Codification, comparative law and constitutionalism

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Professor Willy Jules Hosten was one of the first, if not the first, South African academic to introduce comparative law into the law curriculum.[1] For more than thirty years he was involved in teaching comparative law (or more correctly the comparative method) and, recognised as a distinguished comparatist, he was invited to attend and address various international congresses and *colloquia* in Western Europe. As a former student of his at both the LLB and doctoral levels and for many years also a colleague, I would like to pay tribute to him. The essay that follows is offered as such a tribute with sincere appreciation particularly for his valuable contribution to the discipline of comparative law. Some years ago he published a scholarly article on the question of codification in South Africa.[2] In the light of the new legal dispensation in South Africa, more specifically the constitutional dispensation, and in the context of comparative law the issue of possible codification may once again be broached.[3] This will be considered in comparative perspective as will the question of constitutionalism, the latter particularly in the light of decisions of the Constitutional Court.

A century and a half ago Jeremy Bentham wrote of a code:

> The great utility of a code of laws is to cause both the debates of lawyers and the bad laws of former times to be forgotten.[4]

Before considering this proposition, a brief overview of the debate on codification in South Africa would not be out of place. Although this country escaped the great wave of codification that engulfed Western Europe in the

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1 See his 'Romeinse reg, regsgeskiedenis en regsvergelyking' 1962 *THRHR* 16.

2 Hosten 'Kodifikasie in Suid-Afrika – 'n heroorweging?' in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 59

3 Much of what follows on the issue of possible codification, was presented by the author in two previous papers, viz 'The future of the Roman-Dutch legal heritage' presented at the International Conference of the Southern African Society of Legal Historians, held in Pretoria during January 1993; and 'Codification. Panacea or progression?' at a seminar presented by the Department of Private Law (Unisa) and subsequently published in Van Aswegen (ed) *The Future of South African Private Law* (1994) 99.

4 Bentham *A General View of a Complete Code of Law* as quoted by Lokin & Zwalve *Hoofdstukken uit de Europese Codificatie-geschiedenis* (1992) 1.

eighteenth and nineteenth centuries,[5] there have been many calls to codify in South Africa. At the turn of the century, for example, the earlier view of one Van Zyl, Esquire,[6] that serious consideration be given to codification in the continental mode was echoed in an after-dinner speech by Sir Thomas Graham.[7] It was a call to be reiterated in the 1920s by Sir John Wessels, the then Judge President of the Transvaal Provincial Division. Having extolled the virtues of the Roman-Dutch law some seven years previously, he now feared an English take-over.[8] 'It is so much easier', he wrote, 'to find your law in an English text-book or in English reports than to wade through a sea of Latin or puzzle your head over old Dutch writers and black letter consultations.' In the realisation that there was (in his words) a 'social revolution . . . silently but surely at work' that would 'undoubtedly affect the future of the Roman-Dutch law', he advocated codification. Nonetheless, his voice was long to remain, as he suspected it would, 'the voice of one crying in the wilderness'.[9] In the following decade there were those who argued for codification[10] but by 1960 the majority view of leading South African jurists, as represented by professors Bobby Hahlo and JC de Wet *inter alios*, was that codification was undesirable.

Briefly the pro-codification arguments ran thus: On the one hand it was argued that the sources of law, particularly the Roman-Dutch authorities, were unwieldy, inaccessible and out of keeping with the times. Codification would serve to make the law more manageable and clear to all. On the other hand it was argued that the survival of the Roman-Dutch system was at risk and codification would preserve it in the face of an English onslaught.

Against codification it was argued that the 'gigantic task was not worth the candle'. While codification might benefit practitioners in that the law would be made certain and accessible, it would demand a heavy price in labour and readjustment. 'It would be the height of folly', a leading South African jurist wrote, 'if we, in South Africa, where codification is not necessary in order to achieve legal unification, were to embark on the immense trouble and inconvenience of transforming our law and learning it afresh.'[11] In the view of another jurist writing in the 1940s, the English 'take-over' feared by Sir John Wessels had been averted; there was therefore no longer any need to codify for this reason.[12] Moreover, codification would serve to stultify and stunt by separating the legal system from its roots. Far better, it was argued, to make a sound and scientific

5 As Hosten in the article cited above has shown, there were various reasons for this: Not only was there geographic isolation but at the time of the great Napoleonic codification in the early 19th century, the administration of justice at the Cape was relatively unsophisticated and trained jurists few and far between; the occupation of the Cape by the British and subsequent orientation towards the English common law militated against the idea of codification in a civilian mode; political instability during the Anglo-Boer War and the subsequent formation of Union in 1910 served further to hamper any move towards codification.

