

Transformative constitutionalism and the development of South African property law (part 2)*

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4 German theory

4.1 Introduction and background

South African courts and academic commentators had relatively frequent recourse to German theory on the application issue during the early stages of constitution writing and the development of a new constitutional jurisprudence¹²⁸ but now, when the debate seems to be moving into a new paradigm, German literature and case law are strangely neglected. German constitutional theory is a suitable source of comparative analysis for the South African debate about the effect of the constitution on private law, because it has a strong, well-developed system of private law that is distinguished quite strictly from public law, but not unlike South Africa it also has a constitution that was adopted with clearly transformative intentions subsequent to a political catastrophe. Moreover, like South African law, German law clearly accepts that private law is not isolated from the constitution,¹²⁹ and that the constitution can in principle (and does in fact) influence or have an effect on private law.¹³⁰ Initially, the South African debate about the effect of the constitution on private law was based mainly on arguments about the horizontal application of fundamental rights,¹³¹ and although horizontal application was discussed with

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¹²⁸ I suspect that a section on German law (probably written by Johan de Waal) in Davis, Chaskalson & De Waal "Democracy and constitutionalism: The role of constitutional interpretation" in Van Wyk, Dugard, De Villiers & Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1994) 1-130 at 96-97 had a big influence on the way in which German sources on constitutional theory and interpretation were accepted in South African law during the formative years of the new constitutional dispensation. De Waal was also a clerk of now retired constitutional judge Ackermann, who was one of the few constitutional court judges who referred to German law now and again in their judgments. As was pointed out in par 3 above, Ackermann J referred to German theory briefly in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 961F-H, but in *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 2 SA 359 (CC) no reference was made to German law.

¹²⁹ The *Grundgesetz für die Bundesrepublik Deutschland (GG)* Constitution (1949).

¹³⁰ See Stern III/1 *Das Staatsrecht der Bundesrepublik Deutschland* (1988) 1553.

¹³¹ The only early source in academic literature that seems to discuss both these vocabularies is the one by De Waal in Davis, Chaskalson & De Waal (n 128) 96-97.

reference to a range of comparative sources,¹³² German theory was apparently a big influence in the development of the authoritative version of indirect horizontal application that was eventually generally accepted. As was indicated in part 1 of this article, the South African debate has recently been conducted with reference to the state's duty to protect fundamental rights, while talk about horizontal application seems to have moved into the background, and this time around South African courts preferred to cite international law and not German law.¹³³ However, German law has developed through a similar shift from focusing on horizontal application to placing greater emphasis on the state's duty to protect, and German scholars and courts have worked out the notion of state duties to protect in great detail.¹³⁴ It therefore seems strange that German law is not consulted in this regard, and it appears worth the effort to form a picture of the doctrines of horizontal application and of state duty to protect in German constitutional law. To do so requires some general doctrinal background.

In his authoritative work on German constitutional law,¹³⁵ Stern explains that the effect of the German constitution on private law has to be considered in four spheres:¹³⁶

- i The constitution can (explicitly or implicitly) impose a duty on private law legislatures to make and amend private law legislation in such a way that fundamental interests are protected in accordance with constitutional values and norms.

¹³² including jurisdictions where horizontal application is rejected in any form. In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957G-960A reference is made (per Ackermann and Goldstone JJ) to jurisprudence from the US and the European court of human rights, arguing that the state action doctrine in US law cannot influence SA law because it, like the European Convention, "points the other way" as far as the applicability of the fundamental rights to cases not involving state action is concerned. In *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) 677F-681E Kentridge J referred to US law, Canadian law and German law; and Ackermann J (704F-711F) to German and US law; while Krieger J (717H-718C) regarded the SA constitution so unique in its aims and aspirations and context that comparative analysis seemed unnecessary or unsuitable to him.

¹³³ See eg *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 958B-C; and cf par 3 in part 1 of this article (see 2005 TSAR 655-689).

¹³⁴ I cannot deal with German literature on this topic in full. Apart from the sources that I refer to below, the following are also important: Langner *Die Problematik der Geltung der Grundrechte zwischen Privaten* (1998); Jestaedt *Grundrechtsentfaltung im Gesetz: Studien zur Interpendenz von Grundrechtsdogmatik und Rechtsgewinnungstheorie* (1999); Gellermann *Grundrechte in einfach-gesetzlichem Gewande* (2000); Koch *Der Grundrechtsschutz des Drittbetroffenen: Zur Rekonstruktion der Grundrechte als Abwehrrechte* (2000); Calliess *Rechtsstaat und Umweltstaat: Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassungsrechtsverhältnisse* (2001); Unruh *Der Verfassungsbegriff des Grundgesetzes: Eine verfassungstheoretische Rekonstruktion* (2002); Möstl *Die staatliche Garantie für die öffentliche Sicherheit und Ordnung* (2002).

¹³⁵ Stern (n 130); see further Stern III/2 *Staatsrecht* (1994). The important par 77-81 in vol III/2 were written by Sachs, and I refer to them as "Sachs in Stern III/2" with the relevant page numbers. See further Stern "Die Grundrechte und ihre Schranken" in Badura & Dreier II *Festschrift 50 Jahre Bundesverfassungsgericht Klärung und Fortbildung des Verfassungsrechts* (2001) 1-34 at 3-7.

¹³⁶ Stern III/1 *Staatsrecht* (n 130) 1563.

- ii Certain constitutional provisions (possibly but not necessarily within the bill of rights) are capable of direct horizontal application and will therefore have a direct impact on private law relations.
- iii Other constitutional provisions (both inside and outside of the bill of rights) affect private law indirectly and will influence the development and interpretation of private law accordingly.
- iv Certain constitutional provisions affect private law via the imposition of regulatory control over the exercise of private power that is similar or comparable to state power.

Of these four spheres, the first concerns the effect of legislative action on private law, while the last three relate mostly to the effect of judicial interpretation on private law. The fact that all four spheres provide examples of ways in which constitutional rights provisions affect private law illustrates Stern's argument that the effect of the constitution on private law has to be considered in a wider context than just horizontal application of fundamental rights (which functions mainly on the level of private law adjudication). This observation is illustrated by (and explains) the gradual shift in German constitutional theory away from its initial focus on the horizontal application of fundamental rights towards greater emphasis on constitutional provisions and values that force the state to ensure or promote the protection of fundamental rights and interests.¹³⁷ Initially, this insight inspired a stronger interest in constitutional duties of the state to protect fundamental rights, but more recently the pendulum seems to be swinging back again and a growing number of critical voices question the scope and value of the duty to protect doctrine as a theoretical framework for explaining the effect of the constitution in private law.¹³⁸

To appreciate the significance and the potential value of the shift from application discourse to duty to protect discourse, one needs to appreciate something of the terminological complexities of German constitutional theory.¹³⁹ The starting point is the central distinction between fundamental rights *provisions* in the Constitution; the *interests* that are protected by these provisions; fundamental *rights* as subjective rights; and the *objective content* of the fundamental rights provisions.¹⁴⁰ Fundamental rights provisions are regarded

¹³⁷ See Ruffert *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: Eine Verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes* (2001) 10-12, 13-14, 20-21 for a brief overview.

¹³⁸ See especially Ruffert (n 137); Poscher *Grundrechte als Abwehrrechte* (2002) and the other sources in n 134 above.

¹³⁹ See generally in this regard Sachs "Vorbemerkungen zu Abschnitt I" in Sachs (ed) *Grundgesetz Kommentar* (2003) 41-50; Sachs II *Verfassungsrecht: Grundrechte* (2002) 24-51; Badura *Staatsrecht: Systematische Erläuterung des Grundgesetzes* (2003) 99-118; Pieroth & Schlink II *Grundrechte: Staatsrecht* (2003) 16-28; Ipsen II *Staatsrecht: Grundrechte* (2003) 16-35; Schmidt *Grundrechte* (2004) 11-20; Schmidt-Bleibtreu & Klein (in cooperation with Brockmeyer, Kannengießer & Sannwald) *Kommentar zum Grundgesetz* (1999) 116-117; Jarass & Pieroth *Grundgesetz für die Bundesrepublik Deutschland* (2002) 18-19; von Münch in von Münch & Kunig (eds) I *Grundgesetz-Kommentar* (2000) 29-38; Robbers in Umbach & Clemens (eds) I *Grundgesetz Mitarbeiterkommentar und Handbuch (Heidelberger Kommentar)* (2002) 117-119. South African readers who do not have access to the German sources can consult Davis, Chaskalson & de Waal (n 128) at 86-89 for general background.

¹⁴⁰ See further Sachs "Informationsinterventionismus und Verfassungsrecht" in Osterloh, Schmidt & Weber (eds) *Staat, Wirtschaft, Finanzverfassung: Festschrift für Peter Selmer zum 70. Geburtstag* (2004) 209-226 at 211-212.

as objective norms that create specific duties for the addressee (mostly the state), usually amounting to the duty not to infringe upon the fundamental interest that is protected.¹⁴¹ In this perspective, a fundamental rights provision is regarded as objectively valid law, and its primary content is a duty not to infringe upon a certain fundamental interest.¹⁴² In suitable cases, when the requirements for establishing a subjective right are present,¹⁴³ the objective provisions are accompanied by corresponding subjective rights. The structure of fundamental rights is explained in terms of this distinction between the fundamental interest protected, the fundamental rights provision, the duty placed upon the state to respect that interest, and the subjective right that might accompany the primary duty and create a beneficial legal effect for a specific person.¹⁴⁴

In addition to the core distinction between the objective norm embodied in the fundamental rights provision and the subjective right that usually accompanies it, German constitutional theory also distinguishes between the subjective right and the objective content of fundamental rights provisions.¹⁴⁵ This theoretical distinction has been described as the “true genius of German constitutional thinking”¹⁴⁶ and as the inspiration for the development of the fundamental rights in the German constitution.¹⁴⁷ This distinction is not entirely uncontroversial, although it enjoys relatively wide support in the literature and the federal constitutional court has adopted aspects of it.¹⁴⁸ The core of Ger-

¹⁴¹ See Sachs “Vorbemerkungen” (n 139) 41-50 for a clear explanation of the basic distinctions. The par numbered 28-29 in the margin on 41-42 are crucial.

¹⁴² Sachs “Vorbemerkungen” (n 139) 41.

¹⁴³ Fundamental rights establish subjective rights when and in so far as a constitutional provision intentionally creates objectively beneficial legal effects for a specific person, with the intention that those legal effects should be enforceable: see Sachs “Vorbemerkungen” (n 139) 46; Sachs II *Verfassungsrecht* (n 139) 36 par 6. Most of the fundamental rights in the German constitution satisfy these requirements and indeed establish subjective rights, but as Sachs indicates, this has to be ascertained in every individual case (in so far as it has not already been established).

¹⁴⁴ See generally for this outline Sachs II *Verfassungsrecht* (n 139) 34-51. The distinction between the objective norm and the subjective right is part of basic German legal theory, and the primary duty placed on the state by the objective norm to respect the fundamental interest should not be confused with the more complex notion of the state’s duty to protect fundamental rights; nor should the objective norm embodied in the fundamental rights provision be confused with the so-called objective content of the fundamental rights that forms the basis of the state’s duty to protect.

