# Transformative constitutionalism and the development of South African property law (part 1)*

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## 1 *Introduction*

One of the most complicated and controversial questions in contemporary South African legal theory[1] is whether (and how, and why) constitutional provisions — particularly the rights provisions in the bill of rights[2] — can and should permeate (or affect the development of) private law.[3] In one sense,

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[1] See n 11 below. I use the term "legal theory" here to refer to one area of legal theory only, namely legal thinking about the effects of the new constitutional order, and specifically the bill of rights, on private law (see n 2 below), although other aspects of legal theory inevitably enter into the discussion (see text surrounding n 4 and n 5 below).

[2] As will appear from the discussion below it is unnecessarily restrictive to discuss this issue only with reference to the bill of rights, as other constitutional provisions can also have an effect on private law. However, the effect of the bill of rights is most directly visible and therefore of more obvious importance.

[3] Defining the problem accurately is difficult. As will appear from the discussion below, describing it purely in terms of the horisontal application of fundamental rights is unnecessarily restrictive for various reasons. Even though I am focusing my attention here on the effect of the constitution on private law, discussing the problem in terms of the effect of the constitution on private law can be too restrictive as well, because the same arguments apply to the effect of the constitution in criminal or labour law. The problem is characterised vividly in the title of a German source that I refer to extensively in part 2 of this article : Ruffert *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: Eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes* (2001). As Ruffert's analysis and the rest of this article indicate, this problem is much larger than the relative temporal priority or rank of legislation vis-à-vis the constitution — Ruffert 26 refers to it as a "*grand thème*" of contemporary German constitutional theory. For the moment I am leaving the exact nature of the effects that the constitution might have in private law open, but they could include: (a) possible private-law side-effects of "normal" defensive enforcement of fundamental rights against the state; (b) private-law effects of direct and (different kinds of) indirect horisontal enforcement of fundamental rights; (c) amendment of private-law rules caused or inspired by the fundamental-rights and other constitutional provisions; and (d) constitutional enforcement of so-called protective duties of the state towards private interests. These aspects are explained and analysed further below.



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this may seem like just another instance of the old problem of properly articulating the relationship between public law and private law, but I intend to analyze the problem with reference to the more problematic, dynamic[4] aspirations of what Klare calls "transformative constitutionalism". In what has become an influential article in South African legal discourse,[5] Klare described transformative constitutionalism as "a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."[6] In this context, the project of defining the effect of the constitution on private law assumes urgency and significance beyond traditional (spatially conceived)[7] debates about the "proper" relationship between public and private law. In what follows I will analyse the effect of the constitution on private law from Klare's dynamic perspective of transformative constitutionalism, and therefore a few introductory remarks

[4] In this article the relationship between public and private law is considered in what Schlag "Rights in the postmodern condition" in Sarat and Kearns *Legal Rights: Historical and Philosophical Perspectives* (1996) 263 267-270 describes as the "instrumentalist" — as opposed to the "analytic" — aesthetic of law. The analytic aesthetic "enacts a rhetoric of order" in which concepts are ordered according to their proper place and spatial relationships between them; the instrumentalist aesthetic presents rights as "energy sources" that inspire or motivate change and reform. As Schlag points out (eg 294-300), the instrumentalization of rights rhetoric means that change, progress or reform is implicitly preferred to order, stability and certainty. The dynamic or instrumental notion of constitutionalism is obviously more problematic, as is illustrated by Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* 146-188. See further on the metaphoric stability of private law in the analytic aesthetic and the dynamic function of public law Botha "Metaphoric reasoning and transformative constitutionalism" 2002 *TSAR* 612 627 n 71.

[5] The term "transformative constitutionalism" was used by Klare (n 4) to describe the aspirational aspect of the new South African constitutional order, which is still shaped very strongly by the remnants of a fundamentally conservative legal culture. Like some of my colleagues, I am attempting here to substantiate a positive response to Klare's question whether transformative constitutionalism is a viable project for South Africa. For South African publications inspired by Klare's notion of transformative constitutionalism see especially Botha "Metaphoric reasoning and transformative constitutionalism" 2002 *TSAR* 612-627; 2003 *TSAR* 20-36; Moseneke "The fourth Bram Fischer memorial lecture: transformative adjudication" 2002 *SAJHR* 309-319; Botha "Freedom and constraint in constitutional adjudication" 2004 *SAJHR* 249-283; and further Currie "Judicious avoidance" 1999 *SAJHR* 138 152; Osborne and Sprigman "Behold: angry native becomes postmodernist prophet of judicial Messiah" 2001 *SALJ* 693 699; De Vos "A bridge too far? History as context in the interpretation of the South African constitution" 2001 *SAJHR* 1 2; De Vos "Grootboom, the right of access to housing and substantive equality as contextual fairness" 2001 *SAJHR* 258 260; Bilchitz "Giving socio-economic rights teeth: the minimum core and its importance" 2002 *SALJ* 484 486; Du Plessis "Between apology and utopia — the constitutional court and public opinion" 2002 *SAJHR* 1 9. In addition to the introductory remarks below, I return to the notion of transformative constitutionalism in the South African context in the final section of the article (part 2).

[6] Klare (n 4) 150. See the concluding section of the article for further discussion of Klare's notion of transformative constitutionalism (part 2).

[7] in Schlag's terminology (n 4). In simplified terms, one could say that private law and public law would, in the analytic aesthetic, represent two spatially differentiated and related entities or fields, whereas the instrumentalist aesthetic would present them as two parts or aspects of a dynamic process of change. In the former aesthetic, the theme of this article assumes the nature of a "border dispute", in the latter it acquires a more complex and problematic character involving tension and movement between two imperfectly distinguished aspects of a single process. It would be foolish to claim that the instrumentalist aesthetic is a perfect or the best paradigm for discussing the effect of the constitution on private law, but for the purpose it is clearly less restrictive than the analytic alternative.

are necessary to sketch out some of my assumptions and hypotheses about the dynamics of legal change in the South African context.

When the new South African constitution explicitly declared itself the supreme law of the land[8] and granted the courts the power of constitutional review[9] it created a new adjudicative dilemma of simultaneously upholding the supremacy of the new constitution and the integrity of a well-developed and established system of private law.[10] In the transformative context of the new South African democracy constitutional supremacy was implemented against the background of a history characterised by inequality and injustice, and the constitution must be seen as an explicit attempt to transform legal and social institutions and power relationships towards greater equality and justice. Although the tension between constitutional supremacy and the integrity of private law also attracts attention in other legal systems,[11] the historical, social and political context against which this issue features in South Africa is particularly important. The configuration of a new supreme constitution, judicial power of constitutional review and a strong moral and political impulse to-

[8] s 2: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed." See further s 7, 8, 38, 39.

[9] s 172(1): when deciding a constitutional matter within its power, a court must declare that a law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency, and make any order that is just and equitable, including an order that limits the restrospectivity of the declaration of invalidity and an order to suspend the declaration of invalidity for a period to allow correction.

[10] South African private law consists of a mixture of largely uncodified common law (of mixed Roman-Dutch and Anglo origin) and ad hoc legislation; see Zimmermann and Visser "Introduction: South African law as a mixed legal system" in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 1-30. Constitutional review affects pre-existing legislation, new legislation and also uncodified common law (because all law is subject to the constitution: s 2; and the bill of rights binds the legislature, the executive and the judiciary and "applies to all law": s 8(1)). As will appear from the discussion below, the issue is arguably less controversial with regard to private law legislation created subsequent to the constitutional provisions in question, because in such a case it is "normal" that later law has to conform to pre-existing (not to mention superior) law, and it is also less likely that legislation will be promulgated that is fundamentally in conflict with the spirit of the new constitutional order. Moreover, newly conceived, ordinary legislation is easier to subject to constitutional control and amendment than is the case with ancient common-law principles. However, as will appear from the examples discussed below, even ostensibly less controversial new legislation creates some problems because smaller conflicts between the constitution and private law legislation will still occur.

[11] As will appear from section 3 below this problem has been a prominent issue in South African constitutional theory since about 1990, and as appears from sections 5 and 6 it has enjoyed considerable theoretical attention in German constitutional law and in international law for at least three decades. Generally speaking, American law does not distinguish between private law and public law as sharply, and the application question assumes a different form because of the state action doctrine; see generally Tribe *American Constitutional Law* (1988) 1688-1720. For various reasons similar or related issues have also emerged in Dutch literature (see Van Maanen "De onrechtmatige rechtmatige overheidsdaad bij de burgerlijke rechter: Zoektocht naar de kwadratuur van de cirkel" in Hoitink, Van Maanen, Van Ravels and Schueler *Schadevergoeding bij Rechtmatige Overheidsdaad* (2002) 7-89; Smits "Constitutionalisering van het vermogensrecht" in *Preadviezen voor de Nederlandse Vereniging voor Rechtsvergelijking* (2003) 1-163), English (see MacQueen "Delict, contract, and the bill of rights: A perspective from the United Kingdom" 2004 *SALJ* 359-394) and Scots (see Boyle, Himsworth, Loux and MacQueen (eds) *Human Rights and Scots Law* (2002)) recently; and see further Friedmann and Barak-Erez (eds) *Human Rights in Private Law* (2001). Parts of the problem relate back to older debates in English and American theoretical literature. For reasons of space and time I will not discuss the Dutch, English and Scottish debates here.

wards social and legal transformation inevitably means that all legislative, executive and judicial activity[12] takes place in terms of a set of moral and political judgments regarding the abolition or reform of what is perceived as having been wrong in the past and the promotion and development of what is considered right for the future.[13] In such a constitutionally driven transformative context, reform and development often involves more than the "normal" tension between the stabilising tendency of existing law and the urge to adapt, renew and develop the law[14] — the morally justified and constitutionally entrenched privileging of transformation entails what may be perceived as a

[12] Although I will point out that this problem involves and affects legislative, administrative and judicial powers, judicial lawmaking features prominently in the literature on this issue because of the critical implications of constitutional review and the countermajoritarian dilemma. Klare (n 4) 146-188 pays special attention to judicial lawmaking and answers some of the questions raised by the majoritarian theory. The best recent South African discussion of the countermajoritarian dilemma is that of Botha "Democracy and rights: constitutional interpretation in a postrealist world" 2000 *THRHR* 561-581.

[13] On the dynamic of transformation and its rhetorical codes see Van der Walt "Dancing with codes — protecting, developing, limiting and deconstructing property rights in the constitutional state" 2001 *SALJ* 258-311. For an illuminating analysis of the adjudicative issues surrounding transformation see Botha "Freedom and constraint" (n 5) 249-283.

[14] The dynamic that I describe here (existing private law stabilising the status quo and resisting change) is neither inevitable nor universal, but it seems to be a reasonable explanation of the current South African situation. Klare (n 4) 146-151 recognises the tension between democratic lawmaking and transformative adjudication; at 166-172 he identifies the "disconnect" between the transformative aspirations and potential of the South African constitution and the pervasive conservatism of South African legal culture as a major source of potential conflict in the project of transformative constitutionalism. See further along the same lines Van der Walt "Property theory and the transformation of property law" in Cooke (ed) *Modern Studies in Property Law* (2005) 361-380. For examples that contradict the dynamic of reformist constitution and reactionary private law see Van der Walt "Tentative urgency: Sensitivity for the paradoxes of stability and change in social transformation decisions of the constitutional court" 2001 *SAPL* 1-27. Of course, in the course of time the constitution itself could become an instrument of resistance against change and transformation, while private law could become an instrument of reform and change. I am indebted to Michael Sachs for alerting me to the following two examples from German law. The first example illustrates how private law could be developed to effect reform with reference to the constitution despite failure of the legislature to develop new law. When certain laws were declared unconstitutional for allowing sex discrimination in 1949, the German legislature was given four years to amend them or produce new laws that conform to the constitutional principle of non-discrimination. When it appeared that new laws had not been prepared after four years the constitutional court refused to allow an extension and all existing laws became invalid at once (see *BVerfGE* 3, 225), leaving a huge gap in private law that could — at least for the meantime — only be filled through judicial activity. In the event, until new laws were eventually promulgated in 1958, the courts apparently did a reasonably good job developing new law with reference to acceptable parts of old law and the equality provisions in the constitution. The second example involves a case where legislative development was easier than constitutional amendment, and the constitution therefore could not drive social reforms. Because of the greater majority required for constitutional amendment, recent changes in German law to permit formalised same-sex partnerships were implemented by way of normal legislation when a proposed amendment to the anti-discriminatory rule in a 3 of the German Basic Law (*Grundgesetz — GG*) failed. The new private law legislation already survived a constitutional challenge based on the special protection of marriage in a 6 *GG*: *BVerfG*, 1 BvF 1/01 of 17.7.2002, par 76-103 (at http://www.bverfg.de/). This example indicates that the dynamic set out above is not self-evident, as is also illustrated by the Indian experience with the constitutionalization of property. The Indian courts interpreted the property clause in the new Indian constitution of 1950 in a reactionary rather than a reformist way and struck down reformist legislation, causing interminable conflicts with the reform-oriented government and ultimately resulting in the removal of the property clause from the Indian bill of rights: see Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 192-206 for an overview of the history and references.

