The Constitutional Development of Fundamental Rights and the Horizontal Application of the Bill of Rights under the South African Constitution of 1996

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I. Introduction

Human rights undoubtedly playing an important role in the modern world and they are now recognised in most parts of the world. Many states incorporated these rights into their constitution under the heading of 'Bill of Rights'.[1] Several different definitions, of the term 'human rights' exist but none of them is generally accepted. Intuitively, the word 'human' suggests that this right applies to every human being. The question of whether the term 'human' also covers the unborn child or a dead person, too, is also a controversial question and is not fully discussed.[2] Presently it can be said, that the term 'human' at least covers every human being from birth until dead.[3] The issue of what kind of rights human rights are is also a very controversial one. However, for the purpose of this discussion, human rights shall be understood as the basis of all rights which people have[4] and ... *human rights are those liberties, immunities and benefits which, by accepted contemporary values, all human beings should be able to 'as of right' of the society in which they live.*[5]

This thesis will deal with the development of the application of human rights in states' constitutional systems. As with historical development it will deal with human rights as rights of the individual against the state. Then the application of the Bill of Rights in the private sector will be closely examined in regard to the South African Interim- and Final Constitution.

II. A Brief History of Human Rights

Human rights in the modern sense did not simply emerge from one day the next. The development of human rights has a long history and it is not very easy to find a date when it began. If we take a look at the Bible, for instance, we will see that several ideas of human rights in the modern sense have their basis there, for example, the idea of equality. According to the New Testament every individual is equal before God. In jurisprudence it is controversial when the development started and at which time modern human rights were born. Some authors are of the opinion that the origins of human rights go back to ancient Greece[6] and

[1] For example South Africa, Canada, France and Germany.

[2] G. Roellecke *Lebensschutz, Schutz von Ehe und Familie und Abtreibung* (1991) JZ p. 1046.

[3] I. von Münch 'Vorb. Artikel 1-19' in I. von Münch & P. Kunig *Grundgesetz Kommentar* (1992) Vol. 1 Rn. 8 (Rn stands for: Margin No).

[4] R. Wasserstrom 'Rights, human rights and racial discrimination' in D. Lyons (ed.) *Rights* (1979) p. 48.

[5] L. Henkin 'Human Rights' in R. Bernhardt *Encyclopaedia of Public International Law* (1985), Vol.. 8 p. 268.

[6] K. Vasak as cited in: I. Szabo 'Historical Foundations of Human Rights and Subsequent Developments' in K. Vasak (ed.) *The International Dimension of Human Rights* (1982) p. 11. For Szabo the origin can be found in the Greek literature and his classic example is that of Antigone: according to Sophocles, when Creon reproaches Antigone for having buried her brother despite her having been forbidden to do so, Antigone replies that she has acted in accordance with the unwritten and unchanging laws of heaven.

others consider that human rights have their origins in Roman law[7]. It might be correct that some ideas around human rights today have their basis in Greek literature or Roman Law. However, to regard the origin of human rights as being in either of the two is wrong. Those authors who express this opinion do not see that the sources on which they base their arguments recognised the legitimacy of slavery as well. The recognition of slavery implies the acceptance of social differences between human beings which allow for different treatment. Such an idea contradicts the fundamental and central idea of human rights: that every human being is equal.[8]

During the Middle Ages several ideas important for human rights in the modern sense were developed in Europe,[9] for example, that it was forbidden for the king to intervene in the rights of individuals. However, during this period, the central idea of equality was still not accepted.[10] For example, it was forbidden for the King to treat his people unfairly, according to the theory of Thomas of Aquinas. People were treated unfairly according to his theory, if the King intervened in their personal rights, which were life, freedom and property, but these personal rights were not possessed by women and slaves.[11]

An important basis for human rights in the modern sense was laid by Hugo Grotius (1583-1645). His theory was one of the first to recognise that all people have the right of freedom and equality by nature. This is one of the largest steps taken towards the establishment of human rights in the modern sense.[12]

It could be said, however, that human rights in the modern sense were born in the seventeenth century. Several theories were developed, especially in England, for example, by Thomas Hobbes (1588-1679) and by John Milton (1608-1674).[13] The main basis of human rights in terms of today's understanding was laid by John Locke in his 'Two treatises on Government' in 1690. He is regarded as the father of modern human rights.[14] Locke was the first person who described human rights as the subjective rights of human beings against the state, which protect the freedom of the individual and the community.[15] In Paragraph 87 of his second treatise he states:

[7] G. Burdeau as cited in: ibid. p. 11-12.
[8] I. Szabo ibid. p. 12.
[9] A comprehensive presentation of the development of Human Rights during the middle ages in G. Oestereich 'Die Entwicklung der Menschenrechte und Grundfreiheiten' in Betterman/Neumann/Nipperdey (ed.) *Die Grundrechte* Vol. 1 (1966) p. 1.
[10] K. Stern *Das Staatrecht der Bundesrepublik Deutschland* Vol. 3/1 (1988) p. 58.
[11] I. Szabo (n.6) p. 12.
[12] K. Stern (n.10) p. 73.
[13] ibid. p. 71-78.
[14] Compare K. Stern (n10) p. 78; E. de Wet *The Constitutional Enforceability of Economic and Social Rights* (1996) p. 1.
[15] E. de Wet (n14) p. 2.

> *Man being born with a title to perfect freedom and uncontrolled enjoyment of all rights and privileges of the law of nature, equally with any other man, or number of men in the world, has by nature a power ... to preserve his property, that is, his life, liberty and estate, against the injuries and attempts of other man.*[16]

As we can see from this quotation, he describes life, freedom and property as the innate subjective rights of human beings who are all born equal.

Various different theories developed over the centuries form the basis for human rights in the modern sense, especially the theory of John Locke. However, the main step in developing human rights in the modern sense were made in England. The 'Agreement of People' of 1647, was the first constitutional text which included human rights in the modern sense, but it never came into effect. This agreement guaranteed freedom of religion and conscience and that all people are equal before the law.[17] A hint of the idea of human rights was realised in the English Habeas Corpus Act of 1679, in the Declaration of Rights of 1688 and in the Bill of Rights of 1689.[18] All of them, except for the 'Agreement of People' did not really accept equality and the rights referred to were merely rights of the English people.[19]

The actual realisation of the theory of human rights in the modern sense can be found in the Virginia Bill of Rights from 12.06.1776[20]. Virginia was the first state which had a declaration of Human Rights. The Virginia Declaration of Human Rights, which formed the basis of the Virginia Bill of Rights stated, in Section I:

> *... all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into the state of society, they cannot, by any compact, deprive or divest their posterity, namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*[21]

In Europe, one realisation of human rights in the modern sense was the 'Declaration of the Rights of Man and Citizen'[22] established during the French Revolution in 1789.[23] With the

[16] J. Locke 'Second Treatise of Government (1690)' in W. Lacquer & B. Rubin (ed.) *Human Rights Reader* (1979) p. 27
[17] K. Stern (n10) p. 80.
[18] ibid. p. 81.
[19] K. Stern (n11) p. 80; E. de Wet (n14) p. 1.
[20] It is controversial whether the French Declaration or the Virginia Declaration is the first declaration of human rights. The French Declaration did not cover other rights than the Virginian Declaration, and the Declaration of Virginia is from 1776 and the French from 1789. Thus the Declaration of Virginia is the first one. See: G. Jellinek Die *Erklärung der Menschen und Bürgerrechte* 3ed. (1919) p. 42; K. Stern (n10) p. 84; other opinion I. Szabo (n6) p. 14.
[21] Section I of the Virginia Declaration on Human Rights as cited in E. de Wet (n14) p. 3.
[22] The declaration of the Rights of Man and Citizen (Declaration des droits de l'homme et du citoyen) was promulgated by the National Assembly on 26 of August 1789. Bleckmann *Staatsrecht* (1989) Vol. 2 p. 6; E. de Wet (n14) p. 3.
[23] I. Szabo (n6) p. 14; H. Hoffmann *Die Grundrechte 1789-1949-1989* in NJW (1989) p. 3178.

introduction of the 'Virginia Bill of Rights' and the French 'Declaration of the Rights of Man and Citizen' it is possible to speak of the starting point of human rights in the modern sense.[24] The growth of human rights in the modern sense fits into a conceptual apparatus that recognises their development in three stages, each interpenetrating and connected with the other. International Human Rights Law[25] perceives the emergence in turn, of three generations of human rights[26]. Although this division has been criticised[27], it seems legitimate to categorise human rights in this way by broadly looking at them in terms of their historical emergence.

1. Civil and Political Human Rights as Defensive or Negative First-Generation Rights

First-generation human rights are based on the eighteenth-century conceptions of libertarian rights, and reflect 'natural law' ideas. These are negative rights, to the extent that they provide protection against the encroachment of individual rights by government and provide for civil and political liberties.

The first constitutions which implemented human rights adopted the classic liberal idea of human rights based on the John Locke thesis.[28] Locke lived in a period of absolutism - whereby the King was the absolute ruler. The King as an 'independent' authority determined the law and could take decisions over the life and property of individuals.[29] He was not bound by any law, except that of God.[30] According to this system of rule, the Locke theory was based on the idea of giving the individual subjective rights against the state. These subjective rights were aimed at protecting the freedom of the individual and the community against the power of the state. They should prevent the state, or, in other words, the King, from interfering in the exercise of those subjective rights, which were, according to Locke, life, freedom and property.[31] Although the King was obliged to guarantee, regulate and safeguard subjective rights, he did not have the duty to ensure that people actually made use of their freedom. That was left to the initiative of the individual and the community.[32] For example, if an individual was not able to live an ordinary life because he or she was very poor, the state was not obliged to help them. Even if an individuals freedom was constrained by private persons, the state

[24] K. Stern (n10) p. 84; I. von Münch (n3) Rn. 8; I. Szabo (n6) p. 14.
[25] In political terms, this approach is loosely characterised as the 'three worlds' of human rights. The western (First World) approach emphasises civil and political rights; the socialist (Second World) approach emphasises economic and social rights, while the Third World approach emphasises self-determination and development rights. See J. Donnelly *International Human Rights* (1993) p. 35.
[26] See for example D. H. Ott *Public International Law in the Modern World* (1987) p. 238-238.
[27] See for example P. de Vos *The Economic and Social Rights of Children and South Africa's transitional Constitution* SAPR/PL 235. De Vos criticises the traditional point of view concerning the division of human rights into three generations. In his opinion first-generation and second-generation rights are interdependent and indivisible and that there is no conceptual difference between these groups.
[28] A. Bleckmann (n22) p. 5. E. de Wet (n14) p. 1.
[29] K. Stern (n10) p. 68.
[30] Ibid.
[31] E. de Wet (n14) p. 2.
[32] Ibid.

was, according to the human rights entrenched in the constitution, not obliged to interfere. The Classic-Liberal view of human rights did not take into consideration nor make provision for the protection of persons who were in a weaker position against those who were in a stronger one.[33] There was a strict division between the private sphere and human rights. The private sphere was an aspect of civil law and human rights - one of public law. Human rights were only applicable between the individual or community and the state. They did not protect people in relationships involving private authority.[34]

The constitutions of the United States of America and France,[35] two of the first constitutions to include human rights, followed the Classic Liberal approach of human rights. The first amendment[36] of the Constitution of the United States of America, for example, guaranteed freedom of speech, religion and the press.[37] In France, the declaration provided that all men are born free and equal in respects of their rights and that everybody has the right to freedom, property and resistance to oppression as the natural and inalienable rights of the human being. Furthermore, it provided for freedom of religion, conscience and speech.[38] The reason for following the Classic Liberal approach was that these constitutions were drawn up and came into effect in the period of absolutism. Particularly at this time, as stated earlier, human rights were intended to give the individual protective rights against the state. This was especially the case in France, where the revolution of 1789 put an end to the system of absolutism. However, human rights not only give protection against the state, but also, particularly in France, eliminate the feudal and social class-system by giving everybody the same rights.[39]

The first human rights included in constitutions were defensive rights of the people against the state. This was merely a vertical application of human rights.

