

# The horizontal application of constitutional rights in a comparative perspective

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## 1 INTRODUCTION

Traditionally, constitutional rights apply in the public sphere but not in the private sphere. In other words, private actors were not bound by human rights. Although often associated with the natural rights theory, the distinction between the public and the private in the application of human rights 'antedates modern liberalism by more than two millennia.'<sup>1</sup>

This traditional position has also been maintained in international law.<sup>2</sup> Thus, non-state actors, such as transnational corporations, cannot be found liable in international law for violating human rights. The realisation that non-state actors have become more influential internationally than was previously the case and that these actors have been implicated in a wide range of gross violations of human rights in various parts of the world has strengthened the call for binding international standards for these actors.<sup>3</sup> However, resistance to establishing such a framework is still strong. Thus, efforts initiated in August 2003 by the UN Sub-Commission for the Protection and Promotion of Human Rights to adopt the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Norms), have been stalled.<sup>4</sup> Instead of adopting the Norms as an UN declaration or treaty, the UN Commission on Human Rights appointed a Special Representative of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises to undertake further research into existing initiatives and standards for holding these actors accountable for human rights, both at domestic and international levels.

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1 Thornton M 'The cartography of public and private' in Thornton M (ed) *Public and private: Feminist legal debates* (1995) 2.

2 See Charlesworth H 'Worlds apart: Public/private distinctions in international law' in Margaret Thornton M (ed) *Public and private: Feminist legal debates* (1995) 243.

3 See, e.g., Orentlicher D & Gelatt T 'Public law, private actors: The impact of human rights on business investors in China' (1993) 14 *Northwest Journal of International Law and Business* 1 at 66; Saunders L 'Rich and rare are the gems they war: Holding De Beers accountable for trading conflict diamonds' (2001) 24 *Fordham International Law Journal* 1402; Skogly S 'Complexities in human rights protection: Actors and rights involved in the Ogoni conflict in Nigeria' (1997) 15 *Netherlands Quarterly of Human Rights* 47.

4 See Chirwa D 'The long march to binding obligations of transnational corporations in international human rights law' (2006) 22 *South African Journal on Human Rights* 76.

This article seeks to contribute to this ongoing investigation by showing that comparative constitutional jurisprudence points towards an increasing recognition of the relevance or applicability of these rights to private actors. The constitutions of five countries (United States, Canada, Germany, Ireland and South Africa) will form the main subject of discussion. The US Constitution is one of the oldest constitutions, whose lifespan extends over a period of 200 years. The Canadian Constitution is a relatively recent one adopted in 1982. However, both of these constitutions are traditional in the sense that they limit the conception of duties generated by human rights to negative obligations,<sup>5</sup> and do not permit the application of rights to non-state actors.<sup>6</sup> Nevertheless, it will be argued that even traditional constitutions such as these recognise that private conduct may, in certain limited circumstances, fall within the reach of constitutional rights. The jurisprudence of the Federal Constitutional Court of Germany also establishes that constitutional rights are relevant in the private sphere. German constitutional law is well known for what has come to be called the 'doctrine of *Drittwirkung*' (third party effect of basic rights). This doctrine has been in application for more than half a century and has been adopted by a range of other countries including Italy, Spain, Switzerland and Japan,<sup>7</sup> and by the European Court of Human Rights.<sup>8</sup> Both the Constitutions of Ireland and South Africa permit the application of constitutional rights between non-state actors. These constitutions represent potential models of full horizontal application of constitutional rights.

## 2 THE UNITED STATES AND THE STATE ACTION DOCTRINE

As mentioned earlier, the Constitution of the United States is emblematic of traditional constitutions in the sense that it is intended to bind the state only. The human rights provisions under this Constitution have no direct application between private actors.<sup>9</sup> This position has been encapsulated in what has come to be popularly known as the 'state action doctrine'. According to American constitutional theory, private actors are not bound by constitutional rights unless the conduct of those actors qualifies as 'state action'. In *Virginia v Rives*,<sup>10</sup> for example, the United States Supreme Court stated that 'the provisions of the Fourteenth Amendment of the

5 For the US see *United States v Cruikshank* 92 U.S. 514, 554 – 55, 318 (1875). For Canada see *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573, 9 B.C.L.R. (2d) 273, 595 ('*Dolphin Delivery*' cited to S.C.R.).

6 For the US see, for example, *Shelley v Kraemer* 334 U.S. 1; *DeShaney v Winnebago County Department of Social Services* 489 U.S. 189, 196 (1989); for Canada see *Dolphin Delivery* at 595.

7 Barak A 'Constitutional human rights and private law' in Friedmann D & Barak-Erez D (eds) *Human rights in private law* (2001) 13 at 22. For Japan see also Horan M 'Contemporary constitutionalism and legal relationships between individuals' (1976) *International and Comparative Law Quarterly* 848, 864 – 866.

8 See Clapham A 'The "Drittwirkung" of the Convention' in Matscher F *et al* (eds) *The European system for the protection of human rights* (1993) 163.

9 See *United States v Cruikshank* (fn 5 above) 554 – 55.

10 100 U.S. 313 (1879).

Constitution . . . all have reference to State action exclusively, and not to any action of private individuals'.<sup>11</sup> This principle was reiterated in the *Civil Rights Cases*, where it was held that 'it is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment'.<sup>12</sup>

The jurisprudence on state action defies coherence and its scope has been the subject of a long drawn-out academic debate.<sup>13</sup> However, some principles within the maze of this jurisprudence are settled<sup>14</sup>, and establish that that the conduct of a non-state actor may, in certain circumstances, constitute 'state action' and, therefore, be subject to constitutional rights. For example, private conduct may constitute state action where it is regulated directly by government. In *Jackson v Metropolitan Edison Co*, the Supreme Court held that 'a sufficiently close nexus between the State and the challenged action of the required entity' must be established for the action of the latter to be treated as that of the state itself.<sup>15</sup>

Secondly, a private decision will amount to state action if exercised under the coercive power of the state or where the latter has provided such significant encouragement, either overtly or covertly, that the choice could, in law, be deemed to be that of the state.<sup>16</sup> The case of *Peterson v City of Greenville, S.C.*<sup>17</sup> exemplifies the application of this rule. In this case, the appellants were black boys and girls who had been convicted of trespass for sitting at a store lunch counter. The evidence in this case established that the only reason for excluding the appellants from the restaurant was their race. The Supreme Court held that since an ordinance passed by a city authority, a state agent, required restaurant facilities to be operated on a segregated basis, the decision of the owner of a private restaurant in deciding to exclude the defendants did precisely what the city law required and, therefore, that decision amounted to state action.

Thirdly, acts performed by a non-state actor with the participation or involvement of the state 'through any arrangement, management, funds or property' may also constitute state action.<sup>18</sup> In *Burton v Wilmington Parking Authority*,<sup>19</sup> an injunction was granted, restraining the operator of a restaurant located within a state-owned parking building from refusing to serve the appellant solely because he was black. Although the restaurant was privately owned, the Supreme Court found that a peculiar relationship

11 *Ibid* at 318.

12 109 U.S. 3 11 (1883).

13 See Schneider R 'The 1982 state action trilogy: Doctrinal contraction, confusion, and a proposal for change' (1985) 60 *Notre Dame Law Review* at 1150; Black CL 'Foreword: "State action", equal protection and California's proposition' (1967) 81 *Harvard Law Review* 69, 95.

14 See Strickland H 'The state action doctrine and the Rehnquist Court' (1991) 18 *Hastings Constitutional Law Quarterly* 587, 645.

15 415 U.S. 912, 94 S.Ct. 1407 U.S., 1974.

16 *Blum v Paretsky* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534.

17 373 U.S. 244 (1963).

18 *Cooper v Aaron* 1958, 358 U.S. 14.

19 365 U.S. 715.

existed between the restaurant and the parking authority, which meant, that the refusal was subject to the equality clause. Among other things, the government agency not only maintained the building, of which the restaurant was part, and benefited from the financial success of the restaurant, but the restaurant was also operated as an integral part of a public building devoted to a parking service.