¹⁴⁵ Note that the two distinctions referred to (viz between the objective norm and the subjective right on one hand and between the objective and subjective content on the other) is not as simple as a form-content distinction; the former distinction can also be explained in terms of the duty and the rights content of the provision. The best explanation seems to be that the objective norm in the provision involves a primary duty to protect a fundamental interest; that this objective norm can generate a subjective right that correlates with the primary duty; and that the provision may also include additional objective content that goes beyond the primary duty. Sachs “Vorbemerkungen” (n 139) 41-43 indicates that the distinctions and terminology are not quite clear or satisfactory.

¹⁴⁶ Stern (n 130) 894 n 25.

¹⁴⁷ Stern (n 130) 903.

¹⁴⁸ Stern (n 130) § 69 at 888-994 sets out the basis of the theory and the arguments for and against it, and reviews the federal constitutional court (*BVerfG*) cases in which aspects of it have been adopted. See further Stern (n 130) § 72 at 1177-1209, § 76 at 1509-1595. The idea that new law must be in accordance with what was then described as the “objective value system embodied in the fundamental rights” was stated concretely in the *Lüth* decision of the *BVerfG* ie the German federal constitutional court: *BVerfGE* 7, 198 204; although it was adopted in earlier decisions:

man theory about the effect of the constitution on private law is based on this distinction.¹⁴⁹

Subjective rights are available to specific individual rights holders when and in so far as a constitutional provision creates beneficial legal effects for a person, with the intention that those legal effects should be enforceable by that person. The subjective right forms the counterpart of the primary duty placed upon the state to respect the objective norm accompanied by the right.¹⁵⁰ Constitutional subjective rights are primarily enforced against the state, mostly in the form of classic defensive rights, although some may be performance (participation) rights or protective rights.¹⁵¹

Apart from their subjective right aspect and in addition to their primary objective content,¹⁵² constitutional norms may (again in suitable cases) also have objective content that extends beyond both the primary objective obligation and the subjective right aspect. This additional objective content assumes the form of constitutional values or principles that underlie the fundamental rights and the legal order as a whole.¹⁵³ According to Stern,¹⁵⁴ the additional objective legal content of the fundamental rights involves normative principles or directives that require judicial interpretation and concretization, and he identifies four distinctive effects that these principles may have:

- i The objective content of the fundamental rights can have a radiating effect on the legal order (*Ausstrahlungswirkung*). For purposes of private law, this is also described as the indirect horizontal effect of the fundamental rights.¹⁵⁵

BVerfGE 6, 32 40; *BVerfGE* 6, 55 71, 72. It was confirmed in many subsequent decisions, eg: *BVerfGE* 10, 303 322; *BVerfGE* 30, 173 188; *BVerfGE* 39, 1 47; *BVerfGE* 43, 242 267. For my purposes, neither the logical correctness nor the actual academic or judicial acceptance of the theory is of primary importance — my purpose is to show how this theory identifies a theoretical vantage point from which the effect of constitutional-rights provisions on private law can be analysed and discussed, regardless of the eventual general acceptance or rejection of the theory.

¹⁴⁹ Davis, Chaskalson & de Waal (n 128) 88 provide a brief summary of the main principles, and expand on it at 89-97.

¹⁵⁰ As Sachs “Vorbemerkungen” (n 139) at 41-42 explains, the subjective content of the subjective right does not form the counterpart of the objective content; in that sense the terminology is confusing.

¹⁵¹ Performance rights (or participation rights) are perceived as too dependent on feasibility to be enforceable and were therefore not included in the constitution as fundamental rights, except for the derivative performance rights (to participate in a social performance), which are based on the equality principle. Protection rights are enforced as performance rights on the principle that the state has a duty to protect holders of fundamental rights against interferences. This has been recognised by the *BVerfG* with reference to life and bodily freedom: Sachs “Vorbemerkungen” (n 139) 47-50; Sachs II *Verfassungsrecht* (n 139) 39-42 par 20-32; Sachs in Stern (n 130) § 66 at 619-687, § 67 at 687-750.

¹⁵² That is, the duty placed upon the state to respect the interest protected by the provision.

¹⁵³ Sachs “Vorbemerkungen” (n 139) 41-43; see also Davis, Chaskalson & de Waal (n 128) 87-89.

¹⁵⁴ (n 130) 921-922.

¹⁵⁵ See Sachs “Vorbemerkungen” (n 139) 43-44; compare also Davis, Chaskalson & de Waal (n 128) 89-96. The heading in Davis, Chaskalson & de Waal at 89 suggests that the radiation effect and the horizontal application of the fundamental rights (*Drittwirkung*) are the same thing, but they are not: radiation affects all existing law and therefore extends beyond private law; while indirect horizontal application only applies to private law, as it only concerns the enforcement of fundamental rights in civil litigation between private persons. The radiation effect has especially been recognised in criminal law, administrative law and labour law; see Davis, Chaskalson & de Waal (n 128) 89-96 for examples and references.

- ii The objective content of the fundamental rights forms the basis of the state's duty to protect fundamental rights (*Schutzwirkung*).¹⁵⁶
- iii The objective content of the fundamental rights can have an effect on legal institutions (public broadcasters, public universities etc) and on procedures.¹⁵⁷
- iv The objective content of the fundamental rights can establish subjectively enforceable rights for specific individuals.¹⁵⁸

In its important *Lüth* decision,¹⁵⁹ the German federal constitutional court adopted the view that all law must be in accordance with the objective value system established by the fundamental rights norms. The value system referred to in this case is what is described above as the objective content of the fundamental rights norms, and from the position adopted by the federal constitutional court in the *Lüth* decision it appears that this objective aspect of the fundamental rights norms influences both existing and new law: new law has to be made in accordance with the objective values, and existing law (including new law once made) has to be interpreted in accordance with it. Obviously, the first duty is aimed more directly at the legislature, while the latter is aimed more directly at the executive and the judiciary.

This double duty to ensure conformity of all law with the value system that underlies the constitution forms the basis for considering the effect of the constitution on private law; and the shift in German and South African constitutional theory already referred to can be seen as a move from emphasis on the latter to the former aspect, from horizontal application to the state's duty to protect. Importantly, although German law also experienced a shift of emphasis from indirect horizontal affect to duty to protect discourse during the 1980s, this shift never implied that the radiation effect of the constitution was entirely abandoned, and the effect of the constitution on private law has throughout been explained with reference to both doctrinal frameworks in tandem. In the more recent development of criticism against the duty to protect doctrine the value of the radiation doctrine is again underlined.

4.2 Horizontal application in German theory

The notion that the fundamental rights in the constitution should have a general radiation effect on all law was recognised when the federal constitutional court decided that, apart from the defensive subjective rights, the fundamental rights provisions in the constitution also contain an objective value system that provides guidelines and impulses for the legislature, administration and the judiciary in all fields of law.¹⁶⁰ This value system can affect private law in

¹⁵⁶ See Sachs "Vorbemerkungen" (n 139) 44-46; cf also Davis, Chaskalson & De Waal (n 128) 96-97.

¹⁵⁷ This is just a combined application of the first two effects in the area of institutions and procedure. See further Sachs "Vorbemerkungen" (n 139) 44.

¹⁵⁸ This is the combined consequence of the first three effects, considered together with the general criteria for the existence of subjective rights that correspond with objective duties.

¹⁵⁹ *BVerfGE* 7, 198 204. See further *BVerfGE* 6, 32 40; *BVerfGE* 6, 55 71, 72; *BVerfGE* 10, 303322; *BVerfGE* 30, 173 188; 39, *BVerfGE* 1 47; 43, 242 267.

¹⁶⁰ See *BVerfGE* 7, 198 205, 207; *BVerfGE* 39, 1 41. This case deals with criminal law and not private law, and hence the term *Ausstrahlung* is more suited here than indirect horizontal effect. It is the first case on *Schutzpflichten*.

different directions. The direction of the influence that the objective legal content of the fundamental rights exercises on private law is significant, as appears from the *Lüth* decision and from Stern's explanation as set out above.

On the one hand, the judiciary has a responsibility to interpret and apply existing law in accordance with the constitution. In this sense, the objective legal content of the fundamental rights affects existing law, mainly through the courts, in that existing law has to be interpreted in accordance with the principles and directives established by the objective content. This effect of the constitution is referred to as the horizontal application of fundamental rights for purposes of private law or, in a wider context, the radiation effect (*Ausstrahlungswirkung*) of the fundamental rights on all law.¹⁶¹

During the first phase of its development,¹⁶² German constitutional theory about the relationship between the Constitution and private law was dominated by the enforcement issue in the debate about the *Drittwirkung* or horizontal application of fundamental rights. The *Drittwirkung* debate, which reached its highpoint in the 1950s,¹⁶³ engaged the central question whether fundamental rights could be enforced against private legal subjects (or third parties) as well as against the state (as primary addressee). In this phase of the debate the defensive image of fundamental rights was still the norm, and once it was accepted that the constitution should have some effect on private law,¹⁶⁴ the defensive perspective was merely transferred from the state to private parties, the issue being whether one private party could rely on a fundamental right against another private party in what would otherwise have been a civil dispute.¹⁶⁵ Initially, the *Drittwirkung* debate focused on the strong notion of direct horizontal application, which means that the fundamental guarantees could be enforced not only against the state as direct addressee, but also directly against private parties.¹⁶⁶ Although the federal labour court followed the doctrine of direct horizontal enforcement until the 1980s,¹⁶⁷ most commentators and other courts rejected this notion, and the classic debate about the direct application of constitutional rights was replaced in the literature and case law by other, wider and simultaneously more nuanced debates concerning the effect of fundamental rights in and on private law. Strong theoretical arguments against the notion of direct horizontal enforcement were raised

¹⁶¹ See n 159 above.

¹⁶² 1950-1970; described by Ruffert (n 137) 10-12. See further Poscher (n 138) 227-240.

¹⁶³ See Ruffert (n 137) 2, 61 and literature referred to there.

¹⁶⁴ Ruffert (n 137) 11 explains the theoretical direction of this debate with reference to postwar criticism against legal positivism: the fundamental rights provisions — and especially the guarantee of human dignity — under the newly adopted constitution were seen as the embodiment of central values that underpinned the new, postwar society and that required extensive protection and enforcement in the whole legal system, including private law.

¹⁶⁵ Ruffert (n 137) 61.

¹⁶⁶ A quite different issue was whether the constitutional fundamental rights directly bind the private law legislature. As Ruffert (n 137) 89-90, 91-92 points out, a 1.3 of the constitution quite clearly and unambiguously states that all state organs, including legislatures (and accordingly also private-law legislatures) are directly bound by the constitution: "The following fundamental rights shall bind the legislature, the executive and the judiciary as directly enforceable law." The question whether private parties can enforce these rights directly on the horizontal level is a different issue.

