisaged by the Constitution and should be applied in a direct horizontal manner.[43]

(f) The application of these essential rights should be limited by the values that other rights promote, as well as the limitation clause, section 33.

(e) The rights not promoting essential values should have vertical and indirect horizontal application only.

The above test, apart from providing a principled approach to the application of specific rights, also have the following advantages. The Values based approach will force the courts to make decisions based on substantive reasoning.[44] In this regard

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42 In Holomisa v Argus Newspapers Limited Cameron J defines these values at p 844 G to be equality, democracy, governmental openness and accountability.
Botha H The Values and Principles underlying the 1993 Constitution (1994) 9 SAPL 233 at p 233 defines these values as national unity, limited government, liberty, equality and pluralism.

43 Support for this test can be found in the judgement of Justice Madala in the matter of Du Plessis v De Klerk at p 923 F to 926 E. For example at page 925 E the learned Judge states " If the proposition is accepted that the basic concern of the Constitution is to transform the South African society and the legal system into one that upholds democratic principles and human rights between , inter alia, the State and the individual and between individuals inter se, there must be instances which call, in so far as private relationships between individuals are concerned, for the direct application of the provisions of Chapter 3 between such individuals."

44 Cheadle H and Davis D The Application of the 1996 Constitution in the

Cockrell points out[45] that there are two types of reasoning, namely substantive reasoning and formal reasoning. The author states that a substantive reason for a decision is a moral, economic, political, institutional or other social consideration. In contrast, the author continues, a formal reason is a legally authoritative reason on which judges are required to base a decision and which overrides any countervailing substantive reason arising at the point of application . The person who makes the decisions when resolving a dispute by formal reason does not have to go beyond the rule itself and investigate the substantive reasons for its decision. If the courts engage in a process of evaluating the underlying values of the Constitution and can justify the application of the Bill of Rights in the light of those values, the decision will be one made after a process of substantive reasoning was followed . Such decisions will give expression to the aims of the Constitution to transform our society. As was stated by Cockrell ;

> "an engagement with the substantive vision of law which is part of Chapter 3 of the Constitution would be likely to produce a healthy spill-over effect in the context of private-law adjudication in the horizontal realm"[46]

As some rights will apply to private disputes the Values Test will bring our Constitution in line with other modern constitutions and international instruments

As only the essential rights will have direct horizontal application the workload on the courts should be less.

The counter majoritarian argument against direct horizontal application will lose some of its force. Judges can now, when they impose their values on private

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Private Sphere (1997) 13 SAJHR 44 at p 60 states " The fundamental values of the Constitution should act as guidelines to which rights are suitable to promote application because they enhance the kind of society envisaged in the Constitution."

45 Cockrell A Rainbow Jurisprudence. (1996) 12 SAJHR 1 at p 5 .

46 Cockrell at p 37.

persons, point to the avowed aims of the Constitutions to transform society and use this aim as justification for their interference in private affairs.

Chapter 5

THE NORTH AMERICAN EXPERIENCE

In this chapter I will examine the judgments of the Supreme Courts of the United States of America and Canada[47] and analyse how they have dealt with the application issue. I will concentrate on the principles formulated in the case law and investigate whether the Values Test that I proposed in the previous chapter should be modified.

THE UNITED STATES OF AMERICA

5.1 THE AMERICAN STATUTORY FRAMEWORK

The Constitution of the United States, and more specifically the Amendments thereto, contain provisions protecting the rights of individuals. For example the First Amendment states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of people to peaceably assemble and to petition the Government for a redress of grievances."

Also, the Fourteenth Amendment states:

> "Section 1. All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any

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47 Section 35(1) of the Interim Constitution and section 39(1)(c) of the Final Constitution states that in the interpretation of the provisions relevant to the application debate the court may consider comparable foreign case law.

> law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Unlike the Canadian, German or South African Bills of Rights there is no clause specifically dealing with the issue of the application of the Bill. The question, to whom does the Bill apply, can only be answered by examining the manner in which the rights themselves are described. For example in the First Amendment it is stated that "Congress shall make no law .....". The Fourteenth Amendment states "No State shall make or enforce any law .....". The Supreme Court therefore has to determine who is bound by the Bill of Rights by examining the words used to describe the right itself.

5.2 AMERICAN CASE LAW

5.2.1 THE CIVIL RIGHTS CASES[48]

The scope of the application of the Bill of Rights was first extensively treated by Justice Bradley in the civil rights cases. In 1875 Congress passed the Civil Rights Act. Section 1 of this Act stated:[49]

> "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and

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48 The Civil Rights Cases 109 US 3; 3 S Ct 18; 27 L ed 835 (1883).

49 Civil Rights Cases 3 S Ct p 20.

> applicable alike to citizens of every race and colour, regardless of any previous condition of servitude."

Stanley, Nicols, and Ryan amongs others, were convicted in the lower Courts of committing acts prohibited in terms of this Section. The accused appealed and when these matters were heard in the Supreme Court they argued that their convictions should be set aside on the grounds that Congress had exceeded its powers in terms of Section 5 of the Fourteenth Amendment when it passed the Civil Rights Act.

In two of the cases, United States v Stanley[50] and United States v Nicols,[51] the accused were convicted of denying persons of colour the accommodation and privileges of an inn or hotel. In United States v Ryan[52] and United States v Singleton[53] the accused were found guilty of denying persons of colour the privileges and accommodation of a theatre. The issue to be decided was whether the Federal Government had the constitutional authority to pass the Civil Rights Act. Does Congress have the constitutional power under the 14th Amendment to make such a law? After quoting the 1st Section of the Fourteenth Amendment Justice Bradley stated that the 14th amendment has vertical application only;:

> "It is State action of a particular kind that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation and State action of every kind which ..... denies to any of them the equal protection of the law."[54]

Justice Bradley also made the following illustrative remarks which throw light on how the Bill of Rights should be applied:

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50 The Civil Rights Cases. 109 US 3; 3 S Ct 18; 27 L ed 835 (1883).
51 The Civil Rights Cases. 109 US 3; 3 S Ct 18; 27 L ed 835 (1883).
52 The Civil Rights Cases. 109 US 3; 3 S Ct 18; 27 L ed 835 (1883).
53 The Civil Rights Cases. 109 US 3; 3 S Ct 18; 27 L ed 835 (1883).
54 Civil Rights Cases at p 21

> "[C]ivil rights, such as are guaranteed by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; [55]

As Congress only had the power to make laws protecting its citizens from the infringements of its rights by the State, Section 1 of the Civil Rights Act was too wide and was therefore declared unconstitutional and void.

The principles that one can deduce from this decision are the following:

a. The Fourteenth Amendment applies only to state legislation and state action.

b. It does not protect a person from the invasion of his rights by another person who has no connection with the state.

c. It applies to state officers, administrative, executive or judicial.

d. It applies to acts done under state authority.

These principles ignore that racism is not just practised by the State but is to a large extent a social problem. No constitutional protection is provided under these principles as long as the state is not involved. The above approach is also a formula approach[56] which does not require the court to ventilate the values of different rights in different factual situations.

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55 Civil Rights Cases at p 25.

56 William W Van Alstyne and Kenneth L Karst State Action (1961) 14 Stanford Law Review 3 at p 58.

5.2.2 THE TEXAS PRIMARY CASES

The State primaries are a process whereby political parties elect their candidates to be put on the national ballot for election to Congress. From the people on the ballot the citizens of the particular state elect their representatives in Congress. In the case of Nixon v Herndon,[57] Nixon, a black man was refused the right to vote in a Democratic Party Primary for the State of Texas. At the time a Texas statute stated that:

> "In no event shall a Negro be eligible to participate in a Democratic Party Primary election in the State of Texas."

The Supreme Court was obliged to determine whether this Texas statute was a breach of Nixon's constitutional rights under the Fourteenth and Fifteenth Amendments. The Fifteenth Amendment specifically states:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the Unites States or by any State on account of race, colour, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Without even considering the ambit of the Fifteenth Amendment, the Supreme Court found that the State of Texas had infringed Nixon's right to equal protection granted to him in terms of the equal protection clause of the 14th Amendment.

In reaction to this judgment, the Texas State legislature re-enacted the article and gave to the State Executive Committee of the Democratic Party the power to prescribe who could be members of the party and who could vote in the primaries. The Democratic Party by means of the State Executive Committee passed a

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57 Nixon v Herndon 273 US 536; 71 L ed 759; 47 S Ct 446.

resolution that only white democrats and no one else could participate in any election of candidates for the Congress ballot. Nixon was again refused the right to vote and again brought an action for damages based on an infringement of his constitutional rights.[58] The Supreme Court ruled that the test to be applied was whether the Committee operated as a representative of the state in the discharge of the state's authority. The Court found that it did and that for the purpose of the constitution the actions of the Executive Committee of a political party were deemed to be that of the state.

After this defeat the State Executive Committee delegated its powers to prescribe the requirements for the right to vote in primaries to the State Convention of the Democratic Party. In 1932 the State Convention adopted the following resolution:[59]

> "Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic Party and as such entitled to participate in its deliberations."

In terms of this resolution a county clerk refused a Negro, Mr Grovey, the ballot, based solely on the fact that Grovey was black. The Supreme Court distinguished Grovey from the Nixon case and found that, unlike the Executive Committee, a state convention of a party was not an organ of state. Grovey was denied the right to vote.[60]

The issue was once again raised and finally settled in Smith v Allwright.[61] Smith, a Negro citizen, was refused a ballot to vote in the Texas primaries of the Democratic Party. Relying on the above quoted resolution of the Democratic Party's State Convention, the election judges refused Smith the right to vote. Smith claimed

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58 Nixon v Condon 286 US 73; 76 L ed 984; 52 S Ct 484.
59 Smith v Allwright 88 L ed 987 at p 993.
60 Grovey v Townsend 295 US 45; 79 L ed 1292; 55 S Ct 622.
61 Smith v Allwright 88 L ed 987.

damages for the infringement of his constitutional rights as embodied in the Fourteenth and Fifteenth Amendments.

It was once again argued that the Democratic Party primaries were elections conducted by the Democratic Party through its party officials for the selection of the party nominees in the general election. These were not elections conducted by the State of Texas. The Democratic Party was a voluntary organisation. The primaries are political affairs handled by the party and not by the government. The majority judgment was delivered by Justice Reed. The judge first noted and discussed the history of the cases and concluded that in United States v Classic,[62] the Supreme Court had found that the whole process of electing officials to government positions should be seen as one process. Justice Reed found that this whole process was protected by the Fourteenth Amendment. The resolution of a political party on the facts of this case was thus viewed as "state action."[63]

The following principles can be deduced from these cases

a. The whole election process is the exclusive and traditional function of the state.

b. The state, by delegating its governmental functions to private persons or organisations, cannot escape the limitations imposed on it by the constitution. Such private persons and organisations will be deemed to be agents of the state and their actions to be state actions.

c. Private persons, when fulfilling traditional government functions, will be bound by the constitution.

d. The following have been seen as traditional government functions:

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62 United States v Classic 313 US 299; 85 L ed 368; 61 S Ct 1031.

63 Smith v Allwright at p 995.

1. The operation of election systems;

2. The governing of cities or towns;

3. The operation of public places such as parks;

e. This test became known as the public functions doctrine and is an extension of the State Action Doctrine.

In my view the approach of the court should have been to weigh the right of a person to belong to a political party of his choice and to vote for candidates of his choice against the right of the members of a political party to freedom of association. Instead the court has to do fancy footwork to find the presence of the state in the workings of a political party.

5.2.3 THE MARCH CASE [64]

The town of Chickasaw in the State of Alabama was owned by the Gulf Shipping Corporation, a private company incorporated in terms of the laws of the United States. The town was freely accessible to the public and generally speaking there was nothing to distinguish it from other towns in the vicinity. Mrs March, a Jehovah's witness wanted to distribute religious literature but was warned that the company's regulations did not permit her to do so. She proceeded to do so and was arrested by the sheriff for committing the offence of remaining on private property after being warned by the owner not to be there.

Mrs March contended in Court that her arrest was an infringement of her right to freedom of religion. Justice Black found that if the title to Chickasaw had belonged to a municipal corporation her conviction would have had to be set aside as her 1st Amendment rights would have been infringed on the grounds that neither a state nor a municipality could completely bar the distribution of religious material. The judge

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64 Grace March v State of Alabama 326 US 501; 66 S Ct 276; 90 L ed 265 .

ruled that the more an owner, for his own advantage, opens up his property for use by the public the more his rights become circumscribed by the statutory and constitutional rights of those who use it. The Court ruled that the company had infringed Mrs March's constitutional rights and set her conviction aside.[65]

The following principle can be deduced from this case :

Once a private person fulfils a traditional government function, that person will be bound by the bill of rights. The more a private person opens his business to the public the more likely it will be that his conduct is circumscribed by the constitution.

5.2.4 JACKSON V METROPOLITAN EDISON COMPANY [66]

The Metropolitan Edison Company was a privately owned and operated company which delivered electricity to a service area which included the city of York in Pennsylvania, where the petitioner Catherine Jackson lived. To operate the company needed a certificate from the government, the Pennsylvania Public Utility Commission, and could only operate subject to extensive government regulations. On non-payment of Jackson's electricity account, her electricity was cut off, without notice to her. This, Jackson alleged, infringed her 14th Amendment due process rights to property.

The majority decision of Justice Rehnquist, after referring to the Civil Rights cases, emphasised the difference between actions by the state which are subject to the 14th Amendment and the actions of private persons which are not. Whether particular conduct is private or state action can be difficult to determine. The mere fact that private business is state-regulated cannot by itself make the private acts of such a person the actions of the state. This is so even if the regulation is extensive. It might however be a factor, taken together with other factors, which would lead to the conclusion of sufficient state involvement. The true test is the following:

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65 March v Alabama 90 L ed at p 269.