Fourthly, private conduct in which there is no apparent state involvement may also constitute state action if it relates to functions or powers normally exercised by the government. In *Marsh v Alabama*,<sup>20</sup> the Supreme Court held that the conduct of a corporation – namely refusing the appellant permission to distribute religious literature in a town owned and run by the corporation – was attributable to the state because the town did not function differently from any other town and its community shopping centre was freely accessible and open to the public. That refusal was found to be inconsistent with freedom of the press and freedom of religion.

Lastly, it has also been held that a decision by the state to deny judicial or other intervention in enforcing racially restrictive covenants constitutes state action. This rule was applied in the controversial decision of *Shelley v Kraemer*.<sup>21</sup> This case concerned the enforcement of an agreement signed between 39 owners of property in a specified residential area, which contained a restrictive covenant excluding black persons from occupying any property in that residential area as owners or tenants.<sup>22</sup> The respondents, who were parties to this agreement and owners of some property in this residential area, brought a suit asking for an order restraining the petitioners, who were black people and had bought property in this residential area without knowledge of the restrictions, from taking possession of the property. At issue in the Supreme Court was whether the right to equality under the Fourteenth Amendment bound state courts to refuse to enforce restrictive covenants based on race or colour. The Court stated that restrictive agreements such as the ones in question, on their own, could not be regarded as a violation of any rights, as long as the purposes of the agreements were effectuated by voluntary adherence to their terms. However, the same was not true, the court held, in respect of similar agreements whose purposes were secured by judicial enforcement by state courts. Thus, it held that in granting judicial enforcement of restrictive agreements, the state denied petitioners the equal protection of the laws.

These decisions demonstrate that despite the strong adherence to the traditional conception of rights as injunctions against the state, American Courts recognise that private conduct may be subject to constitutional rights in certain limited circumstances. The manner in which constitutional rights reach private conduct is indirect because it is the state that is held responsible.

20 326 U.S. 501.

21 Fn 6 above.

22 *Ibid* at 4.

The rules of attribution of conduct to the state under the state action doctrine bear a close resemblance to those under the doctrine of state responsibility in international law.<sup>23</sup> The latter is an age-old principle, which posits that a state is responsible for an international wrong committed against another state. In order for a state to be held responsible for an international wrong, the applicant must prove that the wrong complained of constitutes 'an act of the state'.<sup>24</sup> However, the rules of state responsibility in international law have received a more generous interpretation in human rights law, through the recognition of the duty to protect individuals or groups from violations of their rights committed by non-state actors or other states.<sup>25</sup> International human rights law posits that a state will be responsible for violations committed in the private sphere if it failed to exercise due diligence to prevent those violations, investigate them, control or regulate private actors, or provide remedies when the violations occurred.<sup>26</sup> Failure by the state to comply with these duties would lead to a finding of state responsibility for the violation committed by private actors. Under this framework, the scope for finding state responsibility for acts of private actors is broader than that under the traditional notion of state responsibility in international law.

It must be noted that the duty to protect constitutional rights is not recognised in American constitutional law. According to Henry Strickland, '[t]he state generally has no constitutional obligation to intervene in private disputes either to protect individuals from harm inflicted by other private entities or to force the wrongful private entities to compensate the victims of their wrongdoing'.<sup>27</sup> While *Shelley v Kraemer* represents the closest that American courts have come to recognising the duty to protect, the case has been roundly criticised by those who consider constitutional rights to be of no relevance to private relations and has hardly been invoked again.<sup>28</sup>

The reluctance to recognise the duty to protect in American constitutional law has limited the extent to which constitutional rights may reach private conduct indirectly. Erwin Chemerinsky has argued for the abolition of the state action doctrine because of its limited applicability to the

23 Attempts to codify these rules have resulted in the adoption, by the International Law Commission, of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles), as contained in the Report of the International Law Commission on the Work of its 53<sup>rd</sup> Session, UN Doc A/55/10 (2000). Discussed in Crawford J *The International Law Commission's Articles on State Responsibility: Introduction, text and commentary* (2002).

24 Article 2 of the Draft Articles.

25 Chirwa D 'The doctrine of state responsibility as a potential means of making private actors accountable for human rights' (2004) 5 *Melbourne Journal of International Law* 1.

26 This duty is explained in *Velásquez Rodríguez v Honduras* [1988] Inter-Am Court HR (ser C) No 4.

27 Strickland (fn 14 above) at 608. See also *DeShaney v Winnebago County Department of Social Services* (fn 6 above).

28 Cole KL 'Federal and state "state action": The undercritical embrace of a hypercriticized doctrine' (1990) 24 *Georgia Law Review* 327. For counter-arguments, see Chemerinsky E 'Rethinking state action' (1985) 80 *Northwestern University Law Review* 503.

conduct of non-state actors.<sup>29</sup> Abolishing the doctrine means that 'the Constitution would be viewed as a code of social morals, not just of governmental conduct, bestowing individual rights that no entity, public or private, could infringe without a compelling justification.'<sup>30</sup> Stephen Gardbaum has argued differently, but to the same effect, that the state action doctrine gives only a partial answer to the foundational question of the reach of constitutional rights into the private sphere in the United States. He submits that the supremacy clause in the American Constitution should be interpreted to mean that '[a]ll law, including common law and the law at issue in litigation between private individuals is directly and fully subject to the Constitution'.<sup>31</sup>

In conclusion, the American Constitution is limited as regards the application of its rights to private relations. Constitutional rights have no direct application to non-state actors. Rather, they can bind a non-state actor indirectly only where its conduct can be attributed to a state. The rules of attribution of state conduct are very limited, meaning that indirect application of constitutional rights to private relations is also circumscribed. Furthermore, the American constitutional jurisprudence does not give full recognition to the state's duty to protect constitutional rights, which has also limited the extent to which non-state actors may be held indirectly accountable for human rights through the state. What is important to note is that this jurisprudence establishes that the conduct of private actors can, in limited cases, be constrained by constitutional rights.

### 3 CANADA

Like the American Constitution, the Charter does not contain an express provision regarding its application in the private sphere. However, section 32(1) of the Charter provides:

This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament, including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

In *Dolphin Delivery*,<sup>32</sup> the Canadian Supreme Court took a restrictive interpretation of this section to hold that Charter rights do not bind private persons. The respondent in this case (Dolphin Delivery Company) was a private company engaged in a courier business. The appellants (a trade union and some of its members) advised the respondent that its place of business would be picketed unless it agreed to stop doing business with Supercourier, with whom the appellants were involved in an unresolved

29 Chemerinsky *ibid* at 550.

30 *Ibid*.

31 Gardbaum S 'The "horizontal effect" of constitutional rights' (2003) 102 *Michigan Law Review* 387, 389 - 390.

32 Fn 5 above.

labour dispute. Thereupon, the respondent made an application for an injunction to restrain the threatened picketing, which was granted. The basis of granting the injunction was that the threatened secondary picketing amounted to the common law tort of inducing a breach of contract. The appellants' appeal to the Court of Appeal was dismissed.

In the appeal to the Supreme Court, the issue for consideration was whether secondary picketing by members of a trade union in a labour dispute is a protected activity under section 2(b) of the Canadian Charter, which guarantees freedom of expression, and, therefore, not the proper subject of an injunction to restrain it. The Supreme Court found it easy to hold that the picketing sought to be restrained involved freedom of expression. However, since the parties to this matter were private, the question arose as to whether Charter rights had application to private litigation and common law. According to McIntyre J, who wrote the opinion of the court, section 32(1) of the Charter was conclusive as regards the actors to whom the Charter is applicable. It was held that the actors bound by the Charter were the legislature, executive and administrative branches of government. With respect to these, the Charter will apply 'whether or not their action is invoked in public or private litigation'.<sup>33</sup> As the respondent was a private company, the appellants could not plead freedom of expression as a defence to the injunction.