¹⁶⁷ Main exponents of the theory of direct horizontal enforcement were Nipperdey (labour law specialist and later judge in the federal labour court) and Leisner.

during the 1960s, including the view that the constitution guaranteed freedom from state interference in private transactions, so that the influence of the constitutional values on private relations had to take effect not directly but indirectly. In the later phases of the debate the original purely defensive perspective on fundamental rights as subjective defensive shields against the state were expanded by the insight that the fundamental rights provisions in the constitution also embody objective values that have a different kind of effect on private law.¹⁶⁸

The notion of direct horizontal enforcement was eventually replaced by stronger emphasis on what was called indirect horizontal effect,¹⁶⁹ which was said to take place through fundamental-rights inspired interpretation of especially the open concepts and general principles of private law embodied in the civil code.¹⁷⁰ The notion of indirect horizontal application gained support from the federal constitutional court's decision in the *Lüth* case of 15 January 1958.¹⁷¹ In this decision, the court rejected the idea of direct horizontal application and emphasized that the fundamental rights were primarily defensive rights against the state. However, in a significant passage the court added that the effect of the fundamental rights was nevertheless extended beyond their purely subjective defensive function in that the rights provisions also establish a system of objective values that serve as guidelines and directives for adjudication in all areas of law, including private law.¹⁷² The result is that no rule of private law may conflict with the system of objective fundamental-rights values, and that all private-law rules have to be interpreted according to its spirit.¹⁷³ The fundamental-rights values established by the constitution generate development through the general norms and principles of private law, which require interpretation and concretization.¹⁷⁴

In the *Lüth* decision and other cases, the federal constitutional court combined the notion of objective values embodied in the fundamental rights provisions with the equally significant but different notion that the fundamental rights provisions exercise a radiation effect on all law (including private law).¹⁷⁵ In its simplest form, the radiation effect is nothing more than the general principle that (*inter alia*) private law rules should be interpreted and applied in conformity with constitutional values emanating from the objective

¹⁶⁸ More recently, emphasis is again placed on the defensive function of the fundamental rights; see especially Poscher (n 138) and other sources mentioned in n 134 above.

¹⁶⁹ Discussed by Ruffert (n 137) 13-14. The notion was originally developed by Dürig.

¹⁷⁰ *Bürgerliches Gesetzbuch* or *BGB* (1900).

¹⁷¹ *BVerfGE* 7, 198; discussed by Ruffert (n 137) 15-16; Poscher (n 138) 238-239.

¹⁷² *BVerfGE* 7, 198.

¹⁷³ Ruffert (n 137) 15.

¹⁷⁴ In addition, the court also raised the problem of what Ruffert (n 137) 15 refers to as the "functional aspect" of the problem relating to the effect of the fundamental rights in private law, namely the problematic relationship and division of jurisdictional competence between the federal constitutional court and the subject-oriented, "normal" private-law courts. Ruffert (n 137) 32-35 indicates that this "functional aspect" also includes issues concerning the division of powers between the legislature and the judiciary.

¹⁷⁵ Ruffert (n 137) 66 points out that the radiation effect is supposed to apply to all law, but has so far been applied especially to private law, while it has been ignored altogether in certain areas of public law. However, it is used widely in other areas of public law such as criminal law and administrative law. The term "radiation" refers to the general effect of the constitutional values on all law, and the term "indirect horizontal application" specifically to private law.

content of the fundamental rights.¹⁷⁶ The indirect horizontal application cases¹⁷⁷ illustrate how the interpretation and concretization of general private law principles in accordance with the objective values derived from fundamental rights resulted in the development of private law, *inter alia* through the judicial filling of gaps. However, central to the *ratio decidendi* of the *Lüth* decision is the court's statement that the scope and content of the effect that the fundamental rights had in private law were basically open, in the sense that their exact influence had to be determined individually in every case through a process of interpretation of the relevant general principles of private law. This open-endedness resulted in easier acceptance of the quite dramatic effect that objective fundamental-rights values could have on private law, because the actual development or amendment of private law had to be effected contextually in every individual case.¹⁷⁸

Stern explains the indirect horizontal effect of fundamental rights provisions as a duty that rests upon the courts to interpret existing law to reflect constitutional values. This kind of interpretation can assume different forms: interpretation of existing law in conformity with the constitution;¹⁷⁹ in orientation upon the constitution;¹⁸⁰ or in recognition of the general radiation effect of the fundamental rights on all law.¹⁸¹ These principles establish guidelines for the interpretation of the existing private law rules in the *BGB*,¹⁸² but they are also relevant for the judicial filling of gaps in existing law and the creation of new law.¹⁸³ The same principles or values also serve as guidelines in finding a solution when conflicts arise between fundamental rights; or between a fundamental right and other constitutional values.¹⁸⁴ In this sense, the objective

¹⁷⁶ Ruffert (n 137) 65 refers to *BVerfGE* 7, 198 207; *BVerfGE* 73, 261 269; *BVerfGE* 76, 143 161.

¹⁷⁷ Ruffert (n 137) 65 refers to *BVerfGE* 35, 202 219; *BVerfGE* 61, 1 10 ff; *BVerfGE* 81, 242 256; *BVerfGE* 89, 214 229; *BVerfGE* 90, 27 33 ff; *BVerfGE* 97, 169 175. Of these references, the first might not be really a good example as it involved a complaint against the public broadcaster, which forms part of the state for this purpose. Poscher (n 138) 240-245 argues that only four decisions after *Lüth* allow one to infer anything about the constitutional court's position regarding *Drittwirkung*: *BVerfGE* 42, 143; *BVerfGE* 66, 116; *BVerfGE* 73, 261; *BVerfGE* 81, 242.

¹⁷⁸ Not every German theorist would accept the notion of development of new law through judicial interpretation as a sensible one, or acknowledge that it is in any way different from interpretation as such. The generally accepted principle is that the legislature is responsible for the making of new law, and the judiciary for the interpretation of existing law. See Sachs "Vorbemerkungen" (n 139) 842-843 with references to further literature. The development since the *Lüth* decision is discussed by Poscher (n 138) 240-245.

¹⁷⁹ In cases where the normal interpretation would result in unconstitutionality of the law, but the clear wording of the law or the intention of the legislature also allows for a second interpretation that would allow for constitutionality, the court must follow the constitutional option. See generally Stern 888-994, especially 923-930; Sachs II *Verfassungsrecht* (n 139) 48-51 par 56-64.

¹⁸⁰ Where more than one interpretation of the law is possible without any interpretation necessarily resulting in unconstitutionality, the one that best promotes or advances the purposes of the fundamental rights is to be adopted.

¹⁸¹ Interpreters who have a choice of interpretations or actions should select the option that best reflects or promotes the purposes of the fundamental rights.

¹⁸² *Bürgerliches Gesetzbuch*.

¹⁸³ Examples in Stern (n 130) 928.

¹⁸⁴ Details in Stern (n 130) 930. This notion is referred to as *Güterabwägung*, also *Verhältnismäßigkeit* or *praktischer Konkordanz*. *Verhältnismäßigkeit* is the term used for evaluating the proportionality of state infringements upon private interests, eg when a law restricts a freedom for a state objective. When the state objective is the protection of other fundamental rights, some refer to the process as *praktischer Konkordanz*.

principles function as goals that justify specific limitations of subjective rights, provided the limitations are proportional.

4.3 The state's duty to protect in German theory

In the section above it was explained how the effect of the constitution on private law is explained in German theory with reference to the judicial interpretation of private law in accordance with the objective value system established in the fundamental rights provisions in the constitution (indirect horizontal application in private law, on a wider scale *Ausstrahlungswirkung*). In a different direction, the directive principles or values that form the objective content of the fundamental rights also influence private law via the legislature. New law has to be promulgated in accordance with the principles and directives established by the objective content, and in this instance the influence works through the legislature, which has the duty to promulgate new law and to amend existing law.

The effect of the *Lüth* decision was that the *Drittwirkung* debate lost its relevance as far as direct horizontal application was concerned, and it was pretty much dead by the end of the 1970s. In addition, new academic analyses¹⁸⁵ demonstrated the shortcomings in the theoretical debates about the effect of the fundamental rights in private law by 1980 and the need for a paradigm shift in this debate. Such a shift was eventually centered on the notion of constitutional protective duties, which was introduced in a decision of the federal constitutional court in 1980¹⁸⁶ and subsequently accepted widely, although the notion of protective duties remain controversial and critical voices are increasingly emerging to question the scope and value of the duty to protect doctrine.¹⁸⁷ In the new paradigm and in subsequent decisions and

¹⁸⁵ See Ruffert (n 137) 20. Jürgen Schwabe *Die sogenannte Drittwirkung der Grundrechte — Zur Einwirkung der Grundrechte auf den Privatverkehrsverkehr* (1971) suggested — in the postrealist spirit — that the whole debate was misconceived, considering that the promulgation of private-law statutes and civil-law court decisions were state actions that could infringe upon private rights just like any other action of the state. Although this theoretical stance was widely rejected, it served as a starting point for renewed theoretical debate about the effect of the fundamental rights in private law (see Ruffert (n 137) at 16-18). See more recently also Schwabe “Phantomjagd: Die Grundrechts-Drittwirkung in der neueren Rechtsprechung des Bundesverfassungsgerichts” in Osterloh, Schmidt & Weber (eds) *Staat, Wirtschaft, Finanzverfassung: Festschrift für Peter Selmer zum 70. Geburtstag* (2004) 247-258. Alexy *Theorie der Grundrechte* (1985) introduced a number of significant new considerations in an effort to merge the existing positions in his three-levels model. Alexy distinguished three levels where the effect of fundamental rights on private law has to be considered (see Ruffert (n 137) 19-20).

¹⁸⁶ *BVerfGE* 39, 1. See also *BVerfGE* 81, 242; *BVerfGE* 97, 125; *BVerfGE* 97, 169; *BVerfGE* 102, 1; *BVerfGE* 102, 347; *BVerfGE* 102, 370. An interesting recent case is the federal labour court (*BAG*) decision of 10.10.2002 — 2 AZR 472/01 (Hessen), 2003 *NJW* 1685 (a decision concerning the termination of a labour contract of a salesperson who insisted upon covering her head for religious reasons; the federal labour court declared the termination of her contract socially unjustifiable and unconstitutional) at 1686: the content of the fairness required by the relevant provisions of the civil code (*BGB* § 315.I) is co-determined by the fundamental rights (in this case especially the right to religious freedom in *GG* art 4). See further to this decision Thüsing “Vom Kopftuch als Angriff auf die Vertragsfreiheit” 2003 *NJW* 405-406. The federal constitutional court held that the federal labour court’s decision recognised the constitutional positions of the parties adequately and that its decision was constitutionally above reproach: 2003 *NJW* 2815.

¹⁸⁷ One of the most vehement critics of this doctrine is Diederichsen “Das Bundesverfassungsgericht als oberstes Zivilgericht — Ein Lehrstück der juristischen Methodenlehre” (1998) *Archiv für die Civilistische Praxis* 171-260. Depenheuer “Vertragsfreiheit und grundrechtliche

theoretical analyses,¹⁸⁸ the liberal image of the state as a threat to freedom was replaced by the new image of the state as guarantor of individual rights.¹⁸⁹ For purposes of the debate about the effect of fundamental rights in private law, the significance of this shift in focus is that it was now deemed possible to deduce the private law effect of fundamental rights from their protective function.¹⁹⁰ The central idea of this new conception of the relationship between constitutional rights and private law rules was that the state, through private law statutes and through civil law adjudication, had to protect the fundamental rights of individual citizens against all infringements, including those by other private persons. This notion has since then become a major theoretical framework for the explanation of the private law effect of fundamental rights. Apart from anything else it reflects awareness of the increasing exercise of state or quasi-state powers by individual private parties such as multinationals and other large corporations. This is the context in which the South African courts' recent references to the duty to protect could be evaluated fruitfully.