66 Jackson v Metropolitan Edison Company 419 US 345; 95 S Ct 449; 42 L ed 2d 477 (1974).

> "But the enquiry must be whether there is a sufficiently close nexus between the state and the challenged actions of the regulated entity so that the actions of the latter may be fairly treated as that of the state itself. ..... The true nature of the state's involvement may not be immediately obvious and a detailed inquiry may be required in order to determine whether the test is met."[67]

Mrs Jackson's first argument was that the termination without notice by the electrical company should be seen as state action because of the monopoly status of the company to supply electricity to the people. In rejecting this argument the Court found that there was an insufficient nexus between the cutting off of the electricity and the state permitting the monopoly, to render the cutting off of the electricity state action.

Mrs Jackson next argued that state action was present because the company provided an essential public service. Justice Rehnquist rejected this argument by stating that state action will be present only if a private entity exercises a power traditionally and exclusively exercised by the state. In the history of Pennsylvania however the providing of electricity had never been the traditional exclusive function of the state.

Justice Rehnquist then found that Metropolitan Edison was a privately owned corporation which does not lease its facilities from the state. It pays tax to the state. It is extensively regulated in a way that most other businesses are not. Metropolitan elected to terminate Jackson's service in a manner which the state found permissible. Despite this the judge concluded:[68]

> "..... this is not sufficient to connect the state of Pennsylvania with respondent's actions so as to make the latter's conduct attributable to the state for the purpose of the 14th Amendment."

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67 Jackson v Metropolitan 95 S Ct 440 at p 453.

68 Jackson v Metropolitan 95 S Ct 440 at p 457.

Justice Douglas, who dissented, found that the issue could not be determined by finding that a single factor or relationship presents a sufficient degree of state involvement. The question had to be determined by taking all the facts into account, to see whether the aggregate compelled a finding of state responsibility. The most important factor was that Metropolitan Edison was the only public utility which furnished electrical power to the city. If electricity is denied under modern conditions the home becomes uninhabitable. The state was further extensively involved in regulating the electrical company's operations. In fact the commission's functions were that of supervision and regulation and it had to be involved. The judge concluded that Metropolitan Edison was bound by the 14th Amendment[69].

Justice Marshall, also dissenting, pointed out that the Supreme Court had in the past relied on the following factors to find the presence of state action in the actions of private companies[70]. Firstly the electricity supplier was a state sanctioned monopoly. This is a factor that weighs heavily with the Court. If by itself this factor was not enough there was also an extensive pattern of co-operation between the state and the private entity. On the facts Justice Marshall found far more state involvement than was found by the majority opinion. Finally Justice Marshall relied on the fact that Metropolitan Edison was providing an essential public service

THE FOLLOWING PRINCIPLES CAN BE DEDUCED FROM THIS CASE:

(a) There is an area of private action where the constitution will not apply.

(b) There must be sufficient nexus between the state and the offending actions so that the latter may be fairly treated as that of the state.

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69 95 S Ct 440 at p 459 Justice Douglas said :"In the aggregate, these factors depict a monopolist providing essential public services as a licensee of the state and within a framework of extensive state supervision and controls .....Respondents' actions are sufficiently intertwined with those of the state and its termination of service provisions are sufficiently buttressed by state law to warrant a holding that respondents' action in terminating this householder's services was a state action."

70 Jackson v Metropolitan. 95 S Ct 440 at p 461.

(c) A detailed enquiry must be made into the true nature of the state's involvement.

(d) The majority held that state action will be present if the private entity exercised a function traditionally and exclusively exercised by the state.

To record that the above principles are not absolute and may develop further I am also stating the principles I deduced from the minority judgments. The minority held that state action will be present if the following has been established:

(e) There is a state sanctioned monopoly held by the private entity.

(f) There is an extensive pattern of co-operation between the state and the private entity.

(g) A service is provided by the private entity that is uniquely public in nature.

(h) Any one of these facts can weigh heavily enough to find state action.

(i) The values of pluralism and diversity in a society should be taken into account.

5.2.5 FLAGG BROS INC V BROOKS[71]

After Sherley Brooks and her family were evicted from their apartment in Mount Vernon, New York, the local Marshall arranged for Brooks's goods to be stored with Flagg Bros in its warehouse. A dispute arose over the amount of the storage charges. Brooks was warned by Flagg Bros stating that if she did not settle her account her goods would be sold. Brooks applied for an injunction prohibiting the

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71 Flagg Bros Inc v Brooks 436 US 149; 98 S Ct 1729; 56 L ed 2d 185 (1978). See also Paul Brest State Action and Liberal Theory, A Case Note on Flagg Bros v Brook (1982) 130 University of Pennsylvania Law Reviewe 1296.

sale alleging that the said sale (in terms of the New York Uniform Commercial Code) would violate her due process and equal protection of property rights granted to her in terms of the 14th Amendment. She alleged she was deprived of her property without due process. The District Court dismissed her claim but the Court of Appeals found that:

> "By enacting Section 7 - 210 the State of New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution, but also let him, by selling stored goods execute a lien and thus perform a function which has traditionally been that of the sheriff." [72]

On appeal to the Supreme Court, Mr Justice Rehnquist, who delivered the majority opinion of the Court, remarked that it is important to keep in mind that most rights secured by the Constitution are protected only against infringements by the government. The question to be answered therefore is whether the sale of the goods by the Flagg Bros can be attributed to the State of New York?

Brooks firstly argued that the resolution of private disputes was a traditional function of civil government. This function the state had delegated to Flagg Bros by enacting Sections 7 - 210 of the New York Uniform Commercial Code[73] Referring to Smith v Allwright[74] and the other cases decided on the issue of the right to vote Justice Rehnquist found that Brooks read too much into those cases. The conduct of election is and always was an exclusively public function as was the running of a town. The test is whether the function is one exclusively performed by the state with the emphasis on exclusivity.

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72 Flagg Bros v Brooks 98 S Ct at p 1732.

73 The Uniform Commercial Code provides inter alia that the warehouseman's lien may be enforced by himself at a public or private sale that he arranges on certain reasonable terms and conditions. Section 5 is the really offending provision which provides that a purchaser of goods at such a sale acquires good title to the goods, i.e. ownership.

74 See footnote 11.

The Court found that the settlement of disputes between creditors and debtors was not traditionally and exclusively a public function[75] The type of functions that are exclusively performed by government are the running of elections, governing of cities, education, fire and police protection and tax collection.

The second argument was that the action of Flagg Bros in selling her property should be attributed to the state because the state had authorised and encouraged it by its enactment of Section 7 - 210.

In dismissing this argument Justice Rehnquist found that a state is responsible for the act of a private party when the state by its laws has compelled the act. He stated:

> "This Court however has never held that a state's mere acquiescence in a private action converts that action into that of the state."[76]

The majority concluded that this was not a case where the State of New York had compelled the sale of goods. The Commercial Code merely announced the circumstances under which a private person may sell the goods of another. On the facts the warehouseman was not subject to the restraint of the 14th Amendment. No violation of Brooks' rights by either the State of New York or Flagg Bros occurred.[77]

Justices Marshall, White and Stevens dissented. One cannot overlook the frustrations of Mr Justice Marshall with the majority's application of the public function test of the state action doctrine when he declared:

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75 Flagg Bros v Brooks 98 S Ct at p 1736 the Court found ".... the settlement of disputes between debtors and creditors is not traditionally an exclusive public function ..... Thus even if we were inclined to extend the sovereign function doctrine outside of its presently carefully confined bounds, the field of private commercial transaction would be a particularly inappropriate area into which to expand.

76 Flagg Bros v Brooks 98 S Ct at p 1737.

77 Flagg Bros v Brooks 98 S Ct at p 1738.

> "I cannot remain silent, as the Court demonstrates, not for the first time, an attitude of callous indifference to the realities of life for the poor." [78]

He found that in New York the execution of a lien had been traditionally the function of the sheriff. The public function test was therefore applicable.

Justices Stevens and White found that a state statute which authorised a private party to deprive another person of his property without his consent must meet the requirements of the 14th Amendment. The majority's view, that the statute is not subject on the basis that the statute only permits it, but does not compel it, should be rejected.

> "Under this approach a state could enact laws authorising private citizens to self-help in countless situations without any possibility of federal challenge. A state statute could authorise the warehouseman to retain all proceeds of the lien sale, even if it far exceeded the amount of the debt; it could authorise finance companies to enter private homes to repossess merchandise; or indeed it could authorise "any person with sufficient physical power" ante, at 1734, to acquire and sell the property of his weaker neighbour."[79]

Convincingly in my view the minority held that the distinction between permission and compulsion is not relevant in determining whether state action is present. The Supreme Court recognised that there are many levels of state involvement that could support a finding of state action. By enacting Section 7 - 210 the state had given Flagg Bros the power to convey ownership of one person's goods to another. The non-consensual transfer of ownership of property had always been a traditional function of government. The majority opinion that the test is "exclusive" government function is wrong. The word "exclusive" should not be included in the test.

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78 Flagg Bros v Brooks 98 S Ct at p 1739.

79 Flagg Bros v Brooks 98 S Ct at p 1740.

THE FOLLOWING PRINCIPLES CAN BE DEDUCED FROM THESE CASES :

a. A private person will be subject to the constitution if he performs a function that has traditionally and exclusively been performed by government.

b. If a statute compels a person to act, such action will be subject to the constitution.

c. There is uncertainty when a statute permits or encourages people to perform an act, whether such action will be state action.

5.2.6 THE SHELLEY V KRAMER CASE[80]

In the city of St Louis, 30 property owners in a neighbourhood signed an agreement which provided that:

> "the said property is hereby restricted to the use and occupancy for the term of 50 years from this date ..... against the occupancy as owners or tenants of any portion of the said property for resident or other purposes by people of the Negro or Mongolian race." [81]

During August 1945 Shelley, a Negro bought a property from one of the owners who had signed the above-mentioned agreement. Later that year the respondents, as owners of the other properties subject to the agreement, brought an action asking that Shelley be restrained from taking possession of his new property.

The Supreme Court of Missouri granted the relief and ruled that the agreement was valid as no state action was involved and that enforcement of the restraint violated no rights secured by the constitution. In the Supreme Court Shelley argued that the judicial enforcement of this agreement had violated his 14th Amendment rights not to be subjected to racial discrimination.

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80 Shelley v Kramer 334 US 1; 68 S Ct 836; 92 L ed 1161 (1948).

81 Shelley v Kramer 68 S Ct at p 838.

The unanimous decision of the Court was delivered by Mr Chief Justice Vinson who ruled as follows:

> "The agreement does not seek to determine what the land may be used for, but rather the race of person who may or may not use the property. Among the civil rights intended to be protected by the 14th Amendment are the rights to acquire, enjoy, own and dispose of property. These rights all citizens must enjoy equally. Whenever the state had attempted by law to provide for provisions similar to those contained in the agreement the Supreme Court had struck it down. This case unlike those decided by the Court does not involve action by the state legislature or city councils. In this case the pattern of discrimination is brought about by an agreement amongst private individuals. The participation of the state consists in the enforcement of the agreement by the judicial system."

Referring to the Civil Rights cases the Court stated that the basic principle of the 14th Amendment is to only inhibit such action as may be fairly said to be that of the state. The agreement alone and voluntary adherence thereto by the signatories did not infringe Shelley's rights. But here there was more because the agreement had been enforced by the highest Court in the state. The judge remarked that the Supreme Court had always ruled that if the judiciary was the source of procedural unfairness which infringed constitutional rights, such infringement would constitute state action.[83] Therefore Judge Vinson concluded, if a state Court enforces the common law and such enforcement violates a constitutional right, the violation is subject to the constitutional review. The judicial branch of government is not immune to the operation of constitutional rights.

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82 Shelley v Kramer 68 S Ct at p 841.

83 Shelley v Kramer 68 S Ct at p 844.

The Court remarked that the historical context of how the rights came about should always be looked at. It should be asked what the framers sought to achieve, what their purpose was. The Court concluded that the framers intended to establish equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action by the state based on considerations of race or colour.

THE FOLLOWING PRINCIPLES TO BE DEDUCED FROM SHELLEY:

a. The acts of the judiciary are subject to the Constitution, as the judiciary is part of the state.

b. If a judge commands a private person to take certain actions, that person so commanded or supported by the Court order shall be subject to the constitution. .

c. If state legislation prescribes a certain activity or officially recognises the legitimacy thereof then state action will also be present. [84] It follows that if a state statute commands an action, for example requiring that restaurant owners in a state serve meals on a segregated basis, the actions of the restaurant in that state will be state action for constitutional purposes.

5.2.7 BURTON V WILMINGTON PARKING AUTHORITY [85]

A private restaurant owner who refused to serve Negroes leased his premises from a state created parking authority. The building on which the premises were situated had been demarcated for public use. The cost of the land and maintenance of the building were derived by the City of Wilmington from public money. Guests at the restaurant were allowed to park their cars in the government garage which had

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84 See Rotunda, Nowak and Young section 16.3.

85 Burton V Wilmington Parking Authority 365 US 715; 81 S Ct 856; 6 L ed 2d 45 (1961).

benefited because of the presence of a restaurant. The Court found that the state had:

> "..... so far insinuated itself in a position of interdependence with Eagle (the restaurant owner) that it must be recognised as a joint participant in the challenged activity, which on that account cannot be considered to have been so "pure private" as to fall without the scope of the 14th Amendment."[86]

5.2.8 LEBRON V NATIONAL RAILWAY PASSENGER CORPORATION [87]

In 1992 Lebron contracted with the leasing agents of the National Railway Passengers Corporation (AMTRAK) for the rights to place advertisements on an AMTRAK billboard in New York. The space rented was known as "the Spectacular", a covered illuminated billboard of massive proportions. After the signing of the agreement Lebron proposed putting up an advertisement which criticised the Coors empire (Coors is a well-known beer) for its support of right wing causes and specifically its support of the contras in Nicaragua. AMTRAK's vice president, relying on a clause in the contract, turn down the advertisement . Lebron filed suit against AMTRAK claiming that the refusal violated his First and Ninth Amendment rights.

AMTRAK, a corporation, was created by the Rail Passenger Services Act to further a congressional finding that the public needed a good transport service. Six of AMTRAK's eight directors are appointed directly by the president, of whom four are submitted to the President on the consent and advice of the Senate. However, a provision in the Rail Passenger Services Act stated that AMTRAK would not be an agency or establishment of the United States government.