Having denied the possibility of direct horizontal application of the Charter, the Supreme Court considered the question whether the Charter applied indirectly to private litigation through the Charter's application to the judiciary and to common law. The Court rejected the contention, on grounds departing from the approach of the US courts in *Shelley v Kraemer* (discussed above), that judicial orders constitute governmental action. McIntyre J refused to

'equate for purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The Courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard the court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation . . . A more direct and a more precisely defined connection between the element of government action and the claim advanced must be present before the Charter applies'.<sup>34</sup>

This dictum means that as far as litigation involves private actors, the judiciary is not bound to apply or consider the human rights provisions in the Charter, unless it can be shown that there is some governmental connection to the litigation at hand. The prime basis for this holding was that section 32(1) of the Charter did not mention the judiciary as an actor to whom it applied.

33 *Ibid* par 41.

34 *Ibid* par 43.

Regarding the question whether the Charter applies to the common law, the Supreme Court held that this was possible 'only insofar as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom'.<sup>35</sup> Accordingly, 'where private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply'.<sup>36</sup>

The rationale for restricting the application of the Charter to the common law in this manner defies logic. The Court held in this case that the Charter applies to all legislation, meaning that the Charter will apply to private relations when legislation is involved. It is difficult to understand why legislation should be subject to the Charter in private litigation but not the common law. The implication of the Court's decision, which I submit is absurd, is that it is governmental action when the legislature enacts law or a minister promulgates by-laws, but it is not state action when the judiciary 'makes', develops or interprets the common law. What is more, the distinction between legislation and the common law, as regards the application of the Charter to private litigation, raises many questions which undermine the validity of the Court's rationale. As Brian Slattery has rightly asked:

Where a statute partially *modifies* the common law governing a particular subject, silently leaving other parts intact, is it sensible to hold that statutory portions of the resulting legal regime are governed by the *Charter* while the common law portions are exempt? By the same token, where a statute merely *replicates* a portion of the common law rules governing a subject, making no mention of the remaining portion, should we hold that the replicated rules are subject to *Charter* scrutiny while the others are not?<sup>37</sup>

These questions underline the difficulties involved in separating legislation from the common law for purposes of application of human rights. The Court's rationale in this regard was weakened further by its concession that the Charter values were relevant to private litigation concerning the application of the common law.<sup>38</sup> It held that the judiciary, while not bound by the Charter in private litigation, 'ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution'.<sup>39</sup> The Court did not provide any constitutional basis for holding so, given that it had rejected the argument that the Charter applied to private common law disputes.<sup>40</sup>

35 *Ibid* par 41.

36 *Ibid* par 46.

37 Slattery B 'The Charter's relevance to private litigation: Does Dolphin deliver?' (1987) 32 *McGill Law Journal* 905, 919 (emphasis original).

38 *Dolphin Delivery* (fn 5 above) par 46.

39 *Ibid*.

40 Thus, Amnon Reichman has even suggested that '[t]he duty to develop the common law in light of constitutional values, therefore, is not derived from the supremacy of the Charter, but from the common law itself'. See Reichman A 'A Charter-free domain: In defence of Dolphin Delivery' (2002) 35 *The University of British Columbia Law Review* 329, 343. Apart from the fact that the decision in *Dolphin* does not support this construction, the view that common law inherently requires Courts to develop this law in

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While the importance of Charter values to private law remains to be elaborated by Canadian courts,<sup>41</sup> it appears that there is no significant difference, in effect, between the Charter rights applying directly to the common law or indirectly as Charter values. According to Peter Hogg,

[t]he rule that the common law should be developed in conformity with 'Charter values' means that, although the Charter does not apply directly to the common law, it does apply indirectly. Despite some differences in the way s. 1 justification is assessed, the indirect application is much the same in effect as the direct application.<sup>42</sup>

It can therefore be said that constitutional rights have indirect application to private relations in Canada in the sense that they can be considered as values that can inform the development of the common law. They can also be relied upon in private litigation where either party invokes a provision in legislation that is inconsistent with any of those rights. Significantly, unlike under the state action doctrine, it is the private party that is sued and held responsible for the conduct in issue, meaning that, although the manner in which constitutional rights are considered is said to be indirect, in effect, the private party is held directly responsible for the human rights violation.

Litigants also have the option of suing the state in respect of violations of human rights committed in the private sphere. Until recently, Canadian constitutional law maintained that the rights entrenched in the Charter create only negative obligations.<sup>43</sup> In *Vriend v Alberta*,<sup>44</sup> the appellant was dismissed from his employment based on his sexual orientation.<sup>45</sup> He then made an application for a declaration that the exclusion of sexual orientation as a prohibited ground of discrimination from the Individual's Rights Protection Act<sup>46</sup> amounted to a violation of the Charter, which recognises in section 15 the right to equality before and under the law and the right to equal protection and benefit of the law. The Supreme Court held that this omission constituted government action to which the Charter was applicable. The Court stated that, where the challenge concerns an Act of the legislature that is 'underinclusive' (or fails to protect Charter rights) as a result of an omission, section 32 should not be interpreted as precluding the application of the Charter.<sup>47</sup> The fact that the effect of applying the Charter to the impugned Act was to regulate private activity did not persuade the Court to hold otherwise. It was held that the Individual Rights Protection Act violated article 15(1) of the Charter by failing to include 'sexual orientation' as a ground of discrimination.

line with reason-based principles is not only novel but also an invitation to water down the supremacy of constitutional values and rights.

41 Weinrib L & Weinrib E 'Constitutional values and private law in Canada' in Friedmann & Barak-Erez (fn 7 above) 43, 46.

42 Hogg P *Constitutional law of Canada* 2 (2001) 34 – 24 (footnotes omitted).

43 See Macklem T 'Vriend v. Alberta: Making the private public' (1999) 44 McGill Law Journal 197, 209.

44 156 D.L.R. (4th) 385, [1998] 1 S.C.R. 493.

45 *Ibid* par 7.

46 1972 (Alta.)

47 *Vriend v Alberta* (fn 43 above) par 61.

Another case, *Dunmore v Ontario (Attorney General)*,<sup>48</sup> concerned the exclusion of agricultural workers from Ontario's statutory labour relations regime. The appellants, who were individual farm workers and union organisers, argued that this exclusion amounted to an infringement of their freedom of association under the Charter as they were prevented from establishing, joining and participating in the lawful activities of a trade union.<sup>49</sup> They also claimed that the labour legislation violated their equality rights under section 15(1) of the Charter by denying them the statutory protection enjoyed by most occupational groups in Ontario. In finding that these rights were violated, the Supreme Court of Canada stated, while reiterating that Charter rights do not generally create positive obligations on the state, that 'the *Charter* may oblige the state to extend underinclusive statutes to the extent that underinclusion licenses private actors to violate basic rights and freedoms'.<sup>50</sup> According to the Court, this may be so to the extent that underinclusive state action 'substantially orchestrates, encourages or sustains the violation of fundamental freedoms'.<sup>51</sup> Thus, the impugned legislation was found to be unconstitutional.

These cases establish that failure by the state to take legislative measures to prevent certain kinds of human rights violations committed by private actors will lead to state responsibility. The precise scope of the duty to protect is yet to be developed by Canadian Courts, but it can be envisaged that a more expansive definition of this duty, as developed in international human rights law, will be adopted.

Thus, it can be concluded that, apart from enforcing the obligations of non-state actors by suing the state, the courts in Canada have conceded, albeit in a limited way, that constitutional rights also have relevance to private litigation. Where the litigation involves legislation, Charter rights will have direct application. By contrast, Charter rights will be considered as Charter values where the issues raised in the private litigation concerns common law.

#### 4 GERMANY AND THE DOCTRINE OF *DRITTWIRKUNG*

Like the American Constitution and the Canadian Charter, the German Constitution<sup>52</sup> does not contain an explicit provision concerning the direct application of 'basic rights' to non-state actors.<sup>53</sup> However, article 1(3) of the German Constitution provides expressly that 'basic rights *shall bind* the legislature, the executive, and the *judiciary* as directly applicable law'.<sup>54</sup> The absence of an express provision led to the emergence of two main schools of thought, one school represented mainly by Hans Nipperdey

48 [2001] 3 S.C.R. 1016.