The duty to protect constitutional interests (*Schutzwirkung*) means that the legislature is required to take active steps, usually by making new law, to protect the relevant constitutional rights or interests from disasters, from state action and from unlawful interference by other private parties. In so far as the duty to protect involves the constitutional obligation to make new law that will protect private persons' constitutional rights against unlawful interference from other private persons, this theory has a significant impact on the development of private law, albeit primarily through legislative intervention.

In German constitutional theory, the state's protective duty derives partly from direct or indirect constitutional obligations to protect, promote, and secure specific fundamental interests,¹⁹¹ but the courts¹⁹² and commentators¹⁹³ have also recognised a general constitutional duty to protect that affects all fundamental rights provisions.¹⁹⁴ The duty to protect is structured as a positive duty in a complex relationship that transcends the usual state-individual relationship, in that the state must act to protect the individual from interference from another individual and not simply refrain from interfering from the state's side. This duty is part of the structure of fundamental rights as such, including both the negative defensive and the positive protective rights, and

Schutzpflichten: Grund, Grenzen und Konsequenzen staatlicher Eingriffe in die Privatautonomie" (1996) *Partner im Gespräch* 35-50 argues that the duty to protect can, especially in the context of freedom to contract, result in the absurd notion that the constitution forces the state to protect people against themselves, thereby undermining private autonomy.

¹⁸⁸ Important academic analyses of the duty to protect doctrine include Robbers *Sicherheit als Menschenrecht: Aspekte der Geschichte, Begründung und Wirkung einer Grundrechtsfunktion* (1987); Dietlein *Die Lehre von den grundrechtlichen Schutzpflichten* (1992); Ruffert (n 137).

¹⁸⁹ Ruffert (n 137) 21.

¹⁹⁰ As argued by Starck "Die Grundrechte des Grundgesetzes" 1981 *JuS* 237-246; see Ruffert (n 137) 21.

¹⁹¹ See Stern (n 130) 934-937, 949 for examples; compare Dietlein (n 188) 28-31. The most important explicit protective duties that are recognised are associated with the fundamental rights protected in a 1.I (human dignity); 6 (marriage and family, caring for and raising children, and motherhood); and a 16.II(2) (asylum) *GG*.

¹⁹² Cases and references in Stern (n 130) 937-943.

¹⁹³ Details in Stern (n 130) 931-953.

¹⁹⁴ See in this respect Stern (n 130) 944-951; compare Dietlein (n 188) 74-87.

it imposes primary defenses against interference, although it can also include duties to promote a right.

The duty to protect affects all state powers, albeit that the effect is different in each sphere: the legislature must create and amend legislation as and when required, including legislation that empowers executive action; the executive must act as and when required, including action to ensure suitability controls; and both are subject to judicial control over the execution of their protective duties.¹⁹⁵

Since the 1990s the federal constitutional court has confirmed its position with regard to the objective fundamental rights values as established in the *Lüth* decision,¹⁹⁶ while on the other hand making a nod in the direction of the new theory of protective duties without subscribing to it explicitly, creating uncertainty about the source and derivation of the protective duties.¹⁹⁷ Even so the recent case law of the federal constitutional court has been subjected to criticism, especially based on the argument that it is not the place of the constitutional court to introduce social-political improvements to private law relationships by way of constitutional adjudication.¹⁹⁸ This debate about the place and function (both formally and materially) of constitutional adjudication in the development of private law has been the main inspiration for a recent resurgence of debate about the effect of the fundamental rights in private law. One should not conclude that the duty to protect doctrine replaced the indirect horizontal application debate completely. Poscher¹⁹⁹ denies that the *Drittwirkung* debate died out when the duty to protect discourse was introduced, and indicates that the cases continued to employ the notion of indirect horizontal application in cases where no duty to protect exists. In his view, the duty to protect doctrine developed next to and in harmony with the indirect horizontal application doctrine, and it played a smaller role in the constitutional court's case law than is often believed.²⁰⁰

Making the shift to the protective-duties doctrine did not solve all problems with regard to the effect of fundamental rights in private law. The main problem created by this theoretical approach is the relationship between the theory of protective duties and the doctrine of indirect horizontal application — the two are not identical at least insofar as the former includes constitutional directives aimed at both the private law courts and the private law legislatures, whereas the latter is restricted to adjudication.²⁰¹ A second problem is how the

¹⁹⁵ details in Stern (n 130) 951-953. Cf Dietlein (n 188) 70-74.

¹⁹⁶ *BVerfGE* 81, 242 254, 256; *BVerfGE* 86, 122 128 ff; *BVerfGE* 89, 214 229 ff; *BVerfGE* 90, 27 33; *BVerfGE* 97, 169 178. See Ruffert (n 137) 24. Apparently the fundamental rights require concretization of the general principles, which result in the decision being based on weighing of interests.

¹⁹⁷ *BVerfGE* 86, 122; *BVerfGE* 89, 1; *BVerfGE* 90, 27 are examples of quite vague indications; *BVerfGE* 81, 242 256; *BVerfGE* 89, 214; *BVerfGE* 96, 56; *BVerfGE* 97, 169; *BVerfGE* 99, 185 are much clearer. See Ruffert (n 137) 25. A controversial ground that has been mentioned is the protection of the weak members of society in civil law and compensation for situations characterised by the unequal position of private parties; see n 198 below.

¹⁹⁸ Ruffert (n 137) 26 provides an overview. See further Deppenheuer (n 187) 35-50.

¹⁹⁹ Poscher (n 138) 243.

²⁰⁰ Poscher (n 138) 266-267 indicates that the duty to protect doctrine was only used explicitly in two decisions: *BVerfGE* 81, 242; *BVerfGE* 97, 169.

²⁰¹ Because it is based on radiation, which requires pre-existing norms that can be affected by radiation.

protective duties are derived from the fundamental rights and how these are once again translated back into subjective (enforceable) rights against the state.²⁰² The central question remains that of re-subjectivisation: once objective contents have been derived from the defensive, subjective fundamental rights, how should subjective rights be again attached to them to make them enforceable?²⁰³

With regard to the effect of constitutional values and principles Ruffert²⁰⁴ concludes, after having analysed various models that purport to explain the effect of constitutional law on legislation, that a single model cannot adequately explain this complex relationship. In his view, the explanation is to be found in the tension between constitutional supremacy and legislative freedom — a tension that illustrates the restrictive as well as the directive effects of the constitution on legislation.²⁰⁵ In its restrictive effect, the constitution sets limits that may not be crossed by legislation — illustrated primarily by the institutional guarantees and the defensive guarantees in the German constitution. In its directive effect, the constitution contains instructions to the legislature — within the bill of rights these instructions are contained in the fundamental rights protective duties, but similar and other instructions can also emanate from other constitutional provisions outside of the bill of rights (such as the social state principle in the German constitution). The challenge for legal theory is to describe the legislative duties and their limits — as they appear from the constitution — accurately. In Ruffert's view,²⁰⁶ this entails that separate fundamental-rights functions have to be derived from the objective content of the fundamental rights, and that the effect of these values on private law should be considered for each function separately. He distinguishes five such functions of fundamental rights as (a) institutional guaranties; (b) subjective defensive rights; (c) fundamental protective duties; (d) social participation claims; and (e) organisational and procedural guaranties.

Ruffert²⁰⁷ explains the relationship between constitution and private law with reference to two categories of validity: on the basis of its own supremacy, the constitutional provisions enjoy effective validity, while private law rules enjoy recognition validity on the basis of its historical anteriority and rational

²⁰² Ruffert (n 137) 22-23 mentions further problems and criticisms, see also 67.

²⁰³ Ruffert (n 137) 67 indicates that the federal constitutional court answered this question in three steps: (a) the fundamental rights as subjective defensive rights of individuals are the point of departure; (b) the objective value embodied in these rights are separated and included in the objective value system of the constitution; (c) should a judge fail to pay sufficient attention to these values in private-law adjudication, the judge as state functionary would infringe the subjective right of the aggrieved party. See further Dietlein (n 188) 175-218.

²⁰⁴ (n 137) 35-45, see also 66.

²⁰⁵ Ruffert (n 137) 44.

²⁰⁶ (n 137) 69-70.

²⁰⁷ (n 138) 49-52. However, there are several different theoretical approaches that enjoy support from different academics. In an influential analysis Canaris *Grundrechte und Privatrecht — eine Zwischenbilanz* (1999) 71-90 construed a connection between the duty to protect and the discretionary space to act that the state enjoys between the limits of the so-called *Übermaßverbot* (the prohibition against disproportionately heavy-handed state interference in private rights) and the so-called *Untermaßverbot* (the prohibition against unjustified state inaction in private affairs). See also in this regard Sachs "Vorbemerkungen" (n 139) 45: the so-called *Untermaßverbot* involves a terminological rather than a substantive novelty; the principle remains that the legislature is obliged — in appropriate instances — to create suitable and effective protection, based on carefully collected factual information and reasonable projections.

coherence deriving from its subject-focus. The latter recognition creates an assumption of validity in favour of private-law rules, and implies that they should be respected and upheld as far as possible. At the same time this validity is not absolute, and rules clearly in conflict with constitutional principles or values have to give way. In addition, Ruffert²⁰⁸ discusses reasons and arguments for the statement that the effect of the fundamental rights on the private-law legislature has to be less direct and straightforward than in the case of public law legislation.

The result of developments in German theory is that both indirect horizontal application and state duty to protect feature in the discussion about the effect of the constitution on private law. Although the bulk of literature can create the superficial impression that duty to protect language has gained in importance over the last decade and that indirect horizontal application language is used less frequently, it is important to bear in mind that the state duty to protect theory is of limited application and that its relevance and scope have been questioned increasingly over the last years. As far as development of private law doctrine is concerned the most significant influence of the state duty to protect theory has always been in the sphere of a state duty to enact suitable legislation rather than in the sphere of judicial intervention through creative and transformative adjudication, although the latter is not excluded altogether. On the other hand, the possibilities of amending and developing private law through judicial activity have always been easier to accept within the German theory of adjudication, although even here the scope for judicial activism was never unlimited. In the result, then, one must conclude that the two theories exist side by side and that one places stronger emphasis on judicial development through suitable interpretation of legislation, while the other concentrates on legislative duties to enact suitable legislation that would amend the existing private law. However, the theory of the state's duty to protect its citizens' fundamental rights cannot replace the theory of indirect horizontal application, nor can it in itself explain or justify a very wide judicial power or discretion to develop the existing private law.

5 *International law*

5.1 Introduction

In the previous section it was indicated that German constitutional theory offers interesting points of reference for the notion that the state has a duty to protect its citizens' fundamental rights, but earlier it was pointed out that the South African cases do not refer to German theory on this issue at all. The tendency in recent South African case law is to discuss the constitution's effect in private law in terms of the state's duty to protect citizens' fundamental rights and no longer in terms of the horizontal application of fundamental rights,²⁰⁹

²⁰⁸ (n 137) 88 ff, especially 90 ff.