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86 Burton v Wilmington 81 S Ct at p 861.

87 Michael A Lebron v National Railway Passenger Corporation 130 L ed 2d 902.

The District Court found that because of its close ties to government, AMTRAK was a government actor for constitutional purposes and that Lebron's right to freedom of speech had been abridged. It ordered AMTRAK to display the sign. The United States Court of Appeals[88] reversed this decision. Lebron appealed to the Supreme Court.

Justice Scalia, in delivering the opinion of the Supreme Court found that a corporation is a part of the government for the purposes of the 1st Amendment if the government:[89]

a. created the corporation by special law for the furtherance of government objectives; and

b. retains for itself permanent authority to appoint a majority of the corporation's directors.

5.3 ACADEMIC OPINION

The impact of Judge Bradley's judgment in the Civil Rights cases in October 1883 is still as strong as ever. Rotunda et al point out that:

> ".....there are no generally accepted formulae for determining when a sufficient amount of government action is present in a practice, thus justifying subjecting the practice to constitutional restraint ..... The lack of predictability stems from the Court's repeated insistence that state action depends in each case on sifting the facts and weighing the circumstances." [90]

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88 12 F 3d 388 (1993).

89 Lebron v National at p 922.

90 Rotunda et al Section 16.5 at p 194.

Professor Lewis criticises the state action concept for not having any general principles to mark its limits. [91] Glennon and Nowak[92] remark that the state action doctrine has no general accepted formula for determining when there is sufficient state involvement to attract constitutional scrutiny.

Huston remarks that state action in a sense permeates the whole of society, for the existence of any thing and the action of any individual or group is permitted, commanded or forbidden by the state . [93]

Prof Brest in his discussion of the Flagg Bros case remarks that the Courts' State Action Doctrine seems a crude substitute for addressing and accommodating the concerns to prevent abuse of power on the one hand, and to protect individual autonomy and federalist values on the other [94].

It does seem that in the long run the academic criticisms have made some impact. Mr Justice Scalia recognised the need for a coherent theory as to when private actions may be deemed to be that of the state, for constitutional purposes. He conceded in Lebron:

> "It is fair to say that our cases deciding when private action might be deemed that of the state have not been a model of consistency." [95]

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91 Thomas P Lewis The Meaning of State Action (1960) 60 Columbia Law Review 1083 at p 1121.

92 Robert J Glennon and John E Nowak A Functional Analysis of the Fourteenth Amendment "State Action" Requirement (1976) The Supreme Court Review 221 at p 221-224.

93 John A Huston Constitutional Law - State Court Enforcement of Race Restrictive Covenants as State Action within scope of Fourteenth Amendment (1947) 45 Michigan Law Review 733 at p 747.

94 Brest at p 1330.

95 Lebron v National at p 909.

5.4 CONCLUSION

From the discussion of the foregoing cases and the principles deduced from each case, the following concluding principles can be formulated with respect to the scope of the application of the American Bill of Rights.

a. The Bill of Rights has primarily a vertical only application.[96]

b. Rights will be applied horizontally in exceptional circumstances.

c. The judiciary is part of the state and the Bill of Rights applies to it.

d. If a private person performs a function traditionally and exclusively performed by government, such as administering the electoral system or a town, it will be bound by the constitution.

e. If a private person is commanded or encouraged by state legislation or state officials to act in a certain manner, that private person may be subject to the constitution.

f. If a private person is sufficiently entangled with government his actions will be subject to the constitution.

g. The funding by the state of private persons whose actions breach the constitution is a breach by the state of its constitutional obligations to its citizens. However, whether an individual who receives state funding is subject to the constitution, in the absence of other forms of state engagement, has not been settled.

h. A corporation will be subject to constitutional restraint if it is created by special law for the furtherance of government objectives and if government

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96 Greenya v George Washington University 512 Federal Reporter 2nd Series 556 at p 559

retained for itself the permanent authority to appoint a majority of the corporation's directors.

Are the above principles suitable for applying to the South African Bill of Rights? I suggest they are not for the following reasons :

1. The Preamble and Declaration in the South African Constitution demand that the essential rights should have direct horizontal application.

2 The historical context of the origins of the two Bills of Rights is significantly different.

3. In the South African Constitution whether a right applies in a given factual situation depends on the wording of the right itself read with section 33 (the limitation clause). The rights in the American Bill of Rights on the other hand are not evaluated in a two stage approach.

4. The preferred method in determining the scope of a right is not by enquiring whether the State is involved but by actually evaluating the values underlying the competing rights

5. The Values Test implies that there will be some rights that will only have vertical application. The American principles in the light of years of experience should be looked at for guidance when applying fundamental rights between the state and private person.

CANADA

5.5 THE CANADIAN CHARTER

In 1982 the Federal Parliament of Canada adopted the Constitution Act, 1982.[97] Part 1 of the Act consists of a Bill of Rights named the "Canadian Charter of Rights and Freedoms". The application clause, clause 32(1), is very similar to section 7(1) of the Interim Constitution. The Canadian Charter also has a limitation clause set out in clause 1. What is immediately evident is that the Canadian Charter is a lot more similar in structure to the South African Bill of Rights than is the American Bill of Rights. In this chapter I will investigate the manner in which the Canadian Supreme Court has resolved the application of its Charter

The rights in the Charter are phrased in a similar manner to the South African Bill of Rights. For example Section 12 states:

> "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

Section 32(1) which deals with the application of the Charter provides that:

> "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

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97 Peter W Hogg Constitutional Law of Canada 3ed (1992) 7.

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."[98]

5.6 THE DECISIONS OF THE CANADIAN COURTS.

5.6.1. RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 580 ET AL V DOLPHIN DELIVERY LTD, ET AL[99]

This matter was the first Canadian case which canvassed the application issue. The core facts were that Dolphin Delivery Ltd (hereinafter referred to as "Dolphin") conducted courier business in Canada and it had dealings with Purolator Courier Incorporated (hereinafter referred to as "Purolator"). Purolator's employees belonged to the Appellant Union which was their bargaining agent. Dolphin was a party to a collective agreement with another union (not Appellant) which provided that Dolphin's employees would be protected from dismissal if they refused to cross a picket line. As a result of a labour dispute between Purolator and the Appellant union, the Appellant union decided to picket Dolphin's premises. It informed Dolphin that unless it stopped doing business with Purolator, its premises would be picketed. Obviously concerned in the light of its employees' right to refuse to cross a picket line, Dolphin obtained an urgent interdict against the Appellant union and its members prohibiting them from picketing. On appeal to the Supreme Court the union argued that the interdict infringed its freedom of expression.

Section 2 of the Canadian Bill of Rights states:

> "Everyone has the following fundamental freedoms:
>
> (a) .....

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98 Dale Gibson The Charter of Rights and the Private Sector (1982-83) 12 The Manitoba Law Journal 213. Prof Gibson holds the view that the charter also applies to private relations.

99 Retail, Wholesale and Department Store Union, Local 580 et al v Dolphin Delivery Ltd, et al (1986) 25 CRR 321, 33 DLR 4th p 174.

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;"

Justice McIntyre had to decide whether, in the light of Section 32 of the Charter, Section 2 applied to private litigation. He remarked that section 32 specified the actors to whom the charter applies.[100] They are the legislative, executive and administrative branches of government. The court found that a judge when issuing an order is not part of the state. The Court therefore concluded that the Court interdict did not infringe the union and its members' freedom of expression.

The consequences of this very legalistic interpretation and narrow view on this issue of the application of the charter have been heavily criticised.[101] Dale Gibson remarked that as the government privatises its functions the ambit of the charter will shrink.:

> "Oppressive conduct is no less hurtful, after all when it comes from Big (or little) Business than when it comes from Big Government."[102]

The same sentiments are echoed by Prof F R Scott.[103] Prof Gibson also pointed out the problems relating to the narrow interpretation in the Dolphin case. He noted that if the Charter only applies to government then government employees have all the rights embodied in the Bill of Rights, whilst private employees have none. Patients of public hospitals will have Charter protection but private patients none.[104] Prof Brian Etherington is also very critical of the application principles set out in the

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100 Dolphin Delivery 33 DLR 4th p 195.

101 David Beatty Constitutional Conceits: The Coersive Authority of the Courts. (1987) 37 University of Toronto Law Journal 183 concludes at p.192 that "In the circumstances, the Supreme Court has no option but to overrule its decision in Dolphin Delivery."

102 Dale Gibson The Deferential Trojan Horse : Decade of Charter Decisions (1993) 72 The Canadian Bar Review No 4 p 417 at p 426.

103 F R Scott Canadian Federalism: The Legal Perspective. (1966 -67) 5 Alta LR 262 at 265.

104 Dale Gibson The Charter of Rights and the Private Sector (1982 - 83) 12 The Manitoba Law Journal 213 at p 218.

Dolphin case. Apart from suggesting that the Court had misquoted the authorities for its finding that the Charter does not apply to private litigation[105], he also points out the following:

> "The real irony of the Dolphin Delivery decision on Charter application is that, while the labour relation policy choices of legislatures and expert administrative tribunals will be subject to review, for consistency with the Charter, and hence provide the opportunity for renewed judicial entanglement and intervention in legislative policy-making, the labour policy choices of the judiciary in shaping and applying common law doctrines, already severely criticised for being inbred with liberal economic values and assumptions that are antithetical to collective worker activity and interests, will go unreviewed for consistency with Charter values." [106]

Probably the most incisive criticism is that of Hutchinson and Peter:

> "The Charter forces us to cram the rich complexity of social life into an abstract and simplistic framework. Distinctions like those developed in Dolphin provide formal paraphernalia behind which private power thrives relatively unchecked and substantive issues are arbitrarily and unjustly resolved." [107]

The champions of indirect horizontal application argue that the principles as decided in the Dolphin Case are embodied in section 35(3) of the South African

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105 Brian Etherington Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd (1987) 66 The Canadian Bar Review 819 at p 832.

106 Etherington at p 836. See also David Beatty Constitutional Conceits : The Coercive Authority of the Courts (1987) 37 University of Toronto Law Journal 183 at p 186:
For an overview of all the arguments for and against the horizontal application of the Charter consult Brian Slattery Charter of Rights and Freedoms - Does it Bind Private Persons (1985) 63 Canadian Bar Review 548 Footnote 3."

107 Allan C Hutchinson and Andrew Peter Private Rights/Public Wrongs; The Liberal Lie of the Charter 38 University of Toronto Law Journal p 297.

Bill of Rights and that Dolphin Delivery should be followed here. My view is that this section states only that the court must have due regard to the spirit , purport and objects of the Constitution. "Due regard" can mean many things. If Dolphin is followed the very real possibility exists that adjustments to the common law will be negligible in so far as the broader aims of the Interim Constitution are concerned[108].

5.6.2 SLAIGHT COMMUNICATIONS V DAVIDSON [109]

Mr Ron Davidson, a radio time salesman employed by Slaight Communications Inc operating as Q107 FM radio, was dismissed after three and a half years of service, ostensibly because his performance was inadequate. Mr Davidson filed a complaint under the Canadian Labour Code. The parties were unable to resolve the matter and an adjudicator was appointed in terms of the Labour Code.

The adjudicator, Mr Joffe, found that Mr Davidson was unjustly dismissed as his service was more than satisfactory. In fact on most occasions Mr Davidson had made more than his target sales so the true reason for his dismissal could not have been bad performance. When Mr Joffe invited Slaight Communications to disclose the true reasons for the dismissal, Slaight Communications refused. The adjudicator ordered a money payment of $46 628-96 and that the employer give the complainant a letter of recommendation which he (the adjudicator) drew up. He also ordered:[110]

> "that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise from any person or company about Mr Ron Davidson's employment at Q107, shall be answered

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108 Stuart Woolman Defamation, Application and the Interim Constitution: An Unqualified and Direct Analysis of Holomisa v Argus Newspapers Ltd. at page 437 where he points out the very real danger of this approach. He states: "....the provision (35(3)) will be read as providing no more that a bit of textual incentive for making minor interstitial developments in existing common-law doctrines."

109 Slaight Communications Inc v Davidson 59 DLR (4th) p 416.

110 Slaight Communications Inc v Davidson at p 420.

> exclusively by sending or delivering a copy of the said letter of recommendation".

The employer appealed and when the matter ended in the Supreme Court one of the issues raised was that this order infringed the employer's right of freedom of speech under the Canadian Charter. On this point the unanimous view of the Court was written by Justice Lamer who found as follows: [111]

> "The fact that the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied. "[112]

I agree with the finding of the court. In my view the state should never be able to escape the constraints of a bill of rights by delegating its functions to others.

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111 Slaight Communications Inc v Davidson at p 444.

112 The Judge then quotes the following by Professor Hogg in his text entitled Constitutional Law of Canada, 2d ed (Toronto), The Carswell Company Limited, 1985), at p 671: "The reference in s. 32 to the "Parliament" and a "legislature" make clear that the charter operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (ultra vires) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorise action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority."

5.6.3 McKINNEY V UNIVERSITY OF GUELPH

The majority of the Supreme Court in McKinney v University of Guelph[113] followed the view expressed by Justice McIntyre in the Dolphin case. The judgement was delivered by Justice La Forest with whom Justice Dickson and Justice Gonthier concurred. The background facts were the following:

The Universities of Guelph, Toronto, York and Laurentian all had established retirement policies for their staff. At the University of Toronto its staff had to retire at 65. This was effected by a formal resolution of its board and the University Pension Fund. At York University both the university plan and the collective agreement with the faculty association provided for retirement at age 65. At the University of Guelph, mandatory retirement was based on policy and practice and a pension plan that provided for retirement at age 65. At Laurentian University, retirement policy of 65 was established by the general by-laws, the collective agreement between the university and the faculty, and the retirement plan for the staff.

Eight faculty members and a professional librarian employed by the above-mentioned Universities alleged in the Supreme Court that their equality rights in terms of Section 15 of the Charter had been infringed in that they were being discriminated against on the basis of their age.