After the French Revolution, other states started to include human rights in their constitutions too, especially those states which were occupied by troops of Napoleon at the beginning of the 19th century, for example, the Rheinbund States in Germany.[40] Austria included human rights in 1867.[41] In Germany, human rights were determined by the states and not by the 'Reich', but by the mid-nineteenth century most states had incorporated these rights into their constitutions.[42] All these constitutions followed the approach that human rights were only

[33] Ibid.
[34] Ibid.
[35] The first constitution of France came to effect in 1791. K Stern (n10) p. 98.
[36] The original Federal Constitution of 1789 did not include any human rights. E. de Wet (n14) p. 3.
[37] A. Bleckmann (n22) p. 6.
[38] E. de Wet (n14) p. 4.
[39] K. Stern (n10) p. 97.
[40] ibid. p. 322.
[41] ibid. p. 114.
[42] For example, Kurhessia in 1831, Saxon in 1831, Hanover in 1833. A comprehensive representation in K. Stern (n10) p. 322-327.

defensive rights and were only applicable between the state and the people. Thus, with the decline of absolutism civil and political liberties as human rights became generally recognised and guaranteed on a constitutional level.

2. Social Economic Human Rights as Demanding or Positive Second-Generation Rights

Civil and political rights have traditionally been regarded as being at opposite poles to social and economic rights.[43] One of the causes of this has been the influence of the first Bills of Rights in the USA and France, steeped in the classic-liberal tradition. *Notably, the business of government was not to provide the people with a 'welfare-state' kind of welfare; government was to leave the individual free to pursue such welfare himself.*[44] According to this, human rights were limited to civil and political rights, which served principally as a buffer against the intervention of the state. Social and economic rights, in contrast, are often dependent on positive steps being taken by the state, and are de facto based on state intervention. In presenting the historical development of social and economic rights, I will show that these rights on one hand, and civil and political rights on the other hand, are not actually at opposite poles, but are rather interdependent.

a) The Eighteenth Century

The vital importance of the protection of social and economic rights had already begun to dawn towards the end of the eighteenth century. John Adams, the second president of the United States, for instance, considered the right to education as being innate and fundamental: *Liberty cannot be preserved without a general knowledge.*[45] The Briton, Thomas Paine, in his book 'The Rights of Man' (1792), exposed a system of social insurance which included aspects ranging from childhood, motherhood, marriage and burial allowance, to old-age pensions and the provision of employment for the poor.[46]

[43] E. de Wet (n14) p. 1

[44] Louis Henkin *International Human Rights and Rights in the United States* (1983) p. 31/32

[45] E. de Wet (n14) p. 5.

[46] ibid. With regard to the categorisation of the development of human rights into three generations, as described in the section above, it therefore has to be accepted, that it is slightly incorrect to say, that social and economic rights emerged later than political rights. See: A. Andreassen 'Article 22' in: A. Eide, G. Alfredsson, G. Melander, L. A. Rehof and A. Rosas (eds.) *The Universal Declaration of Human Rights A Commentary* (1992) p. 323. Andreassen refers to the British social historian T. H. Marshall's interpretation of 'Citizenship' where Marshall stated that civil rights had been the great achievement of the eighteenth century, laying the foundation of the notion of equality of all members of society before the law; that political rights were the principal achievement of the nineteenth century by allowing for increasingly broader participation in the exercise of sovereign power and that social rights were the contribution of the twentieth century, making it possible for all members of society to enjoy satisfactory conditions of life.
46 E. de Wet (n14) p. 6 with further references.

b) The Nineteenth Century

Although social and economic rights did not find their way into constitutions in the nineteenth century, various labour organisations strove to achieve recognition for such rights, especially in the United Kingdom and Germany.

During the Industrial Revolution in the UK, it was a labour movement which propagated parliamentary reforms and the discarding of the class system[47]. In 1838 a People's Charter was promulgated which focused on the political emancipation of the proletariat and insisted, among other things, on male suffrage on the basis of equality. This People's Charter was expanded to include a bill of social and cultural rights in 1848. Among other things, it urged material equality, the protection of the labour force, the right of association, a fair wage, an official public holiday ('Labour Day'), fair working conditions, support during illness and the right to strike[48]. This, in fact, was the first bill that was expressly aimed at the protection of social and economic interests in England.

The Chartists endeavoured to base social and economic rights on the philosophy of Locke, who described ownership as a natural right vested in labour. On these grounds the Chartists raised the objection that labourers were not receiving an equitable share of the proceeds of their labour.[49]

In 1848 in the Pauline church ('Paulskirche') in Germany, the first noteworthy attempt was made to entrench the right to work as a social human right in the constitution. Although this motion was rejected, the imperial constitution ('Paulskirchenverfassung') of 1849 did, however, entrench the right to free public education in sections 155 and 175.[50] More important was the existence of trade unions for the development of social and economic rights in Germany, in the so-called German Empire, out of which some political parties were formed, namely the Social Democratic Party. During parliamentary debates, the Social Democratic Party regarded the right to work, the protection by the state of freedom of association, the reform of factory legislation, legislation with the view to the protection of children, youth and women, and the regulation of working hours, as fundamental elements in a dignified human existence.[51] Nevertheless, no social rights were entrenched in the Constitution of the German Empire of 16 April 1871 ('Bismarcksche Reichsverfassung'). However, the ban on freedom of association was lifted in 1869.

[47] ibid. with further references.
[48] ibid.
[49] ibid.
[50] ibid. p. 9
[51] ibid. p. 10

In the late-nineteenth century Germany, as a constitutional-dualistic monarchy, was to neutralise a grown up radical working class[52]. In 1878 it initiated a governmental campaign to destroy the growing social democratic movement by conceding several social and economic rights. After 1883, various insurance acts were promulgated in the areas on insurances against illness, accidents, disability and old age[53]. These items of legislation guaranteed the rights of the working class, as well as the duty of the state to protect the labourer. The state assistance was thus no longer to be regarded as charity, but as a right[54]. Flora and Alba conclude that the extension of social rights to the working class was a substitute for democratic reforms and the extension of political rights[55]. From this point of view, it becomes clear that, in fact, civil and political rights are interdependent and indivisible from social and economic rights and that the latter, in the course of time, did not emerge as second-generation after the previous rights. It is important to observe, however, that the evolution of socio-economic rights varied substantially in each country, in terms of and the political foundation of these rights.

c) The Twentieth Century

In the wake of the Russian Revolution, World War I and World War II, social and economic rights became more and more a matter of concern. Since 1945, human rights in general, including social and economic rights, became recognised as a most important matter to be dealt, with especially on an international level.

aa) Russia and Eastern European Countries

Economic, social and cultural rights became a serious part of human rights discourse after the 1917 socialist revolution in Russia, and were later adopted by the newly independent states. This revolution proclaimed the Rights of the Oppressed and Toiling Workers and Peasants. The socialist approach to human rights proceeds from the premise that *social opportunities and rights are not inherent in the nature of man, and do not constitute some sort of natural attribute, since rights and freedoms of individuals in any state are materially stipulated and*

[52] P. Flora and A. J. Alba (eds.) *The Development of Welfare States in Europe and America* (1981) p. 70. In their analysis of the development of welfare states in Western Europe, Flora and Alba conclude that "constitutional-dualistic monarchies tended to introduce social and insurance schemes earlier [in chronological and developmental time] than the parliamentary democracies for several reasons", primarily due to a) the greater need to solidify the loyalty of the working class, b) the higher capacity of already developed state bureaucracies, and c) because the former type of regime was dominated by landed interests that were able to shift the costs of social security schemes to the urban upper and middle classes by taxes on income and profit, as well as their ability to extract contributions from both by the employers and the employees.

[53] E. de Wet (n14) p. 10

[54] ibid.

[55] Flora and Alba 1981 (n52) p. 70

depend on socio-economic, political and other conditions of the development of society, its achievement and progress.[56]

From a constitutional point of view, the Russian Revolution of 1917 was the turning point in the struggle for social and economic rights. A bill of social and economic rights was written into the Constitution of the Russian Soviet Republic of 1918[57], which complied with Marxist theory[58] and was seen as merely a means to overthrow civil society.[59] Stalin allowed a bill of human rights to be included in the USSR Constitution in 1936 to bridge the gap between human rights and Marxism which mentioned first the right to work, leave, provision of material needs and education as 'social human rights'.[60] This scheme was adopted by all Eastern European peoples' democracies after 1945. From a Marxist view, social and economic rights would be meaningless in the classless, communist community for realisation of those rights would be a logical element of the society.

bb)Western European Countries

Social and economic rights in the Western European countries became recognised in different order than in the communist states. Based on the theory of Ferdinand Lassalle (1825-1864)[61], social and economic rights were implemented through the social democracies of Western Europe[62]. Inlike Marx and Engels, Lassalle advocated a democratic and evolutionary approach towards collective property, which should be directed and administrated by the state. This aim should mainly be reached by the implementation of voting rights for the working classes, so that they could have a lawful share in the state authority and in the social changes therein[63]. With the implementation of a general and equal right to vote, parties which have been fighting for both freedom and social justice became a major influence in legislation. The demand for social and economic rights increased steadily, as it became more and more clear that formal guarantees of equality and freedom were not sufficient to ensure that every person was, in fact,

[56] V. Katarshkin 'The Socialist Countries and Human Rights' in: K. Vasak (n6) p. 631

[57] E. de Wet (nl4) p. 10

[58] ibid. p. 7-8. Marx held civil and political rights as characteristics of civil community, aimed only at the individual and do not extend further than the egoistic individual. For him, individuals should see each other as people and not as exponents of specific classes or interests, or as having a specific standing in regard to property ownership. Taking into account that the civil state entertained individualistic human rights, in Marx view the state itself also had to be removed by revolution, from which a classless society should ensue.

[59] ibid.

[60] ibid. p. 10

[61] ibid. p. 8-9 with further references. E. de Wet stated: Lassalle was of the opinion that the state was a necessary structure within which individuals should participate in political and cultural activities and within which the community should be educated. From Lassalles point of view, the Classic-Liberal version of human rights, civil and political rights, were an empty concept because, politically speaking, labourers were not free and did not own any property. He propagated the necessity of collective property, in form of state-owned companies that would be responsible for production. In this way, in the new industrialised world, the state would be able to efect social equality and property. See also: Informationen zur politischen Bildung (1992) No. 215 *Der Sozialstaat* p. 6: Although Lassalle wanted as well to abolish private property, like Marx and Engels, he took the view that the state should simply protect political freedom, while the economic aspect is regulated by the community. With property owned by the community he wanted to overcome the separation between salary of the labourers and the profit of the employers.

[62] E. de Wet (n14) p. 8-9

in a position to make an equal use of his or her freedom but was rather dependent on state assistance for the realisation of freedom. Social security legislation in Western Europe and the Western hemisphere, therefore, developed social security or insurance systems to cover the rise of industrial accidents, sickness and invalidity, old-age, including survivors, and unemployment[64]. In the wake of this development, social and economic rights were enshrined on a constitutional level[65]. These rights are enshrined as state objectives or, in other words, as constitutional demands, which means that they serve as guiding principles, or legislative obligations, and not as right claimable before court by an individual.