²⁰⁹ With the exception of at least two recent constitutional court decisions, where the court did not refer to either horizontal application or the state's duty to protect explicitly but decided the case on the basis of the development of the common law or the interpretation of statutory law so as to promote the spirit, purport and objects of the constitution in terms of s 39(2); see *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) in part 1 (2005 TSAR 655-689) n 110 above and compare the concluding section below.

and the cases in which the duty to protect discourse is used mainly rely on authorities from international law. In this section of the article, I briefly review three lines of decisions in international law that relate to the idea that the state has a constitutional duty to protect the fundamental rights of its citizens against infringements by other private parties. The first line emerged from the European court of human rights decisions in which the private law of delict was extended or developed under the influence of international law to allow for state liability in cases where it was thought that the state should have a duty of care towards its citizens. This line of decisions was referred to in the constitutional court's decision in *Carmichele*.²¹⁰ A second line of cases from the European court of human rights, the inter-American court of human rights and the African commission for human rights emphasised the constitutional duty to respect, protect, promote and fulfil rights as the source of a general duty upon states to protect their citizens against infringements of their fundamental rights. This line of cases was referred to in the high court and supreme court of appeal decisions in *Modderklip*, but not in the constitutional court case.²¹¹ The third line of cases from the court of justice of the European Union reached a similar result by arguing that certain provisions of the European Charter have direct horizontal application in that they directly bind private persons. This line of cases has not yet been cited in any of the South African decisions dealing with the application issue or the idea that the state has a duty to protect fundamental rights.

5.2 The state's duty of care in delict

In the *Carmichele* case, the constitutional court referred to case law from the European court of human rights 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.²¹² These cases argued in favour of an extension of the common-law duty of care doctrine that would render the state liable for inaction in cases where it has a duty of care — in delictual terms — to protect members of the public against harm, and this argument was adopted in South African case law.

The two cases referred to in *Carmichele* established that the so-called immunity approach of the English courts, according to which public authorities such as the police were granted what amounted to an absolute immunity

²¹⁰ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957F-960B.

²¹¹ *Modderklip Boerdery (Edms) Bpk v President van die RSA* 2003 6 BCLR 638 (T) 680I; *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) 832 n 17; *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC).

²¹² *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) 957F-960B. The cases referred to are *Osman v United Kingdom* 29 EHRR 245 (also reported as 1998 ECHR 101); *Z v United Kingdom* Application no 29392/95, 10 May 2001 (since the *Carmichele* decision reported as 2001 ECHR 329). In *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 2 SA 359 (CC) the constitutional court again accepted this line of argument and referred to the *Osman* decision without much discussion; see 399A-B.

against claims in delict by members of the public, conflicted with provisions in the European Convention on Human Rights. Despite the apparently good reason for the immunity approach, namely to prevent “the chilling effect such delictual liability might have on the proper exercise of duties by public servants”,²¹³ the European court for human rights decided that such an immunity, applied absolutely, left no room for instances where the reasons for its existence were weak and the need for public protection by the authority involved was strong. In the cases referred to, the immunity approach was rendered relative or more flexible in view of the proportionality demands of the European Convention. As was pointed out in *Carmichele*,²¹⁴ a similar flexible approach was also followed in a recent decision of the house of lords.²¹⁵ Seen from the perspective of domestic law or from the perspective of European Convention law, the upshot of this development was that delictual liability was extended to public servants in certain cases, subject to limits that are to be established by the requirements of foreseeability and proximity and the proportionality test — a development that was judged to be relevant in the sense that an absolute public interest immunity would also be inconsistent with the South African constitution and its values. In South African law liability also had to “be determined on the basis of the law and its application to the facts of the case, and not because of an immunity against such claims”.²¹⁶

This development cannot be equated with the more general doctrine (as developed in German law) in terms of which the state has a constitutional duty to protect its citizens against infringements of their fundamental rights. The European court for human rights cases were specifically concerned with delictual liability in the context of the duty of care doctrine and the existence of a principle — the immunity approach — that restricted such liability; and therefore the extension of the duty of care (and accordingly of delictual liability) to public authorities does not necessarily amount to adoption of the wider notion of a constitutional state duty to protect all fundamental rights. The duty to protect fundamental rights as a general constitutional duty is wider in scope and impact in that it affects all fundamental rights and not just the right of physical integrity; and it is more radical in that it places a constitutional duty upon the state to make laws and to provide remedies that amend social relations. It can therefore be argued that the reference to and application of this doctrine in *Carmichele* and similar decisions must necessarily be limited in scope in the sense that the applicability of this doctrine is restricted to cases where the immunity-liability issue is relevant in the context of delictual theory about general delictual liability and its effect on the state’s duty to protect its citizens from harm caused by other private persons. At the same time, this doctrine cannot easily or obviously be extended to other areas where the narrow immunity-liability issue does not arise. In a word, it is not certain how the

²¹³ *Carmichele* 959H.

²¹⁴ 958D.

²¹⁵ *Barrett v Enfield London Borough Council* 1999 3 All ER 193 (HL).

²¹⁶ *Carmichele* 960B. It was pointed out in *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 2 SA 359 (CC) 399D-F that the *Carmichele* finding amounts to the principle that the constitutional accountability of a state organ is a consideration in deciding whether it is liable to the claimants in delict.

Carmichele principle would apply in cases where delictual damages is not an option as a remedy.

5.3 The duty to respect, protect, promote and fulfil fundamental rights

In the *Modderklip* case, a different set of international law cases from the European court for human rights, the inter-American court of human rights and the African commission was referred to by the high court and the supreme court of appeal as authority for the idea that the state has a duty to protect the fundamental rights of its citizens.²¹⁷ In these cases the central argument was that the constitutional duty to respect, protect, promote and fulfil fundamental rights, which is stated explicitly in some constitutions and international instruments and regarded as an implicit provision in others,²¹⁸ places a general duty upon states to protect their citizens against infringements of their fundamental rights. This duty obtains even when fundamental rights are under threat of violation through the unlawful actions of other private citizens.

In *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*,²¹⁹ the African commission analysed the various levels implicit in the state's duty to *respect, protect, promote, and fulfil* the rights in the bill of rights, relating the duty to respect rights with the mainly negative or defensive duty not to interfere with or infringe rights; the duty to protect and the duty to promote with provision of adequate legislation and effective remedies that would protect holders of rights against interference from others; and the duty to fulfil rights with the "positive expectation on the part of the State to move its machinery towards the actual realization of the rights."²²⁰ In this decision it

²¹⁷ *Modderklip Boerdery (Edms) Bpk v President van die RSA* 2003 6 BCLR 638 (T) 680I; *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the RSA v Modderklip Boerdery (Pty) Ltd* 2004 8 BCLR 821 (SCA) 832 n 17. The cases referred to are *X & Y v The Netherlands* [1985] 8 EHRR 235 (ECHR, 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); *Velásquez Rodríguez v Honduras* 28 ILM 291 (1989) (Inter-American Court of Human Rights). The decision in *Union des Jeunes Avocats v Chad* can be found (reported as *Commission Nationale des Droits de l'Homme et des Libertés v Chad* African Commission for Human and Peoples' Rights, Comm No 74/92 (not dated) at <http://www1.umn.edu/humanrts/africa/comcases/74-92.html>. The *Velásquez Rodríguez v Honduras* decision is also available (reported as Judgment of July, 29, 1988, Inter-Am Ct HR (Ser C) No 4 (188)) at <http://www1.umn.edu/humanrts/iachr/C/4-ing.html>. With regard to *X & Y v The Netherlands* 1985 8 EHRR 235 see further *Airey v Ireland* 1979 ECHR 3 (9 Oct 1979). All the ECHR decisions are available at <http://www.worldlii.org/eu/cases/ECHR/>.

²¹⁸ This duty is stated explicitly in a 1 of the European Convention; a 1.1 of the American Convention on Human Rights (see *Velásquez Rodríguez v Honduras* sec XI par 161); and a 1 of the African Charter on Human and Peoples' Rights. It also appears in s 7(2) of the South African Constitution 1996.

²¹⁹ (n 217) par 43-48.

²²⁰ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (n 217) par 44-47. This analysis is in line with the attitude developed in the General Comments of the UN Committee on Economic, Social and Cultural Rights (especially General Comment 9 on the duty to give effect to the Covenant in the domestic legal order, but see further General Comment 12 (food), 14 (health care) and 15 (water) as further examples) on the International Covenant on Economic, Social and Cultural Rights. In General Comment 9 it is stated unequivocally that the flexibility that allows due consideration for the particularities of

was stated that states commit themselves to these duties when they commit themselves to a human rights regime.²²¹

The result of these decisions is comparable to the German duty to protect doctrine, except for the fact that it is usually (but not always) based upon the authority of an (explicit or implicit) constitutional provision that the state should respect, protect, promote and fulfil the rights in a specific bill of rights. This approach is particularly relevant to the South African situation because section 7(2) of the 1996 constitution provides explicitly that “[t]he state must respect, protect, promote, and fulfil 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 the *Modderklip* case 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. Surprisingly, the constitutional court upheld the supreme court of appeal order on appeal but made no mention of section 7(2) or the general theory that a state has a duty to protect its citizens’ rights against unlawful interference, preferring to construe a completely different argument based upon section 34 of the constitution. The right of access to the courts, so the court argued, places an obligation upon the state to not only ensure the existence of suitable institutions and procedures for the enforcement of rights, but also to act in assistance when it appears that a citizen finds it impossible to protect or enforce his constitutional right because of the sheer magnitude of the invasion or the personal circumstances of the infringers.²²² The refusal of the constitutional court to decide the case on the basis of the state duty to protect doctrine renders the status of this doctrine somewhat uncertain, which is not necessarily a bad thing, as will appear from my argument below.

The most significant difference between the German duty to protect doctrine and the approach that relies upon the constitutional provision that the state has a duty to respect, protect, promote and fulfil the rights in the bill of rights is that the latter is potentially much wider. In the German theory the emphasis is on the state’s duty to make laws that will protect fundamental rights and provide effective remedies, but as it was set out in the *Nigeria* case of the African commission, this is just one aspect of the state’s duty; other aspects relate to the state’s traditional negative duty to refrain from interfering with rights and to a potentially wider, positive duty to take active steps to fulfil the rights in question.²²³

the legal systems and circumstances of each state co-exists with the duty upon each state to use all the means at its disposal to give effect to the rights recognised in the Covenant. Part of this duty to give effect to the rights recognised in the Covenant is to ensure fulfillment of the obligations under the Covenant through the availability of effective legal or administrative remedies. See further 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; Liebenberg distinguishes between the duty to enable and assist communities to gain access to socio-economic rights and the duty to provide goods directly where communities are unable to access them through the means at their disposal.

²²¹ par 48. See also *Commission Nationale des Droits de l’Homme et des Libertés v Chad* African Commission for Human and peoples’ Rights, Comm No 74/92 (not dated) par 20.

²²² *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC) par 48.

²²³ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* par 44-47; see nn 217, 220 above.

5.4 The state's duty to protect in public law

A third line of case law that also has a bearing on the effect that a constitution has in private law has so far not been referred to in South African cases dealing with this problem. The duties imposed by the European Union's Charter of Fundamental Rights are addressed at member states, but in a number of cases since 1974 the European court of justice has decided that some of these duties have direct horizontal application, which means that private persons are also prevented from acting in ways that could impede or prevent free cross-border trade.²²⁴ It is interesting to note that the most important cases in which this construction was followed dealt with the prohibition against discrimination, and the court was obviously of the opinion that private discrimination should not be allowed to exist — in this respect the decisions on this point bear an interesting resemblance to the South African situation.