6 In a lecture on 'Codification' delivered 'before the Cape Town Forensic Society' (see 1895 *Cape LJ* 16).

7 Subsequently published as 'A legal dinner' 1907 *SALJ* 108.

8 See Wessels 'The future of Roman-Dutch law in South Africa' 1920 *SALJ* 265.

9 Wessels 'Codification' 1928 *SALJ* 5.

10 See Gie 'Kritiek op die grondslae van die strafreg' 1944 *THRHR* 201 and Du Plessis 'Kodifikasie van ons gemene reg in die lig van die Ontwerp-Wetboek vir Burgerlike Reg in Nederland' 1955 *THRHR* 257.

11 See Hahlo & Kahn *The South African Legal System and its Background* (1973) 73.

12 See the book reviews of De Wet in 1942 *THRHR* 313; 1943 *THRHR* 283; 1948 *THRHR* 1.

study of the 'root' Roman-Dutch legal system itself.[13] It was further reasoned that codification would lead to a form of narrow legal positivism which would frustrate sound legal development.

While it is true in the European context that initially at least the idea of the continental code being *the law* led to an attitude of legal positivism and nationalistic sentiment, the passage of time since codification diminished nineteenth-century legal positivism.[14] As Professor Derek van der Merwe has convincingly shown (albeit in a different context), a legalistic approach or what may be termed 'legal determinancy' particularly with regard to dispute resolution, serves not only to counteract arbitrariness and instability thus providing security, it is actually supportive of individual freedom and allows for progressive legal development.[15] Inherent in his approach (if I understand it correctly) is the *caveat* that the legal system or frame of reference should be flexible enough to accommodate development. This is also in accordance with the sound civilian tradition[16] of the continental codes. The need for general provisions within a clear and certain code of law was recognised, for example, by the drafters of the French Civil Code. Portalis in the famous foreword or *Discours préliminaire* explained their view and stated that the code should contain 'broad views' and 'general maxims'; only through general rules in a relatively short code which was known to the ordinary citizen, would a judge be able to apply the law to a given case; only general rules would give the judges of the future sufficient opportunity to adapt the law to contemporary needs and ideals. Although there may have been those who initially felt differently, a 'mechanistic theory of code application'[17] never *dominated* French legal thought. Particularly under the influence of Francois Gény creative interpretation of the *Code Civil* has long been recognised.

That a code cannot be self-sufficient was also recognised by the Swiss. One of the prominent features of the Swiss Civil Code is that it allows the judge considerable latitude in applying and, in some cases, in framing the law. As Overbeck in an article on the *Zivilgesetzbuch* explains, this recognition of the latitude accorded to the judge in the code was perhaps not only theoretically but also practically inspired. The code had to be accepted by some twenty-five jurisdictions – many with different local laws and customs – and general rules would have been more acceptable. This, coupled with the fact that historically the Swiss judge enjoyed the confidence of the populace, made judicial activism acceptable.[18] Be that as it may, the Swiss judge is empowered by the code to 'fill the gaps' so to speak. The relevant provisions deserve to be stated in full. Thus article 1 (in translation) provides:

(1) The Code governs all questions of law which come within the letter or spirit of any of its provisions.

13 As Hosten *Huldigingsbundel vir WA Joubert* 59 61 points out this is a 'skadubeeld' of Von Savigny's *Volksgeist* theory; see too Cloete 'Codification and *stare decisis* in a new South African legal order' 1991 *TRW* 59 62.

14 See David & Brierley *Major Legal Systems in the World Today* (1985) 65-70.

15 Van der Merwe 'A moral case for lawyer's law' 1992 *SALJ* 619.

16 See in general David & Brierley 150ff.

17 See Tunc 'Codification: The French experience' in Stoljar (ed) *Problems of Codification* (1977) 65.

18 Overbeck 'The role of the judge under the Swiss Civil Code' in *Problems of Codification* 135ff.

(2) Where no provision is applicable, the judge shall decide in accordance with existing customary law, and failing that, according to the rules he would himself lay down if he were to act as a legislator;

(3) In this he shall be guided by approved legal doctrine and case-law.

Article 4 adds:

> Where the law expressly leaves a point to the discretion of the judge, or directs him to take circumstances into consideration, or to assess whether a ground alleged is material, he must base his decision on principles of justice and equity.

The idea that the judge should play a role in legal development within the broad equitable spirit of the Roman-Dutch law should not sound strange to South African jurists. Referring to the important role that courts should play with regard to policy and the development of the law Mr Justice Corbett (later to become Chief Justice) had this to say: 'A community has certain common values and norms . . . it is these values and norms that the judge must apply in making a decision . . .' While recognising that such values were not universal, and that even within a society there would be competing values which would often require judges to perform a balancing act, he declared that this was a process 'to which our Roman-Dutch common law, based on broad principle, lends itself particularly well'.[19]

Only where the interpretative approach is literal and historically positivistic rather than contextual and purposive, will the development of equitable principles to meet the needs of modern society be stultified.