49 *Ibid* par 1.

50 *Ibid* par 26.

51 *Ibid*.

52 Basic Law for the Republic of Germany (*Grundgesetz, GG*) promulgated on 23 May 1949.

53 Markesinis B 'Privacy, freedom of expression, and the horizontal effect of the Human Rights Bill: Lessons from Germany' (1999) 115 *Law Quarterly Review* 47, 49.

54 Emphasis added.

and Walter Leisner who argued that basic rights had direct horizontal application, but no indirect application, and the other represented primarily by Günter Dürig propounding the opposite view.<sup>56</sup>

Early decisions, rendered by the Federal Labour Court, in which Hans Nipperdey presided, took the view that basic rights bound private actors directly.<sup>56</sup> This meant that basic rights could be invoked as the basis of an action or defence to an action in litigation involving non-state actors.

However, the Federal Constitutional Court appears to have disregarded these decisions. Its jurisprudence establishes that basic rights apply to all law, including private law. Thus, while a private person may not bring a direct constitutional action against another, parties to private litigation may raise basic rights in support of their respective positions through the general clauses and concepts of private law.

The *Lüth Case* (1958)<sup>57</sup> is regarded as a 'linchpin of German constitutional law',<sup>58</sup> especially on the issue of the horizontal effect of basic rights. Erich Lüth was the Director of Information and an active member of a group whose objective was to contribute to achieving reconciliation between Jews and Christians in the aftermath of the Nazi regime. When a film director, Veit Harlan, well-known for producing anti-Semitic films during the Nazi regime, produced a new movie in 1950 after his acquittal of Nazi crimes, Lüth called for a public boycott of the film arguing that the re-emergence of this film director could jeopardise reconciliation efforts. Consequently, the film's producer and distributor applied for an injunction to restrain Lüth from urging the German public not to see the movie and asking theatre owners and distributors not to show or distribute the film. The injunction was granted by the lower court on the ground that Lüth's actions amounted to actionable incitement under article 826 of the German Civil Code. An appeal by Lüth to the Court of Appeals was rejected. As a result, he filed a constitutional complaint in the Federal Constitutional Court, alleging that the superior court had violated his right to free speech enshrined under article 5(1) of the Constitution.

The Federal Constitutional Court, while endorsing the idea that 'the primary purpose of basic rights is to safeguard the liberties of the individual against interferences by public authority',<sup>59</sup> stated that:

55 See generally Lewan K 'The significance of constitutional rights for private law: Theory and practice in West Germany' (1968) 17 *International and Comparative Law Quarterly* 571.

56 See Oeter S 'Fundamental rights and their impact on private law - Doctrine and practice under the German Constitution' (1994) 12 *Tel Aviv University Studies in Law* 7, 11.

57 7 BVerfGE 198. The facts and holding as discussed herein are based on the English translation of the case in Kommers DP *The constitutional jurisprudence of the Federal Republic of Germany* 2ed (1997) 361 - 368. All page references of the judgement are cited to this book.

58 Kommers *ibid* 361.

59 *Ibid* 363.

[i]t is equally true, however, that the Basic Law is not a value-neutral document . . . Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights . . . Thus it is clear that basic rights also influence [the development of] private law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit.<sup>60</sup>

Thus, basic rights serve the function of 'influencing' the development of private law in Germany and, as such, bind private actors indirectly. This influence, the Court suggested, would be through those provisions of private law that contain mandatory rules of law forming part of the *ordre public*.<sup>61</sup> These are rules which 'for reasons of the general welfare also are binding on private legal relationships and are removed from the dominion of private intent'.<sup>62</sup> This influence could also occur through the interpretation of general clauses in private law, such as 'good morals'.<sup>63</sup>

The duty to consider basic rights when applying and interpreting substantive rules of private law, it was held, emanates from article 1(3) of the Constitution cited above, which states that basic rights shall bind, among other actors, 'the judiciary'. Thus, if a judge fails to apply these standards and ignores the influence of constitutional law on the rules of private law, he/she violates 'objective constitutional law'.<sup>64</sup>

Applying these principles to the main issue in the present case, the Court held that Lüth was acting within his rights to state his views about the film in public, given his especially close relation to all that concerned the German-Jewish relationship. It regarded as unjustified the contention that, under these circumstances, Lüth should nevertheless have refrained from expressing his opinion out of regard for the director's professional interest and the economic interests of the film companies employing him. It stated that 'where the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual interests must, in principle, yield'.<sup>65</sup> Thus, it was concluded that the superior court violated the complainant's right enshrined in article 5(1) by misjudging the special significance of the basic right to freedom of opinion in assessing the behaviour of the complainant. The decision of the superior court upholding the injunction was thus quashed.

While the *Lüth Case* engaged in a balancing exercise of a constitutional basic right and a right protected by private law, the *Mephisto Case* (1971)<sup>66</sup> considered two conflicting constitutional rights. In the 1930s Klaus Man published a novel based on the character of his brother-in-law, Gustaf Gründgens, an actor who had gained prominence by subscribing to and

60 *Ibid* (citations omitted).

61 *Ibid*.

62 *Ibid*.

63 *Ibid*.

64 *Ibid* 364.

65 *Ibid* 367.

66 30 BVerfGE 173. The discussion of this case is based on the English translation of the case in Kömmerers (fn 57 above) at 301 – 304 & 427 – 430. Page references below are made to this book.

supporting the Nazi ideology and regime.<sup>67</sup> An adopted son of Gründgens applied for an injunction, which was granted, banning the distribution of the novel, on the ground that it 'dishonoured the good name and memory of the now-deceased actor'.<sup>68</sup> Consequently, the publisher of the novel filed a constitutional complaint in the Federal Constitutional Court arguing that the lower courts violated the right to freedom of art and science guaranteed in article 5(3) of the Constitution.

The Court held that article 5 of the Constitution guarantees autonomy of the arts without reservation.<sup>69</sup> However, it went on to hold that the lower courts properly considered the late actor's right to human dignity as a limitation on freedom of the arts. It reasoned thus:

It would be inconsistent with the constitutionally guaranteed right of the inviolability of human dignity, which forms the basis for all basic rights, if a person . . . could be degraded or debased even after his death. Accordingly the obligation which article 1(1) imposes on all state authority to protect the individual against attacks on his dignity does not end with death.<sup>70</sup>

After weighing the two rights and considering the circumstances of the case, the decision was made, in favour of Gründgens, to protect the dignity of the now deceased actor. In other words, the decisions of the lower courts restraining the distribution of the novel were affirmed.<sup>71</sup>

The above discussion demonstrates that basic rights have 'strong' indirect horizontal application. It is indirect simply because a private person may not commence a constitutional action against another private person. One has to rely on private law to redress violations of human rights. In addition, the cases brought before the Federal Constitutional Court are argued as if a lower court had violated the right in issue, rather than the private action involved in the litigation. What is interesting, however, is that, despite these technical points, the Federal Constitutional Court has held quite clearly that private law courts have the duty to consider human rights if called upon by the parties to the case at hand. If they fail to do so,

67 Kommers (fn 57 above) 301.

68 *Ibid.*

69 *Ibid.* at 428.

70 *Ibid.*

71 This case and the jurisprudence it has generated were given a renewed impetus by two recent decisions of the Federal Constitutional Court in 2001. The first, handed down in February, concerned the validity of a marital agreement whereby a mother waived claims relating to the maintenance of her son and herself in the event of a divorce. It was held that the agreement constituted a violation of the right to family protection and the rights of the child. The other decision handed down in March in the same year also concerned the validity of a marital agreement. The Court reiterated that it has an obligation to 'exercise control of the agreement's content and, where necessary, correct the contractual terms in order to render the agreement compatible with the Constitution'. It considered the woman's inferior bargaining position, quashed the decision of the lower court and ordered the former husband to pay a stipulated monthly sum as maintenance for the ex-wife. Both cases are discussed by an anonymous author in 'Constitutional control of marital agreements II: The FCC affirms its path-breaking decision' (2001) 2 *German Law Journal*, online journal available at <http://www.germanlawjournal.com/print.php?id=86>.

the aggrieved party may commence a constitutional complaint before the Federal Constitutional Court.

Compared with the position in the United States and Canada, basic rights have a wider reach in Germany. There is no need to prove state action before invoking basic rights. All laws have to be construed and interpreted against the backdrop of basic rights. Furthermore, German courts, unlike those in the US and Canada, are bound to consider basic rights when resolving purely private disputes. While it could be said that section 1(3) of the German Constitution, which expressly provides that the judiciary is bound by basic rights, is responsible for the manner in which courts have understood the influence of basic rights on private law, it must also be noted that the decisions discussed above essentially also recognise that German Courts are bound to protect peoples' rights. This is why the failure by a lower court to consider human rights when resolving private disputes is considered by the Federal Constitutional Court as a violation by the lower court of the human rights involved. As a result, the impact of basic rights on private law and, by extension, on private conduct has been more significant than has been the case with constitutional rights on the US or Canadian private law.

## 5 IRELAND

Like the constitutions of the United States, Canada and Germany, the Irish Constitution<sup>72</sup> does not have an express provision recognising the application of constitutional rights to non-state actors. Article 40(3) of this Constitution provides:

1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

This article clearly imposes on the state the duty to respect and protect the rights of citizens. The duty to protect is defined in a manner that suggests that the state would discharge its duty by simply enacting legislation aimed at defending and vindicating the personal rights of the citizen.

However, the Supreme Court of Ireland has construed these provisions quite broadly. The case of *Meskeil v C.I.É.*,<sup>73</sup> is often credited as authority for the contention that human rights under the Irish Constitution bind non-state actors such that an action against a private person alleging an infringement of a right could be based on the Constitution. In that case, Walsh J stated that:

[a] right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit

72 Adopted on 1st July 1937, entered into force on December 1937, as amended up to 7 November 2002.

73 [1973] 1 I.R. 121. It was held in this case that to try to alter the constitutional rights of an employee retrospectively by enforcing a closed shop agreement on current employees was unconstitutional.

into any of the ordinary forms of action in either common law or equity and that the constitutional right carries with it its own right to a remedy or for the enforcement of it.<sup>74</sup>

In fact, the view that non-state actors have duties in relation to human rights was recognised far earlier than this case. In *Educational Company of Ireland Ltd v Fitzpatrick (No. 2)*,<sup>75</sup> Budd J held thus:

If an established right in law exists a citizen has the right to assert it and it is the duty of the Courts to aid and assist him in the assertion of his right. The Court will therefore assist and uphold a citizen's constitutional rights. Obedience to the law is required of every citizen, and it follows that *if one citizen has a right under the Constitution there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it*. To say otherwise would be tantamount to saying that a citizen can set the Constitution at a naught and that a right solemnly given by our fundamental law is valueless.<sup>76</sup>

This dictum clearly demonstrates that Irish courts regard rights as entitlements requiring protection from both the state and other actors. In *Attorney General (Society for the Protection of the Unborn Child (Ireland) Ltd) v Open-Door Counselling Ltd*,<sup>77</sup> Hamilton J, of the Irish High Court, also stated that 'the judicial organ of government is obliged to lend its support to the enforcement of the right to life of the unborn, to defend and vindicate that right and, if there is a threat to that right *from whatever source*, to protect that right from such threat, if its support is sought'.<sup>78</sup> In this case, the defendants, both private companies, provided services to pregnant women, such as counselling those who had an unwanted pregnancy and those who sought assistance on the options open to them. The plaintiff sought a declaration that the activities of the defendants infringed the right of the unborn to life and an injunction to stop those activities.<sup>79</sup> Both the High Court and the Supreme Court found that the activities of the defendants, in counselling or assisting pregnant women to obtain further advice on abortion or obtain an abortion abroad, violated the right of the unborn to life guaranteed under article 40(3)(3) of the Constitution. Finlay CJ, who wrote the opinion of the Supreme Court, stated that both the legislature and the judiciary had a duty to defend and vindicate the right to life of the unborn.

This case can be criticised on the ground that it did not consider the question of abortion against the backdrop of women's reproductive rights and the right to security of the person. However, it is cited here as an authority for the position that Irish courts consider constitutional rights binding on non-state actors.

Another case in which a violation of a constitutional right by non-state actors was found, concerned a socio-economic right. In *Crowley v Irish*

74 *Ibid* 134.

75 [1961] I.R. 345.

76 *Ibid* 368 (emphasis added).

77 [1988] I.R. 593.

78 *Ibid* 599 (emphasis added).

79 *Ibid* 603.

*National Teachers Organisation*,<sup>80</sup> the defendants were a teachers' organisation, its members and a number of national teachers. The plaintiffs alleged that the defendants had violated their right to education by reason of the defendants' circular written in August 1976, as part of a strike, to neighbouring schools urging the latter not to accept pupils from Dri-moleague national school. As a result, the pupils of that school were deprived of schooling until February 1977. It was held that the actions of the teachers were both unjustified and illegal, and constituted an unlawful interference with the plaintiff's constitutional right to education.

As is clear from these cases, Irish courts consider themselves bound to allow constitutional claims alleging violations of human rights, as part of the fulfilment of the duty to protect entrenched in article 40(3) of the Constitution. As has been argued earlier, where the Constitution does not expressly state that the judiciary is bound by rights, the recognition of this duty alone supports the interpretation given by Irish Courts of the role of human rights in the private sphere.

A fear has been expressed that the explicit recognition of direct horizontal application of human rights would see common law actions being replaced by 'innominate claims for infringements of personal rights'.<sup>81</sup> Contrary to this expectation, Gerard Hogan and Gerry White observe that nothing of this sort has happened in Ireland.<sup>82</sup> They write that, rather, courts have 'taken the view that it is only in those cases where common law remedies are inadequate or non-existent that an action based directly on the Constitution would arise'.<sup>83</sup> In *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*<sup>84</sup> Henchy J stated that

[s]o far as I am aware, the constitutional provisions relied on have never been used in the courts to shape the form of any existing tort or to change the normal onus of proof. The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question. In many torts – for example, negligence, defamation, trespass to a person or property – a plaintiff may give evidence of what he claims to be a breach of a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. A person may of course, in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskeil v C.I.E. IR 121*); but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional rights.<sup>85</sup>

It was held in this case that the right to bodily integrity and the right to property did not have the effect of shifting the onus of proof from the

80 [1980] I.R. 102.

81 Hogan G & White G *The Irish Constitution (JM Kerry)* (1994) 707 (citing Heuston R 'Personal rights under the Irish Constitution' (1976) 11 *Irish Jurist* 205).

82 *Ibid.*

83 *Ibid.*

84 [1988] I.L.R.M. 629, also available at <<http://www.baiiii.org/ie/cases/IESC/1988/1.html>>

85 *Ibid.*



plaintiff to the defendant in an action for nuisance. The plaintiffs had the burden to show that their person or property had suffered injury or damage, but also that the emissions from the defendant's factory were the cause of the injury or damage.<sup>86</sup>

As is clear from this case, where common law or statutory law is inadequate to redress a human rights infringement, the victim may bring a direct constitutional tort action. In some cases, the courts may develop the common law in line with the Constitution. In *McKinley v The Minister of Defence*,<sup>87</sup> for example, the majority of the Supreme Court held that the right to bring an action for loss of *consortium* and *servitium* was inconsistent with the right to equality, as it was available to the husband only, not the wife. In order to cure the inconsistency, the majority of the Supreme Court held that this action would continue to exist, but that wives would also have the right to sue for loss of consortium.

The foregoing discussion demonstrates that the Irish Constitution admits of full horizontal effect of the constitutional rights. This position has not resulted from an express provision of the Constitution recognising the application of the Bill of Rights to private actors. Rather, Irish courts have interpreted article 40(3), which essentially embodies the duty to protect, as the basis of this position. Thus, claims alleging violations of human rights based directly on the Constitution can be permitted. Significantly, Irish courts have also recognised that private law contains causes of action which give effect to human rights. However, they have not required that all human rights violations should be addressed through private law actions. Where private law (statutory or common law) is inadequate, ineffective or not available to redress a human rights infringement in the private sphere, the victim has the option of commencing a direct constitutional claim.<sup>88</sup> Where reliance is placed on a common law action, the court may develop that law in line with the right in question.<sup>89</sup>

## 6 SOUTH AFRICA

Unlike all the other constitutions discussed in this article, the South African Constitution adopted in 1996 expressly recognises that non-state actors are bound by constitutional rights. Section 8 provides:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

86 *Ibid.*

87 [1992] I.R. 333.

88 *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd* (fn 84 above) 146.

89 *McKinley v The Minister of Defence* (fn 87 above) 149.

- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

It must be noted that subsection 1 explicitly states that the Bill of Rights applies to 'all law' and also binds the 'judiciary'. Section 7(1) of the Interim Constitution was drafted without these important terms. All it provided for was that '[the Bill of Rights] [bound] all legislative and executive organs of state at all levels of government' although it also stated in section 35(1) that '[i]n the interpretation of any law and the application and development of the common law and customary law, a court [was bound to] have regard to the spirit, purport and objects of [the Bill of Rights]'.

These provisions were given a narrow interpretation in *Du Plessis and Others v De Klerk and Another*<sup>90</sup> by the South African Constitutional Court, following the Canadian decision in *Dolphin Delivery* discussed earlier. It held that constitutional rights under the Interim Constitution could be invoked against an organ of government but not by one private litigant against another.<sup>91</sup> But constitutional rights, it was held, were relevant to private litigation where a party alleged that a statute or executive act relied on by the other party was invalid for being inconsistent with any of the rights.<sup>92</sup> Furthermore, the Court held that, since constitutional rights applied to the common law, governmental acts or omissions committed in reliance on the common law could be attacked by a private litigant as being inconsistent with those rights.<sup>93</sup> The thrust of this decision was that the Bill of Rights was irrelevant to private litigation where no governmental conduct or legislation was relied upon by either party to the litigation.

Section 8 of the final Constitution suggests a departure from this decision, not only because it expressly states that the Bill of Rights applies to all law and binds the judiciary but also because it explicitly states that the Bill of Rights would bind a natural or legal person to the extent that it is applicable, depending on the right and nature of duties involved.

While sections 8(1) and (2) appear to be relatively straightforward, controversy and confusion has arisen among South African academics as to whether the Bill of Rights has direct or indirect application to private disputes. This confusion is coloured by remnants of *Dolphin Delivery* thinking, although it can also be attributed to the manner in which section 8 is drafted and the inclusion of section 39(2) of the Constitution. As noted above, section 8(3) of the Constitution states that when applying a provision of the Bill of Rights to a natural or legal person, the court must apply or develop the common law to the extent that legislation does not give effect to the right. It may also develop the common law to limit the

90 1996 (5) BCLR 658 (CC), 1996 (3) SA 850 (CC) ('Du Plessis').

91 *Ibid* par 49.

92 *Ibid*.

93 *Ibid*.

right in accordance with the limitation clause in section 36(1) of the Constitution. Section 39(2) of the Constitution states that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

Cheadle and Davis have argued that these sections do not mean that constitutional rights apply directly to private conduct.<sup>94</sup> They argue instead that human rights under the South African Constitution apply to non-state actors only indirectly through their application to law.

A slightly different line of reasoning is advanced by Sprigman and Osborne, who argue that section 8 of the Constitution has not altered the position under the Interim Constitution as interpreted in *Du Plessis*.<sup>95</sup> They argue that this section simply mandates indirect application of the Bill of Rights. They understand indirect application as a method whereby a court faced with a private dispute will apply and develop the common law in a manner consistent with the values contained in the Bill of Rights. Indirect application is, importantly, different from direct application in that the result – the court's decision – is not a constitutional ruling with the rigidity and finality attendant upon such a decision, but a common law ruling made in light of constitutional values; ie a ruling that is amenable to repeal or modification by ordinary legislation.<sup>96</sup>

Currie and De Waal have defined direct and indirect application similarly.<sup>97</sup> Like Sprigman and Osborne, they hold that direct application entitles the applicant to a constitutional remedy that 'overrides ordinary law' and 'any conduct' that is inconsistent with the right.<sup>98</sup> By contrast, indirect application does not 'override ordinary law or generate its own remedies'.<sup>99</sup> Rather, it demands that ordinary law must be interpreted in accordance with an 'objective normative value system' established by the Constitution.<sup>100</sup>

However, unlike Sprigman and Osborne, who make very light of the specific language used in sections 8 and 39(2) of the Constitution, Currie and De Waal posit that the 1996 Constitution has moved away from the position in *Du Plessis* and now admits of both direct and indirect application to private conduct and disputes. They hold that section 8 permits the direct application of constitutional rights to private disputes, while section 39(2) entrenches indirect application. Curiously, however, Currie and De Waal come close to the position advanced by Sprigman and Osborne by arguing that 'indirect application was (and remains), in accordance

94 Cheadle H & Davis D 'Structure of the Bill of Rights' in Cheadle HM et al (eds) *South African constitutional law: The Bill of Rights* (2002) 1, 3.

95 Sprigman C and Osborne M 'Du Plessis is not dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes' (1999) 15 *South African Journal on Human Rights* 25.

96 *Ibid* 36.

97 Currie I & De Waal J *The Bill of Rights Handbook* (2005) 32, 64.

98 *Ibid* 32.

99 *Ibid*.

100 *Ibid*.

with the principle of avoidance, preferred to direct application' and that the latter will offer no meaningful advantages over indirect application when resolving private disputes, except in very limited instances where a common law rule is being challenged so that the courts can invalidate it.<sup>101</sup> The effect of Currie and De Waal's argument is that sections 8(2) and (3) of the Constitution are only relevant when common law is inconsistent with a right and in need of reform or development. As I argue below, this is not mandated by a proper construction of the text in section 8(3). In terms of this section, courts need not always develop the common law in order to give effect to a constitutional right.

While criticising Currie and De Waal for drawing a line between direct application under section 8 and indirect application under section 39(2) of the Constitution, Roederer posits that there is no difference in effect between the two.<sup>102</sup> He adopts an analysis that gives more weight to the role of section 39(2) than section 8 of the Constitution in resolving private disputes concerning the Bill of Rights. In attempting to show that consideration of human rights in private disputes will always involve a balancing of conflicting rights, he projects the significance of section 39(2) on such cases thus:

It is only by looking at the spirit, object and purport of the Bill of Rights that the balancing (mutually limiting) process can make constitutional sense. Not only is this dictated by the logic of viewing the Constitution as a coherent scheme of value, but is dictated by the Constitutional text itself. The s 36 analysis required of s 8(3) limitations asks whether the limitation is 'reasonable and justifiable in an open and democratic society based on equality, dignity and freedom'. These values are integral to the spirit, objects and purport of the Bill of Rights.<sup>103</sup>

*Khumalo and Others v Holomisa*<sup>104</sup> is the only case decided by the Constitutional Court after *Du Plessis* that deals with the meaning of section 8 of the South African Constitution. In this case, the applicant entered an exception to the respondent's claim for damages for defamation, arguing that the respondent's particulars of claim did not disclose a cause of action because it failed to aver that the alleged defamatory statement was actually false. The applicant argued that the right to freedom of expression under section 16 of the Constitution meant that a person claiming damages for defamation in respect of a published statement concerning a matter of public interest, political significance or the fitness of a public official for public office bore the burden of proving the falsity of the statement.

The Constitutional Court (per O'Regan J) found that the right to freedom of expression was of direct horizontal application to this dispute in terms of section 8(2) of the Constitution. However, it held that the absence of a requirement within the common law of defamation for the plaintiff to prove the falsity of the alleged defamatory statement was a justifiable

101 *Ibid* 50.

102 Roederer C 'Post-matrix legal reasoning: Horizontality and the rule of values in South African law' (2003) 19 *South African Journal on Human Rights* 57.

103 *Ibid* 76 – 77 (footnotes omitted).

104 2002 (5) SA 401 (CC), 2002 (8) BCLR 771 (CC) ('*Khumalo*').

limitation on this right in terms of section 8(3)(b) of the Constitution. This decision was reached by balancing the right to freedom of expression of the media and human dignity. The Court stated that while the applicants were right to argue that 'individuals can assert no strong constitutional interest in protecting their reputations against the publication of truthful but damaging statements', the applicants did not have a strong constitutional interest in publishing false material.<sup>105</sup> It concluded that the defence of reasonableness of the publication, where the defendant cannot prove the truth of the defamatory statement, struck an appropriate balance between the applicant's right to freedom of expression and the respondents' right to dignity because, according to the Court, this defence adequately considers the difficulties and lessens the burden of establishing the truth by defendants to a defamation case.<sup>106</sup>

Although some commentators have argued that *Khumalo* is 'exceptionally clear',<sup>107</sup> this case has not resolved all issues involved in the direct and indirect application debate. In particular, it fails to clarify the relationship between section 8 and section 39(2) of the Constitution, let alone the relationship between section 8(1) and 8(2)-(3) of the Constitution. In a rather confusing fashion, O'Regan J held that common law would not be the subject of direct application of the Constitution where a dispute involves private parties, arguing that to do so would render section 8(3) superfluous.<sup>108</sup> It is not clear in the judgment what the difference really is when human rights are said to apply to the common law or any law directly or indirectly. Assuming that the judge uses the terms as defined by Currie and De Waal, I would be inclined to agree with Roederer, who has persuasively argued that the courts' powers under section 39(2) of the Constitution to develop the common law in accordance with the object and spirit of the Bill of Rights necessarily include the powers to declare the common law invalid. This renders the difference between direct and indirect application under sections 39(2) and 8(2)-(3) unimportant on this point.

More importantly, Woolman has rightly pointed out in an incisive but long-winded critique of the case that this decision resuscitates the *Du Plessis* and *Dolphin Delivery* reasoning, because O'Regan's decision has the effect of saying that any law or the common law can be challenged for being inconsistent with the Constitution in all circumstances where the parties at least include the state, but only in limited circumstances where the parties are private.<sup>109</sup> This holding ignores the importance and neutrality

105 *Ibid* par 43.

106 This defence was developed in *National Media Limited and Others v Bogoshi* 1998 (4) SA 1196 (SCA). In *Khumalo* (fn 104 above) par 43 O'Regan J defined this defence thus: 'It permits a publisher who can establish the truth in the public benefit to do so and avoid liability. But if a publisher cannot establish the truth, or finds it disproportionately expensive or difficult to do so, the publisher may show that in all the circumstances the publication was reasonable'.

107 See e.g. Roederer (fn 102 above) 62.

108 *Khumalo* (fn 104 above) par 32.

109 Woolman S 'Application' in Chaskalson M *et al* (eds) *Constitutional law of South Africa* (2005) 31-54.

of sections 8(1) and 39(2) of the Constitution regarding the relevance of constitutional values to the development of the law and common law.<sup>110</sup> These provisions cannot be said to be subject to development in accordance with the spirit and objects of the Bill of Rights only when the parties before the Court include the State.

However, Currie and De Waal have rightly construed *Khumalo* as standing for the position that, in any case where a specific right is implicated by a private dispute, recourse must, as far as possible, be had to section 8(3) rather than placing general reliance on section 8(1) or section 39(2) of the Constitution.<sup>111</sup> In this sense, *Khumalo* reaffirms the significance of sections 8(2) and (3), which expressly acknowledge that constitutional rights bind non-state actors depending on the nature of the right at hand and the duty it imposes. Once it is concluded that a given right binds a non-state actor, courts are enjoined in terms of section 8(3) of the Constitution to apply or develop common law to the extent that legislation does not give effect to that right or to limit it in accordance with the limitation clause. In essence, this section makes provision for avenues for enforcing obligations of non-state actors in relation to constitutional rights, or obtaining redress for violations of constitutional rights committed by non-state actors. While it forecloses the possibility of direct constitutional claims, it defers to the legislature to devise remedies for redressing violations of rights by natural or legal persons or enforcing their obligations. If legislation is absent or fails to give full effect to the right at hand, courts are enjoined to apply the common law and/or develop it to the extent that legislation fails to give effect to the right or to consider whether the common law constitutes a justifiable limitation on the right.

Thus, sections 8(2) and (3) of the South African Constitution have very wide import. A common law action or legislation that adequately gives full effect to a given right may constitute an instance of the direct application of that right, even if the common law involved has not been developed or the legislation is not invalidated for being inconsistent with a right. Furthermore, a court is empowered to go as far as fashioning a new remedy where legislation or the common law fails to make adequate provision for the right implicated in a private dispute.

This position can be distinguished from that obtaining in Ireland where, as pointed out above, a litigant alleging a violation of a right by a non-state actor can bring a direct constitutional claim where the relevant common law cause of action and remedy is ineffective or inadequate to give full effect to the right concerned. In South Africa, while legislation and common law are the principal avenues for addressing human rights concerns in the private sphere, courts have express powers to develop the

<sup>110</sup> See also Cheadle HM 'Application' in Cheadle HM *et al* (eds) *South African constitutional law: The Bill of Rights* (2005) 3-1, 3-13 arguing that '[a]ll law should now be subject to constitutional scrutiny irrespective of how and with whom it arises in litigation.'

<sup>111</sup> Fn 104 above 1 - 52. Woolman (fn 109 above) 31-83 has also interpreted *Khumalo* as meaning that courts should 'interpret legislation or develop the common law in light of the general objects of the Bill of Rights *only* where no specific right can be relied upon by a party challenging a given rule of common law' (emphasis in original).

common law to give full effect to a right. By contrast, the Irish jurisprudence shows that courts do not have such powers. It therefore makes sense that direct constitutional claims against non-state actors should be permitted in Ireland, but not in South Africa where any deficiencies in legislation and the common law can be rectified through the development of the common law.

If *Khumalo* and sections 8(2) and (3) were understood as requiring courts to consider applying these provisions first before invoking section 39(2), the argument by Currie and De Waal that indirect application under section 39(2) should be preferred to direct application ought to be revisited. Likewise, the contention advanced by Cheadle and Davis that the Bill of Rights does not have direct application to private conduct is also incorrect because, as we have seen above, the first decision to be made in terms of section 8(3) is whether the right at hand binds the non-state actor, before a common law action can be commenced to redress that right. Furthermore, by applying the common law, even without developing it, it may be sufficient to enforce a human right's obligation of a non-state actor.

It is also not entirely true that section 8(3) and 39(2) represent the same thing – indirect application of the Constitution (as argued by Sprigman and Osborne) or that they have the same effect (as argued by Roederer). Roederer has rightly observed that the two sections are intimately connected,<sup>112</sup> but treating them as if they were the same is not correct in the South African Context. Section 39(2) embodies the German *Drittwirkung* concept, which stipulates that constitutional values must be considered when interpreting or developing the common law. This concept means that courts must interpret mandatory rules of law forming part of the *ordre public* or such general clauses in private law as 'good morals'.<sup>113</sup> Entry points for interpreting the common law in a manner that gives effect to the general objects and spirit of the Bill of Rights are very limited. This is not the case with section 8(2) and (3), which in any case subsumes section 39(2). As seen above, section 8(3) makes reference to the development of the common law, meaning that constitutional values can be considered even when applying this section. *Khumalo* offers an excellent example where, in applying section 8(2) and (3), O'Regan J counterbalanced the right to freedom of expression and the values of transparency and open democracy against the constitutional values of human dignity, freedom and equality. Clearly, the South African Constitution has gone far beyond what has been achieved in Germany through the *Drittwirkung* concept and it is clearly wrong to reduce section 8(2) and (3) of the South African Constitution to this concept.

Finally, it must also be pointed out that, apart from enforcing the human rights directly against a private party through statutory or common-law based actions, a litigant bring may, in some cases, also have the option of suing the state. Section 7(2) of the Constitution enjoins the state

112 Fn 102 above 79.

113 See s 4 above.

to protect the rights in the Bill of Rights. South African Courts have held that the state may be held responsible for violations committed by non-state actors. In *Carmichele v Minister of Safety and Security and Another*,<sup>114</sup> the Constitutional Court, while noting that the state has the duty not to perform any act that infringes rights, stated that '[i]n some circumstances, there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection'.<sup>115</sup> It was held in this case that South Africa has a duty in international law 'to prohibit all gender based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take *reasonable and appropriate measures* to prevent the violation of those rights'.<sup>116</sup> Furthermore, it was held that the police were one of the primary state agencies responsible for the protection of the public in general, and women and children in particular, against the invasion of their fundamental rights by perpetrators of violent crime.<sup>117</sup> As a result, it was held that a recommendation by the police to release on bail a person accused of rape, who had a history of assaults, could give rise to state responsibility for the assault committed by the accused person while on bail. The case was referred back to the High Court for trial. Similarly, in *Modder East Squatters v Modderklip Boerdery; President of the RSA v Modderklip Boerdery*,<sup>118</sup> the Supreme Court of Appeal found that the state had breached the duty to protect the rights of a farm owner by failing to provide squatters, who had occupied a private farm, with land.

As noted earlier, international human rights law uses the standard of due diligence as a measure of state compliance with the duty to protect.<sup>119</sup> 'Due diligence' relates to the question whether the state has taken measures that are 'reasonable' or 'serious' to prevent the violation.<sup>120</sup> The Constitutional Court in *Carmichele* adopted a similar test, by holding that the state will be liable for an infringement of a constitutional right by a non-state actor if it fails to take 'reasonable and appropriate measures' to prevent it.<sup>121</sup> Under this standard, therefore, it may not necessary to have recourse to the rules of attribution of conduct to the state, such as those evolved under the doctrine of state action, in order to find the state responsible for violations of constitutional rights that occur in the private sphere.

The upshot of this discussion is that our law has surpassed the constitutions of the US, Canada, and Germany as far as the application of

114 2001 (10) BCLR 995 (CC) ('*Carmichele*').

115 *Ibid* par 44.

116 *Ibid* par 63 (emphasis added).

117 *Ibid*.

118 2004 (8) BCLR 821 (SCA). This decision was upheld by the Constitutional Court albeit on a different basis, namely the right to an effective remedy. The Constitutional Court held that by failing to carry out the evictions, the state had failed to ensure that the farm owner had an effective remedy. See *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

119 See Velásquez Rodríguez v Honduras (fn 26 above).

120 *Ibid* pars 174 & 177.

121 Fn 114 above par 63.



constitutional rights to private disputes and non-state actors is concerned. In South Africa, direct constitutional actions may not be brought to enforce the obligations of non-state actors in relation to these rights, as is the case in Ireland. This has been wrongly interpreted to mean that constitutional rights only have indirect horizontal application to private law and private disputes in the same way that basic rights operate in German constitutional law. This view point is a significant come-down from the promise of section 8(2) of the Constitution, which explicitly recognises that provisions of the Bill of Rights may bind natural and juristic persons, and underestimates the breadth of the powers given to courts in section 8(3) regarding the application and development of the law to give effect to constitutional rights. As has been argued above, section 8(3) offers greater potential for considering human rights in private litigation than is the case with the German doctrine of *Drittwirkung*. The high watermark of *Khumalo*, it has also been submitted, is that it restores the significance of sections 8(2) and (3).

## 7 CONCLUSION

This article has shown that comparative constitutional jurisprudence does not strictly follow the traditional position that constitutional rights do not bind non-state actors or that they have no relevance to private relations. Rather, it demonstrates a growing trend towards the recognition of the horizontal application of these rights. The extent of and bases for this recognition differ. Some constitutions, such as those of the US and Canada, are traditional in the sense that they do not generally recognise positive direct obligations engendered by constitutional rights. These constitutions tend to deny the application of human rights to non-state actors. However, courts of these countries have found it difficult to justify this denial in all circumstances.

US courts, through the doctrine of state action, have subjected constitutional rights to the conduct of non-state actors, where it can be shown that there is some state connection to the private conduct. It can therefore be said that these courts, to this limited extent, acknowledge that non-state actors are indirectly bound by human rights. Canadian courts have experienced particular difficulty in maintaining the public/private distinction in the application of constitutional rights. On the one hand, the Canadian Supreme Court held in *Dolphin Delivery* that Charter rights have no application to the common law in private litigation, unless some governmental connection to the issues at hand can be established. On the other hand, the Supreme Court held, in the same case, that Charter values are relevant to private disputes. This jurisprudence arguably lacks consistency because the public/private distinction in the application of human rights to private conduct is difficult to defend conceptually. What is important to note for our purposes is that, despite its inclination to the conventional position, Canadian courts have acknowledged that private actors can, in certain circumstances, be bound by constitutional rights indirectly. This could be where the common law is considered in the light of Charter values when resolving private disputes. There is also a move toward the

recognition of the duty, to protect human rights, which, if fully embraced, will lead to a reconsideration of *Dolphin Delivery*. The recognition of this duty, as defined in international law and other domestic jurisdictions, such as Ireland and Germany, might require courts to intervene to protect parties to private litigation from violations of their rights by other parties.

The jurisprudence arising from the constitutions of Germany, Ireland and South Africa recognises that non-state actors are bound by constitutional rights. In Germany, this recognition has occurred through the doctrine of *Drittwirkung*, which posits that basic rights influence the development of private law. The cases decided by the Federal Constitutional Court effectively establish that basic rights have a strong indirect effect on private actors. Failure by a court to consider a basic right in private litigation amounts to a dereliction of duty on the part of the court, which entitles the aggrieved party to apply to the Federal Constitutional Court to set aside the decision of that court. This doctrine, as noted earlier in this article, has received wide acceptance and has been adopted by, among others, the European Court of Human Rights and many courts in many countries including Italy, Spain, Switzerland, and Japan.

While the Irish Constitution does not contain an explicit provision allowing for the horizontal application of constitutional rights, its article 40(3) provides that the state has a duty to 'defend and vindicate personal rights of the citizen'. Irish courts have construed this provision to mean that non-state actors are bound by constitutional rights. They have thus allowed constitutional claims alleging violations by these actors of these rights. However, such constitutional claims are admissible only in those cases where common law remedies are inadequate or non-existent. Where reliance is placed on a common law action to address a human rights violation, the courts may also develop that law to give full effect to the right complained of.

The South African Constitution shares similarities with the German and Irish Constitutions but is unique. Unlike the German and Irish Constitutions, the South African Constitution expressly states that non-state actors can be bound by constitutional rights depending on the nature of the right and the duty in question. In addition, it expressly recognises that the judiciary is bound by these rights. However, in order to enforce a constitutional right against a non-state actor, the claimant has to bring a common law or statutory action. Where statutory law is non-existent, inadequate or ineffective to address that human right in issue, courts are enjoined to apply the common law or to develop it in order to give effect to that right. These are very broad powers, and the fact that no direct constitutional claims can be brought to enforce the obligations of private actors in relation to constitutional rights should not be seen as claw-back clause on the explicit recognition in the Constitution of the horizontal application of these rights. Furthermore, it should not be interpreted to mean that the Constitution mandates a limited role for constitutional rights in private litigation - that of indirectly influencing the development of the common law.

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