The fundamental freedoms in the Treaty on the European Union²²⁵ prohibit unequal treatment of domestic citizens and citizens from other European Union countries in cross-border trade and business, as well as non-discriminatory measures and arrangements that impede or prevent cross-border trade.²²⁶ In the line of cases referred to here,²²⁷ it was decided that the prohibition against discrimination was primarily aimed at member states, but that it also affected private persons and institutions. The finding that the Charter imposed duties upon private persons was explained as direct horizontal application.²²⁸ Accordingly, private contracts could be rendered void and delictual claims for damages could be imposed as a result of private actions that conflict with the duties imposed by the Treaty and the Charter.²²⁹

German commentators have criticised the European court of justice decisions according to which the Charter provisions enjoy direct horizontal application,²³⁰ arguing that the Charter does have an effect on private legal relationships, but not in the form of direct horizontal application. Following German theoretical development, most German commentators argued that the effect of the Charter in private law is better explained in terms of the state's duty to protect the Treaty and Charter values (and concomitant rights) of free cross-border trade relations. According to German literature, this means that the member states have the duty to establish and maintain a private law system that conforms to the Charter freedoms, particularly as freedom of cross-border

²²⁴ The most important cases are 1974 ECJ 1405 (*Walrave & Koch v Association Union Cycliste Internationale*), 1995 ECJ 4921 (*Union Royale Belge des Sociétés de Football Association v Bosman*) and 2000 ECJ 4139 (*Roman Angonese v Cassa di Riparmio di Bolzano SpA*). See generally Craig & De Búrca *EU Law: Text, Cases, and Materials* (3rd ed 2003) 702-704. See Remmert 2003 *Jura* 13 n 8 for references to related decisions. See further on *Bosman* 1996 *NJW* 505-512; Kluth "Die Bindung privater Wirtschaftsteilnehmer an die Grundfreiheiten des EG-Vertrages" (1997) 122 *Archiv des öffentlichen Recht* 557-582; and with regard to *Angonese* Streinz & Leible "Die unmittelbare Drittwirkung der Grundfreiheiten" 2000 *EuZW* 459-473; Michaelis "Unmittelbare Drittwirkung der Grundfreiheiten — Zum Fall *Angonese*" 2001 *NJW* 1841-1842. The European court of justice's decisions are available at <http://www.bailii.org/eu/cases/EUECJ/>.

²²⁵ See http://www.europa.eu.int/comm/justice_home/unit/charte/en/rights.html.

²²⁶ For an overview see Remmert "Grundfreiheiten und Privatrechtsordnung" 2003 *Jura* 13-19.

²²⁷ See n 217 above.

²²⁸ Cf *Angonese* 2000 ECJ 4139 par 30-36.

²²⁹ See Remmert (n 226) 13, especially n 6-7 for details.

²³⁰ See Remmert (n 226) 13 n 14 for references to German literature.

trade relations is concerned. The German commentators have pointed out that direct horizontal application was much more controversial in the case of the European Union Treaty than in the case of a domestic constitution such as the German constitution, because of the Treaty's status in international law.²³¹ In international law the German academic arguments against direct horizontal application and in favour of indirect horizontal application²³² are even stronger than in domestic law, and hence the arguments in favour of explaining the effect of the Charter on private law in terms of a duty upon member states to establish a private law system that conforms to the Charter freedoms are also even more convincing than in domestic law.²³³

5.5 Conclusions

The differences between the approaches in the three lines of decisions set out above are subtle but significant. All three sets of decisions establish the principle that private law does not exist in isolation, and that it is subject to influence from international law in some form. However, the courts reached this result in different ways.

The European court for human rights decision in *Osman* approaches the matter via a very specific development of the private law of delictual liability: the state and its public officials are not immune from delictual claims instituted by individual citizens who suffered harm resulting from unlawful actions of other private persons. In these cases, the delictual liability of the state was extended on the basis of the argument that the state has a duty to protect its citizens' fundamental rights against such interference. The availability of a delictual action for damages against the state must be determined as a matter of law with reference to the facts of each case and issues such as proximity, foreseeability and proportionality. The development of private law occasioned by this decision assumed the form of rejection of the notion of absolute immunity and the development of a duty of care that the state bears with regard to its citizens (in the South African cases this is described as accountability). In effect, this development is restricted to delictual claims against the state for failure to protect its citizens' bodily integrity against unlawful infringement by others, and in effect the development involves a doctrinal extension of the duty of care doctrine in private law rather than the development of a general constitutional duty to protect fundamental rights. Of course these cases can be read as a development of the private law of delict — particularly the doctrine of state liability — so as to reflect constitutional values regarding state accountability, but even then it is unlikely to find application in instances where the infringement cannot or should not be rectified by way of delictual damages. Reliance upon this theory brings with it the danger of facile confusion of the public law notion of the state's duty to protect and the private law notion of the state's duty of care in a particular case.

By contrast, the decisions of the European court for human rights, the Inter-American court of human rights and the African commission rely upon the provision — which is usually included in bills of rights or otherwise inferred —

²³¹ See Remmert (n 226) 14.

²³² Discussed in the previous par.

²³³ Remmert (n 226) 16-17 sets out and explains the aspects of this duty.

that the state should respect, protect, promote and fulfil the rights in question to construe a general duty that the state should not only negatively refrain from interfering with fundamental rights (respect) but also take positive steps to protect those rights against violations by other private persons, as well as steps to promote and fulfil those rights. This is clearly a much wider and more radical duty that involves the making of legislation and the provision of suitable and effective remedies to protect rights, as well as the duty to take other steps to promote and fulfil the realisation of the rights. Because of the inclusion of such a provision in section 7(2) of the South African Constitution of 1996 — which was copied from international law²³⁴ — this approach carries some weight in South African constitutional law, despite the fact that the constitutional court avoided the approach and found another way of deciding the *Modderklip* case. However, it should be realised that only one aspect of this theory — the part that concerns protection of the fundamental rights against interferences by other private persons — bears any relation to the state duty to protect doctrine, while other aspects relate more clearly to the traditional defensive aspect of the state's negative duty not to interfere with fundamental rights and other so-called positive duties to fulfil rights. The most significant difference between this public law theory and the German theory of the state's duty to protect is that the international law theory is probably restricted to the so-called socio-economic rights, because that is the sphere within which the theory was developed. It is not clear how the theory would apply to instances where the state might bear a duty to protect other so-called first-generation rights such as property. A second difference is that the German theory relates primarily to the legislative duty to make suitable laws and to establish procedures and institutions through which protection can be guaranteed and realised, while the international law theory seems to be focused more strongly on adjudicative interpretation of rights.

The *Bosman* and *Angonese* cases decided by the European court of justice also have wider implications than the *Osman* decision of the European court for human rights because they involve the direct subjection of a much wider spectrum of private law to the overriding principles and values of international law. The cases involved equality and freedom of trade and movement issues and directly affected the law of contract and delict, with broader implications (in many respects not explored or analysed yet) in property and commercial and trade law. The effect of the Charter principles cannot be restricted to a specific part of private law, nor can it be assigned to the development of a particular private law doctrine. In the direct horizontal application terminology of the ECJ the implications of these decisions for private law are indeed radical and sweeping; in the more restrained state duty to protect language of the German critics of these decisions the effects are still broad and fundamental, although perhaps less radical. In view of the history of the horizontality debate in Germany and South Africa this approach is unlikely to enjoy much support, although it could have more appeal in the duty to protect version proposed by German critics.

There is a critical difference between the European court for human rights decision in *Osman* and the duty to protect interpretations in either of the last

²³⁴ See Liebenberg (n 220) 33-6.

two approaches described above. The impulse for the development of private law is clearly exterior in the second and third groups of cases, originating from the relevant demand or duty imposed by the constitution. By contrast, the *Osman* decision could possibly be seen as a more restricted development within private law doctrine — in some ways it could be argued that the same development could perhaps have taken place in the absence of the constitution or constitutional impulses to develop, which could in turn strengthen the tendency to deny the influence of the constitution in bringing about the relevant development. In emphasising that the development of state liability was triggered by the constitutional notion of accountability the South African constitutional court cases in which this theory was employed avoided the pitfalls of accommodating a purely private law explanation of the development, which in turn highlights the close resemblance between this version of the duty to protect theory and the German theory of indirect horizontal application or the South African notion of developing the private law in line with section 39(2).

6 Conclusion

6.1 Introduction

The main premise of this article is that the abolition of apartheid laws and the promulgation of the new constitution and the existing new reform laws were just steps in the larger process of post-apartheid transformation, and that the rest of the process will include promulgation of new laws, amendment of existing laws and — most importantly for present purposes — the development of the common law (and particularly private law) to adapt to and promote the spirit, purport and object of the new constitutional regime throughout the whole legal system.²³⁵ An important assumption that underlies and accompanies this premise is that much (although not necessarily the greatest part) of the development work in private law will have to take place through judicial activity. Another assumption is that the judicial development of private law will include both smaller doctrinal refinements, adaptations and developments that can be compared to “normal” scientific development and larger paradigm shifts that resemble scientific revolutions. The question is how to distinguish between them and how to approach the larger, more sensitive changes in a way that will simultaneously give due recognition to the historical context and function of the law during the apartheid era, uphold the supremacy of the constitution in decisively moving away from that history, and still preserve the integrity of private law.

My suggestion in this article was that this daunting task should be approached from the perspective of what Karl Klare described as transformative constitutionalism: “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”.²³⁶ In his groundbreaking article on this topic, Klare particularly warned against the resistance to change that should be expected

²³⁵ In the same spirit see Botha “Freedom and constraint in constitutional adjudication” 2004 *SAJHR* 249-283, especially 275-283.

²³⁶ Klare “Legal culture and transformative constitutionalism” 1998 *SAJHR* 146-188 at 150.

from a basically conservative legal culture, particularly a legal culture whose “participants tend to accept its intellectual sensibilities as normal”.²³⁷ In the new dispensation, Klare argued, “searching and critical examination of the legal culture and its multifaceted and diffuse influences on interpretive practices would seem to be a constitutional duty.”²³⁸ In honouring this duty, Klare remarked in reaction to the constitutional court’s decision in *Du Plessis v De Klerk*, South African lawyers need to be particularly self-reflective and -critical with regard to their own attitudes and interpretive frameworks, shaped by their legal culture, towards the horizontal application issue, because that is a central issue in the transformation of the legal system under the guidance of the new constitution.²³⁹ If the legal culture, which was developed during the apartheid era, is allowed to live on free of critical reflection it will most likely — through its influence upon interpretive practices — inhibit the transformation of society and of the law that should follow upon the almost miraculous peaceful transition from apartheid to a constitutional democracy. That would both betray the transformative constitutional foundations of the peaceful transition and threaten its continued existence.²⁴⁰

If we accept — as I do in this article — that the future development of post-apartheid law has to be explained in terms of the notion of transformative constitutionalism, and that the development of the common law (and particularly private law) is an important aspect of constitutional transformation, it is clear that the theoretical framework within which this development takes place and is explained is critically important. It is in view of this fact that I endeavour, in this article, to reflect upon and reassess the earlier horizontal application debate and the more recent duty to protect discourse that seems to be replacing it: both serve as interpretive and justificatory frameworks within which the development of the common law and the effect of the constitution on private law are explained.