greater threat for the stability and integrity of existing law and for legal certainty than in "normal" situations.[15] Or, in another perspective, moral and political aspirations towards all-embracing or at least wide-ranging political, social and legal transformation highlight the tension between constitutional reform and the potentially reactionary tendency of existing law more acutely than may otherwise be the case.[16]

Since the drafting phases that produced the 1993 interim constitution and the 1996 constitution South African lawyers have struggled with this dilemma, and a variety of theoretical explanations and positions have emerged to explain the application and enforcement of the constitution and its effect on or in private law. As the overview will show, much of the initial debate has concentrated on the notion of (direct or indirect) horisontal application and enforcement of the constitution. Some of the early debates and the positions developed and adopted in them are discussed in sections 2 and 3 below. However, in more recent cases and academic literature the notion of the state's duty to protect fundamental rights has been raised as an alternative discursive framework for this debate. Whereas the early discussion about horisontal application relied at least partly on German law, the recent discussion about the state's duty to

[15] In one sense, the difference between "normal" or doctrinal development and the transformative development I have in mind here can be compared to the difference between normal scientific development and a paradigm shift as described by Kuhn *The Structure of Scientific Revolutions* (1962) 52: even "normal" scientific or doctrinal development (what private law specialists sometimes refer to as interstitial development, *ie* step-by-step development that fills up gaps on a case by case basis, based on the work of Hart *The Concept of Law* (1961) 37-38) involves some change and therefore resistance. Large-scale transformation, on the other hand, requires a fundamental rethinking of the whole paradigm or framework within which all development takes place, and it may therefore imply at least some larger changes as well, even though it does not necessarily mean that everything needs to change or that everything will change radically. However, it may be assumed that resistance against framework changes will be stronger than in the case of doctrinal change and, more pertinently, resistance against framework change often assumes the form of presenting it as (less threatening) doctrinal change. For arguments favouring the interstitial approach to development of private law see Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 171-195; for a more nuanced approach see Lubbe "Taking fundamental rights seriously: the bill of rights and its implications for the development of contract law" 2004 *SALJ* 395-423. For an incisive discussion of approaches to constitutional adjudication and a critique of the interstitial approach see Botha "Freedom and constraint" (n 5) 249-283.

[16] These introductory remarks are inevitably general, but in the rest of the article they are contextualised around the promulgation of the new South African constitutions of 1993 and 1996. What I want to underline for the moment is that the normal tension between stability and change is intensified by the fact that — in the context of transformative constitutionalism as described earlier — the South African constitution is explicitly aimed at reformist or transformative aspirations, while private law (especially in the absence of a civil code) consists of relatively old received rules, principles and institutions (including some older private-law legislation). If one assumes that existing legislation was, with the advent of the new constitutional era, overhauled and "cleansed" of whatever constituted the statutory aspects of the old, unequal and unjust regime, uncodified private law remains the only obvious remnant of the old order, which could create the impression that it alone embodies the stabilizing, change-resistant legacy of the past. This could create the impression that private law has to be abolished or changed drastically to promote the transformative process. However, this is clearly an oversimplified and misleading perspective on the dynamics of legal change; see Van der Walt (n 13) 258-311 for a broad discussion. The tension between the integrity and certainty of existing law and transformation is nevertheless intensified because of the moral and political impulse behind large-scale transformation.

protect fundamental rights relies exclusively on international law although, interestingly, German constitutional law also witnessed a development from horisontal application to protective state duties discourse in explaining the effect of the constitution on private law. My purpose in this article is to analyse the theoretical background of these older and more recent notions in terms of which transformation is explained in South African law, the differences between them and the pros and cons of referring to them in the context of the South African constitution and its effect on private law. For the purpose of evaluating these notions I refer to comparative sources in sections 4 and 5 below before discussing their merit and application in South African law in section 6.

## 2 *The South African application debate in academic literature*

### 2.1 Introduction

From the very beginning, the application issue was a crucial part of the South African debate about the implementation of the fundamental rights in the new constitution.[17] The early debate was dominated by two central arguments, both of which acknowledged that the spirit and values of the new constitution had to be reflected and promoted in private law. However, the two main arguments differed sharply on the best way to realise this goal.

The weak application argument assumed as its point of departure that the spirit and values of the new democratic constitution were basically similar to the "inherent" values of private law in its "original" Roman-Dutch form, untainted by apartheid. According to this argument the best way to proceed — once apartheid legislation has been abolished — was to allow private law to develop in its own way and according to its own inherent value system and doctrinal logic. The assumption was that, eventually, this would produce results substantively similar to those foreseen by the constitution. However, to "colonise" private law by enforcing constitutional values and methods directly, "from outside", would be both unhelpful and unnecessary, and therefore any form of horisontal application beyond indirect and weak "seepage" of general principles would be a grave mistake. Of course there are shades of opinion within the group of academics who argued that private law should be allowed to develop on its own, ranging from the view that there is a completely private sphere where law (including the bill of rights) does not penetrate;[18] through the more moderate argument that direct horisontal application amounts to unwar-

[17] Some authors merely stated what they perceived to be the correct textual interpretation of the constitutional provisions regarding application (eg Wolhuter "Horisontality in the interim and final constitutions" 1996 *SAPL* 512-527 agrees with the majority decision in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) that the 1993 interim constitution applied indirectly to the horisontal relationship between private persons, and points out that the text of the 1996 constitution continues to support indirect horisontal application while also making room for direct horisontal application in certain cases), while others adopted a more principled stance on the necessity for and possible effects of horisontal application. In what follows I concentrate on the latter group.

[18] See eg Van der Vyver "The private sphere in constitutional litigation" 1994 *THRHR* 360-395. Van der Vyver's arguments are based on a textual interpretation of the 1993 interim constitution. He argues that, according to the text, the bill of rights does not apply to non-state law (internal affairs of non-state institutions), although it "may have an indirect effect" on those affairs, especially as far as non-discrimination is concerned (s 33(4) of the 1993 constitution).

ranted "colonisation" or "invasion" of private law;[19] to the fairly widespread attitude that private law could be subject to changes inspired by the constitution, but that those changes should preferably be implemented through legislation; while judicial intervention, when it cannot be avoided, should be restricted to small-scale, "interstitial" or step-by-step development of private law according to its own inherent logic.[20] In all its different shades, this weak application argument was by and large against the so-called horisontal application of the bill of rights.

The stronger application argument assumed that the constitution must have a more direct, fundamental effect on private law and that private law cannot simply be left to gradually "regain" its inherent virtues according to its own inherent logic. In one way or another, this argument was initially expressed in arguments that favoured direct horisontal application of the fundamental rights in the constitution. Since the pro-horisontality arguments have apparently won the day, I will focus on them in the rest of this section and only refer to the more conservative privatist arguments in so far as they are still relevant to the discussion about the methodology of horisontal application.

[19] Visser "A successful constitutional invasion of private law" 1995 *THRHR* 745 746: "I[I]t spells trouble for our legal system as a whole if a judge is actually empowered to change private law almost at will"; "[why should horisontal application not be followed] (at this rather revolutionary stage in the history of our country and its legal system where almost anything can be changed provided that one can somehow vaguely justify it by a reference to the injustices of the past — regardless, of course, of the actual facts or the real merits of the intended change), our private law had better prepare itself for drastic reconstructive surgery". Interestingly, in "Geen afsonderlike eis om 'grondwetlike skadevergoeding' nie" 1996 *THRHR* 695-700 Visser adopted a much more lenient attitude towards horisontal application, although such application was not in issue in the case under discussion — the issue was the creation of a new remedy (constitutional damages) under the influence of the constitution. At 698 Visser actually argues that, whatever form horisontal application eventually assumes in South Africa, it would be unacceptable not to protect fundamental rights against delicts between private persons. At 699-700 he qualifies this statement and states that the South African law of delict is generally capable of dealing with the demands of the new constitutional system, because it is a sophisticated system that does not require radical change. Visser ("Horisontaliteit van fundamentele regte afgewys" 1996 *THRHR* 510-514) explains more clearly that he is against the more open-ended interpretation that he associates with direct horisontal application, but he accepts a milder form of indirect horisontal application as a suitable way of accommodating the promotion of constitutional values while retaining the values of private law and its more rigorous methodology. Van der Merwe "Constitutional colonisation of the common law: A problem of institutional integrity" 2000 *TSAR* 12 14 also describes the "constitutional way of thinking" as harmful to the integrity of the common law and therefore in the long run harmful to the legal system as a whole, and argues that necessary developments can best be achieved within the institutional framework and methodology of private law itself. A recent publication in the same spirit is Jordaan "The constitution's impact on the law of contract in perspective" 2004 *De Jure* 58-65. See Carpenter and Botha "Constitutional attack on private law: Are the fears well founded?" 1996 *THRHR* 126-135 for a critique of the view expounded by Visser and Van der Merwe.

[20] See eg Van Aswegen (n 15) 171-195; Van Aswegen "The implications of a bill of rights for the law of contract and delict" 1995 *SAJHR* 50-69; Van Aswegen "The future of South African contract law" in Van Aswegen (ed) *The Future of South African Private Law* (1994) 44-60; Visser "The future of the law of delict" in Van Aswegen (ed) *The Future of South African Private Law* (1994) 26-43. The latest publication in roughly this vein is Lubbe (n 15) 395-423, although his argument is more nuanced and open to some direct constitutional influence in private law.

## 2.2 Pro-horisontality arguments

Proponents of the view that the fundamental rights should apply horisontally as well as vertically relied on the central argument that the new constitutional order should not countenance the privatisation of inequality and discrimination.[21] From the beginning, pro-horisontality arguments focused on the need to counter so-called privatised apartheid: although apartheid was institutionalised in state policy and law during the pre-1994 era, discrimination and injustice were also entrenched by purely private practice that could continue without the statutory support of apartheid legislation. If the fundamental rights in the new constitution were only enforced vertically against the state, private individuals and institutions would be able to continue the very same discriminatory practices that were supposed to be proscribed by the constitution. The mere abolition of apartheid laws would therefore not eradicate apartheid injustices — proactive reform of private law is required. In order to outlaw and uproot private discrimination and inequality, it is necessary that the fundamental rights should be enforceable not only against the state but also between private persons and against private institutions, and therefore the constitution has to apply on the horisontal level as well as the purely state-oriented vertical level.[22] Pro-horisontality theorists acknowledged that purely

[21] This was the crux of many early pleas for horisontal application; see eg Sachs "Towards a bill of rights in a democratic South Africa" 1990 *SAJHR* 1 3-4; Botha "Privatism, authoritarianism and the constitution: the case of Neethling and Potgieter" 1995 *THRHR* 496-499; Du Plessis "Enkele gedagtes oor historiese interpretasie van hoofstuk 3 van die oorgangsgrondwet" 1995 *THRHR* 504-513; Van der Vyver "Constitutional free speech and the law of defamation" 1995 *SALJ* 572-602; Carpenter and Botha (n 19) 126-135; Mbao "The province of the South African bill of rights determined and redetermined — A comment on the case of *Baloro v University of Bophuthatswana*" 1996 *SALJ* 33-45; Woolman "Defamation, application, and the interim constitution: an unqualified and direct analysis of *Holomisa v Argus Newspapers Ltd*" 1996 *SALJ* 428-454; Van der Walt "Justice Kriegler's disconcerting judgment in *Du Plessis v De Klerk*: Much ado about direct horisontal application (read nothing)" 1996 *TSAR* 732-741; Van der Walt "Perspectives on horisontal application: *Du Plessis v De Klerk* revisited" 1997 *SAPL* 1-31; Woolman and Davis "The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism, and the application of fundamental rights under the interim and final constitutions" 1996 *SAJHR* 361-404; Cheadle and Davis "The application of the 1996 constitution in the private sphere" 1997 *SAJHR* 44-66; Rautenbach "The bill of rights applies to private law and binds private persons" 2000 *TSAR* 296-316; Van der Walt "Die toekoms van die onderskeid tussen die publiekreg en die privaatreg in die lig van die horisontale werking van die grondwet" 2000 *TSAR* 416-427, 605-618 (also published, with a postscript and accompanied by a Dutch and an English translation, the latter as: "The future and futurity of the public-private distinction in the view of the horisontal application of fundamental rights" in *Tangible mais Intouchable, la Loi du Tact, la Loi de la Loi* (2002) 101-147); and Woolman "Application" in Chaskalson *et al Constitutional Law of South Africa* (Revision Service 3 1998).

[22] Woolman "Application" (n 21) 10-1 points out that the dichotomy between vertical and horisontal application of the bill of rights "represented a vast oversimplification of the existing range of possibilities", by which he apparently means to suggest that the two should rather be seen as points on a continuum, with many nuances in between. According to Woolman (10-1) verticalists and horisontalists agree that: (a) statutes, when relied upon by the state, are subject to constitutional review; (b) the common law, when relied upon by the state, is subject to constitutional review; and (c) statutes, when relied upon by a private party, is subject to constitutional review; so that the remaining issue is whether the common law, when relied upon by a private party in a private dispute, is subject to constitutional review.

textual arguments for horisontality were problematic because the text of the 1993 interim constitution was equivocal about the application issue, and even though the 1996 final constitution seems to be much clearer in favour of horisontality it could also support arguments against horisontality.[23] However, they still insisted that horisontal application was a vital requirement for the success of the transformative constitution. It could be said, therefore, that arguments in favour of horisontal application were always backed up by the aspirations of transformative constitutionalism:[24] the ideal of constitutional

[23] See particularly Woolman "Application" (n 21) 10-11–10-18, 10-43–10-45; Woolman and Davis (n 21) 361-404; Van der Walt "Justice Kriegler's . . ." (n 21) 732-741; Van der Walt "Perspectives" (n 21) 1-31 for nuanced arguments to that effect. In the 1993 interim constitution, verticalists rely upon s 7(1), 7(2), 33(4) and 35(3) to support a purely vertical reading. S 7(1) determines that ch 3 binds legislative and executive organs of state, but the judiciary is omitted, creating the impression that private relations (primarily governed through the application and development of the common law by the judiciary) were insulated from the effect of ch 3 on purpose. Verticalists also read s 7(2) (ch 3 applies to all law) cumulatively with s 7(1), so that the common law, relied upon by a private party in a private dispute, is not subject to constitutional review. Horisontalists counter that s 7(1) and 7(2) can be read sequentially as well, which would support an all-inclusive interpretation of s 7(2). Furthermore, verticalists argue that s 35(3) (in the application and development of the common law the courts shall have due regard for the spirit, purport and objects of ch 3) would have been redundant if ch 3 applied horisontally; horisontalists argue that s 35(3) could be seen as a provision that merely ensures that all law is subject to the indirect permeating influence of constitutional values, but that it does not necessarily exclude direct horisontal application of the constitution. Similar arguments apply to s 33(4) (ch 3 shall not preclude measures to prohibit unfair discrimination by bodies and persons other than those bound by s 7(1)). In the 1996 constitution, the strongest textual support for a horisontal reading is located in s 8. S 8(1) provides that the bill of rights applies to all law and binds the legislature, the executive and the judiciary. S 8(2) provides that the bill of rights binds all natural and juristic persons if (and to the extent that) it is applicable, taking into account the nature of the right and any duty imposed by the right. S 8(3) provides that a court, in applying the bill of rights to a natural or juristic person in terms of s 8(2), must apply (or where necessary develop) the common law to the extent that legislation does not give effect to the right (and may develop the common law to limit the right in accordance with s 36). According to Woolman "Application" (n 21) 10-61 s 39(2) (when developing the common law a court must promote the spirit, purport and objects of the bill of rights) has the same function as the old s 35(3), namely to ensure indirect horisontal seepage, but now the courts are obliged to ensure such seepage ("must promote" instead of just "having due regard"). The significant point is that, although the interim constitution seemed to support a vertical reading and the 1996 constitution seems to support a horisontal reading, neither text supports a specific interpretation unequivocally.

[24] As Woolman "Application" (n 21) 10-18 — 10-32, 10-45 — 10-49 usefully indicates, the main non-textual reasons in support of the vertical approach were that: (a) the historical function of a bill of rights is to provide vertical defensive rights against state power; (b) horisontal application would introduce state coercion into the sphere of private autonomy; (c) horisontal application leaves too much power in the hands of unelected judges; and (d) the judicial process is not suited to the kind of decisions required by horisontality. Verticalists counter that: (a) the nature of state power has changed since the 18th century and many of the abuses to be prevented by the bill of rights are now committed by private power; (b) through legislation the state has exactly the same kind of coercive influence in the private sphere as it would under horisontal application; (c) constitutional review by unelected judges is still subject to legislative correction and has the added advantage of acting as a constitutional check on legislative abuse; and (d) in developing the common law the judges are doing roughly the same work as would be required by constitutional review of the common law. See further Cheadle and Davis (n 21) 44-66.

transformation demands that a ''purely private realm'' should not be isolated from the transformative effect of the constitution and therefore authorises or requires horisontal application.[25]

Pro-horisontality theorists accepted that, once apartheid laws have been abolished formally, most of the remaining transformation work would necessarily have to be done through the promulgation of new laws and suitable amendment of existing laws, but they also recognised that legislative activity could probably not do everything and that at least some of this work would have to be done through judicial development of the common law. Where the development of the common law had to take place in the courts through judicial interpretation and application of the constitution in private law, they argued that the correct method of interpretation and application should amount to horisontal application of the bill of rights, which means that the fundamental rights provisions in the bill of rights could when necessary be enforced — in some way or another — in what otherwise was a private law dispute.

Pro-horisontality arguments concerned with the possibility that a ''purely private sphere'' left unaffected by the constitution would frustrate the comprehensive eradication of apartheid and the effective implementation of the new constitutional order initially favoured a strong version of horisontal application, and in fact some of the most vocal supporters of horisontality argued in

[25] Johan (JWG) van der Walt's publications on horisontal application should — together with some of his other work seemingly unrelated to this topic — be read with an awareness of his own rather unique theoretical agenda, which stretches well beyond narrow interpretation issues and even beyond constitutional application as a more or less technical issue. In ''The future and futurity of the public-private distinction'' (n 21) he explains at 102 that the horisontal application of fundamental rights is ''historically the most recent and systematically the final way in which the law can be revised in terms of the public interest'' in order to resist and undermine the ''normative privatisation of the public''. At 110 he describes it (perhaps too strongly) as ''the last straw as far as the collapse of the distinction between private and public law is concerned''. In ''Progressive indirect horisontal application of the bill of rights: Towards a co-operative relation between common-law and constitutional jurisprudence'' 2001 *SAJHR* 341-363 this project is described as a call for progressive indirect horisontal application to indicate that this approach should allow judges to give incisive effect to constitutional principles and values without forfeiting the integrity of the common law system. In ''Blixen's difference: horisontal application of fundamental rights and the resistance to neo-colonialism'' 2003 *TSAR* 311-331 Van der Walt characterises the same thought as resistance to feudal or neo-colonial thinking, which is closely connected to what he earlier described as the conflation of economic and political power or the normative privatisation of the political or the public. In the latter article he characterises his project as a ''horisontalising call on government to justify action in terms of public interest'', and he explains that this call involves both the vertical and the horisontal levels on which law features. This line of argument infuses all his work on horisontal application and a good deal besides; see eg ''Piracy, property and plurality: Re-reading the foundations of modern law'' 2001 *TSAR* 524-547; ''The (im)possibility of two together when it matters'' 2002 *TSAR* 462-477. For an interesting perspective on the philosophical background of Van der Walt's work and related academic views see Le Roux *Die Estetiese Republiek — Kuns, Reg en Post-Liberale Politiek in Nietzsche, Arendt en Lyotard* (2002 thesis UP) 1-8 (the debate between liberalism and republicanism discussed in the context of constitutional interpretation in South Africa).

favour of direct horisontal application.[26] In his earliest publication on this topic, Johan van der Walt explained this position with reference to the real effect that the constitution would (or would not) have in a private law dispute: "the major threat to the equal dignity of all South African citizens will come from the continued exercise of liberties gained as a result of rights sanctioned by the unjust laws of the past", and not from the exercise of rights sanctioned by law.[27] Since Van der Walt initially argued[28] that "it is certainly not true that all social relations are direct counterparts or concrete expressions of legal rules",[29] he was bound to conclude that those affected by exercises of power that are not supported by legal rules could only be protected if the constitution applied directly on the horisontal level, so that they could rely directly on the constitution to found a cause of action for their attack on the other private party. In other words, their concern for the availability of a viable cause of action prompted horisontalists like Johan van der Walt to argue in favour of direct horisontal application rather than just indirect horisontal application of fundamental rights or, even more weakly, gradual and indirect "seepage" of constitutional principles.

However, in a later publication Johan van der Walt revised his earlier position and argued that indeed[30] "there is no 'extra-legal' private sphere",[31] and that every social practice in fact in some way relies upon and is sanctioned by a legal rule that can — in suitable circumstances — be subjected to constitutional review. Accordingly, Van der Walt realised that "the distinction between direct and indirect horisontality is indeed of no real significance for the administration of justice under the Final Constitution".[32] The only real application issue

[26] Johan van der Walt initially forwarded the strongest argument to the effect that we need not only horisontal, but direct horisontal application of the bill of rights, until he changed his mind and conceded that the difference between direct and indirect horisontality was indeed largely meaningless; see the sources cited in n 21, 23, 25 above and 36 below. Woolman (see the sources cited in n 21 and 23 above) seems to argue for direct horisontal application as first prize, but he is not absolutely clear on the matter. The same applies to Rautenbach (n 21) 296-316. Others such as Van der Walt and Woolman allow for different forms of horisontality in different contexts (especially under s 8(2) of the 1996 constitution). Cheadle and Davis (n 21) 57-60 present the clearest nuanced argument that some rights apply horisontally and others do not, with the implication that some apply directly horisontally and others do not. Sprigman and Osborne "Du Plessis is *not* dead: South Africa's 1996 constitution and the application of the bill of rights to private disputes" 1999 *SAJHR* 25-51 present the weakest argument to the effect that the 1996 constitution applies horisontally — in their view, the 1996 constitution allows indirect horisontal application as foreseen in *Du Plessis v De Klerk,* but does not mandate it.

[27] Van der Walt "Justice Kriegler's . . ." (n 21) 736. Van der Walt is here referring to Wesley Hohfeld's distinction between rights (which have correlative duties) and privileges (which do not have such correlative duties, as their jural correlatives are "no-rights", referring to the fact that the other party has no right to object to the exercize of the privilege): see Hohfeld "Some fundamental conceptions as applied in legal reasoning" 1913 *Yale LJ* 16-59; Hohfeld "Fundamental legal conceptions as applied in legal reasoning" 1917 *Yale LJ* 710-770.

[28] contra Mahomed DP in *Du Plessis v De Klerk*: see *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) 700E-H; see Van der Walt "Justice Kriegler's . . ." (n 21) 735.

[29] "Justice Kriegler's . . ." (n 21) 735.

[30] As Mohamed DP argued in *Du Plessis v De Klerk*; see n 27, 28 above.

[31] Van der Walt "Perspectives" (n 21) 11-12. The change in attitude in this article was caused by an amended interpretation of Hohfeld's theory; see n 27 above.

[32] Van der Walt "Perspectives" (n 21) 3.

is, therefore, whether the constitution applies horisontally, either directly[33] or indirectly,[34] to a private dispute between two private parties, in such a way that the (statutory or common law) private law rules that govern the dispute are open to amendment or influence from the constitution, even though a state threat against either party is not directly in issue. The spectre of privatised injustice and inequality can be addressed adequately through indirect horisontal application understood in this way because every rule and institution of statutory and common law is thereby potentially opened up for constitutional scrutiny and amendment or development.

Pro-horisontality authors accepted that direct horisontal application cases — instances where a private person would rely directly on a constitutional provision to found a cause of action against another private person in a private dispute — would constitute a small minority of cases, and that the effect of the constitution on private law would in fact largely take place indirectly via the so-called radiating (or, in a probably weaker version, indirect seepage) effect of constitutional principles and values.[35] The horisontalists attach great value to the possibility that private parties with a genuine constitutional complaint against an exercise of private power should not be left without a remedy simply because neither the common law nor legislation provides a suitable remedy. Horisontal application of the constitution should therefore leave space for the creation of new remedies where these are not provided for adequately by legislation or the common law.[36]

It is probably fair to say that academic commentators now generally accept that the 1996 constitution allows or requires horisontal application in some way; that such horisontal application leaves no room whatever for a "purely private sphere" unaffected by the constitution; that the horisontal application of the constitution implies that any part of the common law can potentially be affected by constitutional provisions, principles and values in one way or another; and that the horisontal application will largely take place indirectly

[33] Terminology on this point varies to some extent, but I follow the argument as developed by Van der Walt and use the term "direct horisontal application" to refer to instances where a private party can rely directly on a provision in the constitution to found a cause of action in a private dispute against another private party, without involving or relying upon any other statutory or common- law rule. See n 26 above for references to other authors on this issue.

[34] See n 33 above. By extension, this would refer to instances where the cause of action is founded upon a statutory or common law rule, but the interpretation or application of that rule is affected by the constitution in some way in order to give effect to a specific constitutional provision or to the "spirit, purport or object" of the constitution, as it is stated in s 39(2) of the constitution.

[35] See Van der Walt "Perspectives" (n 21) 16-17; Van der Walt "Indirect application" (n 25) 343-361; Woolman "Application" (n 21) 10-46 — 10-49. Woolman is less clear on this point than Van der Walt, but his analysis suggests a similar view.

[36] See Van der Walt "Perspectives" (n 21) 21-29 (where he argues that open-ended common law institutions such as actions for pure economic loss and abuse of right could be developed to create remedies); Woolman "Application" (n 21) 10-51. In "Horisontal application of fundamental rights and the threshold of the law in view of the *Carmichele* saga" 2003 *SAJHR* 517-540 Van der Walt identifies the shortcoming in the common law in the procedural rules that determine whether someone would have a fair chance of a hearing and a remedy to protect constitutionally granted or entrenched rights: in view of the common law procedure, lack of a probable cause of action will (as it did in the initial *Carmichele* case in the Cape high court: *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C)) most likely result in a judgment of absolution from the instance, which means that the issue of finding or developing a suitable remedy never even comes up.

rather than directly (that is, by way of horisontal radiation, seepage or influence upon the common law rather than by way of direct reliance on constitutional provisions to establish a cause of action in purely private disputes). However, commentators leave open the possibility (clearly foreseen by section 8(2) and 8(3) of the constitution) that the horisontal application of the constitution could vary according to the context of a specific case (particularly the nature of the specific right involved and any duty imposed by it), and accordingly it is still possible that a specific constitutional provision could require or prescribe direct rather than indirect horisontal application.[37] Perhaps because it is accepted widely that horisontal application takes place through horisontal radiation or seepage that affects the development of the common law, the distinction between direct and indirect horisontal application seems to have lost most if not all of its meaning and urgency in the literature. The issues on horisontal application appear to have dwindled to just a few matters of outstanding detail.

### 2.3 Outstanding issues in the horisontality debate

The most significant issue that still enjoys attention is the way in which horisontal application is supposed to take place in practice. Three lines of debate can be discerned in the literature, one of which I will just mention and then raise again in the discussion of case law and in the analysis of German law and international law in two later sections, because it has not enjoyed much attention in the literature so far.[38] This concerns the gradual but distinctive movement in case law, when considering the effect of the constitution on private law, away from the discourse of horisontal application of fundamental rights and towards a new discourse about the state's duty to protect fundamental rights.

The second remaining line of discussion in the literature concerns the question of new remedies. Both Stuart Woolman and Johan van der Walt, probably the two most prolific and important authors on horisontal application, have pointed out the significance of the theory of horisontal application for the eventual availability of new, alternative, amended or developed private law remedies resulting from the influence of the constitution.[39] Johan van der Walt has argued convincingly that the weak spot of the common law that

[37] See eg Van der Walt "Perspectives" (n 21) 11. An example of the latter would perhaps be the right to equality and non-discrimination in s 9: s 9(4) seems to aim for direct horisontal application, and prior to the promulgation of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 direct horisontal application must have been possible and even necessary. See further Cheadle and Davis (n 21) 59.

[38] The exception is an early discussion of German law (I suspect by De Waal) in Davis, Chaskalson and De Waal "Democracy and constitutionalism: the role of constitutional interpretation" in Van Wyk, Dugard, De Villiers and Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 1 96-97.

[39] Van der Walt "Perspectives" (n 21) 16-17; Van der Walt "Indirect application" (n 25) 343-361; Woolman "Application" (n 21) 10-46–10-49. In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) the constitutional court decided that, while there was no reason why appropriate relief for infringement of a constitutional right should not, in suitable cases, include an award of damages, such an award would have to be necessary to protect and enforce the fundamental rights and should be made only to compensate persons who suffered loss as a result of the infringement of the right. However, there was no need for further constitutional damages aimed purely at vindicating the constitutional right.

has to be improved with regard to remedies is located in the rules and practices of civil procedure, and more specifically in the institution of an order of absolution from the instance, which means that a case is dismissed because the plaintiff could not produce a probable cause of action recognised by the common law.[40] When a plaintiff takes a case to court on the basis that the common law needs to be developed to provide a new remedy, there is a risk that the case could be dismissed without the effect of the constitution or the issue of a new remedy having been considered at all, because the law of civil procedure allows the court to dismiss the case because no cause of action (according to traditional law) was revealed initially.[41] This astute observation by Johan van der Walt clearly opens up an important line of further investigation for the constitutionally inspired development of private law through the development of the law of civil procedure. Inevitably, this kind of development of the common law will involve fairly radical amendments of the existing law, and it may eventually require legislative intervention. In the meantime, in the absence of suitable legislation, it demands a strong, radiation-type development that resembles a paradigm shift rather than just weak, seepage-type interstitial or incremental developments. More debate and work is required in this field.

In a third remaining line of debate about horisontality, several cases and a handful of academic commentaries have raised questions about the mechanics and dynamics of the development of common law: when does development take place in accordance with the ''normal'', internal dynamism of the common law as an organic and evolving system of living law, and when does it take place under the pressure of constitutional command? What should the scale and pace of development be, and how does one determine the right scale and pace — according to the internal logic of a typically private law jurisprudence built on stare decisis, or according to the logic of constitutional demand? Does the development of private law involve small incremental developments or can it include a larger paradigm shift? Is the nature of development similar for all of private law, or are there hot spots where development is more urgent, more radical and more sensitive than in other areas?

Several court decisions have indicated a preference for the non-statutory development of the common law in terms of the ''normal'', internal processes of the common law itself,[42] and these decisions have found support in academic commentaries according to which private law has to be protected against what has been described as an unwarranted colonisation or invasion of private law by constitutional thinking and logic.[43] As for the pace and the dynamism of the development of common law, many private law specialists prefer a step-by-step, so-called interstitial approach,[44] according to which private law is allowed to develop as naturally and logically as possible within its own dogmatic frame-

[40] See Van der Walt ''Horisontal application'' (n 36) 517-540; *cf* n 93-94 below.
[41] As demonstrated by the initial decision in the *Carmichele* case; compare n 93 below.
[42] See eg *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA); *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 3 SA 771 (SCA). See the discussion of *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 (SCA) in 3.4 below.
[43] See eg Visser ''Successful constitutional invasion'' (n 19) 745-750; Visser ''Geen afsonderlike eis'' (n 19) 695-700; Visser ''Horisontaliteit'' (n 19) 510-514; Van der Merwe (n 19) 12-32; but *cf* Carpenter and Botha (n 19) 126-135 for a critique.
[44] As explained by Hart (n 15) 37-38.

work, rather than a larger, possibly paradigm-threatening development driven and animated by the constitution "from outside".[45] These arguments align with the weak notion of constitutional seepage, where the influence of the constitution in private law assumes the form of slow, small-scale prompts towards internal development of private law, whereas the notion of constitutional radiation could be interpreted more strongly to include much larger, paradigm shift-types of development that are forced upon the common law by strong "external", constitutional demands.

The viability of the weaker, integrity-saving or development-from-within approach is probably the most important and contentious issue in what remains of the application debate. On the one hand, it has to be conceded that this approach is in line with the concern for legal certainty and stability. On the other hand, it has to be asked whether development within the existing framework of private law thinking can always attain the kind and the scope of development or transformation foreseen or demanded by the new constitutional order, and whether it might not in some instances bring with it a tendency to entrench the existing whenever possible and to resist or minimise inevitable change. The effect is illustrated by two recent decisions of the supreme court of appeal: *Brisley v Drotsky*[46] and *Afrox Health Care Bpk v Strydom*.[47] In his thoughtful analysis of the two decisions in view of the effect of the constitution on private law, Lubbe[48] is critical of what may be perceived as overly careful and perhaps even conservative sentiments of the SCA, but even he is perhaps still too lenient in his assessment of the SCA's view of development of the common law in view of the spirit, purport and object of the constitution. As is argued in the discussion of case law below, there is a danger that the civil courts could, if attempting to develop private law in terms of its own doctrinal dynamism instead of under the more or less direct and possibly more immediate influence of the constitution and its attendant transformational aspirations, tend to preserve existing law and resist or minimise change. Much more work is required in this area, particularly in the form of more technical, focused debates about the development of the common law in specialised areas of private law where the demand for change and development might be more urgent or more radical than in others; hot spots where either the scale or the direction of the required development might not fit in with the internal logic of the common law. Given its special role in the establishment of apartheid and the special attention it consequently receives in the constitution and in land reform law, the private law of eviction is a good candidate for hot-spot status. Some work has already been done in this field and I return to it below.

[45] See eg Van Aswegen (n 15) 171-195; Lubbe (n 15) 395-423.
[46] 2002 4 SA 1 (SCA).
[47] 2002 6 SA 21 (SCA).
[48] 2004 *SALJ* 395-423. The facts and decisions in the two cases are set out and discussed in detail in Lubbe's article and I do not repeat them here. See further Botha "Freedom and constraint" (n 5) 249-283, who critiques the *Afrox* decision in detail and refers to further discussions of the case (269 n 66). Hawthorne "Closing of the open norms in the law of contract" 2004 *THRHR* 294 criticises the SCA for its hesitance in cases like *Afrox* to develop the notion of freedom of contract in accordance with s 39(2).

## 3 *The South African application issue in case law*

### 3.1 Horisontal application under the 1993 constitution

Under the 1993 interim constitution the high courts decided a few cases involving defamation[49] and equality[50] issues. In the majority of these cases the courts accepted that the constitution intended to transform South African society, that the inequities and injustices of the past were not restricted to exercises of state power, and that the fundamental rights provisions in the constitution therefore had to apply horisontally in one way or another to

[49] See eg *Gardener v Whitaker* 1994 5 BCLR 19 (E), where Froneman J concluded that, while fundamental rights are primarily aimed at safeguarding the rights of individuals against the state, "there is an apparent need to ensure that the values inherent in the charters should permeate throughout the entire legal system, albeit indirectly in most cases. This is hardly surprising, because the very foundations upon which these societies seek to structure and develop themselves are to a large extent contained in their charters of fundamental rights" (30B). Since the South African 1993 interim constitution was also concerned that the entire legal system, including private law, should accord with the broader values of the constitution, Froneman J concluded that the deepest norms of the constitution should determine whether an alleged breach of a fundamental right in private litigation involves explicit constitutional adjudication, or whether it could be left to the rules of common law to evolve in harmony with the values of the constitution. The basic constitutional concern with transformation would, in the judge's view, sometimes call for explicit application of the fundamental rights provisions between private individuals, because the past of suffering and injustice "is not merely a history of repressive State action against individuals, but it is also a history of structural inequality and injustice on racial and other grounds, gradually filtering through to virtually all spheres of society" (31F). Nevertheless, transformation of private law does not involve a radical break with all the legal traditions of the past — all aspects of the common law that come before the courts need to be scrutinised to determine whether leaving them unaffected by the constitution would amount to perpetuation of the undemocratic, discriminatory and unjust past (31H-32C). *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) was also a defamation case decided under the 1993 interim constitution. In this case Cameron J decided that certain bodies and persons would not, without legislative provision, be bound by the fundamental rights provisions, and that the unqualified theory of horisontality therefore had to be rejected (597D). The fundamental rights provisions nevertheless informed all legal institutions and decisions with the new power of constitutional values (598C-D). Any common law rule that infringed upon fundamental rights had to be reconsidered fundamentally in view of the constitution (603G-H). *Mandela v Falati* 1995 1 SA 251 (W) was another defamation case, and Van Schalkwyk J decided that political activity takes place both on the vertical and the horisontal levels, which means that the rights necessary to conduct political activity also have to apply on both levels (257I). The fundamental rights of individuals should therefore be applied in private disputes of this nature (258E).

[50] See eg *Baloro v University of Bophuthatswana* 1995 8 BCLR 1018 (B). The case concerned a labour dispute between a university and employees who were foreign nationals, and who claimed that they had been unfairly discriminated against. Friedman JP decided that the constitution was intended to create a new legal order and to redress the inequities and discriminations of the past, and that the fundamental rights provisions were meant to operate horisontally (1050E). It was particularly clear that horisontal application of the fundamental rights would affect siseable corporations and companies engaged in trade, commerce and business in the public domain, because these institutions had the same kind of power, wealth and influence as the state. It would definitely affect universities (1056C). Friedman JP stated that the notion of "horisontal seepage" detracted from the principles enshrined in the constitution, and he wanted to construe the horisontal effect of the constitution stronger than that. *Motala v University of Natal* 1995 3 BCLR 374 (D) concerned the admission of a student to the University of Natal medical school. Hurt J confirmed that the constitution was intended to replace parliamentary supremacy with constitutional supremacy and that the constitution therefore made the courts the custodians of the fundamental rights, and empowered the courts to drive the process through which the common law was brought into accord with the constitutional provisions. The fundamental

ensure that private law (and the private relations governed by it) was also included in the transformation process.

One high court decision that rejected horisontal application of the fundamental rights provisions outright because it would cause "the whole body of our private law to become unsettled"[51] was subsequently overturned by the constitutional court.[52] The draft of the 1996 constitution was already in an advanced state of completion and it was reasonably clear that the final constitution would make provision for horisontal application, but the decision of the constitutional court in *Du Plessis v De Klerk* nevertheless settled the matter as far as the 1993 interim constitution was concerned: the majority of the court held that the resolution of the horisontality issue must ultimately depend upon the specific provisions of the constitution; that general (direct) horisontal application in the sense of direct invocation of constitutional rights in private litigation was not intended;[53] that a party in private litigation may nonetheless contend that a statute or executive act relied on by the other party was inconsistent with the constitution (ie indirect horisontal application); and that the fundamental rights provisions do apply to private law, so that government actions or omissions in reliance upon private law may be attacked by a private litigant in a dispute against the state for being inconsistent with the constitution.[54]

### 3.2 Horisontal application under the 1996 constitution

Following upon the decision in favour of indirect horisontal application in *Du Plessis v De Klerk*, it could not very likely be argued that there would be no form of horisontal application under the 1996 constitution, especially since section 8 of the 1996 constitution made rather obvious provision for some form of horisontal application. Since the 1996 constitution came into power it has therefore been accepted widely that the fundamental rights provisions apply horisontally — the only outstanding issue was: when, and how?

As was indicated in the previous section, a number of specific issues feature in what remains of the application debate. The first issue arises from decisions (and academic commentary) in which the effect of the constitution on private law is minimized or even indirectly denied by focusing on internal doctrinal developments in private law that would reach the same result. The basic point of departure in these cases is that the development of private law should — and can — take place in terms of the internal dynamism of private law or common law itself, and not under the external force of the constitution. This approach can have two related and often overlapping — but nevertheless distinctly different — results in case law where the development of private law is at stake. One result is to acknowledge that a particular development of the common law is required, but to deny that it takes place under the influence of the constitu-

[51] per Van Dijkhorst J in *De Klerk v Du Plessis* 1994 6 BCLR 124 (T).

[52] *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC). For discussions of this decision see the sources cited in n 21 above.

[53] In *Du Plessis v De* Klerk (n 52) Ackermann J dedicated the entire five pages of his analysis of German law (par 92-106 704F-709E) to a detailed considerations of the reasons why the German courts and scholars rejected (and why South African courts should also reject) direct horisontal application and instead work with indirect horisontal application only.

[54] per Kentridge J par 49 684G-685A.

tion, insisting that the development was inspired by and is accommodated within the "normal" process of dogmatic development, even in the face of strong evidence that the same court opposed the development in the pre-constitution past. In *National Media Ltd v Bogoshi*[55] the supreme court of appeal insisted that the development of the common law principles with regard to defamation that was at stake in this case occurred and should be explained in terms of the dynamic development of the common law of delict,[56] and not in terms of a development required by the new constitutional values or provisions. In many cases this will not make much difference, as the fact that the development takes place is after all the main point, but this attitude does reveal or hint at a certain discomfort with the idea that the common law and the constitution form part of one integral legal system, with the constitution playing a direction-giving role. In *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight*[57] the SCA decided that, since the common law grounds for judicial review of administrative action were left intact by the 1993 interim constitution, it could set aside such action on common law grounds without considering whether it also fell foul of the constitutional grounds.[58] This decision was subsequently set aside by the constitutional court with a rather sharply worded remark to the effect that the common law cannot be treated "as a body of law separate and distinct from the Constitution" — there is just one system of law, of which the common law and the constitution both form part, with the latter as supreme law shaping and giving force to all law.[59] Although the common law remains relevant to the process, judicial review of

[55] 1998 4 SA 1196 (SCA).

[56] In *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A) the appellate division of the supreme court held that a newspaper could only escape a claim for defamation if it could establish that what was published was true; and it confirmed the rule of strict liability in defamation cases against the media that was laid down earlier in *Pakendorf v De Flamingh* 1982 3 SA 146 (A): see Van der Walt "Indirect application" (n 25) 356. In *Bogoshi* the SCA now held that the common law was wrongly stated and that the common law principle should be restated correctly: publication of false defamatory allegations of fact would not be regarded as unlawful if, upon consideration of all the circumstances, it was found to have been reasonable to have published the facts in the particular way at the time (1212G-H). Only once the true statement of the common law has been attained in terms of the common law itself does the court deem it necessary to ascertain that the (correctly stated) common law rule is not in conflict with the constitution. Academic commentators who are against or sceptical of horisontal application might have been expected to regard *Bogoshi* as an excellent decision, but surprisingly some thought that it did not go far enough in rejecting "constitutional argument in drag"; see Van der Merwe (n 19) 21. Academic commentators in favour of horisontal application and constitutionally inspired development of the common law point out that the avoidance of the true effect of the constitution in this decision is cynical and misleading; see Van der Walt "Indirect application" (n 25) 341-363. See further on this decision Botha "Freedom and constraint" (n 5) 253-255: *Bogoshi* treats earlier decisions that undermined press freedom as "unwarranted deviations from the unfolding logic of the common law" and seeks to cleanse the common law from such errors by overruling (*Pakendorf*) or ignoring (*Neethling*) them; once that has been done the court declares that the common law balance between press freedom and personal integrity is in line with constitutional demands. In the process, the integral links between apartheid law and restraints on press freedom during the pre-1994 era are ignored or denied.

[57] 1999 3 SA 771 (SCA).

[58] S 24 of the 1993 constitution provided for a right to just administrative action.

[59] *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of President of the RSA* 2000 2 SA 674 (CC) par 44.

the exercise of public power is now a constitutional matter that takes place according to the provisions of the constitution.[60]

The second result of this attitude is that the courts, even when they acknowledge that development is necessary and that the change is inspired by the constitution, insist that the development should take place according to the timing, methodology and logic of private law and not according to vague and implicit constitutional values. This could often result in necessary developments being minimalised or even frustrated. In *Brisley v Drotsky*[61] and *Afrox Health Care Bpk v Strydom*[62] it was contended that certain contractual clauses[63] should be declared invalid because they were unfair and in conflict with the general principle of good faith. In both cases this argument was rejected, and the result is that general "provisions such as non-variation and exemption clauses therefore cannot be defeated by direct and explicit recourse to the argument that to enforce them would be unfair and consequently against good faith. Good faith in the sense indicated . . . is relevant only to the extent that its precepts are mediated by rules of law."[64] It was accepted in both cases that public policy — of which open-ended norms such as good faith form part — is now informed by the fundamental values in the constitution,[65] and that the constitution might "spur on the development of new substantive rules of law",[66] but it was nevertheless decided that neither the demands of good faith nor the constitutional values and principles "were sufficient to outweigh the traditional bias in favour of the strict enforcement of agreements",[67] and consequently the clauses in question were upheld.

Two problems emerge from these decisions. Firstly, in some cases the SCA demonstrated a worrying failure to grasp the fundamental difference between central values of private law and "the spirit, purport and object of the Constitution". On the one hand the SCA relies on a much contested bright-line distinction between rules and general standards for this decision,[68] and on the other hand it elevates private law rules (the right of ownership or the freedom to contract and strict enforceability of contracts) to the same level as constitutional values and declares the former as deserving of the same protection as any of the "new" (transformational) values highlighted by the theory of transformative constitutionalism. In doing so, the SCA denied the fundamentally political, transformational nature of the constitution and of the developments that are required by its adoption as the heart of the post-apartheid legal system.

[60] Par 51 263B.
[61] 2002 4 SA 1 (SCA).
[62] 2002 6 SA 21 (SCA). The case is critiqued by Botha "Freedom and constraint" (n 5) 249-283, who refers to further discussions of the decision (269 n 66).
[63] In *Brisley* it was a non-variation clause that required any variation of the initial written document to comply with certain self-imposed formalities; in *Afrox* it was an exemption clause that excluded liability that would otherwise have attached to one of the parties because of the general principles of contract. As Lubbe (n 15) 396 points out, both clauses are "regarded as permissible manifestations of contractual freedom, even where they occur in standard-form contracts unilaterally drawn up by one of the parties".
[64] Lubbe (n 15) 398.
[65] in view of the decision in *Carmichele v Minister of Safety and Security (CALS intervening)* 2001 4 SA 938 (CC); see *Brisley* par 91 34G-H; *Afrox* par 18 37D-E.
[66] Lubbe (n 15) 401.
[67] Lubbe (n 15) 401, 414.
[68] This aspect of especially the *Afrox* decision is critiqued extensively by Botha "Freedom and constraint" (n 5) 249-283.

The decision to entrench private law rules such as sanctity of contract on a constitutional foundation[69] sets up a reactionary and potentially destructive barrier in the way of transformation and it blows the tension between stability and transformation up into a constitutional conflict, much in the way that the Indian courts did before the property clause was removed from the Indian constitution.[70] Logically, this move is on a par with arguments to the effect that constitutionally sanctioned and statutorily regulated affirmative action amounts to reverse discrimination — it is true in a certain trite way, but misses the point of transformative constitutionalism altogether. It simply denies the political history and context of the constitution's transformative programme and pretends that the development of the law in view of the constitution is nothing extraordinary — just business as usual.[71]

The second significant move in the two SCA decisions is to refuse to develop the common law in the cases at hand because, in the absence of extraordinary reasons for doing so, the development in question would involve an amendment of existing private law rights for which the court — in its own opinion — does not have an explicit statutory discretion, and therefore it simply affirmed the existing private law situation.[72] This argumentative move is illustrated particularly clearly by *Brisley v Drotsky*, which (apart from the contract issue described and analysed by Lubbe) also involved an eviction application. Eviction is an issue that highlights the real transformative appeal and potential of the constitution much more vividly than contract, simply because it was so much more obviously involved in the political construction of apartheid.

Section 26(3) of the South African constitution of 1996 provides that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." On the face of it, this provision amends the (uncodified) South African common law, according to which the owner of immovable property is entitled to possession of the

[69] See Lubbe (n 15) 415, where he expresses qualified approval of this move.

[70] See n 14 above.

[71] By contrast, the constitutional court decided in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) par 8-23 that the historical context within which marginalisation and social injustice originated and the constitutional context in which its reform is anticipated have to be taken into account when interpreting and applying laws that amend or reform the common law.

[72] According to Roux "Continuity and change in a transforming legal order: The impact of section 26(3) of the constitution on South African law" 2004 *SALJ* 466-492 the eviction part of the *Brisley* decision should be seen as anti-uncertainty rather than anti-constitutional; the SCA was attempting to avoid uncertainty by opting for stability and continuity in the legal position regarding eviction. In view of Henk Botha's analysis of constitutional adjudication (Botha "Freedom and constraint" (n 5) 249-283, especially 259) this effort to uphold the rule of law and continuity should not clear the SCA from blame, as it can be described as either denial or bad faith (in Kennedy's terminology) that avoids "transformative dialogue about social issues" (see Botha 259 for references). Botha's criticism of the SCA's position on *stare decisis* in *Afrox* (Botha 270) is particularly instructive when compared to the approach of Froneman J in *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE); see n 85-86 and surrounding text below.

property and may evict anybody from it by merely proving that the plaintiff is owner of land occupied by the defendant.[73] In response to section 26(3)[74] anti-eviction legislation has been promulgated[75] to place restrictions on the common-law right to obtain an eviction, in that the relevant legislative provisions require a court order that may only be granted after taking into regard considerations that had no relevance in common law, such as the social or economic position of the occupier. It cannot be denied that section 26(3) poses interpretation problems for the courts:[76] in the case law dealing with these provisions there are signs of considerable confusion and disagreement about the effect of section 26(3) and the legislation promulgated to give effect to it;[77] but some of these decisions were also inspired by unwillingness to amend the common law in a way that would detract from the common-law rights of

[73] The raising of a valid defence is left to the occupier: as long as the owner satisfies the initial burden of proof and the defendant fails to raise a valid defence in law, the personal, social or economic circumstances of either party are not considered by the court. The common-law authority is Voet *Commentarius ad Pandectas* 6 1 2; 6 1 24. The *locus classicus* is *Chetty v Naidoo* 1974 3 SA 13 (A) 20A-G; see further *Vulcan Rubber Works (Pty) Ltd v South African Railways and Harbours* 1958 3 SA 285 (A) 289A-G.

[74] read together with s 25(6): "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress." S 25(9) provides: "Parliament must enact the legislation referred to in subsection (6)."

[75] Eg s 5 of the Land Reform (Labour Tenants) Act 3 of 1996 (applies to a technically circumscribed category of farm labourers known as labour tenants), s 9 of the Extension of Security of Tenure Act 62 of 1997 (applies only to land used for non-commercial purposes outside of the urban areas), and s 8 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (applies to urban and rural land, but is restricted to occupiers who do not have permission or a right to occupy). See the overview of anti-eviction legislation in Van der Walt "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation" 2002 *TSAR* 254-289.

[76] Roux (n 72) 474 lists five plausible interpretations of the subsection. His argument is that the courts have to decide between transformation and continuity when dealing with land reform laws and that they often opt for continuity when the choice is not clearly prescribed by the constitutional provision or the legislation in question. This is no doubt correct. However, when making this choice it is equally important to remember the historical context and the role that eviction played in the apartheid era, a consideration that might arguably prompt a different choice in this specific instance. See in this regard Van der Walt (n 75) 372-420.

[77] In *Ross v South Peninsula Municipality* 2000 1 SA 589 (C) the Cape high court decided that s 26(3) of the constitution amended the common law and that a landowner can no longer obtain an eviction order by simply satisfying the common-law onus of proof — instead, s 26(3) placed an additional onus on the plaintiff to inform the court of circumstances that might enable it to exercise its discretion. In *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 4 SA 468 (W) the Witwatersrand high court disagreed, arguing that the common law right to obtain an eviction order was left unaffected by the constitution. A similar decision was reached by the Cape high court in *Ellis v Viljoen* 2001 5 BCLR 487 (C). For a discussion of the cases see Keightley "The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property" 1999 *SAJHR* 277-307; Van der Walt (n 75) 372-420; Roux (n 72) 466-492.

landowners.[78] The decision in *Brisley v Drotsky*[79] is interesting in this land reform context because the SCA decided that, although the constitution applied horisontally and therefore affected landlord-tenant relationships, no practical effect could be given to the provision in section 26(3) that a court should only allow an eviction after considering all the relevant circumstances. In the absence of specific legislation that grants the courts the discretion to amend the common law and deprive a landowner of his common-law right to an eviction upon consideration of specified circumstances, the only circumstances that were relevant to an eviction are ownership and occupation — the elements of the common-law burden of proof for an eviction. In effect, the SCA simply denied its responsibility to give content or effect to section 26(3) and amend or develop the common law with regard to eviction unless it was specifically and explicitly instructed to do so by tailor-made legislation. Considered against the backdrop of the role that eviction played in the apartheid era this is a very strong position to assume, and a clear indication that — left to themselves — there is no guarantee that the civil courts would develop the common law to promote the spirit, purport and objects of the constitution according to the "normal" development processes of private law logic. The more radical, paradigm shift-type developments that might be required in sensitive areas of the common law and that have not or cannot be effected by legislation will only be made by the civil courts if they openly acknowledge and honour their constitutional duty to make these developments in order to properly integrate the common law into the single, constitution-driven legal system that we now have.

[78] These cases involved the applicability of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) — which unquestionably restricts the common-law right to obtain an eviction order by placing an additional burden of proof on the plaintiff — in "normal" landlord-tenant situations. In a series of cases beginning with *ABSA Bank Ltd v Amod* 1999 2 All SA 423 (W) the courts argued that the act was intended to cater for unlawful occupation of land and not for "normal" landlord-tenant situations where the occupation became unlawful through holding over. The issue was settled when the SCA decided in *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) 125B-H (par 21-23) that PIE indeed applied to former tenants who were holding over, because there was not a sufficiently clear indication of legislative intention to the contrary, and it could not be discounted that the legislature intended to extend the applicability of PIE to holding over by tenants and similar occupiers whose right of occupation had been terminated or expired. In the latest decision on this matter (at the time of writing), *Davids v Van Straaten* case no 901/2005 (C) judgment of 17 March 2005 (unreported), the Cape high court followed the *Ndlovu/Bekker* judgment and decided a holding over case in terms of PIE. The court considered the personal circumstances of the majority of occupiers to be such that it would not be unfair to grant the eviction order against them. The most interesting aspect of the decision involved a 77 year old woman who had no income; she was allowed to stay on in the apartment on the strength of a settlement offer from the owner, but the court obviously regarded the settlement as a fair one. It remains unclear whether she would also have been allowed to stay on in the absence of the settlement. The question is, of course, whether the outcome means that it is expected, in terms of PIE, that private property owners should bear the burden of the duty to provide access to housing for those whose personal and social position do not allow them to gain access on their own. The matter is to be settled by amendment legislation; see Prevention of Illegal Eviction from and Unlawful Occupation of Land Draft Amendment Bill (*GG* 27370) (18 March 2005). In terms of s 2 of the latest version of the draft amendment bill the act would not apply to a person who occupied land as a tenant, in terms of any other agreement, or as the owner of the land and who continues to hold over despite the fact that the tenancy or agreement or ownership has been validly terminated.

[79] 2002 4 SA 1 (SCA).

Theunis Roux argues that the choice in *Brisley* was anti-uncertainty rather than simply anti-constitutional,[80] and points out that this choice — albeit perhaps understandable as the kind of choice many lawyers would prefer instinctively — could unnecessarily close down the transformative potential of the constitution, especially in situations where the legislature has not yet acted to indicate the direction of development. The judgment in *Port Elizabeth Municipality v Various Occupiers*[81] makes it clear that the constitutional court favours a contextual, transformative view of eviction, which means that the common law relating to eviction has to be developed (and new eviction legislation has to be interpreted) in a way that will reflect the constitutional choice for change — in this specific instance, continuity and change have to make way for development and change because of a clearly justified constitutional aspiration directly relating to the abolition and dismantling of the apartheid past and the building of a more equitable and just future land law. As far as eviction is concerned, the common law is subjected to direct influence and change inspired by constitutional provisions and aspirations.

Johan van der Walt[82] writes that "the horisontal application of rights obviously constitutes a critical junction between constitutional and common-law jurisprudence in the resolution of private-law disputes and therefore between the two fields of adjudication that delimit the domains of the Supreme Court of Appeal and the Constitutional Court". He argues very strongly in favour of a style of indirect horisontal application that will not allow the civil courts to shy away from development of the common law that goes against the grain of long-standing and perhaps treasured private law principles and institutions, when necessary. The co-operative relation between common law and constitutional jurisprudence that he pleads for can only develop, in his view, if the difference between common law and constitutional law that is upheld in the notion of indirect horisontal application "remains a creative difference or tension, a difference that in fact accentuates the constitutional challenge to common law. It is to be rejected if the difference that it invokes between common law and constitutional law is to be conceived in terms of a shield that fends off the constitutional challenge to existing law."[83] Moreover, Van der Walt argues,[84] this is not a new or strange thing for private law, because the tension characterises common law institutions themselves — it is the "tension between a drive towards closure and certainty and a desire to re-open and include what has hitherto been excluded, despite the degree of uncertainty that this re-opening and inclusion re-introduces into the system. This is the age-old tension between clear-cut rules and open-ended principles . . ." To this one could perhaps add that the explicit transformation-oriented words of the constitution, read within its historical and political context, indicate quite clearly that clear-cut rules cannot be allowed to stand in the way of change indicated by

[80] Roux (n 72) 492.
[81] 2005 1 SA 217 (CC). See the discussion of the case in § 3.4 below.
[82] especially Van der Walt "Indirect application" (n 25) 343-361.
[83] 355.
[84] 360.

open-ended principles that demand the transformation of South African law away from inequality and unfairness and towards greater equality and fairness.

In a recent decision,[85] Froneman J expressed a view regarding the duties of the courts in language that strongly evokes Johan van der Walt's position:

> "But it should be clear that these [practical] difficulties may not serve as an excuse for failing to fashion and enforce new remedies simply because they did not exist under the common law. In these situations the judge who fails to examine the existing law with a view to ensuring the effective realisation of constitutional rights and values that were not recognised before is not, as is often presumed by proponents of this course, merely neutrally and objectively applying the law. That will only ever be true if the existing common law proceeds from a fair and equal baseline, an assumption that will not often be open to the present judiciary in South Africa in cases such as the present, given our unequal past. More often than not such a supine approach will effectively result in a choice for the retention of an unequal and unjust *status quo*."[86]

In this decision, Froneman J accepts that it is the duty of high court judges to develop the existing law and create new remedies to meet the needs of poor and marginalised citizens and to promote effective, accountable and transparent public administration. Moreover, when faced with seemingly restraining authority in higher courts' judgments that could prevent a judge from honouring this duty, Froneman J concluded that the demands of the constitution and the rule of law are supreme. He voiced his concern about the potentially "chilling" effect of a too restrictive interpretation of the SCA decision in *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* as follows:[87]

[85] *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE). The case attracted attention in the media; see Rickard "Judge in revolt takes on the law for the sake of justice" *The Sunday Times* (SA) [26-09-2004] 20.

[86] *Kate* case (n 85) par 16.

[87] 2004 2 SA 611 (SCA). As is explained by Froneman J in the introductory section of the *Kate* decision (par 5-15), this decision has a history in the "persistent and huge problem with the administration of social grants" in the Eastern Cape province and the fact that the courts emerged as "the primary mechanisms for ensuring accountability in the public administration of social grants": par 5. The most significant recent cases in which the courts attempted to enforce public accountability are *Mahambehlala v MEC for Welfare, Eastern Cape* 2002 1 SA 342 (SE); *Mbanga v MEC for Welfare, Eastern Cape* 2002 1 SA 359 (SE), in which Leach J granted applicants whose applications for social security grants have nor been dealt with timeously constitutional relief, consisting of orders for back pay and interest, under s 38(1) of the constitution. In addition, responsible public functionaries were held accountable and declared in contempt of court where judgment debts sounding in money against the state were not paid: *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (Tk); *East London Transitional Local Council v MEC for Health, Eastern Cape* 2000 4 All SA 443 (Ck). In the recent past, court applications based on these decisions have often resulted in "administrative failures" being rectified, However, in the *Kate* case the Eastern Cape government seemed to adopt a new, more defiant stance seemingly based on their interpretation of the SCA decision in *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 (SCA). Although the issue of back pay and interest was not directly relevant to the case in *Jayiya* (the SCA explicitly acknowledged that the issue was not argued and that its remarks on this point were therefore hesitant) the SCA nevertheless included in its decision general remarks that create the impression that back pay and interest, claimed by way of constitutional relief in terms of s 38(1) of the constitution, might be unsuitable because constitutional damages was an exceptional remedy only to be used if the common law and legislation do not provide suitable remedies; a remedy was available to the applicant in the Promotion of Administrative Justice Act 3 of 2000 (PAJA); and relief of this nature could not be claimed under PAJA.

> "'In matters where there may be doubt or ambiguity in higher court authority, and where that doubt or ambiguity may have serious consequences for upholding the fundamental constitutional values of the supremacy of the Constitution and the rule of law, I would respectfully suggest that High Court judges of first instance are obliged to follow the interpretation of authority that in their serious and considered opinion would serve the Constitution and the rule of law best."[88]

Despite the conservative approach followed in *Brisley v Drotsky* and perhaps also in *Jayiya*, there are encouraging signs that the constitutional impetus in favour of transformation will eventually outweigh any hesitation or reluctance that may remain on the side of some courts or commentators. One particularly encouraging result appears from the SCA decision in *Modderklip,*[89] which acknowledged the influence of the constitution and the necessity of amending and developing the common law to accommodate or promote the spirit, purport and objectives of the constitution, up to and including the point of subjecting a landowner's common law right of eviction to a stalling manoeuvre that would allow the state to find alternative accommodation for the unlawful occupiers before evicting them. Moreover, the supreme court of appeal was willing to exercise its discretion in this case without the benefit of a clear statutory mandate. On constitutional considerations it was also willing to fashion a new remedy that would solve the case satisfactorily in the short and in the longer term. Intriguingly, the supreme court of appeal reached its decision in *Modderklip* with reference to a new vocabulary, which is founded in a different theory about the effect of the constitution on private law than has been relied upon before — any mention of horisontal application played a background role in this case, while much more was made of the state's duty to protect its citizens' fundamental rights. By contrast, an equally progressive (and arguably more comprehensively argued) result was reached in the constitutional court decision in *Port Elizabeth Municipality v Various Occupiers*,[90] without any mention of the state's duty to protect. Moreover, on appeal in the *Modderklip* decision the constitutional court also managed to uphold the supreme court of appeal's order, on different grounds, without referring to the state duty to protect argument. However, the duty to protect argument was used previously in another important constitutional court decision. The court's shift from horisontal application discourse to duty to protect discourse in the case law — and the effect of this shift for horisontal application discourse — is the topic for discussion in subsequent sections of this article.

### 3.3 The state's duty to protect

In recent cases, a new vocabulary has entered into the courts' discussion of the effect of the constitution on private law: instead of the horisontal application

[88] *Kate v The Member of the Executive Council for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) par 27. Compare the much more restrictive view of *stare decisis* in *Afrox Health Care Bpk v Strydom* 2002 6 SA 21 (SCA) and the criticism of that view by Botha "Freedom and constraint" (n 5) 270; *cf* n 72 above.

[89] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 8 BCLR 821 (SCA). The order of the SCA was upheld on appeal by the constitutional ourt, albeit for different reasons; see *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* case CCT 20/04 2005-05-13 (CC). The CC decision is discussed below.

[90] 2005 1 SA 217 (CC).

of the fundamental rights, the courts now refer to the state's duty to protect fundamental rights when considering cases where the common law and — particularly but not exclusively — private law[91] is or should be developed in accordance with constitutional provisions, principles or values.[92] The duty to protect language originated in a constitutional court decision but found its way — via an interesting detour — into the SCA decision in *Modderklip*.

The most important case in which the duty to protect was referred to as the basis on which the common law must be developed in accordance with the constitution is *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)*.[93] The applicant in this case claimed delictual damages from the respondents on the basis that they owed a legal duty to protect her; that they negligently acted in breach of that duty; and that she consequently suffered damage. The action that caused the applicant harm was in fact committed by another private person, but she claimed that the respondents (a police officer and public prosecutors) were responsible because they failed to oppose bail while the attacker was awaiting trial and recommended that he be released on warning, despite repeated warnings and expressions of concern about the safety of the applicant. He attacked the applicant and caused her serious injury while he was out on bail. The applicant's case was dismissed when the trial court granted an order of absolution from the instance. This order was confirmed by the SCA and the applicant appealed to the constitutional court.

The applicant based her application on the argument that the relevant members of the police and the public prosecutors owed her a duty to ensure that she enjoyed her constitutional rights to life, respect for and protection of her dignity, freedom and security, personal privacy and freedom of movement. Counsel argued that the trial court and the SCA erred in not developing the common law, because such development would have resulted in a finding that the respondents owed a legal duty to protect these rights. Neither the trial court nor the SCA had regard to the relevant provisions of the constitution, because

[91] As will appear from the discussion below, this process affects public as well as private law. In fact the decision in *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of President of the RSA* 2000 1 SA 674 (CC) par 44 is a good example of how the common law of judicial review can be developed in accordance with new constitutional provisions.

[92] I leave the formulation vague on purpose. As will appear from the discussion of German theory below the influence on legislation and the common law (''normal law'' in the German terminology, referring to all non-constitutional law) can emanate from explicit constitutional provisions (in or outside the bill of rights), general constitutional principles or so-called ''objective'' constitutional values.

[93] 2001 4 SA 938 (CC). For discussions of this decision see the sources cited in n 21 above, and particularly Van der Walt ''Horisontal application'' (n 36) 517-540. Apart from *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 8 BCLR 821 (SCA) other cases in which the duty to protect-construction was referred to are *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); V*an Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA); *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA).

they simply held that no such duty existed at common law and therefore granted absolution from the instance.[94]

In its decision the constitutional court reiterated that the constitution is the supreme law and that the bill of rights applies to all law. The constitution grants all courts the inherent power to develop the common law, and places an obligation upon the state to respect, protect, promote and fulfil the fundamental rights. The constitution also binds the judiciary and provides that the courts must promote the spirit, purport and objects of the bill of rights when developing the common law. Accordingly, when the common law deviates from the spirit, purport and object of the bill of rights the courts are obliged to develop it "by removing that deviation".[95] The decision thus relies on the language and logic of indirect horisontal application (or development of the common law in terms of section 39(2)) thinking as well as state duty to protect (in terns of section 7(2)) thinking.

The applicant's case was that the common law with regard to wrongfulness should be developed beyond existing precedent. Neither the trial court nor the SCA embarked upon the required inquiry for such a development.[96] The starting point is the fact that section 8(1) imposes a duty upon the state and all its organs not to perform any act that infringes the rights protected in the bill of rights. In this regard, the constitutional court adopted a dictum of the European court of human rights in which it was said that the entrenchment of the right to life in the European Convention may imply in certain well-defined circumstances a positive obligation on the state to take preventive operational measures to protect an individual whose life is threatened by the criminal acts of another individual.[97] In view of these considerations, and considering the different options for developing the common law that presented themselves in this matter, the constitutional court decided that the case for the appellant had sufficient merit to require careful consideration of the complex legal matters raised in it, and that the matter should therefore be referred back to the trial court to continue with the trial.[98] Upon reconsideration the trial court acknowledged that it had erred in not considering the constitutional effect on the case, and decided that there was a gap between the common law (which would not have placed a duty upon the state) and the fundamental rights in the constitution (which would place a duty to protect upon the state), and that the

[94] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) par 32 953C-D. See Van der Walt "Horisontal application" (n 36) 517-540, who argues that the problematic aspect of the common law that had to be developed was the rules of civil procedure that allowed a court to grant absolution from the instance before it can be forced to decide whether a new remedy has to be created or developed in view of the constitution.

[95] as set out by Ackermann and Goldstone JJ par 33 953E-954A.

[96] Par 40 956A-C.

[97] par 45 958B-C, with reference to *Osman v United Kingdom* 29 *EHHR* 245 par 115 305 (also reported as 1998 ECHR 101). In par 48 959F the court also referred to *Z v United Kingdom* application no 29392/95, 10 May 2001 (reported as 2001 ECHR 329).

[98] Par 81-83 970H-971E.

common law therefore had to be developed in view of section 39(2) of the constitution to place a duty upon the state. The trial court therefore granted an action for damages to the plaintiff.[99]

One argument that supports the applicant's claim on the basis of the state's duty to protect is therefore that the constitution places an obligation upon all state organs not to infringe upon the entrenched rights of individuals. In addition, the courts are obliged to develop the common law so as to protect, promote and fulfil those rights; and that implies a further obligation upon the state to take preventive measures — in certain well-defined circumstances — to ensure that other individuals do not infringe upon the entrenched rights of private persons. The remarks to the same effect in the *Modderklip* case[100] are therefore not plucked out of thin air — they form part of a larger shift in South African constitutional theory towards the notion of the state's duty to protect private persons against infringements of their fundamental rights by unlawful conduct of other private persons.

### 3.4 Developing the common law according to constitutional demands

The question for decision in C*armichele* was whether the common law of delict indeed should have been developed to recognise a duty of care that would have rendered the state liable for failure to protect the applicant from unlawful attacks by another private person. The trial court initially argued — purely with reference to the common law and without taking the constitution into account — that private law did not recognise such a duty of care. In turning down the appeal against the original decision of the trial court, the SCA agreed that the common law as it stood at the beginning of this saga did not render the state liable — a position that prominent academics apparently shared.[101] Other academics disagreed, arguing that the common law of delict could indeed accommodate the view that the state owed its citizens a duty of care against unlawful actions of other private persons, and that the real problem with the

[99] *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C). See Van der Walt "Horisontal application" (n 36) 517-540 for criticism of the decision, arguing that the problem was not the gap between the common law of delict and the fundamental rights, but between the civil law of procedure and the fundamental rights.

[100] See *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 8 BCLR 821 (SCA). On appeal the constitutional court upheld the SCA order, on different grounds, without referring to the duty to protect argument at all: *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* case CCT 20/04 2005-05-13 (CC). In this case the CC relied on the duty of the state to ensure access to the courts, including efficient and suitable enforcement of court orders, based on s 34 of the constitution. The case is discussed below.

[101] See *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA). Neethling "Die regsplig van die staat om die reg op die fisies-psigiese integriteit teen derdes te beskerm: Die korrekte benadering tot onregmatigheid, nalatigheid en feitelike kousaliteit" 2001 *THRHR* 489-495 agreed that this was the correct approach and result.

common law lay elsewhere.[102] The constitutional court did not decide the issue — it was referred back to the trial court for reconsideration with due regard for the applicable principles and values of the constitution — but suggested strongly that there was a need for development of the common law. The trial judge decided, upon reconsideration, that he had indeed not taken the effect of the constitution into consideration originally, and that the common law indeed required such development to make the state liable, and therefore he reversed his own earlier decision.[103]

It therefore seems fair to conclude that there is little or no agreement about the question whether the South African common law requires judicial development in order for it to accommodate the apparently widely recognised need to construe a duty of the state to protect private citizens from attacks on their physical integrity by other private persons. Subsequent to the strong hints by the constitutional court everybody seems to agree that it is justified and necessary that such a duty should exist and that it should in suitable cases render the state liable in delict for inaction, but there is a wide difference of opinion about the mechanics for realising this development. Some think the common law can accommodate such a duty of care without constitutionally inspired development; others think the duty of care should be recognised but private law requires development for that purpose. Judging from case law and academic reaction, it seems fair to argue that the need to recognise the duty of care would probably not have been recognised so widely and unanimously in the absence of the constitutional court decision in *Carmichele*. Left purely to its own devices, private law would possibly not have made this development at all, or at least not have made it so soon or as comprehensively as it has now been made in the aftermath of *Carmichele*. That must cast some doubt upon the approach according to which the development of private law should take place as an interstitial development or a dogmatic change of direction within and according to the logic of private law — the initial nudge from the constitutional court seems to have been inspirational and instrumental in this case to say the least. In view of the legal certainty that is at stake in developing the common law one should not be surprised by the hesitance of some courts — the decision to

[102] Van der Walt argued in "Horisontal application" (n 36) that there was not a fundamental gap between the common law of delict and the fundamental rights embodied in the constitution, and that it was the common law of civil procedure that required development in view of constitutional principles so as to avoid instances (such as *Carmichele*) where courts grant absolution from the instance too easily and so never get to the point where the possible effect of the constitution on private law can be considered properly. It is interesting that the trial judge reconsidered and reversed his view so readily and radically upon consideration of the constitutional issues, while others seem to react more guardedly. Having described the SCA decision in *Carmichele* as correct, Neethling (with Potgieter) "Toepassing van die grondwet op die deliktereg" 2002 *THRHR* 265-273 does not seem ready or eager to accept that the common law of delict required fundamental development or adaptation in view of the CC decision, and focuses strongly on the aspects of the CC decision that emphasise the limited powers of the courts in changing the common law. Although Neethling and Potgieter accept that the law of delict is now clearly co-determined by constitutional principles and values, they emphasise that it does not give judges carte blanche to change the common law dramatically or at will. See further Neethling and Potgieter "Die regsplig van die staat om die reg op fisiese integriteit teen aantasting deur derdes te beskerm: Twee teenstrydige beslissings" 2002 *THRHR* 273-278.

[103] Chetty J in *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C). See Van der Walt "Horisontal application" (n 36) 517-540 for a critical discussion of what he refers to as "a startling reversal".

uphold and stabilise or to change and develop the common law cannot be made in the abstract; it is a difficult and complex decision that has to be made in every individual case with due regard for the context and the implications of the decision.[104] It therefore remains very important to keep debating the question whether (and when) developments can be left to the "normal" dogmatic processes of private law as a living system and when constitutional inspiration and impetus are required for (and need to be recognised as) the origin and indicator of the pace and scope of such development.

Important as this decision is, it should not be made purely on the basis of duty to protect arguments. The approach according to which the common law has to be developed in accordance with the constitution — in effect the horisontal application approach stated in other terms — is not completely dead, nor is its relevance restricted to the law of delict as it once may have appeared. In a recent property-related decision[105] the constitutional court comprehensively set out the constitutional framework within which the development of the common law has to take place as far as evictions are concerned. The case concerned a group of people who settled upon private land unlawfully and who are now threatened with eviction by the local government, acting on behalf of the private landowners. In such a case, the court explained,[106] eviction laws "cannot simply be looked at as a legislative mechanism designed to restore common law property rights by freeing them of racist and authoritarian provisions, though that is one of its aspects"; they had to be understood and applied "within a defined and carefully calibrated constitutional matrix." This matrix is defined by what the court refers to as a "transformatory public-law view of the Constitution", which requires the establishment of an appropriate constitutional relationship between section 25 (property rights) and section 26 (housing rights), with due regard for the historical context of land hunger and evictions from land in the apartheid era, the role of the constitution in reforming the injustices of the past and the constitutional values of human dignity, equality and freedom.[107] Approached within this interpretive contextual framework or "matrix", the salient features of the way in which the constitution

[104] See Roux (n 72) 466-492 for a carefully considered and argued perspective.

[105] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC). A similar approach was followed in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC). In the latter case, the constitutional court decided to develop the law pertaining to the sale in execution of property, especially immovable property that serves as the debtor's house, to satisfy a debt. The court took the historical and socio-economic context and the importance of security of tenure in housing into account and decided that any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(3) of the constitution: par 34. However, the court also held that a blanket prohibition of sale in execution of housing stock would not take the interests of creditors into account, and accordingly it decided to develop the institution of judicial oversight and to charge magistrates with the duty to ensure that sales in execution will not unreasonably and unjustly deprive indigent persons of their existing access to adequate housing. To discharge this duty, magistrates will have to take into account factors such as the circumstances in which the debt was incurred, attempts by the debtor to pay off the debt, the financial situation of the parties, the amount of the debt, whether the debtor is employed or has a source of income to pay off the debt, and any other relevant factor: par 55-60. To enable the courts to exercise this discretion the court chose to read a suitable phrase into s 66(1)(a) of the Magistrates' Courts Act 32 of 1944: par 64.

[106] par 4-13, but especially 14-23. A very similar approach to transformation is set out in a newspaper article by Cape high court judge Davis: "Let law take its course" *The Sunday Times (SA)* [18-10-2004] http://www.sundaytimes.co.za/.

[107] par 10, 15, 17, 19.

approaches the interrelationship between land hunger, homelessness and respect for property rights are that: (a) the rights of the dispossessed are not generally stated in unqualified terms; (b) eviction of people living in informal settlements may take place, even if that means that they lose their home; and (c) section 26(3) places emphasis on the need to seek concrete, case-specific solutions that require the courts to consider all relevant circumstances:

> "'The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."[108]

Moreover, in a thinly veiled reference to the minimalist stance adopted by the SCA in *Brisley v Drotsky*,[109] the court added that the courts have "a very wide mandate" and "the widest discretion possible"[110] in taking account of all the relevant circumstances in eviction proceedings. In other words, the rather mechanical eviction reflex of the common law is developed, taking into account the historical context and the transformative matrix of the new constitution within which the eviction laws must be interpreted and applied, so as to allow the courts the widest possible discretion to consider all relevant circumstances before deciding whether an eviction is justified in a particular case. This result can only be described as an example of the indirect horisontal application of the fundamental right in section 26 of the constitution, by which the common law is developed and changed in such a way as to move away from the history of inequality and injustice and towards a new dispensation of justice, equality and human dignity.

### 3.5 The state's duty to protect *versus* the state's duty of care

A second question arising from *Carmichele* seems not to have enjoyed academic or judicial attention to date, namely what the exact nature and scope of the duty construed in this decision is and how it relates to the idea of developing the common law in accordance with the constitution. Did *Carmichele* extend the private law doctrine of the duty of care and the claim for damages that goes with it, or did it construe a general constitutional duty upon the state to protect citizens' fundamental rights? What are the differences between these two constructions, if any? Does it matter whether we approach the issue from one rather than the other direction?

On the one hand it looks as if the explicit provisions of the constitution are the origin of the state's duty to protect as it was formulated in *Carmichele* and other cases. Section 7(2) of the constitution enjoins the state to "respect, protect, promote, and fulfil the rights in the Bill of Rights", and it seems natural to deduce from that provision that the state has a constitutional duty to promote and protect rights. The constitutional court went further in *Carmichele*, adding that the South African constitution "is not merely a formal document regulating public power", and that it, like the German Basic Law, "also embodies ... an objective, normative value system", and that development of the common

[108] par 23; see further par 20, 21, 22.
[109] 2002 4 SA 1 (SCA); see particularly par 42, 43 21A-F.
[110] *Port Elizabeth v Various Occupiers* 2005 1 SA 217 (CC) par 30 and 45 respectively.

law in terms of section 39(2) of the constitution must take place "within the matrix of this objective normative value system".[111] This, according to the constitutional court, requires development that meets the constitutional objectives of section 39(2) as well as the requirements of developing the common law within its own paradigm.[112] A link is therefore established between the state's duty to protect the fundamental rights in terms of section 7(2) and the obligation to develop the common law according to section 39(2).

In referring to the objective value system inherent in the fundamental rights and the effect of this system of objective normative values the constitutional court signaled how far it has moved away from discussing the effect of the constitution on private law in terms of horisontal application — the focus now seems to be upon the state's duty to protect private individuals and their constitutional rights against infringements by unlawful conduct of other individuals, in view of the explicit provisions of the constitution or of the objective normative values underlying or embedded in the fundamental rights. However, in discussing this development no mention is made of the horisontal application of the rights in the constitution (such as physical integrity). In making this move from horisontal application discourse to duty to protect discourse, the South African courts followed a line of development that resembles a similar development in German constitutional law,[113] but strangely enough German authorities and the well-developed German theory on this point played almost no part in the South African development at all.

In the *Carmichele* case,[114] the constitutional court referred to case law from the US (against "positive rights")[115] and from the European court of human rights (in favour of state liability)[116] to substantiate its suggestion that the state (in the form of public bodies such as the police) could be liable to delictual actions from members of the public who claim that the state has failed to protect them against violations of their fundamental rights, even in situations where the actual harm was done by another private person. Apart from the rather general statement about the objective normative values in the constitution referred to above,[117] no reference was made to German law in *Carmichele*, nor did Ackermann J refer to the German doctrine regarding the state duty to

[111] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) par 54 961F-H.

[112] Par 55 962B.

[113] The German theory is discussed in part 2 of this article.

[114] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) par 45-49 957F-960B.

[115] *De Shaney v Winnebago County Department of Social Services* 489 US 189 (1988). The case was cited merely to make the point that the state action doctrine precludes state liability in the absence of state action in contravention of a fundamental right, and that the US supreme court works from the baseline position that there are no positive rights in the US constitution; see *Carmichele* par 45 957H.

[116] *Osman v United Kingdom* 29 EHHR 245 1998 ECHR 101; *Z v United Kingdom* 2001 ECHR 329. These cases were cited to demonstrate the court's rejection of the immunity approach that is followed in the UK to safeguard public authorities against delictual claims by members of the public: *Carmichele* par 46 958D.

[117] *Carmichele* par 54 961F-H.

protect in his extensive analysis of German law in *Du Plessis v De Klerk*.[118] German law was not referred to in the subsequent delict decisions that followed the *Carmichele* decision either.[119] In subsequent decisions where the facts did not resemble *Carmichele* or the other delictual cases, the courts relied indirectly upon the *Carmichele* decision and the notion of the state's duty to protect rights, but referred only to international law sources (mostly a different set of international law cases than were referred to earlier).[120] As a consequence, there is considerable lack of clarity about the nature of the shift to duty to protect discourse and about the authority for that shift. It is not clear how this shift affects the existing position with regard to horisontal application either; does that whole debate and everything that was said about radiation now play no role any more? In order to evaluate the authorities referred to in the case law since *Carmichele* I therefore analyse German and international law with regard to the state's duty to protect fundamental rights in sections 4 and 5 below.

Interestingly, the *Carmichele* argument based on the state's duty to protect the fundamental rights of its citizens was recently relied on in a supreme court of appeal decision that had nothing to do with the state's delictual liability, although the order eventually granted included a compensation element. The *Modderklip* case concerned a situation where a landowner was unable to enforce an eviction order against a community of unlawful occupiers on his land because they had nowhere else to go.[121] In *Modderklip* the supreme court of appeal once again relied on the duty to protect argument, deciding that the state was responsible for the impasse in enforcing the landowner's property interests: because the state was not honouring its duty to realise and fulfill the occupiers' constitutional right to access to housing they had no alternative accommodation, and until such accommodation was provided the landowner would be unable to enforce his eviction order. The state was therefore instructed to provide alternative housing for the unlawful occupiers, and the owner was allowed to claim damages from the state for as long as the occupiers

[118] In *Du Plessis v De* Klerk 1996 5 BCLR 658 (CC) Ackermann J dedicated the entire 5 pages of his analysis of German law (par 92-106 at 704F-709E) to a detailed consideration of the reasons why the German courts and scholars rejected (and why South African courts should also reject) direct horisontal application and instead work with indirect horisontal application only.

[119] Other cases in which the duty to protect-construction was referred to are *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); V*an Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA); *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA). Like *Carmichele*, these decisions focused on the liability of the state or public bodies for delictual claims from members of the public in terms of the private law duty of care doctrine, equating an extension or development of the common law that would render the state liable with state accountability. In *Van Duivenboden* the SCA referred to *Osman v Ferguson* 1993 4 All ER 344 (CA); *Osman v United Kingdom* (2000) 29 EHHR 245, 1998 ECHR 101 and *Jane Doe v Board of Commissioners of Police for Municipality of Metropolitan Toronto et al* (1990) 72 DLR (4th) 580 (Ont CA). The other cases referred to *Carmichele* but not to foreign or international law.

[120] especially the different *Modderklip* decisions; see n 122 below for references.

[121] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 8 BCLR 821 (SCA).

were still present on his land. In making this order the supreme court of appeal relied on the case law and literature surrounding the General Comments of the UN Committee on Economic, Social and Cultural Rights.[122] This approach to the duty to protect argument is particularly relevant to the South African situation because section 7(2) of the constitution provides explicitly that "[t]he state must respect, protect, promote, and fulfill the rights in the Bill of Rights." It is therefore not surprising that the international law cases in which this approach was developed are cited as authority in *Modderklip* for the proposition that the state has a duty to respect, protect and fulfil the section 25 and 26 rights in the South African constitution. Interestingly, the constitutional court managed on appeal to uphold the supreme court of appeal's order, without referring to the argument that the state has a duty to protect its citizens' rights at all. This conclusion was reached by relying on section 34 of the constitution, arguing that it was unreasonable for the state to stand by and do nothing in circumstances where a citizen was practically incapable of enforcing his rights because of the sheer magnitude of the land invasion and the particular circumstances of the occupiers. In such a situation, the constitutional court argued, the state has a duty (as part of their section 34 obligation to provide the necessary institutions and mechanisms to ensure access to the courts) to assist the landowner in enforcing his rights. This argument was made without any mention of section 7(2) or the general notion of a state duty to protect the rights of its citizens against unlawful interference.[123]

In the *Metrorail* case,[124] the constitutional court followed a slightly different line of argument in deciding whether a public company (in which the state is the only shareholder) is accountable to its customers (commuters using the railway service provided by the company) for crimes committed against them by other passengers. The court argued that the company was a state organ that bore certain obligations in terms of the Legal Succession to the South African Transport Services Act 8 of 1989; that these obligations had to be interpreted in the light of the bill of rights because the company was accountable to the broader community in the exercise of its powers; and that the statutory provisions that gave rise to the company's powers and accountability had to be interpreted in view of the relevant constitutional provisions and with due regard for the social, economic and political context within which the powers of

[122] Instead of the delictual duty of care cases referred to in *Carmichele*, the court in *Modderklip* referred to another set of cases relating to the state's duty to protect, fulfil, promote and realise citizens' constitutional rights: *X and Y v The Netherlands* 1985 8 EHRR 235 (European court of human rights, European convention on human rights); *Union des Jeunes Avocats v Chad* 9th Annual Activity Report 72 (African Commission, African Charter of human and peoples' rights); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* 15th Annual Activity Report 30 (African Commission, African Charter of human and peoples' rights); *Velàsquez Rodriguez v Honduras* 28 ILM 291 (1989) (Inter-American court of human rights). See further on this literature Liebenberg "The interpretation of socio-economic rights" in Chaskalson *et al Constitutional Law of South Africa* (2nd ed original service 2003) 33-6–33-7. These cases and the relevant development are discussed in part 2 5 of the article .

[123] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* case CCT 20/04 13-05-2005 (CC) par 48. For a discussion of the *Modderklip* cases see Van der Walt "The state's duty to protect property owners vs the state's duty to provide housing: Thoughts on the *Modderklip* case" forthcoming 2005 *SAJHR*.

[124] *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 2 SA 359 (CC) par 69-83 397H-402I.

the company were exercised, to promote the spirit, purport and objects of the bill of rights. Accordingly, the company bore a positive obligation, arising from the authorising statute read with the constitution, to ensure that reasonable measures were in place to provide for the security of rail commuters.[125] In coming to this decision the court relied on the provisions in sections 7, 8 and 39 of the constitution and not on foreign case law, although the *Osman* decision that was applied in *Carmichele* was again referred to.[126] In the relevant passage, the court confirmed that the effect of the *Carmichele* decision was to establish that accountability of a public power was one of the considerations that was relevant to the question of whether a legal duty exists for purposes of the law of delict;[127] thereby clarifying the proper relationship between the public law theory of a state duty to protect and the private law doctrine of the duty of care, and (possibly) liability for a claim for delictual damages. The most important aspect of this finding is the fact that the existence of a state duty to protect (accountability) can be an indication of a duty of care and hence of private law liability, so that private law could possibly be developed (in the sense that state liability is extended) to give effect to a transformative, public law or constitutional notion of accountability.

The approach in the *Metrorail* case is significant for this article, in that it signifies a clear move away from the earlier debate about (direct or indirect) horisontal application, while at the same time leaving us in some doubt about the future direction of the debate about the effect of the constitution on private law. On the one hand, the court still refers to and relies upon the new discourse, opened up in *Carmichele* and similar earlier cases, about the state's duty to protect its citizens' fundamental rights against infringements by other private parties, but without bringing final clarity about the theoretical foundation for this discourse. On the other hand the court also relies, in passages that are easier to follow as far as their constitutional and theoretical foundations are concerned, upon the constitutional duty of the courts to develop existing law to promote the spirit, purport and objects of the constitution according to section 39(2) of the constitution.

The possible sources of comparative authority for the notion of a state duty to protect fundamental rights are discussed in the next sections of the article, followed by an evaluation.

[to be concluded in 2006:1 *TSAR*]

[125] par 85 403E-G. It was unnecessary to decide whether this was a direct constitutional obligation because reliance was placed primarily on the statutory obligations of the company. The court added that the obligation to ensure the safety of rail commuters could not be placed exclusively on the shoulders of the police, because they were operating under severe capacity restraints; once it was clear that the police could not manage to ensure safety on their own the company had the obligation to take reasonable steps to ensure that rail commuter passengers were safe: par 91-93 405G-H, 406D-F.

[126] See par 71-73 398E-399F, particularly 399A-B and n 77 there.

[127] par 73 399D-F. The court pointed out that it would not always be necessary or suitable to award delictual damages for a particular breach of a duty to protect citizens' fundamental rights and that other public law remedies (particularly declaratory, mandatory and prohibitory relief) would sometimes be more suitable: par 79 401F.