There are controversial views as to whether thus anchoring the rights in the Constitution is an effective means to create a society with an equal social standard which to enables everybody to use his or her choice of freedoms. Another possibility is to entrench social and economic rights as subjective rights into a constitution, as has done South Africa in its, Constitution of 1996.[66] It can be concluded, however, that in the Western Europe in the twentieth century, there was a growing recognition that citizens should be protected against the interference of state activities on one hand, and, on the other, they should be assisted in the realisation of freedoms, by the assurance of an existence worthy of human beings.

Viewing the emergence and the historical development of the idea of social and economic rights it becomes obvious, that they are not the diametrically opposed to civil and political rights. They rather promote the capability to enjoy civil and political rights. It can be concluded therefore, that social and economic rights, on one hand, and civil and political rights, on the other, are interdependent. Although it is slightly incorrect to divide these rights into two generations from a historical point of view, a distinction is legitimate according to the different nature of these rights, regarding the duty of a state. Whereas civil and political rights oblige the state not to interfere, social and economic rights oblige the state to take action in order to enable everybody to have and enjoy a standard of life equal to all.

3. Participatory Human Rights as Third-Generation Human Rights

Third-generation human rights, unlike the first two, transcend national borders, and are in essence, rights against the international community of states as a whole. Third-generation rights, also known as 'solidarity', 'brotherhood' or 'green' rights, have as their basis, the global interdependence of both individuals and nations. Although they are rooted in the

[63] ibid. See also: Informationen zur politischen Bildung (1992) No. 215 *Der Sozialstaat p.* 6.
[64] Flora and Alba (n52) p. 52-57.
[65] For example: Weimar Empire, 11. August 1919; Portugal, 1933; Ireland , 1 July 1937; French Republic, 27. October 1947; Italy, 17. December 1947; E. de Wet (n14) p. 12.
[66] Implications and legal problems are carefully examined in: E. de Wet (n14) Chapter 5 p. 91-143.

Universal Declaration of Human Rights, which asserts that everyone is entitled to an international order in which their rights can be fully realised[67], their juridical basis was clearly suggested in the Barcelona Traction Light and Power Case[68], where the court suggested that states may have obligations *ergo omnes*. This view provides a sound basis on which to argue for the international protection of third generation human rights, such as the right to self-determination, to a healthy environment, to peace, and rights to development generally. *The essence of these rights is that they cannot be exercised by individuals as individuals but rather as group rights.*[69] African states made a signal contribution to the development of third generation rights: indeed, these were reflected in a regional human rights instrument for the first time in the African Charter on Human and Peoples Rights.[70]

4. Enforceability Human Rights against the State

Civil and political rights as pure defensive rights have always been directly enforceable before court by individuals against the state. Much controversy surrounds the direct enforceability of social and economic rights. Such a controversy does not exist with participatory human rights because of their very nature as group rights where it is difficult to claim them as an individual against the state. The South African transitional Constitution already contained social and economic rights and in general, there was no debate on whether or not to entrench social and economic rights at a constitutional level. The issue for the architects of the new South African Constitution was whether social and economic rights should be enforced through a progressive development of constitutional demands or in terms of a subjective right which can be asserted by an individual (subjective rights) before the court.

This section the different arguments shall be presented and appraised with reference to the South African situation.

a) Constitutional Subjective Rights

A subjective right in a constitution would clearly stipulate that each individual, for example, has a right to work, housing, health and education. The wording implies that the state would have to furnish each person with a job opportunity, a house, an opportunity to be educated and medical services. If this does not happen, the individual would have the right to challenge the state's performance in a court of law.

[67] Article 28 UDHR.

[68] *Barcelona Traction, Light and Power Co. Case* Belgium v. Spain ICJ Reports (1970).

[69] J. Glasewski *The Environment and the New Interim Constitution* (1994) SAJELP Vol. 1, p. 5; P. D. Glavovic *The Evolution and Articulation of Environmental Human Rights* (1996) SAJELP Vol. 3, p. 72

[70] O. Umozurike *The African Charter on Peoples and Human Rights*' 77 American Journal of International Law (1983) p. 902-912.

aa) Opposition

Opponents argue that the state, acting through its legislative and executive power, would, in this situation, not be able to control its actions and especially not its public expenditure, because of the fact that a positive intervention always gives rise to high costs. They are suspicious of the courts and the legal process[71], querying whether courts have the institutional capacity and competence to adjudicate these rights in the light of available resources.[72] They further argue that the constitutionalisation of social and economic interests, formulated as subjective rights, invariably result in the transfer of power to a court acting thus as super-legislative. Such a transfer of power towards the judiciary would be an infringement of the principle of the separation of powers.

Supporting this argument, one could go further and argue that this infringement renders unenforceability of social and economic rights for the individual, because these rights would not longer be subject to the jurisdiction of the court. Thus, social and economic claims would not be tried by court, but by legislative or administrative bodies, and would therefore lead to a repudiation of the state of law[73]. With regard to unenforceability, furthermore, the point is stressed, that constitutionalised social and economic rights lack precision with respect to the nature and extent of the obligations generated by them, because the circumstances that constitute their violations cannot be rectified immediately[74].

bb) Votes in Favour

Proponents of the entrenchment of subjective social and economic rights in a constitution argue that one must not distinguish between negative and positive rights. Social and economic rights are seen as indivisible from civil and political rights[75]. Including civil and political rights only would be a constitutionalisation of only one part of what is intended to be human rights. It is held that human rights generate three kinds of duty for a state. (1) the duty to respect; (2) the duty to protect and (3) the duty to assist and fulfil the right[76]. According to the indivisibility of human rights, these obligations on the state concern every right included. In regard to the costs, it is also argued that the enforcement of civil and political rights costs the state a lot of money and that the spending of money includes positive and negative aspects.

[71] D. Davis *The case against the inclusion of socio-economic demands in a bill of rights except as directive principles* (1992) SAJHR p. 482

[72] E. de Wet (n14) p. 92 with further references.

[73] ibid. p. 92-93. De Wet refers to Ackermann *Second Generation Human Rights.* Unpublished Paper. Cape Town.

[74] P. de Vos (n27) p. 244. De Vos criticises this point of view.

[75] ibid. p. 235-236.

[76] ibid. p. 245. De Vos follows Henry Shue: *Basic rights: subsidience, affluence and US foreign policy* (1980) p. 38-40.

Furthermore supporters of this arguments argue that social and economic rights should be included in a Constitution even if they can only be partially put into practice.[77] The effectiveness of a fundamental human right means only that the possibility must exist to give at least partial execution to the right. The mere fact that a specific economic right may not be enforceable or fully enforceable at a given time, does not strip away its status as a fundamental right. In regard to available resources, they should initially be seen as promises only to reduce, for example, the housing need and further as promises which promote the idea of the progressive realisation of the rights. In housing this encompasses a right to electricity, access to clean water and waste removal, even for the humblest houses[78].

In my opinion, the financial aspect cannot be ignored therefore social and economic rights have to be treated different from civil and political rights in terms of enforceability. The argument that the enforcement of civil and political rights also cause financial positive interventions cannot serve at the same time as a reason to enlarge duties with such an effect. The argument to entrench subjective rights independent from the possibility to enforce it leaves a right impracticable and therefore meaningless. Furthermore, the supporters do not mention the impact that the incorporation as a subjective right has on the separation of powers, which has to be upheld as a core value of a democratic understanding.

b) Constitutional Demands

An alternative approach to the inclusion of social and economic rights in a constitution is in the way of a constitutional demand. A constitutional demand does not establish a subjective right but works only as a directive principle. The state is therefore under an obligation to act in compliance with the directive principles laid down in the constitution. Any policy not in compliance with the constitutional demands can be challenged on their grounds. Furthermore, the inclusion of social and economic rights as directive principles influences not only governmental policy, but the legislation and the interpretation of existing statutes through the courts as well.

aa) Opponents

Opponents argue that the establishment of social and economic rights as a directive principle is unlikely to give the strength to the rights that they deserve. Rights that are not claimable by an individual are likely to be ignored or can easily be misinterpreted by the courts or the

[77] E. de Wet (n14) p. 94 with further references.
[78] ibid. p. 95 with further references.

administration that implements the rights[79]. Furthermore, it is difficult to prove whether the state ignored the directives or made no attempt to enforce them. Since the incorporation of social and economic rights as directive principles implies that there is no public participation in the enforcement and only difficult surveillance of the implementation, the risks that are mentioned by the opponents are a clear and present danger to the enforcement of the rights at all.

bb)Vote in Favour

On the other hand, the incorporation as a constitutional demand also has some advantages. Since the nature of a directive principle is that it constitutes a general aim of the state and all its powers that are bound by the constitution, it influences the action on all levels of the government and on all three powers, legislative, executive and judiciary. In the CASCARA, it is mentioned that the state is under an obligation to act to the maximum of its available resources[80]. Thus the state is in every case under the burden to demonstrate that it has done its utmost within the constraints of its available resources[81].

In my opinion, the manner of the attainment of social and economic welfare should be left to the democratically elected parliament . The incorporation as a directive principle, can therefore be of great value for shaping national policy. Nevertheless, the danger has to be considered that there is no possibility for an individual to claim the right once it is disregarded by the government and this weakens the enforceability of directive principles. The only influence remaining for the individual is the participation in democratic elections.

III. Application of Human Rights in the Private Sphere

1. The Issue

Irrespective of the question whether all human rights should be entrenched in a constitution as subjective legal rights claimable by the individual or as directive principles the question arises if human rights should be given an impact in the private sphere. Deciding upon whom the obligation of the fundamental rights fall, is crucial if human rights are to be effectively protected. However, it is also necessary to decide whether for instance state-held companies, state-sponsored sports teams, universities and individuals are to respect the constitution. In determining the reach of the fundamental rights two possible options are generally distinguished: firstly, according to the traditional so-called vertical approach, fundamental

[79] ibid. p. 88.
[80] Art. 2 (1) CESCR.

rights are seen as only restricting the state and its organs to judicial scrutiny. Secondly, according to the so-called horizontal approach, fundamental rights are not only applied in relationships between state and individual, but as well in relationships between individuals inter se.

Under the 1993 Interim Constitution of South Africa the Constitutional Court followed the international trend. In *Du Plessis v De Klerk* the majority of judges were of the opinion that the Bill of Rights can generally only be invoked in relations in which the state is involved. However, they recognised that courts have to develop the common law in disputes between private parties in keeping with the fundamental rights enshrined in the Constitution (indirect application).[82] Under the 1996 Final Constitution the legal situation is still open and various approaches are suggested. Start Woolman wants to allow individuals to invoke fundamental rights in relationship to other individuals, i.e. in private disputes. However, he demands that the private relationship in question be governed by law.[83] It is doubtful whether he wants to exclude parts of private life from judicial scrutiny, for he later defines a relationship in question as any dispute brought to court.[84] Dennis Davis, in an article written together with Stuart Woolman, apparently also favours the direct application of fundamental rights to relationships between individuals. However, from the examples given to illustrate the approach, one concludes that the authors focus primarily on the economic sphere when opting for an application of fundamental rights in the private sphere. Whether they want to extend protection of such rights to all aspects of domestic life remains unclear.[85] Thomas Bennet does not aim to permit individuals to invoke their fundamental rights in private disputes. Inspired by the German approach, he recommends that the right should only influence the common law applied in private relations, whenever a court has a broad discretion, or when a rule is vague and unclear. Thus he pleads for an indirect application of the Bill of Rights in disputes between individuals. Further, a certain part of private life should be completely excluded from judicial review. However, he fails to define what part he precisely means.[86] For Andrew Clapham the label "private" simply demarcates an area beyond the reach of constitutional

[81] S. Liebenberg *The International Covenant on Economic Social and Cultural Rights and its Implications for South Africa* (1995) SAJHR Vol. 11, p. 363.
[82] 1996 (5) BCLR (CC) 658, para. 67.
[83] S. Woolman 'Application' in: M. Chaskalson, J. Kentridge, J. Klaaren, G. Marcus, D. Spitz, S. Woolman (eds.) *Constitutional Law of South Africa* (1996) Chapter 10, p. 1-3.
[84] ibid. p. 38-39.
[85] D. Davis, S. Woolman *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* 12 SAJHR (1996) p. 361-404, esp. Fn 119; see also: H. Cheadle, D. Davis *The Application of the 1996 Constitution in the Private Sphere* (1997) 13 SAJHR p. 44-46.
[86] T. W. Bennett *The Equality Clause and Customary Law* (1994) 10 SAJHR p.122-130; Similar also J. de Waal *A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights* (1995) 11 SAJHR p.1-29; and Ackermann's dissenting judgement (1996) 5 BCLR (CC) 658, para. 89-112.

guarantees. He wants of necessity to examine every enumerated right to decide whether it is reasonable to apply it directly in the private sphere.[87] Finally, the Association of Law Societies of the Republic of South Africa is of the opinion that it makes little difference whether one favours the horizontal approach and allows the individual to directly invoke their fundamental rights in private disputes, or, alternatively takes the same position as the Constitutional Court, and insists that the common law has to be developed by the courts in the light of the Constitution (indirect application).[88] Consequently one is faced with the majority of states that reject the direct application of fundamental rights between individuals, a Constitutional Court which accepts this widespread opinion, and the controversial views of South African authors.

a) The Vertical Approach - The Traditional View

A traditional view has long been that vertical relationships between the state and its citizen are inherently different from horizontal relationships between citizens inter se. In many ways this orthodoxy amounted to a variation on the mainstream notion which had long sought to establish a dichotomy between public law and private law.[89] The idea underpinning this was that a bill of rights was an aspect of public law and should be restricted in its operation to the vertical realm of state/citizen relationship. It was considered that to allow a bill of rights to intrude into the realm of horizontal relationships, it would be unduly intrusive in matters that were adequately regulated by private law.[90]

This understanding of the application of fundamental rights is based on a liberal concept of the state. The underlying premise here is the image of the individual as autonomous. According to liberalism, individuals are seen as abstract entities which exist independently from each other. They choose their values, aims and pursuits as entities existing outside themselves. This view is illustrated by John Rawls' original position of completely independent persons and the "veil of ignorance", according to which individuals are

[87] A. Clapham *Human Rights in the Private Sphere* (1993) in Chap. 7; see also: Froneman J in *Gardener v. Whitaker* 1995 (2) SA 672 (E) at 684 H-I: *"There is no uniform and single answer to the question whether an alleged breach of a fundamental right contained in chap 3 of the Constitution* (IC) *can found an action between private individuals and entities, or whether it only applies between individuals and State organs. 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."*; Examining s. 8 of the final Constitution also D. Davis and H. Cheadle *The Application of the 1996 Constitution in the Private Sphere* (1997) SAJHR Vol. 13 p. 57-59.

[88] Association of Law Societies of the Republic of South Africa (ed.) *Human Rights Practice* (1997) p.39.

[89] A. Cockrell *Can you paradigm? - Another perspective on the public law/private law divide* 1993 Acta Juridica 227.

[90] This is the picture of a bill of rights that is defended in *De Klerk and Another v Du Plessis and Another* 1995 (2) SA 40 (T) at 471: *Traditionally bills of rights have been inserted in Constitutions to strike a balance between governmental power and individual liberty; to constitute a precaution against state tyranny. That was the reason for its insertion in the US Constitution. That has been their raison deter ever since.*

In *Gardener v Whitaker* 1995 (2) SA 672 (E) Froneman J pointed out 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* (at 683G).

For other defences of this notion of a bill of rights see in general Annél van Aswegen *The implications of a bill of rights for the law of contract and delict* (1995) 11 SAJHR p. 50-52.

purportedly ignorant of any information about their beliefs, class, status etc..[91] Based on such a perception of individuals, liberal theory assumes that every person shall be able to exercise autonomy; she shall be able to freely choose her values and desired goals. Consequently, each person should be given as much freedom as possible in order to freely construct her life. Therefore, the state should be generally prevented from interfering in the choices made by each individual. A realm of individual liberty has to be protected.[92] This is attempted in a twofold way. Firstly, in the sphere where individuals necessarily encounter the state (the public sphere), certain rights are conferred on every person.[93] These rights can be invoked when the state interferes in the free choice of individuals, threatening their autonomy. Threats to one individuals' autonomy by another individual are generally denied: thus a person cannot assert the rights in relation to another private person. A newspaper can, for example, assert its right to free speech when organs of government censor an article considered defamatory. However the newspapers are not able to invoke the right to free speech against an individual who claims damages for defamation. Secondly, the sphere where individuals encounter each other (the private sphere) is insulated from the state. A separate private realm is created which should be free from public power, in particular free from the interference of the legislator and the judiciary. This private sphere encompasses mainly the domestic and the market spheres. Here the state shall be neutral, so that individuals are able to exercise their liberties. For instance people shall be free to contend what they will, to contract whom they will, and to choose how to treat their children. However, in order to guarantee that all individuals can exercise their liberty within the community of individuals to the full, the various values and aims of the individuals must be co-ordinated. The same applies to the embodiment of their aims and values. To ensure that this is possible, in accordance with the liberties of the individuals guaranteed in the Constitution regulatory laws can be enacted. In this way Parliament can, for example, rule that a certain conduct is defamatory, or that a contract is only valid when both parties agree about its content.[94] In summing up the attempt to protect the individuals' autonomy and liberty, one must acknowledge that a dividing line between public and private spheres is drawn. In the public sphere, relationships are ordered according to fundamental rights, and consequently are also subject to constitutional scrutiny. In the

[91] J. Rawls *A Theory of Justice* (1971) esp. Chapt. 1.

[92] D. Bell *Communitarism and its Critics* (1993) p.4-6; M. Walzer 'The Communitarian Critique of Liberalism' in (1996) 18 Political Theory p. 6-23, p.7-11.

[93] Liberal theory is split into two traditions: on the one hand, a natural rights tradition based on John Locke, which sees these rights as natural rights. In this view, citizens retain inalienable rights, held in tradition based on Thomas Hobbes. According to this understanding, citizens entering into civil society relinquish all natural rights and possess only those rights granted by legislature and other lawmaking institutions. See: P. Brest 'State Action and Liberal Theory: A casenote on Flagg Brothers v Brooks' (1982) 130 Univ. of Pennsylvania LR p. 1296-1330, esp. 1296-1397.

private sphere every person is generally free in their choice; relationships need not be established according to fundamental rights and are thus also not subject to constitutional scrutiny. Only the legislature as a representative of many individuals is allowed to regulate the private sphere.[95]

The creation of a private realm impedes the judiciary in particular from imposing restriction on the private zone. The courts may apply fundamental rights in relations among individuals. Therefore in restricting the application of fundamental rights to the public sphere an attempt is made to limit the power of the judiciary.[96] This restriction serves first to prevent a pre-emption of individual liberties, so that each person may enjoy the freedom to determine her own life without the prescription of the state in form of the judiciary. In this way, an individual is for example free to decide whom to contract, whom to marry and whom to hire. Secondly, the restriction serves to prevent restraint of the legislature. It creates a zone for action which in the absence of laws, is reserved to Parliament. The elected representative is privileged to make regulations concerning the private sphere. In this way, Parliament is, for instance, able to restrict the freedom of contract by requiring equal treatment of all employees, by establishing a certain marital regime, or by enacting a duty to give a certain part of a heritage to close relatives.

Why should this traditional view insist that vertical relationships should be treated differently from horizontal ones? When pressed, the response seemed to be that vertical relationships are between fundamentally *unequal* parties, while horizontal relationships are between *equals*.[97] That is, the Leviathan state was thought to possess a monopoly on social power such that the purpose of a bill of rights was to protect the puny citizen against the abuse of that (public) power. The tacit assumption was that *private* power - situated in the realm of the 'market' rather than the realm of 'politics' - was not problematic in the way that *public* power was; only the latter required regulation by a bill of rights.

b) The Horizontal Approach - Challenges to the Traditional View

Over the last few decades this traditional view described above has come under increasing attack. The following two critiques shall be highlighted, because of their relevance to the new South African Constitution of 1996. The first critique is directed at the institutional nature of

[94] S. Avineri, A. de-Shalit *Communitarism and Individualism* (1992) p.2-3.

[95] The distinction between public and private sphere entails a number of dichotomies characterising a liberal understanding of the law: for instance the distinction between state and civil society; the distinction between criminal and administrative law as public law, and the law of torts, contract, property or commerce as private law; and finally the distinction between politics and law supposedly neutral and apolitical aimed to protect from unstable, redistributive tendencies of democracy. See: M. J. Horrowitz, 'The History of the Public/Private Distinction' (1982) 130 Univ. of Pennsylvania LR p. 1423-1426.

[96] L. H. Tribe *American Constitutional Law* (1988) 2ed. p.1691; Brest (n93) p. 1324.

the bodies which exercise social power in contemporary society. The second critique is directed at the types of law which the state might utilise to regulate private relationships in modern society. This two critiques will be discussed in turn.

The first critique seeks to draw attention to the rise of private power in contemporary society, such that it no longer remains tenable to seek to draw a clear line between public power and private power.[98] Today it is simply not the case that the state has a monopoly on social power.[99]Whereas once it was only the state which was thought to have at its disposal instruments of authority and oppression, in modern society we have seen the emergence of new fragmented centres of power, such as voluntary associations, trade unions, corporations, multinationals, universities, churches etc.[100] The emergence of large private institutions, wielding huge amounts of power over the lives of citizens, is simply a fact of modern life. Often this power can be as oppressive - and potentially as illegitimate - as the power wielded by the state. As Lord Brenning said in *Breen v AEU*:[101]

> *Institutions such as the Stock Exchange the Jockey Club and the Football Association control the destinies of thousands. They have quite as much power as statutory bodies... They can make or mar a man by their decisions.*

Opponents of the traditional liberal view argue: maintaining that the individual should decide upon its aims and values as freely as possible, the state's task is to increase the options available to every person.[102] Its main duty should not only be to provide as much space for the individual as possible, as contended by liberalism, for such a choice does not exist equally for all.[103] It should rather become active in creating conditions which ensure that any individual can pursue her aims, despite constraints of her social context.[104] In particular, the state should

[97] See, for example, I. M. Rautenback *General Provisions of the South African Bill of Rights* (1994) p. 76ff. Alfred Cockrell (n89) p. 228

[98] ibid. 227ff

[99] A. Clapham (n87) p. 137-8; A. Cockrell (n89) p. 228.

[100] The interpenetration of public and private power in modern capitalist society is fully explained by the notion of "corporatism". R. Unger *Law in Modern Society* (1976) p. 193 explains that:

> *private Organisations are increasingly recognised and treated as entities with the kind of power that traditional doctrine viewed as the prerogative of government. Society consists of a constellation of governments, rather than an association of individuals held together by a single government. The state that has lost both the reality and the consciousness of its separation from society is a corporate state.*

[101] *Breen v AEU* (1971) 2 QB 175 (CA) 190; Another example: In *Finnigan v New Zealand Rugby Football Union* (1985) 2 NZLR 159 at 179, Cooke J points out that:

> *while technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance... We are saying that the decision falls into a special area where a sharp boundary between public and private law cannot realistically be drawn.*

[102] F. Olsen *The Family and the Market: A Study of Ideology and Legal Reform* (1983) 96 Harvard LR p. 1497-1578, p.1578; I. P. Young 'Impartiality and Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory' in S. Benhabib, D. Cornell (eds.) *Feminism as Critique*(1987) p. 57-76 with the vision of an heterogeneous and open public which results from this state function.

[103] K. Klare *The public/Private Distinction on Labour Law* (1982) 130 Univ. of Pennsylvania LR p. 1358-1422, p. 1421-1422; A. C. Hutchinson, A. Petter *Public Rights and Private Wrongs: The Liberal Lie of the Charter* (1988) 38 Univ. of Toronto LR p. 278-297, p.295-296.

[104] As Davis and Woolman point out, there are still sufficient differences and heterogeneities among people which maintaine a meaningful notion of individual identity and autonomy although the context of the persons bears some resemblances, for instance a common language or a common culture. D. Davis, S. Woolman (n85) p. 384-385.

support and protect individuals who are not politically, socially and economically dominant, so that they are equally able to realise their life visions. Supporting and protecting people means conferring rights on them, so that they are able to claim their interests instead of being relegated to an inferior position.[105] They argue that power relationships come into play in the private realm, as they do in the public realm. Therefore, fundamental rights should be available not only in relation to the state, as asserted by the liberal view. Instead , the individual should be able to invoke these rights in any relation, regardless whether she finds herself confronted with organs of government in the public sphere, or confronted with another individual in the private sphere. In this way, the right to equality, for instance, would be applicable to someone wanting to work in a private company, because for this person it is irrelevant whether the state or a private individual does not allow her to work in a certain place. The same is true, they argue, for the right to free speech: it makes no difference to a newspaper whether its right to free speech is limited by the state or by an individual. Admittedly, persons in question will not receive their right in any case. Rather, a decision has to be taken as to whose liberty is to by restricted and whose liberty is to be extended. Thus, in the employer/employee relationship the right to property and to privacy of the employer, and the right to equality of the employee have to be balanced. In the case of the newspaper, the right to free speech of the paper and the individual's right to dignity have to be weighed up against each other. The liberal assertion that maximum individual freedom is achieved when the state does not interfere in private relations is often true only when investigating one side of the equation - the inherently more powerful party.[106]

Furthermore, it is argued that the limitation of judicial power was identified as the aim of the public/private distinction, along with the creation of a private sphere free from constitutional scrutiny. This restriction of the courts should serve the pre-emption of individual liberty. As demonstrated, individuals - restrained and determined by their contexts - cannot a priori choose freely, but need to be equally enabled to make choices. In that the fundamental rights destroy existing inequalities and hierarchies, constitutional scrutiny in public and private spheres does not threaten the liberty of individuals, but increases the options available to all. Further, the restriction of the judiciary should create a zone reserved for Parliament. In fact, Parliament disposes about the fundamental rights the individual can invoke. The courts do not create new rights but enforce existing rights.

[105] D. Kairys (ed.) *The Politics of Law. A Progressive Critique* (1982) p. 5-6.
[106] E. Chemerinsky *Rethinking State Action* (1985) 80 North Western University LR p. 503, 536, cit. in Woolman (n83) p. 34 esp. fn. 2.

The second critique of the orthodox view seeks to highlight the hidden role of the state in the regulation of ostensibly private disputes by the common law, in order to claim that the regulation of such relationships might just as well be classified as an aspect of public law.[107] The fundamental point is that state intervention is not limited to statutory law but occurs also when the state intervenes by means of the common law as articulated by the judiciary.[108] Endorsement of this point has far-reaching implications, exploited to devastating effect in the famous American case of *Shelly v Kramer*.[109] In this case, the supreme Court pointed out that

> *the petitioners were willing purchasers of properties... The owner of the property were willing seller; and contracts of sale were actually consummated. It is clear that petitioners would have been free to occupy the property without restraint. These are cases in which the states have made available to individuals the full coercive power of government to deny to petitioners, on the grounds of race or colour, the enjoyment of the property rights in premises which petitioners are willing to acquire and which the grantors are willing to sell... State action, as that phrase is* understood *for the purposes of the 14th Amendment, is state power in all its forms.*[110]

The perceived problem is that if this view is accepted, then there seems to be no logical stopping point; it would seem to follow necessarily that *all law* would qualify as state action for the purpose of constitutional review. This is what alarmed the Canadian Supreme Court in *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd*[111] where McIntyre J stated that

> *to regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of the Charter application to virtually all private litigation.*

c) The Arbitrariness of Maintaining the Distinction Between Horizontal and Vertical Relationships in the Constitutional Arena

It is important to appreciate that any attempt to draw a clear line between horizontal and vertical relationships in the constitutional context will inevitably produce of some arbitrary results. These arbitrary consequences occur on two levels and correspond to the two critiques of the orthodox view already identified above.

[107] A. Cockrell (n89) p. 229

[108] An acceptance of this point explains the otherwise obscure dictum in *Holland v Holland* (1973) 1 SA 897 (T):
In our country... marriage, although it rests upon the actual consent of the parties, is part of the jus publicum of the place where they are domiciled... Marriage is thus of interest to the State and its creation and destruction are regarded as matters which are to be determined by the state alone and not in any degree by the mere will of the spouses themselves.

[109] *Shelly v Kramer* (1948) 68 S Ct 836.

[110] Ibid. Chief Justice Venison p. 846

The first level of arbitrariness relates to the nature of the agency whose actions are sought to be subjected to constitutional review. If it is said that a bill of rights applies only to public bodies and not to private ones, then the line-drawing will inevitably produce arbitrary distinctions. For example: if corporal punishment by school-teachers is said to violate a child's constitutional right to bodily integrity, it would follow that teachers in state-funded schools could not beat pupils, while teachers in private schools could do so without violating a constitutional right. Or consider another example: a small state hospital (where most patients are covered by private health insurance and where most jobs are tendered out to private firms) would be subject to constitutional review, so that complaints about discrimination or anti-union practices would be justiciable in terms of a bill of rights, while a massive multinational corporation would not be subjected to the provisions of a bill of rights.[112] These distinctions seem difficult to defend in rational terms. It is precisely these types of arbitrary distinctions which are now enshrined in Canadian law after the *Dolphin Delivery* judgement; for example, Canadians now have to live with the fact a university is not subject to the Charter[113] but a community college is subject to the Charter in matters relating to compulsory retirement ages.

The second level of arbitrariness relates to the source of the law which is to be subjected to constitutional scrutiny. It seems to be a matter of pure chance whether a horizontal relationship happens to be regulated by statute or by the common law. For this reason, it seems to be quite arbitrary to maintain that a bill of rights applies if there happens to be a statute, but is excluded if the matter is regulated by common law devoid of statutory intervention. Once again, the arbitrariness is well illustrated by Canadian constitutional doctrine, for one of the consequences of the *Dolphin Delivery* approach is that private law is subject to more constitutional scrutiny in Quebec which has reduced its private law to a Code. The result seems to be arbitrary, inasmuch as it is difficult to appreciate rationally why the issue of constitutional scrutiny should be made to turn on an accident of history which means that while some common law rules are codified others are not.[114]

Despite the difference between the various positions, proponents of all theories generally agree upon three points; firstly, statutes when relied upon by the state are subject to fundamental rights, secondly, statutes when relied upon by an individual are subject to fundamental rights and thirdly, the common law when relied upon by the state is subject to

[111] *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* 33 (1987)DLR (4th) 174 at 196.
[112] Example derives from A. Clapham (n87) p. 145-146.
[113] *McKinney v Board of Governors of the University of Guelph* (1991) 76 DLR (4th) 545.
[114] This point has been made in South Africa by J. Sinclair 'Family Rights' in: Van Wyk et al *Rights and Constitutionalism: The new South African Legal Order* (1994) 502 at 522, who observes that many rules of common law have been enacted into statutes.

fundamental rights. Therefore the crux of the matter is whether a private party engaged in a private dispute based on common law can rely directly on fundamental rights.[115]

Provided that there is no statute rule: is it for example possible to invoke the right to free speech when writing an article for a private newspaper? Are children able to assert to their right to freedom from maltreatment when being hit by their parents? In terms of those formulations, the central issue is whether a bill of rights provides a basis for a substantive right held by one citizen against another private citizen in the absence of any statute; I call this direct application. This is compared to the view that a bill of rights only influences a court's interpretation and development of the common law but provides not a basis for a substantive right against another individual; I call this indirect application. A comparison shows that in the majority of democratic states generally only the public sphere is governed by fundamental rights, while the private sphere is not in principle.[116]

2. The Situation under the South African Interim Constitution

The case *Du Plessis v De Klerk* was brought before the Constitutional Court; the Court had to decide whether the Bill of Rights of the Interim Constitution has horizontal application or not. The Court stated its position as follows:

a) The Position of the Constitutional Court in Du Plessis v De Klerk

aa) The Case

In 1993 the Pretoria News and other defendants published a series of articles dealing with the supply of arms by South African citizens to the Angolan rebel movement UNITA. These articles suggested that private air operators and air strip owners - the plaintiffs - were aiding the Department of Foreign Affairs in supporting the Angolan war. The plaintiffs instituted action against the Appellants claiming damages for defamation. The defendants denied that the articles were defamatory or suggested malfeasance, and contended that they were published in the public interest. With the Interim Constitution (IC) after coming into force they asked to amend their plea, claiming their right to freedom of expression, s. 15 IC, as a defence. In the court a quo, J. van Dijkhorst refused to amend the defendants' application inter alia on the ground that s. 15 IC does not apply to disputes between private individuals and

[115] 1996 (5) BCLR (CC) 658, para. 67

[116] See for example for Canada: P. W. Hogg *Constitutional Law of Canada* 2ed (1985) p. 670-678; for Germany: Stern (n10) p. 1538-1550; for India: J. N. Pandey *Constitutional Law of India* (1994) p. 54-60; for the United States: L. H. Tribe *American Constitutional Law* Ed (1988) p. 1688-1720.

thus cannot be invoked in a civil action for defamation. He then referred the issue of the applicability of fundamental rights in private disputes to the Constitutional Court.[117]

bb)The Order of the Constitutional Court

With respect to the application of fundamental rights, the court ordered that such rights are not capable in general of being applied in any relationship expect that between persons and legislative or executive organs of state at all levels of government. Especially it found s. 15 of the 1993 Interim Constitution (IC) inapplicable in any relationship expect that between persons and legislative or executive organs of state at all levels of government. Thus, the defendants were not allowed to invoke s. 15 IC - the right to free speech - in their private dispute.[118]

cc) Further Holdings

Apart from this general commitment the judgement contains several qualifications with regard to the application of the Bill of Rights. Firstly, the Court admits that there might be rights enshrined in the constitution which by implication necessarily apply horizontally.[119] Secondly, the Court held that fundamental rights can be invoked in a private dispute when a statute or an executive act relied upon by the other party is believed to infringe the guarantees of Chapter 3 IC.[120] Thirdly, the Court ordered that governmental acts or omissions relying on common law can be directly attacked as being inconsistent with fundamental rights in any dispute with an organ of government.[121] Fourthly, the Court explicitly leaves open whether the mentioned governmental acts or omissions also include state activities in the commercial or contractual sphere.[122] Fifthly, the Court held that pursuant to s. 35(3) IC, courts have to develop the common law in disputes between private parties in the light of the spirit, purport and objects of Chapter 3 IC.[123] In this way the courts when applying common law rules, have to interpret them in a manner that conforms with the fundamental rights. Sixtly, the Court judged that the development of the common law is not a matter that falls (pursuant to s. 98 IC) within the

[117] For a summary of the facts and the case history see: (1996) 5 BCLR (CC) para. 1-11; also Woolman (n83) p. III-IV.
[118] (1996) 5 BCLR (CC) 658, para. 67. One could for instance, consider the right to free labour relations in s. 27 IC (s.23 of the final Constitution), which could be invoked against an employers who does not allow their employees to become members of trade unions.
[119] (1996) 5 BCLR (CC) 658, para. 62
[120] ibid. para. 49.
[121] ibid. Thus, a citizen could for example contend that a common law rule of criminal law is unconstitutional or that the state's failure to build shelters for street children is a violation of fundamental rights.
[122] ibid. Therefore it is still unresolved whether the state in buying pens for the use of the administration or in running a nuclear power station is bound by the fundamental rights.
[123] ibid. para. 60

jurisdiction of the Constitutional Court, but that this is the responsibility of all other courts including the Appellate Division. However, the Constitutional Court has to ensure that the courts fulfil their task properly. The exact boundaries of such supervision of the Constitutional Court over the jurisdiction of other courts were left open.[124]

b) Arguments of the Constitutional Court

aa) The Text of the Constitutional Provisions

In the opinion of the Court, s. 7(2) IC - which determines inter alia that the Constitution applies to all law - is solely to decide upon what kind of law the Constitution is applied. Thus, it does not state who is bound by the provisions of the Constitution.[125] This issue is treated in s. 7(1) IC, which says that the Bill of Rights binds the legislative and the executive organs of state. The fact that the judiciary is not mentioned leads the Court to conclude that the provision serves to prevent the courts being bound by the fundamental rights. This signifies that they cannot enforce private behaviour that runs contrary to constitutional provisions, for instance, the enforcement of a racist contract.[126] Furthermore, the Court contends that the general limitation clause, s. 33(1) IC, would be inappropriate to balance the interests of the litigants in a private dispute.[127] From s. 33(4) IC, which states that the Chapter 3 shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of s. 7(1) IC, the judges conclude that there must consequently be persons not bound by the Constitution.[128] The judges state further that s. 35(3)IC, which stipulates that in the interpretation of any law and the application and development of the common law, a court shall have due regard to the spirit, purport and objects of Chapter 3 IC, would have been unnecessary if the fundamental rights applied directly to common law disputes.[129] In addition, the Court holds that the provision does not state that the common law should be necessarily invalidated when considered unconstitutional.[130] Resorting to the Afrikaans version of the text, the Court argues that s. 4(1) IC, which provides that any law or act inconsistent with the provisions of the Constitution shall be invalidated unless otherwise provided expressly or by necessary implication in the Constitution, applies exclusively to statutes and acts and not to the common law. Additionally, the Court alleges that on a proper

[124] ibid. para. 63. For a summary of the Court's holding see also: Woolman (n83) p. IV-V.
[125] ibid. para. 44.
[126] ibid. para. 47.
[127] ibid. para. 55.
[128] ibid. para. 46.
[129] ibid.
[130] ibid. para. 60.

construction of Chapter 3 IC, the Bill of Rights only applies vertically. Therefore, when judiciary applies the common law in private disputes it is not bound by the fundamental rights in Chapter 3 IC. Consequently, this would be an exception by necessary implication, according to the provision of s. 4(1) IC. Common law which is not consistent with the provisions of the Constitution is thus not invalid.[131]

bb)The Context of the Constitutional Provisions

Alluding to the doctrine of the separation of powers, the Court points out that it is not the function of the Constitutional Court to ameliorate the law, but the function of Parliament.[132] Furthermore, the Court contends that nothing in the drafting history required the adoption of a horizontal interpretation of the fundamental rights.[133] From s. 98(2) IC and s. 101(5) IC, the Court then concludes that the its own jurisdiction is strictly separated from the jurisdiction of the other courts. Pursuant to s.98(2) IC the Constitutional Court is competent only to decide about constitutional matters, while it is not suited to the exposition of principles of private law. The development of the principles of the common law (see s. 35(3) IC) is instead the task of all other courts, including the Appellate Division as a final court of appeal. Thus, allowing individuals to invoke fundamental rights in private disputes based on common law would deprive the Appellate Division of its role as court of last instance in these matters, for the case would end up as a constitutional case before the Constitutional Court. The Constitutional Court would then have to create common law rules. According to the Court, this would be inconsistent with the general separation of the jurisdiction of both courts intended in drafting the texts.[134]

cc) Comparative Jurisdiction

The judges contended that a comparative examination shows that there is no universally applicable answer to the question of vertical or horizontal application of a bill of rights. They go on to briefly examine the legal situation in the United States, Ireland, Israel, Canada and Germany. The conclusion of this overview is that in each of these countries - except in some instances in Ireland - citizen can generally invoke fundamental rights only in disputes in which the state is involved. In disputes between private individuals, bills of rights are not applicable.

[131] ibid. para. 47-48.
[132] ibid. para. 53.
[133] ibid. para. 56.
[134] ibid. para. 57-63.

Nevertheless, in the opinion of the Court, Canada and Germany in particular have developed a strong human rights culture.[135]

dd)The purpose of the Fundamental Rights in the Constitution

The Court mentions only briefly that the purpose of all rights is ordinarily to protect the subject against legislative and executive action. Citing J. van Dijkhorst, it adds that traditionally bills of rights have been enshrined in constitutions to strike a balance between governmental power and individual liberty; as a precaution against State tyranny.[136]

As demonstrated above, the Court is of the opinion that the fundamental rights enshrined in the Constitution should be generally applied only in relationships in which organs of the state are involved; whereas in relationships among individuals one cannot resort to Chapter 3 IC (Chapter 2 of the Final Constitution). Instead, the courts shall have due regard to the fundamental rights when they apply and develop the common law in disputes among citizens inter se. Put differently, this means that relations in the public sphere need not be in accordance with these rights. Thus, the administration has to respect the right to equality when employing somebody while a private enterprise can, for example, exclude Indians from working in the firm. Consequently, courts are generally only allowed to subject the public sphere; the conduct of individuals is not affected.

3. The Situation under the South African Final Constitution

a) The Text of the Constitutional Provisions

aa) Section 8(1)

According to s 8(1) of the 1996 Final Constitution,[137] the judiciary is now explicitly bound by the provisions of the Bill of Rights. However, this could lead to the conclusion that the judiciary merely has to apply fundamental rights properly when asked specifically to interpret the Bill of Rights, and that it is further bound by provisions which directly concern the courts, for example the right of access to courts (s. 34) or the right of arrested, detained and accused persons (s. 35). In opposing such a view, one may argue that the judiciary was omitted in the previous version of the provision in the Interim Constitution (s. 7(1) IC). Nevertheless, it is unlikely that the courts should not have been bound in the above mentioned sense already by

[135] ibid. para. 33-41. For a critique of the arguments of the Court see: Woolman (n83) p. IV-XI and the concurring and dissenting judgements in Du Plessis v De Klerk (1996) 5 BCLR (CC) 658 para. 68-109.
[136] (1996) 5 BCLR (CC) 658 para. 45.
[137] In the text which follows, sections and chapters without reference are sections and chapters of the South African 1996 Final Constitution.

the Interim Constitution.[138] Supposing that the amendment in the Final Constitution not only functions to avoid confusion about the role of the judges, it could be argued that the judiciary should be bound by the Constitution, in the sense that when enforcing private behaviour, the judges have to conform to the Constitution. In this way, individuals are bound by fundamental rights, at least when they ask the state to carry out an action.[139] Litigants are therefore, according to this provision, able to invoke a right directly against another individual in a Court. Consequently it could be inaccurate to contend that the rights shall merely influence the courts' interpretation of the law. However, s. 8(1) can be interpreted in either way and does therefore not unambiguously allow for a horizontal application of the Bill of Rights. Furthermore, it is questionable which courts, especially the Constitutional Court, should be able to measure their decisions against the Constitution. Their conduct - the processing of law claims and the passing of judgements - is not an extraneous action to be tested against the Constitution - it is constitutive of the law, including the Constitution itself.[140]

bb)Section 8(2)

Section 8(2) states that natural persons are bound by the Bill of Rights: the extent to which the fundamental rights in a specific case are applied depends on the nature of the right and the nature of the duty. Accordingly the majority decision in *Du Plessis* that the interim Constitution does not bind private persons has been quite deliberately corrected by the wording of this section in the final Constitution. The Constitutional Court already pointed out that certain rights might be applicable directly in private relationships by necessary implication.[141] However, s. 8(2) is broader. It does not demand a necessary implication but applicability. The first use of the term *applicable* directs the court to look at the text and determine whether or not the provisions explicitly or implicitly apply to natural or juristic persons. Thus, on the one hand, considering the nature of the right means having to decide whether the right is capable of being applied to a private person. There are instances of explicit application - s. 15(2) imposes obligations on state aided institutions in respect of religious observances; or s. 29(3) placed obligations on private schools; or s. 13 prohibits everybody to subject somebody to slavery, servitude or forced labour. Furthermore, there are instances of implicit application - so the nature of the right may reveal that it is a right capable of being applied to private persons, for instance, the right to dignity pursuant to s. 10 (injuria,

[138] S. Woolman (n83) p. 22-23; J. de Waal (n86) p. 10.
[139] The new version precludes the Constitutional Court's argument from the omission. (1996) BCLR (CC) 658. para. 47; same result: D. Davis, S. Woolman (n85) p. 381; H. Cheadle, D. Davis (n85) p. 45-49.
[140] H. Cheadle, D. Davis (n85) p. 55.
[141] (1996) 5 BCLR (CC) 658. para. 62

defamation), the right to freedom and security of person according s. 12 (delict), the right to privacy pursuant to s. 14[142], or the right to freedom of association (s. 18).[143] Dennis Davis and Halton Cheadle argue persuasive that these rights already find horizontal application in the common law and in statutes and thus give an indication as to whether a right may be directly applied across the board.[144] Other duties may be also accomplished by a private person and consequently can be imposed on an individual, as for instance the right to equality (s. 9(4)), but also the right to life (s. 11), or the right to freedom of expression (s. 16).[145] Other rights are clearly not designed for individuals, but rather for the state's organs in fulfilment of their duty: for example s. 35, the right of arrested, detained and accused persons, or s. 33 the right to just administrative action. In a second use of the term *applicable* Dennis Davis and Halton Cheadle want to examine additionally to the capability of a right of being applied to private persons, with regard to every single right, whether it suites for an individual.[146] Hereby they examine closely the nature of the duty imposed by a right. It could be, they argue, *that the duty imposed by a right would be particularly onerous on a private person. For example, the nature of the duty contemplated in s. 26(2) namely to take reasonable measures to give everyone access to housing may, quite apart from the implications of the text, militate against imposing the duty upon private parties.*[147] Another example is given in this respect. *The right to life may impose a duty of care that on the face of it goes considerably further than the duty to rescue a person in a life-threatening situation. The potentially onerous nature of the duty may constitute grounds for not imposing the duty.*[148]

Nevertheless, one could contend that the rights enshrined in the Bill of Rights only oblige the legislator to enact laws which provide for equality, dignity, freedom of expression, as for instance explicitly determined in s. 9(4) second sentence and s. 27(2). However, s. 8(3) states that the courts have to apply the Bill of Rights when the legislature does not give effect to a right. Thus, should the legislature fail to enact laws concerning the right in question, the judiciary is not to leave this vacuum for Parliament, but has to enforce the rights itself.. Provisions like s. 9(4) second sentence could solely serve therefore as a reminder to the legislature. Consequently, depending on whether the right is suitable for a person, individuals

[142] ibid. p. 58.
[143] This formulation is more likely to test whether a juristic person can invoke the right. For instance, s. 28(1)(a), the child's right to name and nationality, is not suitable for a juristic person and cannot be invoked.
[144] H. Cheadle, D. Davis (n85) p. 58.
[145] ibid. p. 58-59.
[146] ibid. p.57-58, rejecting the contention that s. 8(2) should be circular in arguing that 'applicable' is used in the sense of suitable and capable.
[147] ibid. p. 58-59.
[148] ibid.

are bound according to the wording of s. 8(2). The provision undoubtedly has in view a direct application of the fundamental rights between private parties.

cc) Section 8(3)

Section 8(3) then describes how the Bill of Rights is to be applied in terms of s. 8(2). The subsection presupposes that the Bill of Rights is applicable in private relations, for it provides *...when applying the bill of rights to a natural person.* It further states that the courts have to apply the Bill of Rights where there is no common law rule, or no statute law giving effect to the right in question. This should be done by developing the common law either in order to enforce the right, or in order to limit the right in accordance with the limitation clause (s. 36). The courts have first to determine that there is no legislation giving effect to the right, and secondly to ensure that no common law rule exists which enforces the right. If no such rule exists, the courts have to develop common law rules, in accordance with the Constitution. One can for instance imagine a Christian landlord terminating a lease granting an unlimited time period, on discovering that her tenant is a Moslem. In absence of a statute rule, one has to resort to the existing common law rule, which entitles her to terminate the contract on due notice. Provided that this notice is given, the court has to find out whether the rule gives effect to the fundamental rights concerned. Thus, the tenant can invoke her right to freedom of religion, belief and opinion (s. 15), while the landlord can resort to her right to privacy (s. 14), and her right to property (s. 25).[149] The court has then to balance these rights against each other. It could theoretically decide in favour of the tenant, in being of the opinion that the right to freedom of religion is in this case more important than the right to privacy, and the right to property of the landlord. This result - limiting the right to property and privacy - has to be in accordance with s. 36. The court has then to invalidate the previous common law rule, and to establish a new rule stipulating that the lease cannot be terminated for reasons of the tenant's religion. The above stages of analysis are imposed by the text of s. 8(3). It is therefore hard to imagine how the sophisticated process of identifying the fundamental rights in question, and balancing them in accordance with s. 36, shall properly be done when one contends that the fundamental rights should only 'influence' the development of the common law.[150] Such a concept would lead to a situation in which the process of considering and evaluating the rights remains opaque. Consequently, a decision would be probably taken hastily, according to the former concepts. There would be no direct pressure upon the courts to develop the common

[149] ibid. p. 63-64.
[150] This is argued by T. W. Bennet (n86) p. 122-133 and (1996) 5 BCLR (CC) p. 658, para. 60.

law.[151] Thus, s. 8(3) giving effect to the fundamental rights, demands direct application of the Bill of Rights.

dd)Section 36

The Court and scholars allege that the limitation clause s. 36 is not suited to strike the right balanced between the fundamental rights of two private individuals, as undertaken by the common law, but serves only as a constraint on for the legislature when enacting laws. Furthermore, it is contended that in the common law a well developed system of evaluation is already in place. Some values, like legal certainty, could not be considered at all. Consequently, a direct application of the Bill of Rights would be impossible for it would imply resorting to s. 36.[152]Admittedly, the common law weighs up different interests in finding solutions. However, this does not mean that these common law solutions conform with the new democratic order. Instead, many rules have been established during the apartheid era, which are probably racist. The need for critical revision under the new Constitution is therefore obvious.[153] Furthermore, it is unclear why s. 36 should not be applicable to common law rules, for this section provides for arrangements to strike the balance between different interests. There is no reason why, for example, a rule which prohibits defamation and thus restricts the right to freedom of expression (s. 16) should not be tested against the limitation clause. The defamation rule needs to be *reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.*[154] Moreover, contending that the interests of two individuals cannot be balanced under s. 36, one fails to consider that several acts of Parliament deal with the interests of private parties, and thus have to find a balance in accordance with s. 36, for instance acts concerning the relations between private employer and employee, or between husband and wife. Furthermore, the need for principles, like legal certainty, could be considered under the terms *reasonable* and *justifiable* in s. 36(1), and especially under s 36(1)(b) and (d). Moreover and this is particularly important, the Constitution itself requires in s. 8(3) that the limitation clause be applied in common law disputes. There is no need for the Bill of Rights to merely influence the common law for the limitation clause is directly applicable in private disputes.

[151] Woolman (n83) p. 14
[152] (1996) 5 BCLR (CC) p. 658, para. 55; J. de Waal (n86) p. 14.
[153] Woolman (n83) p. 14.
[154] S. 36(1) of the 1996 Constitution.

ee) Section 39(2)

Finally, s. 2 and s. 39(2) too support the necessity of direct application of the fundamental rights. S. 2 provides that the Constitution is the supreme law, and that any law inconsistent with it shall be invalid. According to the principle of constitutional supremacy, all laws must be subject to the Constitution, both statute law and common law.[155] This is to say that common law provisions which do not conform to the Constitution must be declared invalid if they conflict with fundamental rights and are not capable of being subsumed pursuant to s. 39(2). This section provides that these provisions have to be tested directly against the Constitution, and not only be seen in the light of the Constitution.[156] S. 39(2) states also that the courts, when developing the common law, must promote the purport, spirit and objects of the Bill of Rights. The provision thus underlines the task of the courts to not only have due regard to the fundamental rights when interpreting the common law. Rather, the courts have to develop the common law in line with the Constitution, changing or replacing rules not conforming with the Bill of Rights. This suggests in practice that they have to dismiss the old provision and establish a new one. Thus, one could argue, that the Bill of Rights in the South African Constitution has a direct application in the private sphere, because in any precedent case which has to be decided - either because a common law rule has been invalidated or because there is no common law rule - the plaintiff or defendant in litigation relating to a conflict in a private relationship will argue with the Bill of Rights as to the extent that this is authorised in regard to s. 8(2)(3).

b) The Context of the Constitutional Provisions

aa) Separation of Powers

The Constitution contends that it is the task of the legislature to create new laws, to enforce the fundamental rights in the Constitution, whilst it is the duty of the judiciary to apply these laws. Were it to argue directly on the basis of the fundamental rights in a private law dispute, the judiciary would try to ameliorate the law, and thus usurp a function of the Parliament. This would be a violation of the principle of the separation of the powers, as enshrined in the principle of the rule of law in s. 1.[157] The limitation of judicial power was identified as the aim of the public/private distinction, and the creation of a private sphere free from constitutional scrutiny. This restriction should serve the pre-emption of individual liberty. Restrictions

[155] Kriegler's dissenting judgement in: (1996) 5 BCLR 658, para. 128.
[156] So however the Constitutional Court in: ibid., para. 47.
[157] ibid., para 53 and Sachs para. 175-190

placed on the judiciary should create a zone reserved for Parliament. Admittedly, in applying fundamental rights the judiciary does not create new rights, but only enforces the rights enshrined in the constitution. In fact, in regard to the development of the common law, which is developed by judges, it makes little difference whether fundamental rights are applied directly or indirectly. In either way the common law has to be developed in accordance with the Constitution. Nevertheless, arguing in this way would underestimate on consideration, namely that wording of the fundamental rights in the Constitution gives the Court a wide scope of interpretation and increases its power in the private realm when individuals are allowed to fund a claim on a fundamental right. Thus the core of the problem, the judiciary`s increasing power is the growing number of cases which have to be decided. With indirect application, many claims would not come before court.[158] Rather as a direct horizontal application of fundamental rights is dependent on conditions specifically laid out in s. 8 (3), legislative power is safeguarded and thus leads to a balanced share of power between legislature and judiciary. However, one has also to recognise that the doctrine of the separation of the powers was developed in the struggle against absolutist states mainly in the historical context of France in the 18th century. This is to say that it is not abstract dogma of general validity, independent from time and space. It cannot be abstract dogma which determines the extent to which the doctrine is put into practice. Instead, for determining the content of the separation-of-powers-principle in a specific context, the Constitution as a whole must be considered.[159] Contemporary constitutions do not distinguish clearly between the powers, but provide for breaches of the principle to establish a mutual control of the different organs. We must therefore alter our perception that the legislature creates independently laws, the executive exercises independently them and the judiciary applies them mechanically. In the South African Constitution, for example, Parliament can elect a new president and dismiss the old one (s. 86-89); the legislature can consequently influence the executive. Furthermore, it is not only Parliament that decides what laws will be in force, with no constraints upon it. The judiciary may review these laws and invalidate them should they be considered unconstitutional. Thus, non-compliance with the original principle is not a priori something abnormal. As pointed out above, the judiciary has to develop the common law (s. 8(3), s. 39(2)) to enforce fundamental rights. Thus the Constitution does not leave changes in the legal

[158] A useful explanation is offered by Andrew Clapham for what a limitation of the application of fundamental rights to the public sphere means in regard to the development of the common law. In the course of a reference to the New Zealand Bill of Rights, which ostensibly limits its application to the public sphere, he states: *the New Zealand formula does not permit one party to bring the case before the courts by claiming a remedy against a non-governmental power solèly basing the case on the rights contained in the Bill of Rights. The Bill of Rights only comes into play once the case is before the judge.* A. Clapham (n87) p. 341.

[159] K. Hesse *Grundzüge des Verfassungsrechts der Bundesrepublik deutschland* 19ed (1993) p. 196-198.

status quo exclusively up to the legislature, but entrusts the judiciary with this task. The separation of powers, as set out by the Constitution, is as a result not absolute in this regard, but encompasses the possibility of violating the rules of its own working. The principle of the separation of the powers can therefore not be regarded as having been violated.

bb)Legal Certainty

The Constitutional Court alleges that allowing individuals to invoke their fundamental rights in private disputes would lead to uncertainty concerning what law is. Especially when a common law rule is held unconstitutional, a gap would be left in law.[160] Admittedly, there would be some uncertainty as to which common law rules will be upheld and which declared unconstitutional. However, the principle of legal certainty conflicts in this case with the principle of supremacy in s. 2, and the need for conformity of the common law with the fundamental rights. Balancing these two maxims, some uncertainty about which common law rule will remain in force seems more appropriate than the maintenance of unconstitutional rules, for example racist ones. Stressing a prevailing need for legal certainty would mean undermining the process of transition of the legal order. Furthermore, the constitution provides that all courts, including the Constitutional Court, can develop the common law themselves (s. 8(3), s. 39(2), s. 173), so that there is no danger of a legal vacuum in law.

By allowing direct application of fundamental rights in the private sphere, legal uncertainty could be caused also by an overstrain on the Constitutional Court. Allowing individuals to invoke their fundamental rights in any dispute could mean placing too much of a burden on the Constitutional Court, for it would be always the Court of last instance in these cases. Thus the number of constitutional claims could increase dramatically[161] and could lead to cases being judged in an unacceptably long period of time, during which the legal order would remain uncertain. One reason for a dramatic increase in cases will be the fact that relations between individuals are far more complex than the relations between individual/state; the former involve not only power, but also love, hatred, family, kinship etc.[162] It must be admitted that the Constitutional Court will create case law, in deciding on cases. Thus litigants and courts have a guideline as to which issues are likely to succeed and which issues are likely to fail and thus in long term will reduce the number of cases brought before the Court. It could be argued that an overstrain on the Constitutional Court will thus only exist for the time of

[160] (1996) 5 BCLR (CC) 658, para. 53-59.

[161] This fear is likely to be a motive behind the "mittelbare Drittwirkung" (indirect application) approach of the German Constitutional Court. By generally allowing only an indirect application of the fundamental rights, the cases in which the petitioners can invoke a violation of the German Basic Law are restricted. In this way, the Federal Constitutional Court always stresses that it is not a supreme appellate court. See: BVerfGE 7, 198.

transition and should therefore be accepted. I think that this argument falls too short. A constantly changing society will always be confronted with new social situations and therefore precedents disputes, thus new cases will constantly come into being. The Constitutional Court will be obliged to decide those disputes between individuals although it might be obvious that they will not succeed. Therefore the Constitutional Court will continuously be confronted with a high number of cases. However, s. 8(3), s. 39(2) and s. 173 provide that courts have to develop common law and s. 8(2)(3) explicitly provides for a horizontal application of the Bill of Rights. Thus, whether the Constitutional Court will be overstrained and therefore lead to an legal uncertainty or not is a mere problem of the Court's organisation and cannot serve as an argument to dismiss direct application of fundamental rights in the private sphere.

cc) Comparative Jurisdiction

The Constitutional Court mentions several countries, especially Germany and Canada, in which fundamental rights are not applied in private relationships, and which have nevertheless developed strong human right cultures.[163] Whereas the South African Constitution may be in many respects similar to those of Germany and Canada, one should not overlook differences. The Constitution and its interpretation can never be seen as abstract from the society it is created for, but as response to demands in a specific state. The South African Constitution has to deal with a country which has one of the most skewed patterns of wealth in the world.[164] Furthermore, in South Africa oppressive measures were not confined to state/individual relations but equally to relations among individuals. Thus, the abuse of power is more likely to be perpetuated by private persons than in other countries.[165]

In such a grossly devised society the need for an application of the fundamental rights in the private sphere is much more pressing in order to abolish inequalities than in very homogeneous societies like Germany, or societies with large middle classes, like both Germany and Canada.

In the US, the Bill of Rights is generally only applied in case of an action of state. Thus, individuals are in principle not bound by the fundamental rights. This results from the fact that the US Constitution is a classical liberal Constitution, which strongly stresses individual freedom. However, the Supreme Court decided that courts asked to rule on private conduct,

[162] See A. Clapham (n87) p. 298-299 (esp. fn 2)

[163] (1996) 5 BCLR (CC) 658, para. 33-41.

[164] Woolman (n83) p. XIV.

[165] See also Madala's dissenting judgement, (1996) 5 BCLR (CC) 658, para. 154, 163. Concerning Germany, the constitutional Court does not mention that the German civil law is nearly entirely codified, and thus subject to judicial scrutiny. in imposing the doctrine of "mittelbare Drittwirkung", the German Constitutional Court only avoids supervising every interpretation of civil law. In South Africa, not

are bound by the Bill of Rights, in that they are not allowed to enforce behaviour which does not conform to the fundamental rights. Consequently, individuals are subjected to constitutional scrutiny.[166] Thus, one can assume that the Court acknowledged that in US society, in which large differences in wealth exist among citizens, an effective direct application of fundamental rights is necessary.[167]

Irish courts also interpret the Constitution to directly address private relationships.[168] Ireland, like South Africa, lack a large middle class. The need for a special support of individuals who are not dominant is therefore recognised as being important.

In Namibia, which is likely to have a structure of society comparable to South African society, the Constitution provides in Article 5 that the Bill of Rights will also be applicable too to natural and legal person. Realising that the divisions within the society have to be abolished, it apparently favours a direct application of the Bill of Rights.[169]

Summing up the comparison one has to acknowledge that in homogeneous countries an direct application of a bill of rights is rejected. In countries in which large disparities exist - and which are therefore comparable to South Africa - fundamental rights are often applied among individuals.

dd)The Purpose of the Fundamental Rights in the Constitution

aaa) Transformation of the Society

One of the aims of the Constitution, as set out in the Preamble, is to heal the divisions of the past and to build up a society based on democratic values, social justice and fundamental human rights. The Constitution aims inter alia to abolish the divisions and large inequalities in South African society. It is not exclusively designed to respond to an oppressive state, as in German Constitution, but intends to react to an apartheid state in which oppression was not only confined to government organs, but was also largely institutionalised in private life.[170]

One of the main effects of isolating the private sphere from constitutional scrutiny is - as demonstrated - that existing hierarchies and roles are ratified. Thus, not applying fundamental rights in relations between individuals would imply cementing the status quo of the former apartheid state. It would be rendered impossible, for instance, to take measures against large

only a reinterpretation of statute law by the Constitutional Court would be impossible, but rather a large part of the private law - the common law - would be entirely excluded from constitutional review.

166 L. H. Tribe (n96) p. 1688-1720.

167 This is neglected by the Constitutional court (1996) 5 BCLR 658 (CC) para. 33.

168 Woolman (n83) p. VII, rejecting the contention of the court that this interpretation is a mere aberration.

169 Woolman (n) p. VII.

170 See: (1996) 5 BCLR (CC) 568, Kriegler's dissenting judgement para. 125, 147 and Madala's dissenting judgement para. 157-159.

racist enterprises refusing to employ certain groups of citizens; for the right to equality would not be applicable. Similarly, several common law rules which were at the basis of the former state would be excluded from constitutional scrutiny, and thus remain in force. Probably only vaguely influenced by fundamental rights, they would continue to perpetuate the legacy of the former order. The will to change state and society would be largely undermined by not applying fundamental rights to the private sphere. Therefore, not binding individuals by fundamental rights would clearly be contrary to the very purpose of the Constitution.

bbb) Departure from Liberalism

Considering the purpose of the Bill of Rights in the Constitution, one could contend that the document aims to protect individuals against the power of the state. The Constitution would thus be an instrument to impede the state from interfering in all spheres of private life.[171] The shortcomings of this liberal understanding of fundamental rights have been already pointed out. Liberalism - it was argued - does not create autonomy equally for all people, for it does not consider private power threatening the freedom of an individual's choice, and moreover confirms existing roles and hierarchies. Furthermore, the South African Constitution is not a classical liberal constitution in the sense of seeking to guarantee maximum freedom by simply prohibiting state intervention in private matters. The Constitution provides for several social and economic rights to housing (s.26) and the right to education(s.29). Thus, the Constitution requires that the state become involved in affairs, which in a classical liberal sense, would be treated as part of the private sphere, and thus exclusively as a matter for the individual. By additionally imposing compulsory affirmative action (s. 9(2)), substantive equality - as opposed to the liberal concept of formal equality - shall be obtained. The Constitution thus expresses concern for disadvantaged groups. It recognises that the state should not remain passive concerning developments in the private sphere, but must take measures to guarantee autonomy equally for all. Consequently, it does not follow the classical liberal distinction between a public sphere, and a private sphere free from state intervention; but contends that the state should be impeded from interfering in the private realm. The judiciary needs to cross the dividing public/private line to establish autonomy for all, by enforcing fundamental rights. A consistent interpretation of the Constitution would require judges to apply the Bill of Rights in the private sphere, in relationships of citizens inter se.

[171] So the Constitutional Court ibid. para. 45.

IV. Conclusion

As the historical development of implementation of fundamental rights on a constitutional level shows, fundamental rights were in general only vertically applicable, in relationships between state and individual. This approach is based on a liberal concept of the state. Removing the public sphere from the private sphere sought to limit judicial power and to create a private sphere free from constitutional scrutiny. This restriction should safeguard individual liberty. With the emergence of social and economic rights on the constitutional level, the need for positive action by the state is asserted to enable everybody to enjoy his guaranteed rights. Within the vertical approach, including such rights in the South African Final Constitution already triggered a controversial discussion in terms of their enforceability. Furthermore, the question of whether to provide for direct applicability of fundamental rights in the private sphere, thus a horizontal application or not, was hotly debated.

From a historical point of view, the development of social and economic rights started after the Second World War; nevertheless, there has been a demand for such rights throughout the human history. However,for as long as demands for social and economic rights have existed, they were most likely to be denied or not practicable due to the costs. Therefore, when the New South African Constitution was drafted, there was a debate as to how to give effect to the social and economic rights it contained. The need to incorporate social and economic rights was obvious, since it was in the nature of the former regime not only to deny civil and political rights, but also to weaken the social and economic position of the majority of the population. The problem of enforceability has however recurred. Since the test for a right is its practicability, what should have been considered more carefully was whether to enshrine the social and economic rights in the Bill of Rights or to incorporate them as directive principles. However it is quite comprehensible that the writers of the Constitution with an eye to the apartheid regime, wanted to give people a strong Bill of Rights with all the subjective rights in it that they had been denied for so long. On the other hand, it is debatable whether people will see any change and therefore whether they can come to trust their constitution if the rights enshrined are, for economical reasons, not enforceable and unclaimable. It might bring the state close to a situation of bankruptcy if attempts were made to give effect to all the rights due to being obliged to seek to do so, while expressing such rights as a general directive principle, would have shaped national policy. The state would have been able to work with available resources and would have been under the obligation to do its utmost. This, however, includes the danger of abuse, but at least it does not lead to the disappointment arising when

people receive rights from a new constitution and see that ultimately nothing changes because the rights are not enforceable. The enforceability of any right is always the key to its enjoyment and exercise and it might be easier to give effect to a well-considered development program which may be asserted by individuals than to thousands of rights. Nevertheless, the final interpretation of social and economic rights under the new Constitution remains in the hand of the Constitutional Court. One of the main questions that need to be answered in the near future is what extend it will be possible for individuals to claim their rights.

With the perception of the rise of private power in contemporary society the traditional view that there is inherent difference between private/public relationships has come under increasing attack. Whereas South Africa in its Interim Constitution followed the international trend of drawing a distinction between the public/private sphere, it did not do so in its 1996 Final Constitution. The analysis of the text, context, and purpose of the constitutional provisions demonstrates that the jurisprudential understanding of the applicability of fundamental rights has changed. The Final Constitution of South Africa allows in principle a horizontal application of fundamental rights, thus between individuals inter se. There is no reason to exclude any relationship from constitutional scrutiny by contending that the relationship is inherently private in nature as s. 8(2) provides that *provisions of the Bill of Rights bind a natural and a juristic person.* Both the public sphere and the private sphere, including family and market, have to conform to the fundamental rights. However, this does not result in an Orwellian society where there would be no privacy at all and where the judiciary dictates whom to invite for dinner and whom to marry. Rather the right to privacy is still protected under s. 14 and has to be balanced with the rights invoked in a dispute. The Final Constitution of South Africa has to be seen in the light of its history and its existing social disparities caused by the apartheid regime. Its aim, as stated in the preamble, is to *heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights.* The legislature is likely to be unable to immediately implement all the necessary laws,[172] and to bring the existing law in line with the new Constitution. In managing the transformation of the legal order, a strong judiciary, which helps to enforce fundamental rights, serves as a stabilising and accelerating factor in this process. Consequently, South Africa has implemented such a strong judiciary, allowing constitutional scrutiny in private disputes.

[172] See: section 21 of schedule 6 of the 1996 Constitution.

However, giving the Bill of Rights a direct horizontal application raises the problem of a vast number of cases being brought before the Constitutional Court especially during the time of transition. This could lead to legal uncertainty and thus should not be feasible in practical terms. The Constitutional Court not be able to give a ruling on such cases within a reasonable time period, the intended effect of supporting the legislature in managing the above-mentioned transition could be neutralised. A well-designed statute is much better suited to give legal certainty for many different possible disputes. Furthermore, does in this regard, the legislature directly represent a democratically-elected parliamentary power lying in the hands of many whereas with the judiciary, the power lies in the hands of a few judges. Therefore, one could argue, that in such a situation judgements are not based on democratic values. Although this argument is not convincing - given that a horizontal application of fundamental rights is conditional to the specifically provided circumstances of s. 8(3) and thus in its impact on courts does not violate the principle of the separation of powers - South Africa should develop well-balanced statutes rather than the judiciary common law in order to give the fastest possible legal certainty. However, one has to accept that, on the one hand, the courts will have an increased political power in the private realm while developing common law in areas where no law exists, and on the other hand, that the Constitutional Court will have to decide many cases which are obviously unfounded and thus will weaken its effectiveness in deciding important constitutional disputes.

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