6.2 Resume

By way of brief resume the overviews of South African and comparative debates about the effect of the constitution on private law can be summarised as follows:

- i Initially, the South African debate focused largely on the horizontal application of the bill of rights. By around 2000 it was widely accepted, partly in view of the explicit provisions in sections 7, 8 and 39 of the 1996 constitution, that the constitution has an effect in private law, that this effect takes place via the process known as development of the common law and in the form of indirect horizontal application, which means that the common law is adapted and developed through adjudication to reflect and promote the spirit, purport and objective of the constitution in civil disputes.

²³⁷ Klare (n 235) 167.

²³⁸ Klare (n 235) 168.

²³⁹ Klare (n 235) 179-186; *cf* Botha (n 235) 276, 281.

²⁴⁰ See also Moseneke “The Fourth Bram Fischer Memorial Lecture: Transformative adjudication” (2002) 18 *SAJHR* 309-319 at 313-314; Botha “Metaphoric reasoning and transformative constitutionalism” 2003 *TSAR* 20-36 at 35; Botha (n 235) 249-283.

- ii More recently the courts have started mentioning the duty of the state to protect citizens' rights when developing the common law to give effect to the constitution in private law. In some instances this was done with explicit reference to the duty of the state to respect, protect, promote and fulfil the rights in the bill of rights in section 7(2) of the constitution. Simultaneously, it looks as if references to the indirect horizontal application of the bill of rights have decreased, although some of the decisions that included development of the common law obviously employed typical indirect horizontal application strategies even when they do not mention this approach by name.
- iii Despite these observations there are civil cases in which the courts failed to effect real and meaningful development of the common law or denied that the developments were inspired or required by the constitution.
- iv In German constitutional theory indirect horizontal application has long been regarded as the main theoretical explanation of the constitution's effect in private law. Indirect horizontal application is understood as an interpretive device that involves interpretation of legislation according to or conforming to the constitution, but it also has a limited role in judicial filling of gaps and creation of new law. More recently, German constitutional theory also recognised the doctrine of state protective duties, which means that the objective normative values in the fundamental rights create duties for the state to protect the fundamental rights. For the most part these duties involve legislative duties to promulgate new laws and to provide suitable statutory protection and remedies, although they also involve the interpretation of existing law. The duty to make new laws and the duty to interpret existing laws in accordance with the constitution and in a way that will protect the fundamental rights are seen as complementary; German theory recognizes indirect horizontal application and protective duties as complementary doctrines.
- v The notion of a state duty to protect fundamental rights also emerged from international law, most notably from the General Comments of the UN Commission and from jurisprudence of the European court for human rights, the African commission and the Inter-American court of human rights. In this jurisprudence, the duty to protect is related to the explicit or implicit constitutional provision that the state should respect, protect, promote and fulfil the rights in the bill of rights; a provision echoed in section 7(2) of the South African constitution. From the jurisprudence it looks as if the duty to protect rights is associated with the duty to make laws and provide procedures and remedies that will effectively protect fundamental rights against infringements from other private or state parties, while the duty to fulfil relates to the state duty to take positive steps to realize particularly social and economic rights. Both processes have direct implications for the development of private law since they affect private relations.
- vi Other, similar-looking developments referring to state duties to protect in international law are less promising. The European court for human rights cases dealing with the expansion of the private law of delict in United Kingdom law to allow for a state duty of care towards citizens is of smaller scope and import than the constitutional doctrine of a duty to protect

fundamental rights, and the European court of justice decisions regarding private discrimination simply follow the contours of early German constitutional theory without adding anything new.

- vii South African cases in which the courts switched from horizontal application to duty to protect language referred to the less promising European court for human rights decisions on the state's duty of care in delict (*Carmichele* and *Metrorail*) and to the more promising European court for human rights, African commission and Inter-American court of human rights decisions on the duty to respect, protect, promote and fulfil (*Modderklip*), but not to German theory at all.

6.3 Threshold assessment: what a duty to protect doctrine does not do

Before embarking upon a concluding assessment of the value and scope of protective state duty doctrine, it is worthwhile to first exclude a number of issues from the debate. These observations indicate what the protective state duty doctrine does not do, involve, imply or amount to.

- i First of all it is necessary to state explicitly that we do not require a duty to protect doctrine to justify the duty of the state to refrain from infringing upon negative or defensive rights that are explicitly protected in the bill of rights. Apart from the fact that the purpose of the bill of rights is to place such a duty to respect rights upon the state, that duty is also embodied explicitly in section 7(2) of the constitution.
- ii We do not require a duty to protect doctrine to justify the idea that the state has a duty to protect fundamental rights against infringements from other private persons either — section 7(2) states that duty clearly. We can therefore save ourselves at least some of the heavy doctrinal work that had to be done in German constitutional theory to get to this point, although we can benefit from some of the doctrinal developments in German and in international law in interpreting and developing the implications of such a duty.
- iii We do not need a duty to protect doctrine to justify the development of the common law in terms of the constitution either — section 39(2) states that duty explicitly and separately. In this regard we can also do without German theory, although we can benefit from German theory regarding the continued relationship between horizontal application doctrine and duty to protect doctrine in developing our understanding of the effect of the constitution in private law and particularly the interpretation of the common law and legislation.
- iv We do not need a duty to protect doctrine to support the idea that the state must take positive steps to physically realize certain social and economic rights — apart from the fact that some of these rights are explicitly protected in our constitution, section 7(2) also states that the state must fulfil the rights in the bill of rights. We can benefit from doctrinal development in international law in this area as far as the interpretation and development of this duty is concerned.
- v We do not need a duty to protect doctrine to justify or to explain the development of the common law of delict to allow for an expanded duty of care doctrine that will render the state liable for omissions in protecting citizens against harm caused by others (*Carmichele*). Obviously there is a

connection between the development of the common law and a duty to protect doctrine, but the duty of care in private law is a separate and distinct doctrine that should not be confused with constitutional duty to protect doctrine. The main difference is that one is a development of private law doctrine and the other is a public law or constitutional notion that places an obligation upon the state to develop the law so that effect is given to fundamental rights in general.

- vi At least according to German constitutional theory, a duty to protect doctrine does not and cannot replace the theory of (indirect) horizontal application (or, in the wider context, radiation effect) as a mechanism to explain the effect of the constitution in private law. Especially the most recent German analyses are at great pains to point out and emphasise that a duty to protect doctrine plays only a limited role in justifying, inspiring and explaining certain judicial developments in private law, and that its value is largely in the other direction, namely the justification and explanation of legislative duties to make laws and create procedures and remedies that adequately reflect constitutional demands and requirements. For the rest, horizontal application theory is still dominant in justifying and explaining constitutionally inspired developments of private law through judicial interpretation. For South African purposes, the significant conclusion resulting from this point is that a duty to protect doctrine and talk should not replace but rather complement horizontal application discourse as a framework within which the development of private law can be explained.

6.4 Duty to protect doctrine and horizontal application

Having listed the things that duty to protect doctrine does not do or that it cannot or need not do for South African constitutional theory, the remaining question is what it can do and what its value is for the bigger issue in this article, namely the future development of private property law. In this regard, my first reaction would be to emphasize one of the significant lessons from German theory, namely that duty to protect doctrine does not and should not replace horizontal application discourse as the framework within which we explain and analyse the development of the common law of property (or private law in general) — the one theory is not better than the other and neither provides a complete picture on its own. We need to retain what we have learnt from the horizontal application debate and enrich it with whatever we learn from the duty to protect debate. The *Modderklip* and *Metrorail* cases demonstrate the point nicely.

Seen from the landowner's point of view, German constitutional theory might lead to the conclusion that duty to protect doctrine does not have much to add in the *Modderklip* case: the point of that doctrine is to elucidate the state's duty to make laws and create procedures and remedies that would protect the fundamental rights of citizens, and to all appearances the legislature has made the necessary laws to protect the fundamental rights of both the landowner and the occupiers. On the one hand the legislature added the eviction procedures of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 to the already strong protective measures contained in the common law of property (*rei vindicatio* and eviction procedures). Moreover, the state has established institutions (courts and the sheriff's

office) and procedures through which the landowner can obtain and enforce an eviction order. The courts have already granted such an order in terms of the existing legislation, and it is only for practical reasons related to the position of the occupiers that the landowner was prevented from executing that order.

However, it is clear that the existing remedies and procedures cannot be applied abstractly or in a context-free vacuum; they must be evaluated within the broader context of South African history and the reformist aspirations of the new constitutional order. If the landowner should use these remedies and procedures “normally”, he might find (as in *Modderklip*) that the sheriff’s office will only execute the eviction order against payment of a substantial amount of money, which might be out of the owner’s reach, making the existing remedies appear insufficient. Secondly, even if the occupiers are evicted, chances are that the large number of occupiers will only be removed to the boundary of the owner’s property and that they might well re-enter it and settle there again, because they clearly have no viable alternative. Thirdly, even if the occupiers should be evicted successfully and prevented from returning to the land, the result would be that some 40 000 people are literally on the street, with no shelter, no privacy, no access to water or ablutions. The landowner in *Modderklip* has shown that at least some South African landowners are unwilling to accept that result. In the light of the constitution and the historical context, the interests of the occupiers have to be taken into consideration when considering an eviction order. Even when seen from this perspective the legislature has complied with its constitutional duty to make suitable laws: by promulgating the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act the legislature protected the landowner’s rights as well as the interests of unlawful occupiers, ensuring that they are only evicted when it is just and equitable to do so, and then only in compliance with the requirements and procedures set out in the act. It is therefore not at all surprising that the constitutional court held in *Modderklip* that the mere existence of the institutions and procedures for protecting and enforcing rights cannot exhaust the state’s obligation in terms of section 34 — if it should appear that a landowner is incapable of enforcing his rights because of the sheer magnitude of a land invasion and the personal circumstances of the occupiers, the state has a duty to step in and assist him (and the occupiers). Interestingly, this argument was made in *Modderklip* purely in reference to section 34, with no reference to section 7(2) or the duty to protect doctrine.

As far as German theory is concerned, it looks as if the duty to protect theory cannot add anything to the *Modderklip* case, because there is no question that the state has made the laws that are required by its duty to protect the fundamental rights of both the landowner and the occupiers. What remains is the difficult issue of adjudicating individual cases where the rights of landowners and occupiers clash. German duty to protect theory is equivocal and of limited assistance in this regard, but the duty to protect doctrine developed in international law is more instructive because it links the state’s duty with the issue of remedies and with the value of efficiency. The eviction that protects the owner’s property rights has to be effective and it has to be accompanied by suitable provision of alternative housing for the evictees. In its traditional, “normal” private law form, the common law does not make provision for this, and even the new land reform law that regulates the situation is inadequate or unclear about the situation. Moreover, the situation is exacerbated by

the fact that state provision of alternative accommodation could inspire many more cynical land-grabbing and queue-jumping instances. In view of these considerations, the international law theory of the state's duty to protect, promote and fulfil the fundamental rights of the parties can offer valuable assistance, in line with section 7 of the South African constitution, in developing a suitable interpretation of the relevant laws that would accommodate a solution that would maximise both sets of rights instead of playing them off against each other in a hierarchically determined, zero sum conflict. Since the interests of the occupiers can obviously be described as socio-economic rights, the international law theory of the state's duty to protect is also suitable as an interpretive tool. What is more puzzling, though, is the fact that this theory was employed in a situation where the only party to receive delictual compensation, namely the landowner, did not have what could be described as a socio-economic right in the same sense — his ownership interest is an economic right based on social, economic and political power and privilege, and therefore the international law theory might not be such an obvious interpretive tool for either explaining the state's duty to protect the landowner or for founding a claim in damages in his favour. It could be argued, therefore, that the notion of indirect horizontal application or — in different terminology — of interpreting the existing law so as to develop it to promote the spirit, purport and objects of the constitution might have offered a theoretically more satisfactory basis for the interpretive process. As was mentioned earlier, the constitutional court merely bypassed the duty to protect doctrine and decided the matter on the basis of section 34.