Section 15(1) states:

> "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination ....."

La Forest ruled that the universities were not bound by the charter. He pointed out that Section 32 gives a strong message that the Charter is confined to government action and that the exclusion of private activity from the Charter was not a result of

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113 McKinney v University of Guelph (1990), 2 CRR (2d) 1, 76 DLR (4th) 545.

happenstance. Several reasons [114] are advanced by La Forest for applying the Charter in the above fashion.

a. Historically, bills of rights had been directed against governments, for example, the United States Constitution.

b. To open up all private and public action to judicial review could strangle the operation of society and diminish the area of freedom within which individuals can act.

c. The horizontal application of the Charter will impose an impossible burden on the Courts.

d. Government may establish specialised tribunals like Human Rights Commissions to deal more effectively with discriminatory practices.

e. Dolphin Delivery had already settled the issue.

La Forest found that although universities are subject to government regulation and largely depend on government funds, they manage their own affairs and allocate those funds as they wish. Statutes incorporating universities do not alter the traditional nature of the institution as a community of scholars and students enjoying substantial autonomy. For Charter purposes, therefore, universities do not form part of government.

Justice Sopinka concurred [115] stating that while some of the universities' functions may be governmental, its core functions are not and this includes its relations with its staff.

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114 McKinney v University of Guelph 76 DLR (4th) at p 634.
115 McKinney v University of Guelph 76 DLR (4th) at p 697.

Justice Wilson dissented and found that the state exercised a substantial measure of control over universities in the area of funding, governing structure and policy.[116] For the purpose of Section 32 of the Charter the relevant universities were government and the Charter applied to them.

In coming to the above conclusion the judge developed a principled and comprehensive test for determining whether entities not obviously part of government should be viewed as government for Charter purposes. Justice Cory also subscribed to Justice Wilson's test .[117]

Justice Wilson stated the test as follows:[118]

> "As a result, I would favour an approach that asks the following questions about entities that are not self-evidently part of legislative, executive or administrative branches of government:
>
> 1. Does the legislative, executive or administrative branch of government exercise control over the entity in question?
>
> 2. Does the entity perform a traditional government function or a function which in more modern times is recognised as a responsibility of the state?
>
> 3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?"

In this thesis I will refer to the above test as the **Guelph Test**.[119] I support this test for the following reasons:

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116 McKinney v University of Guelph 76 DLR (4th) at p 593 f.
117 McKinney v University of Guelph 76 DLR (4th) at p 592 f.
118 McKinney v University of Guelph 76 DLR (4th) at p 698 H to 699 B.
119 This test is set out in greater detail in clause 5.8 below.

1. It is a comprehensive and principled theory scrutinising state involvement.

2. It takes into account the many manifestations in which the state operates in a modern society.

3. It will ensure that the state cannot hide behind complex legal structures.

5.6.4 VANCOUVER GENERAL HOSPITAL V STOFFMAN [120]

Justice Wilson developed the Guelph test further in her minority judgment in the Vancouver General Hospital case. [121]

The background facts were that the Vancouver General Hospital Act empowered a board of trustees to manage the hospital and for those purposes pass by-laws. The board consisted of 16 persons of whom 14 were appointed by government. The other two were selected by the hospital. The by-laws which the board of trustees had passed had to be approved by the Minister of Health Services before they could be of any force. Such a by-law was passed by the board that forced doctors to retire at the age of 65. The physicians at the hospital alleged this infringed their Section 15 Charter rights as they were discriminated against on the basis of their age.

As in Guelph, the majority, on the finding of government action, were La Forest J, Dickson C J C, Gonthier J and Sopinka J who held the hospital was not "government" for Charter purposes.

Wilson J, L' Heureux-Dube J, and Cory J held the hospital to be government for Charter purposes. As stated previously, Justice Wilson's Guelph test was further developed and applied in this case. The detail of the further developments is set out in clause 5.7 below.

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120 Vancouver General Hospital et al v Stoffman et al 76 DLR 4th p 700.

121 Vancouver General Hospital et al v Stoffman et al at p 706.

5.6.5 LAVIGNE V ONTARIO PUBLIC SERVICES EMPLOYEE UNION

Finally, in Lavigne V Ontario Public Services Employee Union [122] Justice Wilson again applied the Guelph Test to determine whether a collective agreement is subject to the Charter. In using this test Justice Wilson said: [123]

> "I fully appreciate that in McKinney and the appeals which were heard along with it only two of my colleagues endorsed my test for determining whether or not a body is a government actor for purposes of s. 32(1) of the Charter. On the other hand, I am unable to find a different test of general application enunciated in the reasons of the majority. Those reasons appear to me to reflect an ad hoc approach to the status of each entity brought before the court in order to determine whether or not it forms part of the apparatus of government' so as to be subject to Charter review. This being so, I do not feel as constrained by precedent as I otherwise might. Indeed, I am unchastened in the view that this court has a duty to take a structured approach to this issue and establish appropriate criteria if at all possible for distinguishing those bodies which are subject to Charter constraint from those which are not. In any event, whether I am right or wrong on this, I believe that the ad hoc approach would yield the same result in this particular case."

5.6.6 CONCLUSION.

From the discussion of the above cases it is clear that the Guelph Test developed by Justice Wilson is the only comprehensive test for determining on a principled basis the scope of application of a bill of rights. For this reason I believe is should be applied in South Africa. I will now set out the Guelph Test in greater detail.

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122 Lavigne v Ontaria Public Service Employees Union 81 DLR 4th 545.

123 Lavigne v Ontaria Public Service Employees Union at p 564, c - f.

5.7 THE GUELPH TEST

This test asks three questions, each of which can be viewed as a separate test. The tests can be stated as follows: (The formulations below, although not quoted verbatim from the judgment of Justice Wilson, are her formulations).

5.7.1 THE GUELPH CONTROL TEST

The control test has two fields of focus:

5.7.1.1 General questions about the nature and the extent of government control over an entity.

5.7.1.2 Specific questions about the entity's activity such as "Is there a clear nexus between government and the particular impugned activity.".

NATURE AND EXTENT OF CONTROL

5.7.1.3 The purpose of these questions is to find out whether there is a link between that which we know is government and that which we are not sure is government, by focusing on whether the former exercises control of the latter.

5.7.1.4 The inquiry focuses on what are relevant forms of control. There is no exhaustive list of what are relevant factors.

The following can be examined to determine relevant forms of control:

Does an actor that is clearly part of government, control aspects of the entity's activities:

5.7.1.5 through input into the entity's policy formulation process, through the approval of by-laws or rules that determine how the entity is to carry out its mandate; or

5.7.1.6 through the allocation of funding used to implement the entity's objectives; or

5.7.1.7 through the appointment of personnel that run the entity.

5.7.2 THE GUELPH GOVERNMENT FUNCTION TEST

In applying this test the following guidelines can be used:

5.7.2.1 This test asks whether the performance of a given activity is a government function.

5.7.2.2 Government is not just the maker and enforcer of laws.

5.7.2.3 Over time government has become involved in many areas through the creation of bodies that do not simply enact laws but that provide a wide range of services and support to citizens.

5.7.2.4 Government's functions are not finite. It has become involved in an ever-widening range of activities.

5.8.2.5 Government's functions are constantly evolving, moving into new areas and out of old ones.

5.7.2.6 It is a mistake to try and determine the key functions that a government normally or traditionally performs.

5.7.2.7 A function becomes governmental because a government has decided that it should perform that function.

5.7.2.8 A governmental and non-governmental body can fulfil a function at the same time.

5.7.3 THE GUELPH GOVERNMENT ENTITY TEST

This approach looks at the nature of a body's statutory authority and scrutinises the possibility that government has delegated its power to a subordinate body.

This test asks the following question:

5.7.3.1 Whether an entity performs a task pursuant to statutory authority;

5.7.3.2 Whether it performs that task on behalf of government in furtherance of a government purpose.

5.7.4. PRINCIPLES EXTRACTED

I have set out above and argued that the principles developed by Justice Wilson should be applied in South Africa. I have also extracted from American case law the principles developed by the American court. Before I can finally conclude that Guelph Test is the preferred test is should be compared with the American principles. This I will do in the following clause.

5.8 A COMPARISON BETWEEN THE AMERICAN PRINCIPLES AND THE GUELPH TEST

In this paragraph I will compare the American principles[124] with the principles of the Guelph Test[125]. I will not discuss the principles developed by the majority judgements of the Canadian Supreme Court for the following reasons:

A. Their approach is legalistic and it does not take adequate account of the many manifestations of the state in a modern society. Provisions similar to our Preamble, Declaration and Schedule 4 are absent in the Canadian Constitution. Their judgements can therefore never give expression to the purpose envisaged by the drafters of our Preamble, Declaration and Schedule 4. The purpose that these sections express is of a changed society not just of changed organs of the state in the strict sense of the word.

B. The Guelph Test in any event contains all the principles of the Canadian majority on this issue.

Both the State Action Principles and the Guelph Test prescribe that a bill of rights should have primarily a vertical application.

In terms of the State Action Principles the judiciary is subject to the bill of rights, whilst in the Guelph Test it is not. This elevation of the judiciary above the confines of the bill of rights was first pronounced by the majority judgements in Canada and is still also the majority view. In my view once the principle is decided that the bill of rights should only bind the state the judiciary should be excluded so as not in effect to subject private disputes to constitutional scrutiny by subjecting court orders to the bill of rights.

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124 The American Principles are set out in paragraph 5.4 above.

125 The principles of the Guelph Test is set out in paragraph 5.7 above.

5.8.1 THE GUELPH GOVERNMENT FUNCTION TEST

The State Action Principles developed by the majority in the Texas Primary Cases as well as the March Case postulate that an actor who is not obviously part of the state will be subject to the constitution if he performs a function that has traditionally and exclusively been performed by government.

The Guelph Government Function Test incorporates all the State Action Principles and holds that an entity that performs a traditional government function will be bound by the constitution irrespective whether it is exclusive or not. The Guelph Test however goes further and states that actors who perform a function which, in more modern times, is recognised as the "responsibility" of the state, will be subject to Charter restrictions if and when they perform those functions.

The Guelph Test is to be preferred as its principles provide for the changing nature and purpose of government over time. A practical illustration is the RDP program in South Africa. Governments obviously cannot be equated with a Newtonian universe with its planets and bodies forever circling along the same paths. History teaches the organic nature of government and how the course of history can send governments on unpredictable paths. In South Africa the state will be involved in extensive social engineering. We should not allow the state in these efforts to contract out of its constitutional constraints. For these reasons I prefer this leg of the Guelph Test over the State Action Principles.

5.8.2 THE GUELPH CONTROL TEST

The Guelph Control Test examines the nature of the relationship between that which is clearly part of the state and that which is not, to see if the former controls the latter. Similar state action principles were developed in the Burton and other cases.

On the issue of control, no detailed test has been developed by the American Courts. The State Action Principles still speak of whether the private person is

"sufficiently entangled" or whether the private person can "fairly" be treated to be part of the state.[126] In contrast, the Guelph Control Test is a more principled test. It investigates in a more realistic manner the ways in which government can exercise its power . It does so by examining whether government exercises control over the private entity in three areas:

(a) The governing bodies of the private entity;

(b) The policy formulation of the private entity;

(c) Funding of the private entity.

The control of these three areas is vital to how an entity can and will use its power. By putting these areas under the looking-glass the true nature of government involvement will become apparent. The added advantage of such a detailed test is that it can be used as a working legal tool to predict with some degree of accuracy whether the courts will hold that an entity is bound by the bill of rights. Therefore the Guelph Test in this area is to be preferred to the State Action Principles.

5.8.3 THE GUELPH GOVERNMENT ENTITY TEST

The Guelph Government Entity Test, which was formulated in 1990 by Justice Wilson, asks the following question:

> Is the entity one that acts pursuant to statutory authority specifically granted to enable it to further objectives that government seeks to promote in the broader public interest? .

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126 Judge Friendly remarked that under the state action doctrine lawyers ...." must navigate with the aid of the wavering beacon furnished by Justice Clark's statement in Burton v Wilmington Parking Authority;" Only by sifting facts and weighing circumstances can the non obvious involvement of the State in private conduct be attributed its true significance." Judge Henry J Friendly The Public-Private Penumbra: Fourteen Years Later (1982) 130 University of Pennsylvania Law Review 1289 at p 1291.

Five years later and in the AMTRAK case, the United States Supreme Court for the first time laid down a similar test, as part of the State Action Principles. The State Action Principles are the following:

A corporation will be subject to constitutional restraint:

a. If it was created by special law;

b. For the furtherance of government objectives;

c. Government retained for itself the permanent authority to appoint a majority of the corporation's directors.

Both tests state that the entities must be created to fulfil government objectives. The State Action Principles however only apply in respect of a corporation while the Guelph Test is applicable to any entity. The Guelph Test will therefore cast a much wider net. In principle there can surely be no reason why only corporations should be bound.

In the Guelph Test the entity needs merely to act pursuant to statutory authority whilst the State Action Principles state that the corporation must be created by a special law.

The State Action Principles further require that the state must have the exclusive rights to appoint the directors of the company before it can be said that the State is sufficiently involved.

The rationale for the Guelph Government Entity Test is to prevent government from avoiding its constitutional obligations by delegating its programmes and functions to self-created legal entities. In the light of the social engineering that is taking place in South Africa, and that will still take place as *inter alia* evidenced by the RDP white

paper, the Guelph Government Entity Test, with its more general principles must be the preferred test. The narrowness of application of the State Action Principles stated in AMTRAK becomes highlighted if one focuses on phrases used in the test like "corporation" and "special law", "permanent authority to appoint the majority of corporations' directors". These words make the State Action Principles an unworkable tool in the South African context. I believe that in the future the state will be involved in social engineering on a big scale to address the imbalances of the future. The vehicles they will use to achieve their goals will be funded and controlled in manners much more subtle than the State Action principles can cater for. The Guelph Test should be applied here.

5.8.4 CONCLUSION.

From the above comparison it is clear that Guelph Test is to be preferred over the American principles.

5.9 THE GUELPH VALUES TEST

As stated above the **Guelph Test** is the preferred test. Its shortcoming however is that in the South African context it does not give expression to aims of the new order envisaged in the Preamble, Declaration and Schedule 4 of our Constitution. This shortcoming can be overcome by also applying the **Values Test** that I set out in clause 4.8. below.

A combination of the two I believe will give expression to the interactive purpose of all the constitutional provisions impacting on the application issue.

The **Guelph Values Test** can be formulated as follows. To determine whether an act complained of infringes a right set out in chapter 3 the following inquiry should be conducted. Firstly it should be determined whether the state infringed the right. If the entity is not obviously part of the state the following enquiry should be conducted.

1. Does the legislative, executive or administrative branch of government exercise control over the entity that performed the act?

2. Does the entity perform a traditional government function or a function which in more modern times is recognised as a responsibility of the state?

3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?"

Secondly and once it is determined that the state is not involved, the following enquiry should be conducted to determine whether the right should not be applied in a direct horizontal manner.

(a) The values which the Constitution and more specifically the Bill of Rights, Preamble and Declaration desire for the new order should be identified.

(b) It should then be determined whether those values were absent in the old order. If they were absent then the values are ones that can transform our society.

(c) Next it should be determined whether the right in question can promote these values in the factual context of the case.

(d) If the right can promote these values then it becomes an right essential for transformation and for the society envisaged by the Constitution and should be applied in a direct horizontal manner.

(f) The application of these essential rights should be limited by the values that other rights promote, as well as the limitation clause, section 33.

(e) The rights not promoting essential values should have vertical and indirect horizontal application only.

In the next chapter I will examine the decisions of the South African courts to see if they support the Guelph Values Test.

CHAPTER 6

THE DECISIONS OF THE COURTS

In this chapter I will examine the decisions of the South African Courts to see if any support can be found for the Guelph Values Test.

6.1. MANDELA v FALATI [127]

The applicant at the time was a Deputy Minister. In 1992 she and the respondent were convicted of assault and kidnapping and sentenced to 6 years imprisonment. On appeal, the Appellate Division reduced the sentence of the applicant to R30,000 and that of the respondent to 2 years imprisonment. After her release from prison the respondent wanted to disclose at a press conference the Applicant's role in certain atrocities. The applicant obtained an interim interdict prohibiting the respondent from conducting the press conference. On the return date an application was made for the extension of the interim interdict. The respondent argued that her right to freedom of expression allows her to conduct the press conference and on that basis the interim order should not be extended.

The court ruled that it must first be determined whether the Interim Constitution applies to private disputes of this kind. After quoting the provisions of section 4 and 33(1) and remarking that political activity occurs not only between the State and its citizens but also between citizen and citizen Judge van Schalkwyk held that the right to freedom of expression has direct horizontal application.[128] This dictum supports the Values Test in that it recognises the principle that some of the rights should have direct horizontal application.

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127 Mandela v Falati 1995 (1) SA 251 (w).

128 Mandela v Falati at p 257 I - J.

6.2 DE KLERK AND ANOTHER v DU PLESSIS AND OTHERS, [129]

The facts of the case are set out below in the discussion of the judgement of the Constitutional Court in this matter. In the High Court Van Dijkhorst J. concluded that the fundamental rights set out in the Chapter 3 shall be of vertical application only.[130] Obviously no support for the Values Test can be found in this judgement.

6.3. GARDENER v WHITAKER [131]

The Plaintiff, the town clerk of East London sued the Defendant a city councillor for defamation because the Defendant in a city council meeting called him a liar. After examining the position in Canada, Sri Lanka, Germany and the United States of America, Judge Froneman remarked that it was apparent from his survey that fundamental rights charters are primarily aimed at safeguarding the rights of individuals against the unjustified intrusion upon those rights by public organs of the State.[132] These constitutions require that their inherent values systems should permeate through the entire legal system.

Turning to the Interim Constitution the judge remarked that the same applies to it but with the qualification that the deepest norms should determine whether in private litigation there should be direct horizontal application or indirect horizontal application. Judge Froneman stated that the basic concern of the Interim Constitution is to transform the South African society into a society based on human rights and democracy . This would in particular instances call for the direct horizontal application of the Bill of Rights. [133]

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129 De Klerk and Another v Du Plessis and Others 1995 (2) SA 40 (T).
130 De Klerk v Du Plessis at p 49 F.
131 Gardener v Whitaker 1995 (2) SA 672 (E).
132 Gardener v Whitaker p 683 F.
133 Gardener Whitaker at p 684 H.

Judge Froneman made the following two significant remarks that can be used to support the Guelph Values Test.

(a) the purpose of the Constitution, viz. to transform the South African society, calls for the direct horizontal application of certain fundamental rights;

(b) whether a right has direct horizontal application depends on the value that underlies it.

I submit that this is direct support for the Values Test as the test is based on these two ideas.

6.4 MOTALA AND ANOTHER v UNIVERSITY OF NATAL [134]

In this case Judge Hurt stated[135] that many of the entrenched rights are, by their very nature, exclusively "vertical" in their operation and many of the rights, for example section 8 rights, have direct horizontal application. Although not stating the criteria used for the distinction, support for the Values Test can be found in the judge's acknowledgement that some rights have direct horizontal application.

6.5 BALORO AND OTHERS v UNIVERSITY OF BOPHUTHATSWANA AND OTHERS. [136]

The applicants in this case were all foreign nationals employed by and lecturing at the respondent University . They alleged that the first respondent intended discriminating against them by not offering them promotion on the basis of their nationality. Alleging that the Constitution has direct horizontal application the

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134 Motala v University of Natal 1995 (3) BCLR 374 (D).

135 Motala v University of Natal at p 382 G-H.

136 Baloro and Others v University of Bophuthatswana and Others 1995 (4) SA 197.

applicants averred that they are protected from such discrimination and they therefore asked the court for a mandamus to that effect.

Judge President Friedman made a comprehensive examination of the vertical-horizontal debate in foreign jurisdictions. Rejecting the approach of Van Dijkhorst [137] and approving [138] the approach of Judges Van Schalkwyk, Froneman and Hurt, Judge Friedman concluded that the Bill of Rights does have general horizontal application. [139]The judge suggested the following test: [140]

> "What does appear, however, is a general principle that any activity, operation, undertaking or enterprise operating in the community, and open to the public, is subject to the horizontal dimension of the said rights contained in chap 3 read with ss 33(4) and 35."

This test is too narrow as it emphasises only the public sphere and loses sight of the manner in which the injustices of the past had insinuated themselves even into the private spheres of society.

6.6 DU PLESSIS AND OTHERS v DE KLERK AND ANOTHER

The Constitutional Court in **Du Plessis and Others v De Klerk and Another** [141] finally had an opportunity to clarify the application debate. The majority judgment was delivered by Justice Kentridge:

The Pretoria News is a newspaper. During the beginning of 1993 it published articles about the supply by air of arms to the Angola rebel movement Unita. These articles mentioned by name that a certain Mr De Klerk and his company, Wonder Air (Pty) Ltd, were conducting illegal and pirate flights into Angola to supply the arms. The article further alleged that the Respondents were responsible for fuelling the

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137 Baloro v University of Bophuthatswana above at p 234 D.
138 Ibid.
139 Baloro v University of Bophuthatswana at p 234 H.
140 Baloro v University of Bophuthatswana at p 238 H.
141 1996 (3) SA 850.

war in Angola for their own personal gain. In consequence to these publications Mr De Klerk issued summons claiming damages for defamation in the amount of R750 000-00 for injury to his reputation. His company claimed R5 million for loss of business.

The Defendants admitted publishing the articles but denied they meant that the Plaintiffs were involved in illegal activities. In the alternative the Defendant alleged that the general subject of the articles was a matter of public interest.

During the latter part of 1994 the Defendants brought an application to amend their Plea to add a further defence. Their further defence was that publication of the article was not unlawful by the reason of the protection given to the Defendants by Section 15 of the Constitution of the Republic of South Africa Act 200 of 1993. The Plaintiffs objected to this amendment on inter alia the basis that the Constitution has no application horizontally.

Van Dijkhorst, J heard the application for amendment and refused it inter alia on the ground that the Constitution has no horizontal application. On the 9th of June 1994, the Constitutional Court granted leave to appeal against this order. The Constitutional Court also re-formulated Van Dijkhorst, J's question whether the constitution has horizontal application as follows.

> "Are the provisions of chapter 3 of the Constitution - and more particularly section 15 - capable of application to any relation other than that between persons and legislative or executive organs of state at all levels of government."[142]

The Judgment of Justice Kentridge[143]

The majority judgment was delivered by Justice Kentridge. He stated that the resolution of the issue must ultimately depend on an analysis of the specific

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142 Du Plessis v De Klerk p 862 B

143 Du Plessis v De Klerk p 857 D

provisions of the Constitution.[144] He remarked that it is none the less illuminating to examine the solutions arrived at by the courts of other countries.[145] He then continued by examining the position in the United States, Canada, Germany and Ireland and he concluded that a comparative examination shows at once that there is no universal answer to the problem of vertical or horizontal application of the Bill of Rights.[146] The learned Judge stated that the application question poses two inter-related but none the less different questions. The first was to what law the chapter applies. Does it apply to common law or only to statutory law? The second question was, who is bound by the chapter?[147]

For Justice Kentridge the plain answer to the first question emerged from Section 7(2) of the Constitution and the plain answer to the second question emerged from Section 7(1).[148]

He then continued that entrenched Bills of Right are traditionally intended to protect the subject against legislative and executive action and that the emphatic statement in 7(1) must mean that chapter 3 is intended to be binding only on the legislative and the executive organs of the state. If the legislature intended otherwise, it could readily have expressed its intention.

Section 33 (4) also provided a strong indication to Justice Kentridge that general horizontal application was not intended. So too does Section 35 (3). The judge argued that both these clauses would have been unnecessary if the fundamental rights had direct horizontal application.

Justice Kentridge maked the following findings;[149]

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144 Du Plessis v De Klerk p 871 C
145 ibid
146 Du Plessis v De Klerk p 871 D.
147 Du Plessis v De Klerk p 876 B.
148 Du Plessis v De Klerk p 876 C - 877 D.
149 Du Plessis v De Klerk p 879 A.

"a. Constitutional rights under chapter 3 may be invoked against an organ of government but not by one private litigant against another.

b. In private litigation, any litigant may none the less contend that the statute (or executive act) relied on by the other party is invalid as being inconsistent with the limitations placed on the Legislature and Executive under chapter 3.

c. As chapter 3 applies to common law, governmental acts or omissions in reliance on the common law, may be attacked by a private litigant as being inconsistent with chapter 3 in any dispute with an organ of government. "

The learned judge then returned to the jurisdiction of the Constitutional Court as set out in section 98 of the Interim Constitution. The judge remarked that the operation of the declaration of invalidity of a law (wet) is dealt with in sub-section 6, but section 98 nowhere provides for a declaration that the rules of common law can be declared invalid. Such a declaration would be highly unusual and could give rise to more difficulties, the Judge noted. In short, the judge concluded that the Constitutional Court does not have the jurisdiction to re-write the common law. He found that their jurisdiction is not suited to the exposition of principles of private law.[150]

The judge ruled[151] that chapter 3 does not have a general direct horizontal application but that it may and should have an influence on the development on the common law .

He however remarked:

"I insert the qualification "general" because it may be open to a litigant in another case to argue that some particular provision of chapter 3 must by

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150 Du Plessis v De Klerk p 885 C.
151 Du Plessis v De Klerk p 887 B.

necessary implication have direct horizontal application. Section 15 (1) is not such a provision."[152]

Comments

In coming to the conclusion that the Interim Bill of Rights does not have direct horizontal application Justice Kentridge maked the point that section 33(1) could hardly be applied in a dispute between two private persons regulated by the common law, which law had struck a balance between their competing interests. If this is so, the Bill of Rights cannot be applied in a direct horizontal manner. He however provides no reasons for this statement. Textually I can find no reason why section 33 cannot be invoked[153]. Surely the common law is a law of "general application" as is envisaged by that section. Justice Kentridge had also ruled that if the state is a party to the dispute and it relies on the common law, a fundamental right can be invoked. Section 33(1) would therefore apply in such a dispute. In my view, if section 33(1) can be applied to the common law in a public dispute, it can be applied to the common law in a private dispute.

Justice Kentridge stated that section 4(1) does not provide support for the horizontalists[154] He argued that the statement in this section "any law or act inconsistent with its provisions shall ..... be of no force of effect ..." is qualified by "unless otherwise provided expressly or by necessary implication." This of course is a circular argument. He uses his conclusion about the application debate to provide support for his conclusion. The enquiry is to find out what the other provisions provide or imply about the application of the fundamental rights.

Justice Kentridge's finding on the jurisdiction of the Constitutional Court is also not correct. Section 98(2) states clearly that the Constitutional Court shall have final

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152 Du Plessis v De Klerk p 887 B.

153 Judge Cameron in Holomisa v Argus Newspapers Ltd 1996 (6) BCLR 836 (W) at page 853 E had no problem in invoking section 33(1) in a defamation dispute between two private persons regulated only by the common law

154 Du Plessis v De Klerk p 878 G

jurisdiction over all matters relating to the interpretation, protection and enforcement of the provisions of the Constitution. Textually this must mean that the Constitutional Court can change the common law when it infringes on a fundamental right.[155]

The majority decision states that in cases other that section 15, a litigant may argue that a fundamental right may still be invoked in a purely private dispute. This leaves the door wide open for the Guelph Values Test to be applied. As far as this test is concerned the court only ruled that section 15 is not a right that can promote those values that were absent in the old order and which are desired for the new order.

THE JUDGMENT OF JUSTICE KRIEGLER[156]

Delivering a dissenting judgment, with Justice Didcott concurring, Justice Kriegler stated on the application issue that the question to be answered was simply this.

> " Does our constitutional law directly enforce the fundamental right of persons proclaimed in ss 8 - 32 of the Constitution only as against the State or in all legal relationships?" [157]

Justice Kriegler began by making the point[158] that it is not true that horizontality will result in a Orwellian Society in which the all powerful State will control all private relationships. He described as "nonsense" the fear that direct horizontal application will have the result that the tentacles of government will reach into the marketplace, the home, the very bedroom. He continued:

> "What is more it is malicious nonsense preying on the fears of privileged whites, cosseted in the past by laissez faire capitalism thriving in an environment where the black underclass had limited opportunities to share in the bounty. I use strong language designedly. The caricature is pernicious,

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155 See Woolman and Davis at p 372 for an indepth analysis of why Kentridge AJ is wrong on this point.

156 Du Plessis v De Klerk p 906.

157 Du Plessis v De Klerk p 908 F.

158 Du Plessis v De Klerk p 909 C-G.

it is calculated to enflame public sentiment and to cloud peoples' perception of our fledgling Constitutional democracy. Direct horizontalitly is a bogey man."[159]

Turning to the provisions of the Constitution, Justice Kriegler stated that the preamble and postscript clearly show that the framers unequivocally proclaimed much more sweeping aims than those identified by the judge a quo and accepted by some of his Colleagues. He continued:

> "Our past is not merely one of repressive use of State power. It is one of persistent institutionalised subjugation and exploitation of a voiceless and largely defenceless majority by a determined and privileged minority. The untold suffering and injustice of which the postscript speaks do not refer only to the previous years, not only to Bantu education, group areas, security and the similar legislative tools used by the previous government. The postscript mentions a divided society characterised by strife and conflict. This is not a reference to governmental action only, or even primarily"[160]

Justice Kriegler then proceeded to demolish the textual arguments amassed by Justice Kentridge in support for his conclusions. He remarked that it was common cause that nowhere does the constitution say that Chapter 3 **only** governs the relationship between the State and the individual.[161] Referring to Section 4(1) which states that the Constitution shall be the supreme law of the Republic the Judge noted that perhaps the word "supreme" has been devalued by overuse and perhaps the word "law" has become mundane. Reading Section 4(1) with Section 4(2) it is quite clear that all organs of the State are to honour and enforce the supremacy of the law.[162]

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159 Du Plessis v De Klerk par 120.
160 Du Plessis v De Klerk par 125.
161 Du Plessis v De Klerk par 128.
162 Du Plessis v De Klerk par 128.

Turning to Section 7(2) the Judge noted that Chapter 3 shall apply to all the law in force. He stated that "all" means "all" and the clear intention of the drafters was to expand the scope of Chapter 3 to the widest possible limits that language could express. This is further reinforced by Section 7(1).[163]

The Judge remarked that Section 7 should be read with Section 33(2). If the chapter was intended to operate only vertically or only indirectly horizontally why was it necessary or indeed appropriate to declaim the reservation of rights in such unqualified terms. Justice Kriegler in relation to section 35(3) points out that all this section does is to instruct the courts in disputes not involving fundamental right to take into account the spirit , purport and values of the Bill of Rights[164].

Justice Kriegler concluded that the Bill of Rights has general horizontal application[165].

COMMENTS

The judgment of Justice Kriegler does not support the principles of the Guelph Values Test. According to him all organs of state are bound. Also bound are all persons unconnected with the state if they rely on the law including the common law. I however agree with his view that the purpose of the Interim Constitution is to transform the whole of society and not just the state. The application test he proposes and the Guelph Values Test both have the same aims in mind i.e. the transformation of society . The real difference between these two tests is that in his test competing values will be weighed up only at the section 33(1) stage whilst in the test I propose competing values will be weight up at two points. Firstly when it must be determined whether a private person should be bound according to the underlying values and secondly at the section 33(1) stage.

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163 Du Plessis v De Klerk par's 129 and 130.
164 Du Plessis v De Klerk p 917 E.
165 Du Plessis v De Klerk par 139.

THE JUDGMENT OF JUSTICE ACKERMANN [166]

The judge opened by stating that the German Basic Law (GBL) was conceived in dire circumstances bearing sufficient resemblance to our own to make critical study and cautious application of its lessons to our situation and constitution warranted.[167] The judge remarked that in Germany it is today not seriously questioned that, in deciding disputes between private persons, there is no direct application of the fundamental rights by the judiciary. He noted that the Federal Constitutional Court and academic opinion are in agreement that basic rights only apply with indirect horizontality to the legal relationships of private people. The basic rights do not apply directly to the private law but because the basic rights also operate as an objective value system they influence the private law. Basic rights do not serve to solve disputes in the field of private law and specific cases. The judge also made the point that the GBL not only establishes subjective individual rights but also an objective order of values or an objective value system.

About the operation in German Constitution Law of mittelbare Drittwirkung the learned judge states that the basic rights should have a radiating effect on private law relations.[168] Therefore in private litigation the German courts are obliged to consider the basic rights in interpreting concepts such as "justified, wrongfulness, contra bonos mores, et cetera"[169].

The basic rights therefore should have a radiating effect on the common law through provisions such as e.g. Article 138 of the Civil Code which provides that legal acts which are contrary to public policy are void. Turning to the provisions of the Interim Bill of Rights the judge is of the view that there is a marked similarity between the above approach and the provisions of Section 35(3). This similarity could not have been a coincidence and therefore the legislature intended the German approach to be followed. The judge concluded by stating that the text strongly favours the

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166 Du Plessis v De Klerk p 898 C.
167 Du Plessis v De Klerk par 92.
168 Du Plessis v De Klerk at p 902 D.
169 Du Plessis v De Klerk par 104.

conclusion that direct horizontal application of Chapter 3 to private legal relations is not intended.[170]

COMMENTS

Mittelbare Drittwirkung influences the common law through its open-ended concepts like contra bonos mores. In my view this method does not give sufficient expression to the avowed aims of the Constitution to transform the South African society. Judges are also bound by precedent and develop the common law only in very rare instances . What if there is not an open-ended concept in the law that applies to the dispute?

THE JUDGMENT OF JUSTICE MADALA

Justice Madala stated that in his view some of the rights entrenched in the Bill of Rights have direct horizontal application.[171] This is what the Values Test part of the Guelph Test also states. The Judge examined the underlying values and objects of the Constitution by referring to the pre-and postambles. The objects of the Constitution, he remarked, are to retain from the past only that which is defensible. The purpose of the Constitution is to reject those parts of the past that are disgracefully racist, authoritarian, insular, and repressive. The Constitution is aimed at a decisive break with the past [172]:

> "In a nutshell, these are the underlying values and objects of the Constitution, these are the imbalance which the Constitution seeks to redress. The theme of an open and Democratic society based on freedom and equality runs throughout the Bill of Rights - obviously to facilitate the transition from an apartheid society to a democratic society"[173]

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170 Du Plessis v De Klerk p 906 E.
171 Du Plessis v De Klerk par 154.
172 Du Plessis v De Klerk par 158.
173 Du Plessis v De Klerk par 158.

After asking the question whether the Bill of Right should be applied directly or indirectly by means of section 35(3) Madala J stated;[174]

> "If the proposition is accepted that the basic concern of the Constitution is to transform the South African society and the legal system into one that upholds democratic principles and human rights between, inter alia, the State and the individual and between individuals inter se, **there must be instances which call, in so far as private relationships between individuals are concerned for the direct application of the provisions of chapter 3 between such individuals**. As a matter of interpretation, certain provisions of the chapter have direct horizontal application. We should examine every enumerated right and decide whether it can sensibly be applied in the private domain. In support of this approach, **it all depends on the nature and extent of the particular right, the values that underlie it, and the context in which the alleged breach of the right occurs."**

This dictum of Justice Madala is direct support for the Values leg of the Guelph Values Test. He stated clearly (in those portions I have made bold) that some rights should have direct horizontal application and that the values that underlie the Constitution should be an important factor that should be taken into account in deciding the issue.

THE JUDGMENT OF JUSTICE MAHOMED.

Justice Mahomed concurred with the judgment of Justice Kentridge. It is however important to note that he said: [175]

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174 Du Plessis v De Klerk par. 161.
175 Du Plessis v De Klerk p 892 B.

> "The issue which arises in the present case is to be confined to the proper application of section 15 and the answer to that issue may not necessarily be the same as the answer which might have to be given to any other section contained in chapter 3. (There is some force in the suggestion by Madala J that some of the fundamental rights enumerated in chapter 3 may apply directly in litigation between private persons.)"

Justice Mahomed then refers to the passage from the judgment of Justice Madala quoted above.

I suggest that from the above quotation it can be inferred that Justice Mahomed will support the direct application of certain fundamental rights in a purely private dispute if the decision as to whether the right should so apply is made with reference to the values and objects which underlie the Constitution.

To conclude, the finding of the Court in this case is not in conflict with the Guelph Values Test. Both Justice Madala and Justice Mahomed openly support the Values Test. Justice Kentridge and the judges that concurred with him left open the possibility that the Values Test might still be applied. The judgment of Justice Kriegler and Justice Didcott also supports the idea, like the Guelph Values Test, that transformation of the whole of society was intended by the Constitution. To give expression to this aim fundamental rights should have direct horizontal application.

6.7 HOLOMISA V ARGUS NEWSPAPERS LTD[176]

In May 1993 the Star Newspaper published a report about the Plaintiff under the heading "Holomisa is linked to infiltration of APLA hit squad". This report alleged that the Plaintiff was directly involved in the infiltration into South Africa of an

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176 1996 (6) BCLR 836 (W)and also 1996 (2) SA 588 (W) . Very instructive is the discussion by Stuart Woolman Defamation, Application and the Interim Constitution; An Unqualified and Direct Analysis of Holomisa v Argus Newspapers Ltd (1996) 113 SALJ 428 .

AZAPO hit squad with the aim of killing whites in the Northern Natal Region. At that time the Plaintiff was the military ruler of the Transkei. The Plaintiff issued summons in the amount of a R100 000-00 against the Argus Newspaper group.

In answering the question whether fundamental rights applies between private parties, Judge Cameron stated that the reference to the judiciary in section 4(2) and the absence thereof in 7(1) has the unmistakable implication that the judicial organ of state is not bound in the same way by the chapter on fundamental rights as the legislature and executive.[177] For the Judge this inference is strengthened by section 33(4).[178]

Judge Cameron notes that these clauses also make it plain that the Constitution envisages that certain bodies and persons would not without further legislative provision or further development of the common law be bound by the fundamental rights.[179] After stating that the Bill of Rights does not apply in a unqualified horizontal manner he concluded that the chapter was intended to apply in some manner to all disputes between litigating parties.[180]

Judge Cameron found that section 35(3) is not merely an interpretative directive but a force that informs all legal institutions and decisions with the new power of constitutional values.[181] He stated that in this very practical sense it will be improper to consider the defences available to the Defendant in a defamation action without taking into account as between Defendant and Plaintiff the fact that section 15(1) guarantees every person the right to freedom of speech and expression. After examining the South African Law of Defamation, Judge Cameron stated that the directive in section 35(3) requires the fundamental reconsideration of any common law rule that encroaches on a fundamental right[182].

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177 Holomisa v Argus Newspapers Ltd p 843 D-G.
178 ibid.
179 ibid.
180 Holomisa v Argus Newspapers Ltd at p 844 B.
181 Holomisa v Argus Newspapers Ltd p 844 H.
182 Holomisa v Argus Newspapers Ltd p 850 C.

Judge Cameron also had no problem in using section 33(1) in balancing competing values in a common law scenario. He said that the procedure is essentially similar to the one when enquiring whether a statute has infringed a private person's rights. The court must first determine the meaning and content of the right sought to be asserted. It must then assess whether rules of common law or otherwise which protect the one right, curtail or infringe upon the enjoyment of the other. If so, it must determine whether in the light of the constitutional scheme overall, and the relative place of each competing right in it, that infringement can be justified under the limitation provision. At both stages there will necessarily be an assessment of competing values.[183]

Judge Cameron then proceeded to look at the common law right of free speech and the common law right of dignity and came to the conclusion that the Appellate Division's exposition of the common law gives supremacy to the value of reputation over freedom of speech. The values however which underlie the Interim Constitution prefer freedom of speech over the right to dignity. Therefore the common law in this regards needs reformulating. After examining many different formulations of the new common law rule, Judge Cameron concluded:

> "That a defamatory statement which relates to free and fair political activity is constitutionally protected even if false unless the Plaintiff shows that in all the circumstances of its publication it was unreasonably made."[184]

I agree with the order made by Judge Cameron but the method used by him can surely not be described as mittelbare Drittwirkung. Indirect application takes place when the courts use the open-ended concept of the common law like unlawfulness, contra bonos mores, negligence and others to infuse the underlying values of the Constitution into the common law. The disadvantage of the method used by Judge Cameron is that the precedent system will make it very difficult for other judges to follow his example.

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183 Holomisa v Argus Newspapers Ltd p 853 E-G.
184 Holomisa v Argus Newspapers Ltd p 864 A.

6.8. RYLAND v EDROS[185]

Plaintiff instituted an action against Defendant claiming her eviction from their home where they had lived for some years after their marriage by Muslim rights. The marriage had terminated some years earlier in accordance with Islamic law. The Eviction Claim was ultimately settled. What remained to be determined was Defendant's claim in reconvention for a part of the Plaintiff's estate. Relying on the contractual relationship arising from their Muslim marriage, Defendant sought a monthly maintenance, a conciliatory gift as result of the dissolution of the marriage, and the transfer, alternatively payment of, an equitable share of the increase in Plaintiff's estate.

The court had to decide whether it was precluded by what had been held in **Ismail v Ismail 1983 (1) SA 1006 (A)** from enforcing the terms of the contract arising from the Muslim marriage. That decision had held that the recognition of a potentially polygamous union celebrated according to the tenets and customs of Muslim faith was contrary to public policy, as was the enforcement of the consequences of such a union. Judge Farlam referred to the Du Plessis v De Klerk and the judgement of Ackermann J in setting out the German principle of "mittelbare drittwirkung"[186] . Farlam J stated that it was clear that the spirit, purport and objects of chapter 3 of the Constitution and the basic values which underlie it were in conflict with the view as to public policy expressed and applied in the Ismail case. He stated that therefore the values underlying chapter 3 of the constitution must prevail. These values he identified to be, for the purposes of this case, equality , tolerance of diversity, and the recognition of the plural nature of our society. [187] The judge further agreed that it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the court should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large. The judge then concluded that in these circumstances he was satisfied that the Ismail decision, even though a decision of

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185 Ryland v Edros 1997 (1) BCLR 77 (C).
186 Ryland v Edros at p 87 H.
187 Ryland v Edros at p 91 J.

the Appellate Division, could no longer operate to preclude him from enforcing the terms of a marriage contract concluded by Muslim Personal law .

It is important to note that no constitutional issue was raised by the parties in their pleadings. The fact that the contract relied upon was against public policy was raised by the advocates in argument.[188] No party based any of their claims in the Bill of Rights. This case provides an example of what the legislature intended with the provision of section 35(3) . This section should be used, in disputes where no Constitutional claim is made, to conform the common law to the values which underlie the Constitution. If this is so, surely the legislature must have intended that if a claim based on the Bill of Rights is made, another mechanism should be followed to enforce such a claim. This in my view is a pointer that the legislature must have intended some forms of direct horizontal application.

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188 Ryland v Edros p 85 E.

CHAPTER 7

ACADEMIC OPINION

I will now proceed to explore academic opinion on the application debate. I will attempt not only to find support for the Guelph Values Test but also to point to the different interpretations given to the provisions of the Interim Constitutions relating to the application debate.

7.1 MARTIN BRASSEY[189]

Brassey states that according to the provisions of section 33(4)[190] of the Interim Constitution it is clear that some people fall beyond the reach of section 7(1). He states that those not bound can only be the Judiciary and private persons. Whether the judiciary is bound, Brassey states, must be discovered from section 7. Section 7(1) does not mention the judiciary. This omission, he argues, could not have been an error considering the sections drafting history and that the judiciary is specifically mentioned in section 4. The purpose of the omission was to curtail the breadth of section 7(1). Brassey concludes that in certain capacities the judiciary is bound and in others not.[192]

Brassey moreover holds the view that Chapter 3 does not apply in a dispute between private parties.[193] To come to this conclusion he argues that Section 7(1) should be read as qualifying section 7(2) and that the Bill of Rights only applies to the common law once it is established that an entity is bound in terms of the provision of section 7(1)[194]

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189 Brassey p183.

190 This section is quoted on page 13 above.

191 Brassey p184.

192 Brassey p186.

193 Brassey p189 states: "Ultimately I think we must conclude that private actors went unmentioned because the drafters never intended to impose obligations on them."

194 Brassey p 186.

In my view there is nothing in the text that support this "qualification" explanation. The language chosen in the section very clearly reads that chapter 3 applies to "all law in force". Taking into account the other interpretive principles[195] as set out in chapter 2 it becomes even harder to read into that section the above qualification. These principles, inter alia, require that the interpretation given to section 7(2) should secure for the individual the full protection of the Bill of Rights.[196] Another interpretive principle states that one should take into account the larger object and purpose of the Constitution, viz. to transform society.[197] This purpose demands that section 7(1) should not qualify section 7(2). Transformation of society includes the transformation of the relationships between private persons. Section 7(2) in my view points to a direct horizontal application of the Bill of Rights.[198]

Secondly Brassey argues that the omission in 7(1) of the reference to private persons cannot be explained away as the product of inadvertence. Horizontalists can however argue that private persons are not bound in terms of section 7(1). They are bound in terms of section 7(2). They are bound because the Bill of Rights shall apply to all law. The law does not exist in a vacuum. The law exists because it regulates relationships between persons. Because of the purpose and function of the law, to which the Constitution applies, private persons are bound.

Thirdly Brassey argues that section 33(1) points to the fact that the Bill of Rights does not have direct horizontal application. He states that this clause is a counterweight to the absoluteness of the rights and provides a mechanism for

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195 See pages 6-7 above.

196 See principle (h) on page 7.

197 See page 6 above.

198 In the Du Plessis v De Klerk Kriegler J said "On a reading of s7(2) alone , the scope and application of chapter 3 with regard to law therefore seems clear; It governs all law in force during the currency of the constitution. There is no qualification, no exception All means all. ..... The manifest intention of the drafters of the subsection was to expand its scope to the widest limit their language could express".

balancing competing interests. He states that the wording of the section makes it available only to the state;

> ".....for its operation depends on the exercise of a power that no private person enjoys, the power to make a law of general application"[199]

Section 33(1), however, does not state that a person's right may be limited only by a law passed by the state. The section never mentions what the origin of the law limiting the right should be . The only requirement is that the law must be a law of general application. Obviously the common law is a law of general application. If the owners of a shopping centre therefore, in the exercise of their common law right of ownership, decide that they will forbid the distribution of religious pamphlets in their shopping centre, the religious group can claim that their rights to freedom of speech and freedom of religion have been infringed . They can approach the court for an order declaring the owners' ruling invalid. The court can then consider whether the common law regarding ownership of property is justified in terms of section 33(1). In my view chapter 3 right can be limited by a rule of common law.[200]

Brassey does not support the Guelph Values Test. Some of the arguments he uses to support his proposition that private persons are not bound are open to criticism.

7.2. ANNEL VAN ASWEGEN[201]

Van Aswegen points out that horizontal application of the Bill of Rights can take place either directly or indirectly. She explains the concept of indirect horizontal application by referring to the German doctrine of Drittwirkung. She states that in

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199 Brassey p189.

200 Kriegler J in Du Plessis v De Klerk stated on p 915 F " A rule of common law which , for example, infringes a person's right to privacy or human dignity can be saved if it meets the s 33(1) requirements. Mahomed J on p896 A also agrees with Kriegler J on this point as he states that s 33(1) would in any event apply on the verticalist's view when for example the state rely on the common law and that law is in conflict with fundamental right.

201 Annel Van Aswegen The Implications of a Bill of Rights for the law of Contract and Delict (1995) 11 SAJHR p 50.

terms of this doctrine the provisions of the Grundgesetz have no direct application to private law relations. Private law relations are regulated by the provisions of the German Civil Code. The general clauses in the German Civil Code, embodying the principles of good faith and good morals, which play a major role in the continued development and adaptation of the provisions of the German Civil Code, have to be interpreted and applied to reflect the standards set by the basic rights protected in the Grudgesetz. Van Aswegen further states that the interpretation by the courts of all legislation including that governing private law relations, has to be undertaken to give maximum effect to an objective system of values extracted from the provisions of the Grundgesetz. This she states has the effect of indirectly subjecting all private law rules and principles to the basic values of the bill of rights.[202]

The author states that section 35(1) of the Interim Bill of Rights expressly adopts the German Drittwirking model.[203] From this adoption the following consequences follow for her:

a. The open-ended principles in the common law, such as the contractual contra bonos mores principle and the delictual unlawfulness concept should be radiated by the underlying values of our Interim Bill of Rights

b. Rules of common law must be interpreted in accordance with the values embodied in the Interim Constitution. [204]

Applying indirect Drittwirkung to the law of delict the author states that the tests for wrongfullness, causation and negligence are classical open-ended concepts and can be used to import constitutional values into the common law.[205] The law of contract on the other hand, apart from the concept of "contrary to public policy", does not lend itself so readily to the import of constitutional values.[206]

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202 Van Aswegen p 52.
203 Van Aswegen p 56.
204 ibid.
205 Van Aswegen p 60.
206 Van Aswegen p 65 states " In fact the general principles of contractual

In coming to the conclusion that the Interim Bill of Rights does not have direct horizontal application,[207] Van Aswegen argues that section 7(1) makes it clear that fundamental rights only binds the state.[208] Therefore, she argues, section 33(2) which prohibits the limitation of any fundamental right by the common law also applies only to the common law relationship if the state is involved.

The argument of the author that the Interim Bill of Rights should only have indirect horizontal application according to the German model should be rejected for the the following reasons:

a. the avowed objects of the Interim Constitution (as set out in the Preamble and Postamble) are to transform the South African society.

b. section 4(1), which states that the Constitution shall be the **supreme** law and **any act** (**"enige handeling"** in the afrikaans version) inconsistent with its provisions shall be of no force or effect. To my mind "any act" includes the acts of a person in a purely private dispute.

c. section 7(2) which states that the Bill of Rights shall apply to all law in force.

d the principles of constitutional interpretation as set out in chapter 2 [209].

e. section 35(3) can also be interpreted to mean that in a dispute where no constitutional issue is raised the court must follow the dictates of that section.

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liability consist for the most part of very precise, detailed rules with a fixed area of application."

207 Van Aswegen p 53.

208 Van Aswegen p 53 and p 55.

209 See page 6 and 7 of this thesis.

f. section 33(2) states that no law shall limit any fundamental right. This points to a direct horizontal application of the Bill of Rights. The section also states that this rule shall apply unless another provision of the Constitutiona provides otherwise. As was pointed out by Justice Kriegler there is no provision in the Interim Constitution which states "that chapter 3 only governs the relationship between the State and the individual"[210]

7.3 JOHAN DE WAAL[211]

De Waal makes the unsubstantiated statement that the Bill of Right does not have direct horizontal application.[212] As he does not advance any argument in support of his statement I will not repeat the arguments advanced in favour of direct horizontal application. He remarks that the omission of the judiciary in section 7(1) of the interim bill was clearly aimed at avoiding the consequences of Shelley v Kramer.[213] He concluded that if in a private dispute the common law infringes on one's rights one should be entitled to invoke the Bill of Rights. Once a judge has however made a court order enforcing that common law principle one cannot challenge the court order itself as infringing one's constitutional rights.

7.4 DE WET[214]

De Wet submits that s 7(1) read in conjunction with s 35(3) is an incorporation by the legislature of the German law indirect Drittwirkung concept [215] This she describes as follows;

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210 Du Plessis v De Klerk p 912 I - 913 A.

211 Johan de Waal A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights (1995) 11 SAJHR 1.

212 De Waal p 9.

213 De Waal p 10.

214 Erika De Wet Indirect Drittwirkung and the Application clause: A reply to Johan De Waal by Erika de Wet (1995) 11 SAJHR 610.

215 De Wet p 611.

"The German constitutional court explicitly ruled that the constitutional rights primarily exist between the individual and the state. However, as has been mentioned, these rights also envisage an objective value system which would apply to the whole legal system. Consequently all norms of private law , criminal law, commercial law and the law of procedure must reflect the values underlying constitutional rights, and legislation in conflict with this is null and void."[216]

De Wet states that De Waal's conclusions (that the common law but not the judiciary's rulings on the common law is subject to constitutional review) is problematic for three reasons. One reason is that the common law is created by judges and their court orders. If one therefore finds that the common law is subject to charter review then surely the judges orders must also be. The author continues that the binding of the judiciary as feared by De Waal is not the danger it is made out to be. According to her, the real danger is the sphere of private law to which the bill of rights should apply. The question to be answered according to De Wet is whether the bill of rights should be applied to civil as well as non-civil private law.[217] Civil private law concerns state law (legislation as well as common law) whereas non-civil private law refers to the law of private institutions such as churches and sports societies.

Disagreeing with De Waal on the direct application of the interim bill of rights, De Wet states that in certain instances in German jurisprudence where the objective of the right would be undermined if not applied directly , direct application of a fundamental right is acknowledged.[218] The author concludes by remarking that it cannot be excluded that the court could infer rights and obligations for private individuals directly from the Constitution in cases where the nature and aim of the constitutional rights so demand, and the existing law is too vague to provide a clear direction.[219] Some support for the Values Test can be found in these views.

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216 De Wet p 612.
217 De Wet p 614.
218 De Wet p 616, 617 and 619.
219 De Wet p 619.

7.5 STUART WOOLMAN[220]

The author made an in-depth study of the application debate. He points to all the textual arguments that can be advanced for horizontal, vertical, and indirect horizontal application of the bill of rights[221] and concludes that the text does not settle the debate.[222] Woolman points out that the vertical approach is open to severe criticism. Firstly he demonstrates that whether a right will have application depends fortuitously on the forms it takes. If it is in the form of the common law it will not be subject to review whilst if in the form of a statute, it will. I agree with him and believe that the Guelph Values Test will address this problem. Whether the Guelph values test applies depends not on the form the law takes but on the values which underlie the constitution.

Secondly he points out that a vertical approach will lead to "a neurotic search for the state".[223] The end result will be an incoherent body of case law.[224] The Guelph Values Test will address this problem in that the court must consider the values of the constitution and evaluate the conflicting interest in applying the fundamental rights. This will lead to a substantive vision of the law and a law based on principled decisions

Thirdly Woolman points out that the judiciary should be bound as it is part of the state even when it judges disputes. The Guelph Values Test also subscribes to this principle.

Fourthly, Woolman points out that the public/private distinction perpetuated by the verticalists is unacceptable as it is based on 17th century natural law jurisprudence. Verticalists ignore the principles of the positivist school of thought which declares that the state is involved in all acts of persons even if it is in the form of tolerating

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220 Chaskalson Chapter 11.
221 Woolman in Chaskalson at p 10-8 and 10-31 .
222 above at 10-8.
223 above at 10-15
224 above at 10-16

the behaviour[225]. The Guelph Values Test states that only those rights that can promote the values envisaged for the new South Africa should have direct horizontal application. It therefore does not make a public/private distinction.

Criticising the horizontal approach, Woolman points out that all personal disputes will be subjected to constitutional review thereby creating a totalitarian state. Unelected judges will tell us how to behave and how not.[226] This also flies in the face of our hard fought democracy. The response of the Guelph values test is that not all fundamental rights will have direct horizontal application. Those rights that are applied are needed for the transformation of the South African society.

7.6 CACHALIA ET AL.

The authors hold the view that the Bill of Rights predominantly should be applied in a vertical fashion.[227]

7.7 DU PLESSIS AND CORDER. [228]

The authors state that the Bill is predominantly vertical in operation. Organs of state should be interpreted as widely as possible to include bodies established by statute as organs of government. Also included should be bodies or institutions established by statute but managed and maintained mainly through private initiative like law societies. They make the point that:

> "Whether a body or functionary is an organ of state will depend largely on the extent to which it is integrated into the structures of authority in the state rather than on the nature of the statutory source to which it owes its existence." [229]

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225 above at p 10-20
226 above at p 10-36
227 Cachalia Cheadle, Davis Haysom, Maduna and Marcus; Fundamental Rights in the New Constitution 1ed (1994) Juta & Co Ltd p 20.
228 Du Plessis and Corder p 110.
229 Du Plessis and Corder p 110.

These views of the learned authors support a interpretation very similar to the Guelph Test.

7.8 THE SOUTH AFRICAN LAW COMMISSION

The commission is of the view that:

> "Chapter 3 of the Constitution predominantly operates on the vertical level."[230]

7.9 BASSON

He holds the view that many of the provisions in the Constitution indicate that the Bill has horizontal application as well. [231]

7.10 CONCLUSION

In the academic world the debate is fierce. Some support the German model of mittelbare Drittwirkung. Some claim that only certain rights have direct horizontal application. There is support for the common law to be radically transformed along the contours of the bill of rights. Woolman on the other hand supports direct horizontal application of all rights[232]. Apart from De Wet and Du Plessis and Corder there is no academic author to which I can point in support of the Guelph Values Test.

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230 South African Law Commission p 121.

231 Dion Basson South Africa's Interim Constitution 1ed (1994) Juta & Co Ltd

232 Chaskalson Constitutional Law of South Africa Chapter 11 by Stuart Woolman.

CHAPTER 8

THE FINAL CONSTITUTION

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

ACT 108 OF 1996

Some fundamental changes were made in the Final Constitution[233] to the clauses dealing with the application issue[234]. The changes also open up for debate the questions that were thought settled by the Constitutional Court in the Du Plessis Case[235]. The application examination starts with section 8 which reads as follows;

"**Application**

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

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

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233 The Bill of Rights is set out in chapter 2 of the Final Constitution.

234 Cheadle and Davis p 54.

235 Woolman S and Davis D The Last Laugh states on page 380 and I quote "The language of the Bill of Rights in the final Constitution pulls out the primary textual pegs from which hang Acting Justice Kentridge's argument regarding the application of the Chapter on Fundamental Fights in the interim Constitution." See Chapter 6 for the discussion of the Du Plessis case.

8.1. SECTION 8 (1)

As in the previous clause 7(1) the legislature as well as the executive is bound . What is new is the fact that the Bill of Rights applies to "all laws" and "the judiciary". The inclusion of the judiciary has the effect that one of the verticalists' most powerful arguments is shot down. That argument stated that the legislature, by omitting the judiciary in 7(1), had intended to insulate the common law, thereby intending a vertical reading of clause 7. All court orders will now have to pass constitutional muster[236] thereby in effect subjecting all purely private disputes, where one party resorts to the law, to constitutional scrutiny.

8.2. SECTION 8 (2)

Whereas nothing was mentioned in the Interim Bill of Rights about the application of the Bill to private persons, the Final Bill of Rights makes it clear that all private persons are bound in some disputes with other private persons. This section indicates that the Bill of Rights will have direct horizontal applications.[237]

What meaning should be given to the phrase "if, and to the extent that it is applicable"? The word "if" suggests that the Constitutional Court must still determine which rights will have direct horizontal application. "If" can theoretically mean either that all the rights have direct horizontal application or that some of them shall have direct horizontal application. It is however unlikely that the legislature would have intended all the rights to have direct horizontal application in the light of the formula laid down in this section . The phrase "to the extent that" means that the factual situation within which the right seeks to be applied should be examined. The facts of one situation can require the application of a right while the same right in another

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236 Stuart Woolman Defamation, Application and the Interim Constitution p 450 states "Put another way, because the Bill of Rights binds the judiciary and all its actions- even where there may be no express rule governing a particular private relationship and dispute - when any dispute makes it to court , the court "must" apply the dictates of the Bill of Rights in resolving the dispute, and if necessary, formulate and articulate a new rule of common law.

237 Cheadle and Davis p 55.

set of facts might have no direct horizontal application. For the Values Test it means that the values must be factually located. The phrase "if...it is applicable" further means if the right is capable of and suitable for direct horizontal application[238]. In deciding whether a right is suitable to bind a natural person the court should take into account:

a. the nature of the right

b. the nature of the duties imposed by it.

The courts are instructed to take into account the nature of the right , but what is the nature of a right? To find the answer one must look at whether a similar right has been used in the past to regulate relationships between private persons. If it was so used in the past in the common law or legislation, it will be a good indication that the right is suitable for direct horizontal application. For example section 16(1) states that everyone has the right to freedom of expression. This right has been recognised in the common law as applicable to private relationships in the law of defamation. The nature of the right to freedom of expression is such that it can be applied to purely private disputes.

On the other hand section 20 of the Bill of Rights which states that no citizen may be deprived of citizenship is not a right found in relationships between private persons.

As far as the nature of the duty is concerned the court must take into account firstly whether the duty is one that can be owed by one private person to another. Once again a good indication will be whether such a duty has been placed on a private person by the common law or statutory law. The court should also take into account how onerous it is.

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238 Cheadle and Davis p 57.

I submit that the Court should not take into account only these above-mentioned factors in determining the suitability of a right for direct horizontal application. An additional important factor and of course the starting point of the enquiry should be what are the values which the Constitution desires should be present in the new South Africa. Section 39(1) specifically instructs the courts that the values that underlie an open and democratic society should be promoted when interpreting the application provisions. If the fundamental right under scrutiny can promote these essential values, the right should have direct horizontal application. What are the values that the court should promote? The following clauses give some indication of the essential values that underlie our Final Constitution. **Section 1** for example states:

"**Republic of South Africa**

1. The Republic of South Africa is one, sovereign, democratic state founded on the following **values:**(I inserted the bold)

a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b. Non-racialism and non-sexism.
c. Supremacy of the constitution and the rule of law.
d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Section 7 (1) reads as follows;

"**Rights**

7.(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic **values of human dignity, equality and freedom**."

These are the values which must be promoted by the Bill of Rights. These values should be taken into account when determining whether a particular right should be applied directly in a purely private dispure in terms of clause 8(2).[239]

The text of a specific right should of course be looked at[240]. Section 9(4) is, for example, a section where the text makes it plain that the right should have direct horizontal application.

Another important factor to be taken into account will be the particular facts of a case. The facts of a particular case can demand that, in certain circumstances and to give expression to the values of the Constitution, the rights should be applied in a direct horizontal manner. The same right might not be so applied in a different set of facts.

A further important factor is that Section 71(1) of the Interim Constitution stated that the Bill of Rights in the new constitution shall..... "comply with the constitutional principles contained in schedule 4". If therefore the principles in schedule 4 indicate that a right should have direct horizontal application such a right should be so interpreted in terms of section 8(2) as the Constitutional Court has certified that the Final Bill of Rights complies with the principles in schedule 4.

Once the court has completed this test as set out in section 8(2) and it has found that a right is applicable between two private persons it must then give expression to that right by following the procedure set out in section 8(3)[241].

8.3. SECTION 8 (3)

This section sets out the method that the court must follow when applying a constitutional right in a private dispute. It reads as follows:

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239 Cheadle and Davis p 60
240 Cheadle and Davis at p 57
241 Cheadle and Davis at p 61

"(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)"

The word "must" in this clause commands the courts to create causes of action to give expression to fundamental rights. There can therefore be little doubt that the Final Bill of Rights provides for substantial direct horizontal application. In applying this clause the court must first determine if there is not legislation in place securing the constitutional right for the aggrieved party. If such legislation exists the constitutional right must be expressed by applying the statute. If no such legislation exists the court should then apply the common law to give expression to that right. If no such common law rule exists the court must develop the common law to give expression to the content of the constitutional right. Cheadle and Davis point out the following underlying reasons for this rule:

(a) it ensures the integrity of the common law.

(b) it ensures a rule-based response to conduct that violates constitutional rights.

(c) once a rule was established, any further cases in respect of that rule would no longer be constitutional litigation.

(d) the common law has an existing body of rules concerning standing, proof, relief, and assessment of damages that would otherwise be necessary to provide.

(e) the development of common-law rules and the careful balancing of right is what common-law courts do well [242]

The court may further give expression to a limitation of a fundamental right by developing a common law rule that limits that right if the common law rule complies with the provisions of section 36(1) It is here that the court will have to perform a proper balancing of rights and values.

8.4. CLAUSE 9 - THE EQUALITY CLAUSE

The equality clause states;

"9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

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242 Cheadle and Davies p 63

National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

From the wording of clause 9.4 alone it is clear that this right should have direct horizontal application in a private dispute only regulated by the common law.

8.5. SECTION 39

This section states

"(1) When interpreting the Bill of Rights , a court tribunal or forum-

a must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

b must consider international law; and

c may consider foreign law.

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

Section 39 is also an important clause and gives an indication of how the application issue should be dealt with. When interpreting the application provisions of the Bill of Rights, the court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. If these values demand a direct horizontal application of a specific right, then the right should be so applied.

8.6. CLAUSE 173 - INHERENT POWER

Clause 173 states the following.

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

This section cures the difficulties that Justice Kentridge had in the Du Plessis case with giving the bill of rights direct horizontal application. His arguments were largely based on the fact that the Constitutional Court has no jurisdiction to develop the common law. [243]

8.7. SCHEDULE 6 - CLAUSE 17 - CASES PENDING BEFORE COURTS

This clause reads as follows:

"All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

I suggest that the provisions of the Interim Constitution will remain with us for some time to come. In the light of the radical departure from the Interim Constitution in the Final Constitution on the application issue, I suggest that the new Constitution will have a some effect on the interpretation of the Interim Constitution. All the provisions in the Interim Constitution may therefore be interpreted in a manner that favours a direct horizontal application of specific rights.

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243 Du Plessis v De Klerk p 880 A - 884 G

CHAPTER 9

The Final Bill of Rights and the Guelph Values Test

The question that I will examine in this Chapter is whether the Guelph Values Test can be applied within the framework of the Final Constitution. The Guelph Values Test prescribes that the following enquiries should be conducted to determine whether the right in question should have direct horizontal application:

9.1 If the offending entity is not obviously part of the state the court should determine whether or not the state is in some obscure manner involved with the offending entity. This the court does by asking the following questions;

a. Does the legislative, executive or administrative branch of government exercise control over the entity in question?

b. Does the entity perform a traditional government function or a function which in more modern times is recognised as a responsibility of the state?

c. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

In my view section 8(1) read with the definition "organ of state" as set out in section 239 provides ample scope for this part of the Guelph Values Test to be applied. Note that the provisions in sections 8(2) and 8(3) will not apply in such a case. The provisions of section 7(2), which state that the state must respect, protect, promote and fulfil the rights in the Bill of Rights, then become of primary importance. [244]

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244 For a detailed discussion of what the word " respect, protect, promote and

9.2 If the State is not involved then the values which the Constitution and more specifically the Bill of Rights desire for the new order should be identified. It should be determined whether those values were absent in the old order. If they were absent then the values are ones that can transform our society. (essential values) Next it should be determined whether the infringed right in question can promote the essential values in the factual context of the case. If the right can promote essential values then it becomes an right essential for transformation and for the society envisaged by the Constitution.

In comparison, section 8(2) requires that the right must be **suitable**[245] for and **capable** of direct horizontal application. The court must ask the question: Is this right suitable and capable to be applied in a dispute between two private persons taking into account the nature of the right and the duty imposed by it.? In answering this question the court can also take into account what the values are that is desired for the new order, whether they were absent from the old order , and whether the infringed right is a right that can promote the essential values the Constitution envisaged for the new society. On this point Cheadle and Davis[246] state as follows:

> "Where there is uncertainty, the enquiry into suitability will be determined by an examination of the right viewed within the context of analysis of the right within the overall conception of the Constitution. The court must then seek justification in the overall values of the Constitution - Openness, democracy, dignity, equality and freedom."

Also on the same page the authors state:

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fulfil" means see Pierre De Vos Pious Wishes or Directly Enforceable Human rights?: Social and Economic rights in South Africa's 1996 Contitution (1997) 13 SAJHR 67 p 78.

245 Cheadle and Davis p 57.

246 Cheadle and Davis p 60.

"The fundamental values of the Constitution should act as guidelines to which rights are suitable to promote application because they enhance the kind of society envisaged in the Constitution."

I submit that within the provision of section 8 of the Final Constitution there is ample scope for applying this portion of the Guelph Values Test.

9.3 The next requirement of the Guelph Values Test is that the right, when it complies with the requirement as set out in clause 9.2, will have general horizontal application.

In section 8(3) the Final Constitution states that once the court has determined that a fundamental right applies to a natural or juristic person then effect must be given to the right. Effect is given by applying legislation that can ensure enforcement of the fundamental right or by applying the common law or by developing the common law by creating causes of action and defences. The Constitution prescribes, like the Guelph Values Test, that once a right is found suitable it must be applied in a direct horizontal manner.

CONCLUSION

The Guelph Values Test is supported by the text of the Final Constitution. The only modification to the Guelph Values Test is that one should, apart from examining the values that the right can promote, also consider the following ;

1. The nature of the right

2 The nature of the duties that it imposes.

3 The text setting out the right.

4 The facts of a specific case

The Guelph Values Test can further fulfil another very important function. The Bill of Rights now provides for two methods of expressing Constitutional rights. The one method is when the state is involved and when the rights are applicable to the State as envisaged by section 8(1). In this regard Section 7 (2) states ;

> "The state must respect , protect, promote, and fulfil the rights in the Bill of Rights

The other method is when a natural or juristic person is involved. Then the fundamental right must be applied as is set out in clause 8(3). The content of the right must be expressed through existing legislation, the common law or the development of the common law. These two sets of potential obligations are very different in nature and aims. The Guelph Values Test in my view is a principled test and its principles will ensure that a fair distinction is made between persons connected to the state and bound by section 8(1) and private persons bound by section 8(2).

THE END

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