Another question is whether the early pro-codification argument regarding the accessibility and complexity of authoritative sources still holds good today. Although there is no recent research in this regard, surveys done in the more immediate past and reported in the *Bulletin of the Southern African Society of Legal Historians* show that reference to the old authorities is on the decline.[20] Professor

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19 See Corbett 'Aspects of the role of policy in the evolution of our common law' 1987 *SALJ* 52 69. In an incisive article on juridical institutions in the civil law, Prof Derek van der Merwe concludes that the civilian common law sources are not 'just there' awaiting mechanical application. They should be seen rather to 'comprise statements of institution-constituting rules informing institutions with the rules, goals and interests that make up the civilian tradition and that can never be deemed to provide more than ordinarily necessary and presumptively sufficient meaning to the social relationships the institutions are meant to reflect'. Thus in the context of modern adjudication and reference to such sources, it is not merely mechanical application of the rule/principle involved that is required, but an assessment of 'the continued suitability of the *values*' (my emphasis) that it reflects (Van der Merwe 'Juridical institutions in the civil law: Towards a theory for common-law adjudication' 1993 *TSAR* 580-595).

20 Thus, eg, in a sample of reported cases taken in 1960, it was shown that reference to Roman law was limited to 2% of such cases; statistical analysis indicated that in decisions of the Appellate Division during the years between 1970 and 1979, reference to the *Corpus Iuris Civilis* and the *Institutes* of Gaius was made only in some 4% of the cases; in only some 2% of the cases was reference made to the works of modern Romanists (Van der Merwe 'For the statistically-minded' 1987 *Bulletin of the Southern African Society of Legal Historians* 5 7). A later survey conducted by final-year LLB students of the University of the Orange Free State led to the conclusion that reference to old authority was further to decline. Their survey of Appellate Division decisions in the years 1972-1986 revealed that (expressed as a percentage of total references) the tendency was to refer to Roman law in only 1% of the cases and to Roman-Dutch authority only in 5% of the cases (Du Plessis & Hartman 'Moontlike tendense ten opsigte van verwysings in uitsprake van die Suid-Afrikaanse appèlhof: 1972-1986' 1989 *Bulletin of the Southern African Society of Legal Historians* 4 5).

Ellison Kahn has made similar findings. In 1986 he declared: 'Old authority is infrequently referred to by the courts, and when it is, it is rarely found to be decisive on the legal issue in question.'[21]

While reference to old authority might be on the decline, the accessibility with regard to contemporary authority remains a problem – indeed possibly a greater problem than the problem of accessibility in earlier times. As Hosten explains, while the accessibility of contemporary authority in the form of the decisions as reported in the *South African Law Reports* is not the problem, their volume is. The annual increase in reported decisions is in the region of some 500. Moreover, the mass of legislative authority is daunting. One must agree with the author when he declares:

> Opsommenderwys kan dus met reg gesê word dat moontlik die sterkste argument wat vroeër ten gunste van kodifikasie aangevoer is, naamlik die omvang en toeganklikheid van die bronne, sedertdien heelwat sterker geword het.[22]

An argument against codification that was expressed some twenty-five years ago was that codification was not necessary in South Africa in order to achieve legal unification.[23] It is easy to judge with hindsight but it does seem that such a view as expressed by an eminent South African jurist of the time reflects no small measure of arrogance. The fact that prominent South African jurists for so long failed to recognise a need for integration/unification or at the least, a greater recognition of the African or indigenous law, is lamentable. Professor, now Judge Albie Sachs, with regard to the negation of indigenous law as part of the system of South African law at worst, or at best its relegation to a position of subordination, expressed similar sentiments:[24]

> Far from being a fundamental part of the legal system, the indigenously African component has been relegated to the margins . . . . It is unthinkable that in a democratic South Africa this neglectful and insulting attitude can continue. It is not simply a matter of respect that traditional African law, both in its earlier and contemporary forms, needs to be properly studied and understood, but that African tradition contains many elements and resources that could enrich and invigorate the whole legal system.

As will be shown similar views were expressed more recently by the Constitutional Court.

It may well be in this regard that a new beginning is called for much in the same way as was the case in France at the time of codification. The call for 'people's law' might seem to be the cry of strident radicals. Nonetheless it is indisputable that there is a pressing need for legal reform in a country of diverse peoples. Possibly a synthesis might be effected in a code framed in the civilian mode and embodying what has been termed 'super-eminent principles' – that is broad equitable principles such as good faith, equity and so on – that are included as part of the general part of the code.[25]

Comparative legal research has, however, shown that codification is not the panacea for all the ills of a social system. Professor Nörr, for example, has shown

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21 Kahn 'The "old authorities" today' 1986 *Newsletter of the Southern African Society of Legal Historians* 22 32.

22 Hosten *Huldigingsbundel vir WA Joubert* 59 69.

23 Hahlo & Kahn 73.

24 Sachs *Protecting Human Rights in a New South Africa* (1990) 100.

25 David & Brierley 150ff.

that in Germany the *Leitbild* of codification was replaced by one of constitutionalism.[26]

He does this with reference to article 242 of the *Bürgerliches Gesetzbuch*, one of the celebrated general provisions or *Generalklauseln* found in the continental codes and of which use is made to avoid the rigour of legislative positivism. This particular clause in the German Civil Code embodies the principles of 'good faith', the *Treu und Glauben* according to which, for example, a debtor would be required to preserve good faith in the fulfilment of an obligation. It was to this clause that the *Reichsgericht* would have recourse when after the First World War devaluation was to cause social hardship, when money was devalued to such an extent that it had practically no value. A few million marks were needed to buy a loaf of bread! Debtors used this worthless money to wipe out existing debts with obviously unjust results. To alleviate hardship suffered and the unfair consequences of devaluation, recourse would be had to the protective equitable provisions of the code. As Nörr explains, even where a subsequent statute prohibiting courts from revalorising claims was enacted, some of the judges of the highest court explicitly and publicly declared their refusal to obey such a law. These judges had, however, gone too far. They were subsequently disavowed by other of their colleagues on the Bench in the very same month in which the declarations were made in a case in which the validity of a statute was in fact in issue. In this case lawyers of one of the parties made use of the public statement of the judges previously issued, in order to motivate their demand that the *Reichsgericht* strike down the statute because it violated good morals and good faith. However, the *Senat* (a division of the court) dismissed this argument. A judge had absolutely no authorisation to 'cancel' a statute enacted in due form simply on account of its contents. Subsequently the full court confirmed this verdict. Clearly the *Reichsgericht* was no longer willing to measure laws by the general clauses of codification. In the end the hardship suffered as a consequence of devaluation was redressed – but by reference to the Weimar Constitution rather than the Civil Code: In the words of Professor Nörr 'the old model of codification was replaced by the new model of constitution'. In the subsequent political ascendancy of the Nazi regime and the dark years of atrocity that followed, equitable voices of every persuasion were stifled. After the war, with the promulgation of the Basic Law of 1949, the paradigm of constitutionalism was entrenched. Against the background of the German experience one might be forgiven for cynicism regarding the virtue of codification. Should we not learn from the past and the experience of other countries and favour immediate recourse to constitutional protection rather than codification? I believe not. However, before explaining why I am of this opinion, a brief discussion of the concept of constitutionalism and legal development particularly in the South African context, is necessary.

The idea of constitutionalism is not new.[27] Boulle and others show that even in the ancient era of the cave-dwellers there must have been traces of constitutionalism: In a whole chapter devoted to this theme the authors trace its further

26 Nörr 'From codification to constitution: On the changes of paradigm in German legal history of the twentieth century' 1993 *Codicillus* 1:36.
27 See the definitive works of McIlwain *Constitutionalism and the Changing World* (1939); *Constitutionalism, Ancient and Modern* (1947).

development from the days of the Greeks and Romans, through the Middle Ages and up to modern times.[28] They show that the doctrine of constitutionalism is prescriptive and not descriptive. In other words, it indicates how state power *should be* exercised rather than describing how it *is* exercised; it is normative in that it denotes the values which should be upheld in the governing process. As Carpenter[29] points out, a government can act unconstitutionally even if its conduct falls squarely within the country's constitution. As others[30] have said:

> Constitutionalism proclaims that there are characteristics fundamental to the democratic enterprise which cannot be amended or destroyed even by a majority government.

In essence the doctrine teaches that state power should be defined and limited in order to reflect and protect the interests of society. The concept of the rule of law[31] would be an aspect of constitutionalism but this 'rule' should then reflect the value-system of the whole society.

If constitutionalism is, as has been outlined, a prescriptive doctrine providing a standard and denoting a set of values that should be upheld in the governing process, then correlatively a constitution is a 'particular identifiable assemblage of higher-law prescriptions – be they written, unwritten or some combination thereof – subsisting in the practice of a given country at a given time'.[32] While this is so, it cannot be over-emphasised that the entire constitutional system should enjoy acceptance by the populace at large.[33]

This is now the position in South Africa where 'we the people' have set down principles in a constitutional document (presently the written Constitution as embodied in Act 200 of 1993 and later, once certified by the Constitutional Court, the new Constitution as adopted by the Constitutional Assembly on 8 May 1996) that is the 'supreme law'. The question that now arises is how, if at all, this new dispensation will affect the arguments relating to codification. Here two important aspects of the new dispensation are relevant: The first relates to the question of judicial interpretation/activism and the role of values[34] in the

28 Boulle *et al Constitutional and Administrative Law* (1989) 20ff. Significantly, and as has been the case with many European scholars, their discussion is confined to Western jurisprudence, a fact which other, notably African, writers have commented upon; see eg Ojwang 'Constitutionalism – in classical terms and in African nationhood' 1989 *Lesotho LJ* 57. As is discussed below, there is a real need to take cognisance of the African ethos in the development of South African jurisprudence.
29 In Hosten *et al Introduction to South African Law and Legal Theory* (1995) 948.
30 Davis, Chaskalson & De Waal 'Democracy and constitutionalism. The role of constitutional interpretation' in Van Wyk, Dugard, De Villiers & Davis (eds) *Rights and Constitutionalism* (1994) 2.
31 The Diceyean concept comprises three fundamental tenets: No-one is punishable except for a distinct transgression of the law to which everyone is subject; everyone is equal before the law; and the rights of individuals are not formally protected in a constitution, but by the ordinary courts of the land.
32 Michelman 'Thirteen easy pieces' 1995 *Michigan LR* 1297 1301.
33 As Davis, Chaskalson & De Waal *Rights and Constitutionalism* 1 explain, the previous constitutional dispensation in South Africa – a mixture of Diceyean constitutionalism and white majoritarianism – was totally flawed.
34 The prominent place that 'values' occupy in the new dispensation has been highlighted in various writings; see eg Botha 'The values and principles underlying the 1993 Constitution' 1994 *SAPL* 233; Van der Walt 'Tradition on trial: A critical analysis of the civil-law tradition in South African property law' 1995 *SAJHR* 169 and more recently Cockrell 'Rainbow jurisprudence' 1996 *SAJHR* 1.

adjudicative process. The second relates to the operation of the so-called bill of rights, and its application in the sphere of private law. More specifically, the latter relates to the vertical/horizontal debate regarding the application of the fundamental rights provisions.

With regard to the first question, it is clear from the judgments of the Constitutional Court over the past eighteen months that the court has engaged in making value judgments. There is no doubt that in the adjudicative process the approach has been more open-ended than in the past. Thus, for example, it has been stated that a 'holistic value-based' approach is required in constitutional adjudication and that 'the values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality'.[35] Although he is at the same time critical of the performance of the Constitutional Court, Professor Cockrell holds (and I would agree with him) that 'the explicit intrusion of constitutional values into the adjudicative process signals a transition from a "formal vision of law" to a "substantive vision of law" in South Africa'. In other words, in the interpretation of the constitutional provisions and more particularly those contained in the bill of rights, the court goes beyond or behind the textual rule to engage with the substantive reasons that found the rule and are incorporated therein.[36] Despite a measure of conservatism (evident, for example, in the recent *Du Plessis v De Klerk* decision that will presently be discussed) the court has been open-ended in its approach and is fostering a culture of activism which must influence the process in the higher courts.[37] Indeed recognition of this new culture was already evident in one of the first reported decisions on constitutional interpretation in *Qozeleni v Minister of Law and Order*[38] where Judge Froneman courageously expounded on the need to interpret the Constitution in such a way as to give expression to the values that underlie an open and democratic society based on human dignity, equality and freedom.

If this approach is, in due course, to permeate judicial decision-making in general (and it would seem that this is inevitable), then even if there were a code of private law, legal development would not be stultified. On the contrary, interpretation of the code and particularly its general clauses, which, as has already been indicated, is part of the civilian tradition that is in turn part of the South African legal heritage, would needs be in accordance with the underlying values of the new constitutional dispensation.

This brings us to the following aspect, namely the operation of the bill of rights and its application in the sphere of private law. However, before discussing

35 Per Sachs J in *Coetzee v Government of the Republic of South Africa* 1995 10 BCLR 1382 (CC) par 46. In *S v Williams* 1995 3 SA 632 (CC) par 50 similar sentiments are expressed by Langa J who declared that constitutional interpretation should be tested against the values inherent in the new South African society that had only recently embarked on the road to democracy.

36 Cockrell 1996 *SAJHR* 1 3 10. In the final analysis the author finds that despite moves towards this end there is still not a sufficiently rigorous jurisprudence of substantive reasoning in the court's judgments.

37 In ss 168 and 169 of the proposed final Constitution, the former Appellate Division is referred to as the Supreme Court of Appeal while the other former divisions of the Supreme Court are termed High Courts.

38 1994 3 SA 625 (E).

this aspect, a further word on the question of a holistic approach and the importance of values, more particularly as this relates to indigenous law, would not be out of place.

Here the decision in *S v Makwanyane*,[39] and particularly the references to indigenous African values in the judgments by justices Madala, Mahomed, Mokgoro and Sachs are relevant. In this case, its first politically important and publicly controversial decision, the court struck down the death penalty. Although since 1989 there had been a moratorium on executions, at the time of the court's ruling there were 400 persons on death row. In this case the court declared capital punishment unconstitutional. It is a pity, however, that the approach of the court was 'judiciously tailored'.[40] Rather than engaging in a determinative interpretation of the bill of rights provisions, such as those on the right to life, dignity and equality, the court chose the more conservative approach and determined that capital punishment was unconstitutional on the ground that it was cruel and inhuman punishment. Be that as it may, what is important for this discussion is the reference by members of the court to the African ethos.

Thus, for example, Justice Mokgoro, referring to the values of an open and democratic society according to which the court is enjoined to interpret the Constitution,[41] declared:

> I am of the view that our own (ideal) indigenous values are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality.[42]

Although the Constitutional Court has referred to comparative jurisprudence and foreign cases on numerous occasions in its short history,[43] its reference in comparative vein to African indigenous law is to be welcomed. In the context

39 1995 3 SA 391 (CC). Although the court was acutely aware that public opinion was against it and faced with the counter-majoritarian dilemma, the court nonetheless determined per Chaskalson P, that public opinion in itself is 'no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour' (par 88).

40 See too Klug 'Striking down death' 1990 *SAJHR* 61.

41 The provisions regarding interpretation of the bill of rights are set out in s 35 of the interim Constitution and s 39 of the proposed final Constitution. The latter determines that a court 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom' and further that 'when interpreting any legislation, and when developing the common law or customary law' the court 'must promote the spirit, purport and objects of the Bill of Rights'.

42 Par 304 of the reported decision.

43 Over the period 1994-1995 a total of 255 foreign cases were referred to involving case law of 17 countries and territories. Of these 122 were referred to in 1994 and 133 in 1995. The following countries were involved: Zimbabwe (6); Namibia (17); Ireland (3); Switzerland (1); USA (71); Canada (67); Australia (5); UK (& Commonwealth) (62); India (1); New Zealand (2); Sri Lanka (3); The Netherlands (1); Botswana (7); The West Indies (3); European Community (5). There were 61 references to the constitutional and statute law of 16 countries and territories. The following countries were mentioned: Zimbabwe (1); Namibia (3); France (2); Botswana (1); USA (11); Canada (10); Ireland (2); Malaysia (1); UK (& Commonwealth) (8); India (4); Australia (4); Nigeria (1); Germany (7); The Netherlands (1); New Zealand (4); Brazil (1). A total of 67 references were made to foreign legal writers: UK (15); USA (19); Germany (4); Canada (15); India (3); general (11).

of the case the African concept of *ubuntu* was held to be particularly relevant and in this regard the utterances of Justice Mokgoro bear repeating:

> Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is the value of *ubuntu*. Generally *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our *rainbow* heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly priced. It is values like these that s 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.[44]

I would like to turn now to the final question of the horizontal/vertical application of the bill of rights as this relates to the issue of constitutionalism and codification.

The question of whether the constitutional bill of rights has only a vertical application or, in addition, a horizontal application has been the subject of considerable debate.[45] Although it seems, particularly in the light of the proposed final Constitution, that one could make out a strong argument[46] for horizontal application, I shall confine my discussion to judicial pronouncement on the issue, more specifically the recent and as yet unreported decision of the Constitutional Court in *Du Plessis v De Klerk*.[47]

The case arose out of a defamation action instituted before the Constitution came into force by Mr de Klerk and a company (Wonder Air (Pty) Ltd) controlled by him, after they had been identified in the *Pretoria News* as being implicated in the unlawful supply of arms to UNITA. After the Constitution came into force, the defendant sought to raise the defence that the alleged defamation was not unlawful because it was protected by the right to freedom of speech and expression in terms of section 15 of the interim Constitution.

Previously the Transvaal Provincial Division of the Supreme Court had soundly rejected this defence and any argument of horizontal application of the fundamental rights provisions.[48] Subsequently this court referred two issues to the Constitutional Court: (1) Whether the Constitution could be invoked where the relevant events had occurred prior to the coming into force of the Constitution, and (2) whether chapter 3 of the Constitution was applicable to legal relationships between private parties.

Only the second issue is relevant here. In this regard the majority of the Constitutional Court found that the fundamental rights provisions could not in general apply horizontally, that is in actions between private parties. However, it left open the question whether there were particular provisions of the bill of rights which could be so applied. Nonetheless, courts were obliged in terms of section 35(3) of the interim Constitution,[49] in the application and development of common law and in accordance with the values of an open, democratic society, to have due regard to the spirit, purport and objects of the bill of rights. The majority[50] held that it was the task of the Supreme Court, including the Appellate Division, to apply and develop the common law in the manner required by section 35(3).

As in previous cases, the court, in determining its decision, engaged in comparative analysis and referred to the judgments of the courts in the United States, Canada, Germany and Ireland. Comparative examination showed that there was no 'universal' answer to the problem of vertical/horizontal application of bills of rights provisions. However, in comparative perspective, and in order to reach its decision, the court confined itself to the approach in Canada and Germany.[51] In the case of the former the view was that the Canadian Charter of

44 Pars 307 and 308 of the report.

45 *Inter alia* by Strydom 'The private domain and the bill of rights' 1995 *SAPR/PL* 52; Van Aswegen 'The implications of a bill of rights for the law of contract and delict' 1995 *SAJHR* 50; De Waal 'A comparative analysis of provisions of German origin in the bill of rights' 1995 *SAJHR* 1 and the reply to De Waal by De Wet 'Indirect *Drittwirkung* and the application clause' 1995 *SAJHR* 610. There has been similar debate, both academic and judicial, in other countries with constitutional bills of rights; see eg Van der Vyver 'Constitutional options for post-apartheid South Africa' 1991 *Emory LJ* 745.

46 S 35(1) of the interim Constitution provides that in interpreting the bill of rights provisions 'a court of law shall promote the values which underlie an open and democratic society based on freedom and equality . . .' and further s 35(3) provides that 'in the interpretation of any law and the application and development of the common and customary law, a court shall have due regard to the spirit, purport and object' of the bill of rights. In the new s 39 of the proposed Constitution the provision reads: '[A] *court, tribunal* or *forum* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom . . .', and further: 'When interpreting any legislation, and when developing the common law or customary law, *every court, tribunal* or *forum* must promote the spirit, purport and objects of the Bill of Rights' (my emphasis). Furthermore while in terms of s 7(1) of the interim Constitution the fundamental rights provisions bound only 'all legislative and executive organs of state at all levels of government', s 8(1) of the proposed final Constitution provides that the bill of rights 'applies to *all law* and binds the legislative, the executive, the *judiciary* and all organs of state' (my emphasis).

47 CCT 8/95, judgment was handed down on 1996-05-15.

48 In *De Klerk v Du Plessis* 1994 6 BCLR 124 (T). Here the court had concluded that horizontal application would create undesirable uncertainty in private legal relationships that could not have been intended by the framers of the Constitution. The court determined that the contrary judgment in *Mandela v Falati* 1994 4 BCLR 1 (W) was clearly wrong. However, in the subsequent *Motala v University of Natal* 1995 3 BCLR 374 (D) Hurt J refused to follow the opinion of Van Dijkhorst in the *De Klerk* case while in *Potgieter v Kilian* 1995 11 BCLR 1498 the NPD endorsed the judgment in the *De Klerk* case and disagreed with the judgments in the *Mandela* and *Motala* cases. Judicial opinion was clearly divided.

49 See n 47 above.

50 The judgment of the majority of the court was delivered by Kentridge AJ and was concurred in by Chaskalson P, Langa J and O'Regan J. Mahomed DP delivered a separate concurring judgment which was concurred in by Langa J and O'Regan J. Ackermann J, Madala J, Mokgoro J and Sachs J delivered separate concurring judgments. Kriegler J (with whom Didcott J concurred) wrote a dissenting judgment. In the opinion of Kriegler J, ch 3 applied to all law and all courts were responsible for the application and development of the common law, the Constitutional Court where constitutional issues were involved and the Appellate Division where non-constitutional issues were involved. Where there is no claim based on the Constitution all courts, including the Appellate Division, are required to apply the 'spirit, purport and objects' of the bill of rights.

51 See the judgment of Kentridge AJ pars 33-42.

Rights and Freedoms applied primarily on the vertical level and only in private litigation where legislative, executive or administrative branches of government were involved. In the case of Germany the model could be described as the 'indirect application model'. The rights of individuals entrenched in the Basic Law are directly available as protection against state (including legislative) action, but not directly in private law disputes. However, the values embodied in the Basic Law permeate private law which regulates legal relations between individuals. Thus a constitutional right may override a rule of public law but is said to 'influence rather than override the private law norm'.

Mahomed DP agreed with the majority decision that the fundamental rights provisions had vertical but not horizontal application. However, in his separate judgment he focused on what he termed the 'textual influence'[52] of the Constitution, more particularly section 7(1) of the interim Constitution that provides that the fundamental rights provisions 'shall bind all legislation and executive organs at all levels of government'. From this provision and with the exclusion of the 'judiciary' the inference was that horizontality was not intended. In his words:[53]

> I find it difficult to accept that if the lawmakers had intended to resolve the debate in the manner contended for by 'horizontality' advocates, they would not have said so in clear terms or at least in language which clearly permitted that inference to be made.

Justice Ackermann agreed with the majority judgment and order of the court. However, in the light of the dissenting judgment and the 'importance of the issue at stake' he delivered a separate judgment in which he focused and expanded upon the issue in the light of the German constitutional dispensation and jurisprudence.

Germany, unlike France and the United States of America, did not experience what may be termed 'revolutionary constitutionalism'. However, just as has been the case in South Africa where the reaction, albeit a relatively peaceful reaction, against a repressive regime resulted in a new constitutional dispensation, so the pre- and post-war German experience of racial atrocity resulted in the promulgation of the German *Grundgesetz* or Basic Law of 1949. For this reason both countries may be said to have experienced a similar 'revolution'.[54]

As Ackermann J points out, the Basic Law was conceived in dire circumstances that bear sufficient resemblance to our own to make 'critical study and cautious application of its lessons to our situation and Constitution warranted'.[55] In the light of present German case law and jurisprudence it is clear that there is no direct application of the fundamental rights provision by the German judiciary. At the same time the basic right norms embody an objective and fundamental

52 Pars 72ff.

53 Par 77. This argument would no longer hold good under the proposed final Constitution s 8(1) of which determines: 'The Bill of Rights applies to all and binds the legislative, the executive, the judiciary and all organs of state.'

54 See too Richards 'Comparative revolutionary constitutionalism: A research agenda for comparative law' 1993 *J for International Law and Politics* 1 50ff. For a comprehensive survey of the repressive Nazi racial discrimination against the Jews and its aftermath, see Walk *Das Sonderrecht für Juden im NS-Staat* (1981). The repressive apartheid regime in South Africa and its consequences are well known.

55 Par 92 of the judgment.

value system that acts as a guiding principle for legislative and executive action and also for judicial interpretation. This means that the constitutional norms apply with only indirect horizontality (*mittelbare Drittwirkung*) to the legal relations of private individuals. Thus, for example, in their interpretation of provisions of the *Bürgerliches Gesetzbuch* such as those relating to the *boni mores* in article 826, the courts would have regard to the normative value system as embodied in the Basic Law. By analogy with the German position Justice Ackermann holds that direct horizontal application is not intended in the interim Constitution. In his words 'it could never have been the intention of the framers to constitute Chapter 3 [the fundamental rights provisions] as a super civil code, to which private common law is directly subject'. To hold otherwise would, in his opinion, make the law for the ordinary citizen vague and uncertain, something which is contrary to the constitutional state.[56]

As things now stand there is therefore still room for a code of private law. The arguments marshalled above still hold good: Shorn of the apartheid trappings, our Roman-Dutch law as interpreted by the courts and embodied in a code in which the principles of indigenous law are harmonised, could serve as a 'new beginning'. The law would be accessible and clear while interpretation of the code, particularly with regard to the general clauses or 'super-eminent principles', would allow for legal development. Such interpretation would, in the civilian tradition, be in accordance with the equitable spirit of the Roman-Dutch law. Moreover, in terms of the Constitutional Court decision in *Du Plessis v De Klerk* and by analogy with the German principle of *Drittwirkung*, interpretation of the code would be 'influenced' by the constitutional value system.

It may be argued, however, that the present position might be turned around by the Constitutional Court in the light of the proposed final Constitution. In other words the court may yet find that there is direct or horizontal application of the fundamental rights norms as contained in the Constitution, to the relationships presently governed by private law. It seems to me that even in this eventuality there would still be room for a private law code in the continental mode[57] and that the suggestion of Professor Hosten that codification be reconsidered remains worthwhile.

To refashion the statement of Bentham quoted at the start of the essay:

> The great utility of a code of laws is to cause the bad laws of former times to be forgotten, to allow for sound debates of lawyers and a jurisprudence 'irradiated' by the values of an open and free society.

56 See pars 97 and 111 of his judgment.

57 Some years ago I argued that reform by way of legislation would be better than reform by way of judicial activism in terms of constitutional interpretation which would of necessity have to await a 'test case' and in any event might not be systematic: See the discussion of the Bophuthatswana bill of rights in my LLD thesis *Marriage and the Women in Bophuthatswana: A Historical and Comparative Study* (Unisa 1989) 174ff.

Nihil Obstat

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