It is clear that, whatever road was followed, the outcome in this case had to take the shape of interpretation, application and development of common law and new statutory law in a way that would promote the spirit, purport and object of the constitution — in other words, in the spirit of transformative constitutionalism. Does the theory of horizontal application or the state duty to protect doctrine work better in finding such a Solomonic solution?²⁴¹ The idea of a state duty to protect rights, whether in its German or in its international law form, can probably be relied upon to justify a demand that the state should take the necessary steps to make the landowner's right (and remedy) effective. However, once it is established that there is no need to legislate new or better protective measures, the German theory loses much of its attractions. Moreover, if protection should merely involve ensuring that the occupiers, once evicted, do not reoccupy the land, it would not solve the third dilemma referred to above: where do the evicted people go? In this regard it is possible to argue, on the basis of examples from international law, that the state's duty to protect the occupiers' constitutional rights also means that the state has to take the necessary steps to fulfil those rights, to ensure that the main obstacle in the way of the landowner's right, namely the legal, social and moral objections against blunt eviction, is removed by finding suitable alternative accommodation for the occupiers before they are evicted. The only feasible way to do that is to either purchase or expropriate the land — neither of which is a competent order for a South African court to make without statutory authority, which does not exist in this case — or to force the state to provide alternative accom-

²⁴¹ See Michelman "Constitutional authorship, 'Solomonic solutions', and the unoriginalist method of constitutional interpretation" 1998 *Acta Juridica* 208-234.

modation for the evicted people, which has the serious effect of not only forcing the state to make a certain economic policy choice, but also making such a choice well knowing that it might trigger disastrous land grabbing and queue-jumping “initiatives” from people who cynically want to further their own position by replicating this one.

In my view, both the supreme court of appeal and the constitutional court found a quite ingenious alternative in *Modderklip* by developing the common law of ownership, both with regard to eviction and compensation, even if that is not the way that either court explained or justified its decision. In preventing the eviction from going ahead without suitable alternative accommodation being provided, it fulfilled its duty towards the homeless community and the constitutional values embodied in sections 7 (or 34, in the case of the constitutional court), 25 and 26 by restricting the common law right of the owner to evict unlawful occupiers without further ado. Obviously the decision to leave the occupiers on the land until alternative accommodation has been arranged is in conflict with the “neutral” or abstract way in which ownership and the right to an eviction tended to be understood and applied in the common law, and technically speaking such a protective move was arguably not required by the new land law legislation either, but it reflects a commendable sensitivity on the side of the court for the historical context of landlessness and the role that evictions played in the establishment of the apartheid land regime. Moreover, the court order ensured that the state would also fulfil its duties towards the landowner in terms of sections 7 and 25 by awarding compensation for the time during which the owner had to endure the presence of the community on his land. This award of compensation is a development that did not exist in common law and it also extends beyond anything foreseen in new land reform legislation, but it seems to reflect the transformative constitutional commitments and aspirations of the new, post-apartheid democracy almost perfectly. In the long run it might force the state to purchase or expropriate the land in order to save money, which would leave both the owner and the community satisfied, but then the decision to acquire the land would have been taken by the state for policy and economic reasons, not forced upon it by an overreaching court. Both the decision to leave the occupiers on the land until alternative arrangements have been made and the decision to compensate the landowner can be justified and explained in terms of the notion of developing the common law as intended in section 39(2); a process that is also explained by the German and the early South African notion of indirect horizontal application of the constitution. However, in all its complexity this order cannot really be explained adequately in terms of the international law notion that the state has a duty to respect, protect, promote and fulfil the rights in the bill of rights. Moreover, the German notion of a state duty to protect fundamental rights cannot play much of a role in reaching this result either, mainly because the state had already complied with its duty to provide the necessary legislative, procedural and judicial framework within which the relevant rights could be protected adequately.

Analysis of the *Metrorail* decision produces a similar result. The narrow German version of the state duty to protect theory does not help us much in that case either, again because the state has already complied with its duty to provide suitable and sufficient protection in the relevant legislation. All that remains is for the courts to establish that the company involved is subject to

constitutional accountability principles and that this accountability renders it liable (if necessary and applicable in a delictual action for damages) in private law, so that rail commuters who suffered because of private criminal action while using the commuter services can sue the company. In arriving at these conclusions the courts could simply rely on its constitutional duty to develop existing private law so as to promote the purport, spirit and objects of the constitution as required by section 39(2). The same result could be described in terms of the state's duty to promote the fundamental rights in the bill of rights (in terms of section 7 of the constitution) as well, but the suitability of the international law theory is less obvious because the rights involved are not necessarily socio-economic rights and because the remedy is not necessarily a delictual one. In principle, either approach can get the job done, and the constitutional court included elements of both in its decisions so far, but it does seem as if the decision is easier to argue and substantiate in so far as it relies on section 39 and less so when it relies on section 7.

Having said that, I wish to argue that we should not pile all the work of transformation and development of the common law onto the doctrine of the state's duty to respect, protect, promote and fulfil the rights in the bill of rights, especially in situations where the rights in question (or just one of the conflicting rights) are not part of the package of socio-economic rights for which this theory was developed in international law. In particular we should critically reflect on the gains that were made in the protracted horizontal application debate and see whether some of the interpretive work cannot be justified or explained better in terms of that theoretical approach. Concretely, the common law of ownership (regarding the landowner's rights) in *Modderklip* could not really be developed in terms of the international law theory, but it can easily be developed in terms of a development theory on the basis of section 39(2). In this regard we probably have much to learn from recent German constitutional theory, where a certain measure of dissatisfaction and skepticism about the protective duties doctrine seems to be leading towards renewed attention for the interpretive possibilities inherent in the defensive character and in the indirect horizontal application of the fundamental rights, without referring to triangular relations or to the state's duty to protect rights at all. German theory has already made it clear that a combination of horizontal application theory and protective duties doctrine makes it possible to explain the different applications and effects of the constitution in the legislative, administrative and judicial spheres.²⁴² Not having a codified private law, South African law is

²⁴² In South African constitutional law, the constitution can have effect in private law in any of the following forms (this is just a tentative effort at listing some possibilities): the constitution can directly or indirectly require or inspire moves that have an (1) effect on legislation: (a) scrapping of existing laws, eg all old apartheid laws; (b) promulgation of new laws; (c) amendment of existing laws (i) to bring existing law in line with constitutional principles; (ii) in reaction to constitutional cases where sections of existing laws have been declared unconstitutional; (2) effect on administration: (a) creation of suitable new procedures to comply with constitutional principles and requirements; (b) amendment of existing procedures to bring them in line with constitutional principles and requirements; (c) selection of decision-making options that are in line with or best promote constitutional principles and requirements; (3) effect on adjudication: (a) controlling constitutionality of legislative and administrative action in terms of explicit constitutional provisions and requirements and wider constitutional principles; (b) in cases where different constitutional rights are in conflict, developing an approach that will optimise

largely dependent upon judicial development of the uncodified private law system, and here the new tendencies in German theory might have something worthwhile to offer us. In this regard it is encouraging to see that recent constitutional court decisions rely on the constitutional obligation to develop the common law, without mentioning the duty to protect. Even though the latest decisions do not mention indirect horizontal application either, it is reasonably clear that the solutions in these cases involve the kind of interpretive strategies that were at stake in the later versions of the indirect horizontal application debate.²⁴³

In the final analysis, the purpose of either the theory of indirect horizontal application or the duty to protect doctrine is to give us a theoretical framework within which we can either justify or explain the development of the law — old and new, statutory and common law — according to the obligations and the aspirations implied by constitutional transformation. In my view we have hardly started on this project, especially in the academic, theoretical endeavour of analysing and critiquing the conceptual and logical frameworks within which these developments are conceived, justified and applied.

SAMEVATTING

“TRANSFORMATIEWE KONSTITUSIONALISME” EN DIE ONTWIKKELING VAN DIE SUID-AFRIKAANSE SAKEREG

Sedert die inwerkingtreding van die 1993 interim grondwet was daar ernstige meningsverskil oor die sogenaamde “horisontale toepassing” van die grondwet; en veral die fundamentele regte in die handves van menseregte. Verskillende benaderings is deur akademici voorgestaan en in die regspraak gevolg, maar sedert die finale grondwet in 1996 in werking getree het, is wyd aanvaar dat indirekte horisontale toepassing van die grondwet, hoofsaaklik by wyse van die ontwikkeling van die gemenerereg, die belangrikste bron van invloed vanaf die grondwet op die privaatreë sal uitmaak. Daar bestaan egter heelwat onsekerheid en meningsverskil oor die wyse waarop die ontwikkeling sal plaasvind. In meer onlangse regspraak word daar op die sogenaamde plig van die staat om sy burgers te beskerm gesteun om dieselfde verskynsel te verklaar, terwyl indirekte horisontale toepassing of ontwikkeling skynbaar vergete geraak het.

In die eerste deel van die artikel word ’n oorsig verskaf van die verskillende benaderings wat in die regsliteratuur en regspraak voorkom. In die volgende deel word twee moontlike bronne vir die verskuiwing vanaf horisontale toepassing-taal na staatsplig om te beskerm-taal ondersoek, naamlik die Duitse reg en die volkerereg. Die analise word gevolg deur ’n beoordeling van die ontwikkeling in die nuwe regspraak en gevolgtrekkings. Die belangrikste gevolgtrekking is dat die idêe van indirekte horisontale ontwikkeling in die sin van ontwikkeling van die gemenerereg (ingevolge a 39(2) van die grondwet) nie afgeskep of deur die idêe van staatsplig om te beskerm vervang moet word nie, omdat eersgenoemde op ’n duidelike grondwetlike opdrag berus en van wyer strekking as laasgenoemde is.

both as far as they can be upheld together without one being negated or devalued; (c) in cases where private rights conflict, determining whether there is any place or need for constitutional input to enrich or transform the existing private-law solution in line with constitutional principles or requirements; (d) interpretation of existing laws and common law: when possible choosing the interpretation of existing law that is in line with constitutional principles and requirements (reading down); (e) development of existing law and common law: when necessary filling in gaps or amending existing practices in or interpretations of existing law to promote constitutional principles (reading in); (f) when options above are impossible, declaring existing laws or common law in conflict with constitution and pointing out duty of the legislature to make new law or amend existing law.

²⁴³ See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC).