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Chapter Three MFRILW

Application of the Bill of Rights

Application

8. (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 —

(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).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

Interpretation of Bill of Rights

39. (1) When interpreting the Bill of Rights, a court, tribunal or forum —

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) 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.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

3.1 Introduction: The Meaning of 'Application' and the Distinction between Direct and Indirect Application of The Bill of Rights

The Bill of Rights applies *directly* to a legal dispute when: *(a)* a right of a beneficiary of the Bill of Rights has been infringed by *(b)* a person or entity on whom the Bill of Rights has imposed the duty not to infringe the right, *(c)* during the period of operation of the Bill of Rights and *(d)* in the national territory. In addition, in instances when the Bill of Rights does not apply directly to a dispute because one or more of the elements above is not present, it may apply *indirectly*. This is because all law must be developed, interpreted and applied in a way that conforms to the Bill of Rights.

This description tells us that a conceptual distinction must be made between two forms of application.

- *Indirect application.* The Constitution and the Bill of Rights establish an 'objective normative value system', a set of values that must be respected whenever the common law or legislation is interpreted, developed or applied.[1] This form of application is termed the 'indirect' application of the Bill of Rights. When indirectly applied, the Bill of Rights does not override ordinary law or generate its own remedies. Rather, the Bill of Rights respects the rules and remedies of ordinary law, but demands furtherance of its values mediated through the operation of ordinary law.
- *Direct application.* In disputes in which the Bill of Rights applies as directly applicable law, it overrides ordinary law and any conduct that is inconsistent with it and, to the extent that ordinary legal remedies are inadequate or do not give proper effect to the fundamental rights, the Bill of Rights generates its own remedies.[2]

This distinction was of decisive significance under the interim Constitution. It has comparatively less significance under the 1996 Constitution. This is because of changes made to the jurisdictional and application scheme by the 1996 Constitution, outlined in the following section. There are nevertheless important consequences that follow from the form of application, and the distinction between and indirect application therefore continues to play a role in constitutional litigation.

3.2 Application under The Interim Constitution Compared to the 1996 Constitution

The application of the Bill of Rights has been one of the most troublesome issues in South African constitutional law. The principal reason for the difficulty is that, since 1994, South Africa has had two Constitutions that have treated the issue differently. Much of the jurisprudence, particularly relating to the application of the Bill of Rights to the common law, was decided under the interim Constitution and does not always bear precisely on the altered jurisdictional and application schemes of the 1996 Constitution. For contextual purposes, it is

[1] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 56.
[2] 'Constitutional remedies', discussed in Chapter 8 below.

necessary at the outset to describe the position under the interim Constitution and the changes brought about by the 1996 Constitution.

The narrowest conception of a Bill of Rights is that it is a 'charter of negative liberties'.[3] This means that it is intended to protect individuals against state power by listing rights that cannot be violated by the state, either by means of law or through the conduct of state actors. This is the 'vertical' relationship — between individuals and the state. A Bill of Rights that has solely vertical application will place duties on the state not to violate the rights of individuals. It will not place any similar duties on individuals.

According to the Constitutional Court in *Du Plessis v De Klerk*,[4] the Bill of Rights in the interim Constitution conformed to this traditional model in so far as it had no direct application to so-called 'horizontal' disputes, that is to disputes between private litigants governed by the common law.[5] This was principally because of the absence of the word 'judiciary' in s 7 — the application section of the interim Constitution: '[The Bill of Rights] shall bind all legislative and executive organs of state at all levels of government'. The omission meant that the Bill of Rights placed duties to uphold constitutional rights only on the legislative and executive organs of state. Individuals were not directly bound by the Bill of Rights. Nor was the judiciary, which had the task of adjudicating the rights and duties of individuals.[6]

However, while the interim Bill of Rights did not apply directly to horizontal cases it did have *indirect* application. The Bill of Rights applied to 'all law in force', including all pre- and post-1994 legislation and the uncodified common law. Even if individuals were not directly bound by the Bill of Rights, the courts had to interpret legislation and to develop the common law so that the ordinary law recognised and protected the rights in the Bill of Rights.[7] This was provided for in s 35(3) of the interim Constitution: 'In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of . . . [the Bill of Rights]'.

In *Du Plessis* the Constitutional Court also decided a crucial jurisdictional issue. The court's conclusion that the Constitution distinguished between direct and indirect application of the Bill of Rights was bolstered by the close fit between this distinction and the 'two-track' jurisdictional scheme of the interim

[3] Posner J in *Jackson v City of Joliet 715 F 2d 1200, 1203* (7th Cir) (1983) 1206 (US Constitution 'a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them'.)
[4] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).
[5] *Du Plessis* (ibid) was itself a representative example of such a dispute. The plaintiff (an individual) sued a newspaper for defamation using the common-law actio iniuriarum.
[6] Ibid para 45. The practical result was summarised as follows (para 49): 'a) Constitutional rights under Chapter 3 [the interim Bill of Rights] may be invoked against an organ of government but not by one private litigant against another; b) In private litigation any litigant may nonetheless contend that a statute (or executive act) relied on by the other party is invalid as being inconsistent with the limitations placed on legislature and executive under Chapter 3; c) As Chapter 3 applies to common law, governmental acts or omissions in reliance on the common law may be attacked by a private litigant as being inconsistent with Chapter 3 in any dispute with an organ of government.'
[7] Ibid para 62.

Constitution.[8] The development of the common law was a non-constitutional matter and therefore remained within the jurisdiction of the court that had overseen the development of the common law for the past century — the Appellate Division of the Supreme Court.[9]

With the *Du Plessis* decision in mind and concerned that confining the Bill of Rights to direct vertical application amounted to the toleration of private violations of rights, the Constitutional Assembly created a different application and jurisdictional scheme in the 1996 Constitution.[10] To provide for direct horizontal application, two textual changes were made. The first was the addition of the word 'judiciary' in s 8(1), missing from the application provisions of the interim Constitution. The second was the imposition on individuals, in s 8(2), to uphold the rights of other individuals:

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The 1996 Constitution also made significant changes to the powers of the courts to enforce the Constitution. The 'two-track' jurisdictional scheme of the interim Constitution was replaced by a unified scheme in which the High Courts, Supreme Court of Appeal and the Constitutional Court shared jurisdiction over constitutional matters.[11] This scheme required revision of the holding in *Du Plessis* that the application of the Constitution to the common law was a non-constitutional matter. Under the 1996 Constitution, the Constitutional Court held in the *Pharmaceutical Manufacturers* case, '[t]here are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control'.[12]

[8] Ibid para 57. The jurisdictional scheme of the interim Constitution distinguished between 'constitutional matters' and other matters, the former being the preserve of the Constitutional Court and the latter the preserve of the Appellate Division. (See, further, 5.2*(a)* in Chapter 5 below.) Indirect application was not a 'constitutional matter' and was therefore within Appellate Division jurisdiction (para 64).

[9] This conclusion was further reinforced by drawing a conceptual distinction between the common-law method of decision-making (ad hoc and case by case development of rules and principles) with the constitutional-law method of decision-making (striking down unconstitutional laws). Ibid para 58.

[10] On the Constitutional Assembly deliberations on the issue, see Halton Cheadle 'Application' in H Cheadle et al (eds) *South African Constitutional Law: The Bill of Rights* (2002) 26–28.

[11] These changes and their implications for the controlling jurisdictional concept of a 'constitutional matter' are surveyed in 5.3 in Chapter 5 below.

[12] *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44.

While clearly envisaging direct horizontal application in applicable cases, the 1996 Bill of Rights also requires the courts to apply the Bill of Rights indirectly, in similar terms to s 35(3) of the interim Constitution. This is s 39(2): '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'.

To summarise, the 1996 Constitution, like its predecessor, distinguishes two forms of application of the Bill of Rights. Direct application entails the imposition of duties by the Bill of Rights on specified actors: a breach of such a duty is a violation of a constitutional right. Indirect application occurs where there is a provision of ordinary law (legislation, common law or customary law) that mediates between the Bill of Rights and the actors who are subject to that law. The duty of the courts is to ensure that the ordinary law conforms to the Bill of Rights in the rights and duties that it confers. Like its predecessor, the 1996 Constitution provides for direct vertical application of the Bill of Rights but, unlike its predecessor is not confined to this form of direct application. Section 8(2) clearly envisages direct application of the Bill of Rights in the horizontal relationship in certain circumstances.

3.3 Direct Application of The Bill of Rights

There are four elements that are determinative of the direct application of the Bill of Rights. The first relates to beneficiaries, the second to the duties imposed by the Bill of Rights, the third relates to time and the fourth to the limited territorial effect of the Bill of Rights. We will deal with each of these elements in turn.

(a) Beneficiaries of the Bill of Rights

Legal rights are a correlative relationship. If A has a legal right to something, this postulates that B has a legal duty to A to uphold that right. A is therefore the beneficiary of the right and B is the duty-bearer in respect of the right. The first application issue we need to confront when considering the reach of the Bill of Rights is to identify the beneficiaries of the rights in the Bill of Rights. The duty-bearers are dealt with in 3.3*(b)* further below.

(i) *Natural persons*

Most of the rights in the Bill of Rights are for the benefit of 'everyone' or, phrased negatively, may be denied to 'no one'. For example, s 11 provides that 'Everyone has the right to life'. Section 13 is phrased negatively but, like s 11, accords the right universally: 'No one may be subjected to slavery, servitude or forced labour'. Rights phrased in this way are accorded to all natural persons within the territory of the Republic.[13] The position of juristic persons is a little more complicated and is discussed in the next section.

[13] The benefit of the universal rights may be claimed by anyone within the national territory, irrespective of whether they are there legally or illegally, temporarily or permanently. See *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) (benefits of ss 10, 11 and 12 of the

Other rights are accorded to narrower categories of beneficiaries. The political rights in s 19, the citizens' rights in s 20, certain of the freedom of movement rights in s 21 and the freedom of trade right in s 22 are accorded to 'every citizen'. The right to vote and stand for political office in s 19(3) is restricted to 'every adult citizen'.[14] Further examples of restrictions on the category of beneficiaries are the cultural rights contained in s 31, which are for the benefit only of 'persons belonging to a cultural, religious or linguistic community'. The rights contained in s 35 are restricted to arrested, detained and accused persons.

The restriction of a right to a particular category of beneficiaries is an attempt to circumscribe the scope of the right: a right accorded only to citizens obviously has a more limited scope of operation than a right accorded universally. The circumscription of rights in this manner does not really concern the application of the rights, but may raise difficult issues of interpretation. The courts will have to interpret the Bill of Rights to determine who is, for example, a 'detained person',[15] or 'a worker'[16] or a 'person belonging to a cultural religious or linguistic community'.[17] The activities of persons who are excluded from the scope of a right will not be protected by the right.[18]

(ii) *Juristic persons*

Are the rights accorded to 'everyone' also available for the benefit of juristic persons? In other words, are companies protected by the Bill of Rights? What about state-owned or state-controlled corporations such as Telkom or the SABC? These questions are answered by reference to s 8(4):

Constitution can be claimed by illegal immigrant). In *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) the Constitutional Court dismissed an argument that foreign nationals at airports or seaports who have not yet been given permission to enter the Republic are not beneficiaries of the Bill of Rights. According to Yacoob J, 'denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. It could hardly be suggested that persons who are being unlawfully detained on a ship in South African waters cannot turn to South African courts for protection, or that a person who commits murder on board a ship in South African waters is not liable to prosecution in a South African court' (para 26). The position of people denied permission to enter the country by road was left undecided (para 27).

[14] The explicit restriction of some rights to 'citizens' implies that those rights accorded to 'everyone' are for the benefit of citizens and non-citizens alike. Similarly, we can assume that both citizens and non-citizens are entitled to the protection of those rights accorded to 'every child' (s 28) and to 'every worker' and 'every employer' (s 23). In other words, alien workers are entitled to the protection of s 23 as long as they fall within the category of worker. Similarly, a non-citizen under the age of 18 is entitled to the benefits of children's rights. See *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) paras 46–7 (socio-economic rights in ss 26 and 27 accorded to 'everyone' and not just citizens), *Patel v Minister of Home Affairs* 2000 (2) SA 343 (D), 349I (aliens have the same rights under the Constitution that citizens have, unless the contrary emerges from the Constitution).

[15] See, further, the discussion in 32 2*(a)* in Chapter 32 below.

[16] *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC) paras 27–29 (permanent members of SANDF are 'workers' for purposes of the right to join trade union and the right to strike). See, further, the discussion in 23 2 in Chapter 23 below.

[17] See, further, the discussion in 28 2*(b)* in Chapter 28 below.

[18] Such persons are, however, provided they have sufficient interest in doing so, entitled to rely on and benefit from the 'objective inconsistency' between a law or conduct and a provision in the Bill of Rights. This is a result of the generous interpretation by the Constitutional Court of the standing requirements for enforcement of the Bill of Rights. See, further, the text accompanying note 26 in this Chapter and Chapter 4 below.

A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

In the *First Certification* judgment[19] the Constitutional Court dealt with an objection to the extension of the protection of fundamental rights to juristic persons. It had been argued that the Constitutional Principles only permitted the Constitution to confer fundamental rights on natural persons.[20] By extending the rights to juristic persons, it was argued, the protection afforded by the rights to natural persons was diminished. The Constitutional Court responded that it could not accept this argument:

> [M]any 'universally accepted fundamental rights' will be fully recognised only if afforded to juristic persons as well as natural persons. For example, freedom of speech, to be given proper effect, must be afforded to the media, which are often owned or controlled by juristic persons. While it is true that some rights are not appropriate to enjoyment by juristic persons, the text of s 8(4) specifically recognises this. The text also recognises that the nature of a juristic person may be taken into account by a court in determining whether a particular right is available to such person or not.[21]

This quotation indicates that the activities of juristic persons will not always fall within the scope of the rights listed in Bill of Rights. In order to decide whether a juristic person is protected, regard must be had to two factors: the nature of the fundamental right in question and the nature of the juristic person.

The nature of some of the fundamental rights prevents them from benefiting juristic persons. The rights to life and physical integrity, and to human dignity,[22] for example, cannot sensibly be applied to juristic persons. A company cannot claim protection of the right to life or the right not be tortured because these rights protect aspects of human existence that a company does not possess. However, the nature of most of the rights that are likely to be relied on by juristic persons (equality (s 9), privacy (s 14), freedom of expression (s 16),[23] freedom of association (s 18), the right to engage in collective bargaining (s 23(5)), the property right (s 25), the right of access to information (s 32), just administrative action (s 33), access to court (s 34) and the fair trial rights (s 35(3)) makes them applicable to the protection of juristic persons. However, in the case of rights that stem from the protection of human dignity (such as privacy), the

[19] See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

[20] Constitutional Principle II required the final Constitution to ensure that 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution'. On the Constitutional Principles and the Certification process see 1 2*(b)* in Chapter 1 above.

[21] *First Certification* judgment (note 19 above) para 57.

[22] See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) para 18.

[23] The specific protection of freedom of the press and other media in s 16(1)*(a)* expressly contemplates that the benefit of the right will be claimed by juristic persons.

Constitutional Court has indicated that juristic persons are entitled only to a reduced level of protection compared to natural persons.[24]

It is the second of s 8(4)'s criteria — the nature of the juristic person — that may place greater restrictions on the availability of human rights to juristic persons. It is difficult to see how organs of state exercising core government functions such as Parliament, a cabinet minister or the police will ever be able to rely on the protection of the Bill of Rights. Although arguably they are 'juristic persons', the nature of such organs of state makes them unsuitable to be beneficiaries of fundamental rights. They are not used by individuals for the collective exercise of their fundamental rights, but are instead used by the state for the exercise of its powers. However, state-owned corporations such as the South African Broadcasting Corporation or the Post Office, or entities such as universities, which are set up by the state for the purpose, amongst other things, of realising particular fundamental rights, are differently situated. Clearly a state-owned corporation like the SABC should be able to invoke the right to freedom of speech and the press when it becomes involved in a dispute with the state or even with an individual.

As for private juristic persons, the size or activities of the juristic person are not necessarily decisive. Of greater significance, in our view, is the relationship between the activities of the juristic person and the fundamental rights of the natural persons who stand behind the juristic person. In other words, juristic persons are not in and of themselves worthy of protection, but they become so when they are used by natural persons for the collective exercise of their fundamental rights. For example, companies are routinely used by individuals as an entity for conducting business, necessitating the exercise of property rights by companies.[25] What s 8(4) envisages is that there should be a link between protecting the activity of the juristic person and protecting the fundamental rights of the natural persons that lie behind it.

Much of the debate about the meaning of the guidelines contained in s 8(4), that is, 'the nature of the right' and 'the nature of the juristic person', is made irrelevant by the courts' approach to standing in constitutional litigation. The issue of standing is discussed in detail in Chapter 4 below. Basically, a person has standing to challenge the constitutionality of laws or conduct provided that they allege that a fundamental right is infringed or threatened, and they have, in terms of the categories listed in s 38, a sufficient interest in obtaining a remedy.[26] The first enquiry is objective: it is sufficient to show that *a* right in the Bill of Rights is violated by a law or conduct and it is not necessary to show that a right *of the applicant* has been violated.

This approach allows anyone with a sufficient interest to rely on the objective inconsistency between the Bill of Rights and a law or conduct. For example, it will seldom be necessary for juristic persons to invoke s 8(4) which sometimes

[24] *Hyundai Motor Distributors (Pty) Ltd* (note 22 above) para 18 (although juristic persons are not the bearers of dignity they are entitled to the right to privacy, but their privacy rights 'can never be as intense as those of human beings').

[25] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2002 (4) SA 768 (CC) paras 41–45.

[26] *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

extends the protection of the right to the juristic person itself. Laws and many forms of state and private conduct inevitably impact on the activities of both natural and juristic persons. Provided that a juristic person has a sufficient interest of its own (s 38*(a)*) or, if it is an association, a sufficient interest of its members, it may challenge such laws or conduct on the basis of fundamental rights that do not necessarily benefit the juristic person. For example, a law which prohibits the sale of wine on Sunday may be challenged by a company on the basis of the right to freedom of religion, provided that the company has a sufficient interest in the outcome of the litigation. It is not necessary in such a case for the company to show that the right to freedom of religion benefits juristic persons.

It is only when a law or conduct impacts solely on the activities of juristic persons that it will not be possible to follow this course of action. Then there can be no objective inconsistency between the Bill of Rights and the law or conduct, unless s 8(4) extends protection of the relevant right to juristic persons. For example, when a special tax on companies is challenged, a person challenging the tax will have to do so on the basis of a right that benefits juristic persons.[27]

(iii) *Declining the benefits of the Bill of Rights: the problem of waiver*

Waiver can be treated as an application issue and can be accommodated under the consideration of the beneficiaries of the Bill of Rights in that someone who has waived a right has agreed that they will not claim the benefit of it.[28] Although the distinction may be difficult to make in some cases, the waiver of fundamental rights should be distinguished from a decision not to exercise a fundamental right. Where a person chooses not take part in an assembly or not to join an association they cannot later complain about a violation of their rights to freedom of assembly or association. The same applies when an arrested person makes an informed choice to co-operate with the police by making a statement or a confession, or when a person allows the police to search their home.[29] Such a person cannot subsequently object at their trial that the intro-

[27] The approach of Davis J in *City of Cape Town v Ad Outpost* 2000 (2) SA 733 (C) cannot be supported. He held that a juristic person could not rely on s 22 (occupational freedom) to challenge a by-law that prohibited certain types of advertisement because s 22 only protects individual citizens and not juristic persons. This disregards the objective approach to constitutional invalidity. A juristic person with standing may rely on the objective inconsistency between a law and the Bill of Rights, even if its own rights are not impaired by the law.

[28] See *Transnet Limited v Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA). The argument had been raised in the course of litigation that the respondent (whose tender to provide a service to Transnet had been rejected) had waived its right to be given reasons for administrative action. The litigants did not persist with this argument on appeal and the majority of the appeal court therefore did not deal with it. However, Olivier JA, in a separate judgment, stated that a 'waiver of a right is a limitation thereof' and that Transnet had not made a case that the waiver was warranted by a law of general application.' We disagree. Waiver is conduct of the beneficiary of the right and not conduct of an alleged infringer of the right and is therefore not a limitation.

[29] The choice must be informed (the person must at least know what his or her rights are) and considered. See *S v Pienaar* 2000 (7) BCLR 800 (NC) para 6. In *S v Shaba* 1998 (2) BCLR 220 (T), 222H the court held that a person cannot waive a constitutional right since they are inalienable, but that a person may decline to exercise a right. An accused who co-operates with investigators chooses not to exercise his right to silence, but may at any stage change his mind and refuse to talk further. We agree, save to say that a person can indeed waive a fundamental right in the circumstances we describe below.

duction of the evidence violates their right to remain silent or their right to privacy of their home. In principle, the accused may nevertheless object to the use of the evidence if it would render the trial unfair. But, in the absence of other circumstances (for example, that the accused was improperly persuaded to co-operate), it is difficult to see why the use of the evidence would result in an unfair trial.

Waiver is different. It is an undertaking not to exercise a fundamental right in future. For example, a contractual restraint of trade is an undertaking to waive the s 22 right to occupational freedom for a period of time. Or, a person may undertake not to disclose sensitive information, or undertake to vote for a particular political party on election day, to perform nude on stage, or to attend religious instruction classes in a private school. These are, respectively, attempts to waive the rights to freedom of expression, to vote, to privacy and to freedom of religion. The question is then whether someone may be obliged to honour such an undertaking even if they subsequently change their minds.

A few general observations can be made at the outset. A waiver cannot make otherwise unconstitutional laws or conduct constitutional and valid. Section 2 of the Constitution provides that law or conduct inconsistent with the Constitution is invalid. The actions of the beneficiary of the right can have no influence on the invalidity of unconstitutional law or conduct. That is why a person cannot validly undertake to behave unconstitutionally. Such an undertaking will have no force and effect.[30] Similarly, a person cannot waive the indirect application of the Bill of Rights. Two people cannot undertake, for example, that the law of defamation must be applied in future disputes between them without any reference to the Bill of Rights. The reason for this is that s 39(2) requires courts to promote the Bill of Rights when developing the common law and individuals may not prevent the court from fulfilling its constitutional obligations.

What individuals may do is to waive the right to exercise a fundamental right.[31] The individual may undertake not to invoke the constitutional invalidity of state or private conduct. However, from a constitutional point of view, such a waiver is seldom decisive of an issue. But it is also seldom irrelevant. While we deal with waiver here as an issue of application, we do not mean to suggest that it must be answered by simply asking whether the individual may exclude him or herself from the 'benefits' of a particular fundamental right in the circumstances of the case. Waiver, and more generally, victim responsibility, may also influence

[30] See *President of the Republic of South Africa v South African Rugby Football Union (SARFU III)* 2000 (1) SA 1 (CC) para 198, where the court gives a hypothetical example of a contract in which the Minister of Foreign Affairs undertook to ensure that the other party would be appointed ambassador to a particular country. Such an undertaking, according to the court, could not fetter in any way the discretion conferred by s 84(2)*(i)* of the Constitution on the President nor the discretion of the Minister to recommend someone else for that post. Nor could it be a ground for a claim that the appointment of someone else should be set aside because the disappointed contractor has not been given a hearing by the President before the appointment was made.

[31] It seems as if the rights violator may also explicitly or implicitly waive the right to rely on possible defences or grounds of justification. See *Tetley v Minister of Home Affairs* 1999 (1) BCLR 68 (D), 74I–75A.

the limitation stage and the remedy that a court will award for breach of the fundamental right.

The effect of waiver firstly depends on the nature and purpose of the fundamental right in question. In principle, many of the freedom rights may be waived as long as the subject does so clearly and freely and without being placed under duress or labouring under a misapprehension.[32] In the words of the Constitutional Court, to be enforceable, the waiver would have to be a 'fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent to the rights being waived in consequence of such consent'.[33]

For example, the right to occupational freedom (s 22) is often waived by employees when concluding a contract of employment. There is also no reason why one cannot waive the s 14 right to privacy.[34] Similarly, one may validly undertake not to demonstrate (s 17), not to join a political party (ss 18 and 19) or not to leave the Republic (s 21(2)). One may also waive many of the procedural rights, such as the right to legal representation or the right of access to court. As far as these rights are concerned, it is not so much the nature of the right, but the length of the period of the waiver, the danger of abuse and the position of the beneficiary that may be decisive.

In contrast to the freedom rights, the nature of the rights to human dignity (s 10),[35] to life (s 11),[36] and the right not to be discriminated against (s 9(3) and (4)) or the right to a fair trial, does not permit them to be waived. Unlike the freedom rights, these rights cannot be exercised negatively. The right to freedom of expression, for example, can be exercised by keeping quiet, but the right to dignity cannot be exercised by being abused. One cannot therefore assume that the right *is exercised when it is waived* as one can, subject to the other considerations we have mentioned above, with the freedom rights.

Although some rights may not be waived, it does not mean that the fact of waiver then becomes legally irrelevant. As we stated above, waiver may also be relevant when considering the remedy to be awarded for the violation of a fundamental right. For example, a court would not enforce an undertaking to

[32] See for example *S v Gasa* 1998 (1) SACR 446 (D) (not a properly informed waiver of the right to legal representation). In *Coetzee v Comitis* 2001 (1) SA 1254 (C) para 38 the court assumed (in our view, incorrectly) that a player did not 'voluntarily' agree to the terms of a contract which incorporated National Soccer League Rules and Regulations which limited his fundamental rights. The question is rather whether *such an agreement* is against public policy.

[33] *Mohamed* (note 13 above). It had been argued by the state that an extraditee to the United States (where he faced the possible imposition of the death penalty) had waived his right by consenting to his removal. The court was able to avoid deciding whether the rights to life, dignity and physical integrity could validly be waived by holding (para 62) that the applicant's purported waiver was not fully informed. It was not clear that he knew of his right to insist that the government would not deliver him to the United States without first obtaining an undertaking that the death penalty would be imposed. Moreover, the fact that he was not represented by a lawyer meant that his capacity to waive his rights was seriously impaired (para 66)

[34] The general right to privacy is interpreted as a subjective expectation of privacy that is objectively justified. (See 14.3 in Chapter 14 below.) There is therefore no subjective expectation of privacy where prior consent has been given, for example, for the publication or dissemination of personal information.

[35] The same goes for rights closely associated with the right to dignity such as the right not to be tortured, enslaved or subjected to cruel punishment.

[36] *Mohamed* (note 13 above) para 62 (expressing doubt whether a person may give binding consent to being removed to a country where he or she might face the death penalty).

vote for a particular political party, but it would also probably not grant relief for such a violation of the right to vote other than to declare the agreement to be invalid. On the other hand, if a person is prevented from voting against their will, it may well be appropriate to award damages for the infringement.

There is very little South African jurisprudence on waiver of constitutional rights. Van Dijkhorst J held, in *Wittman v Deutscher Schülverein, Pretoria*,[37] that the applicant had waived her constitutional right to freedom of religion (in the sense of the right not to attend religious observances) by subjecting herself and her daughter to a private school's constitution and regulations. We support this conclusion, particularly because nothing prevented the applicant from removing her daughter from the school and placing her in a school where there was no religious instruction. She was therefore required to honour her undertaking to allow her daughter attend religious instruction for a certain period of time or to leave the school. After this period she could re-negotiate or she could seek education elsewhere. If this type of waiver is not acknowledged as constitutionally valid, s 29(3) (the right to establish and maintain independent educational institutions based on religious principles) would mean very little.

In *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society*[38] the High Court granted an interdict enforcing an contractual undertaking not to use loud-speaking equipment to broadcast calls to prayer from a suburban mosque. An undertaking not to use any amplification equipment had been given by the respondent in 1986, in the deed of the sale of the land on which the mosque was built. Despite the contract, the respondent started broadcasting amplified calls to prayer through a loudspeaker and the applicants applied for an interdict to stop it.

The argument of the respondent was that enforcing the contract would amount to a violation of the constitutional right to freedom of religion and that the Constitution did not permit the waiver of a fundamental aspect of one's religion. Conradie J was able to avoid the waiver issue by holding that amplification of the call to prayer had not been shown to be a fundamental precept of the Islamic faith and that the agreement therefore did not infringe the right to religious freedom.[39] In our view, it was not necessary for the court to decide on what constitutes a 'fundamental precept' of the respondent's religion. If the respondent had waived its right to practice its religion in this way, it would have made the decision itself. But it is any any event doubtful that the waiver would have been binding since it cannot have qualified as having been given in full knowledge of the freedom that is being surrendered. In *Northpine* the undertaking was made in 1986, at a time when there was no constitutionally protected right to religious freedom. It is therefore not feasible to argue that a properly informed waiver of rights took place, since the right in question did not exist at

[37] *Wittman v Deutscher Schülverein, Pretoria* 1998 (4) SA 423 (T).

[38] *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 (2) SA 268 (C).

[39] Ibid. The contract also contained an agreement that no call to prayer (by unamplified voice) would be made from the mosque. The applicants did not attempt to enforce this clause. Had they done so it would have squarely raised the waiver issue, since the call to prayer must assuredly be considered a fundamental aspect of the Islamic faith.

the time. Indeed, it looked like the respondents would not have given up their right if it had been constitutionally protected at the time:

> The respondent states . . . that it never intended to abide by clause 20, since the call to prayer is one of the basic tenets of Islam. It does not say how it intended avoiding fulfilment of its bargain. The agreement was concluded long before a justiciable Bill of Rights became a reality.[40]

(b) Duties under the Bill of Rights

(i) *Direct horizontal and vertical application of the Bill of Rights*

As we have seen, traditionally, a bill of rights confines itself to regulating the 'vertical' relationship between the individual and the state. This is not a relationship of equality. The state is far more powerful than any individual. It has a monopoly on the legitimate use of force within its territory. State authority allows the state to enforce its commands through the criminal law. If not protected by a bill of rights against abuse of the state's powers, the individual would be in an extremely vulnerable position. The 1996 Bill of Rights performs this traditional task of protecting individuals against the state by imposing a duty on all branches of the state to respect its provisions.[41]

However, as we have seen, the 1996 Bill of Rights goes further than is traditional. It recognises that private abuse of human rights may be as pernicious as violations perpetrated by the state. For this reason, the Bill of Rights is not confined to protecting individuals against the state. In certain circumstances the Bill of Rights directly protects individuals against abuses of their rights by other individuals by providing for the direct horizontal application of the Bill of Rights.

The direct application of the duties under the Bill of Rights is governed by s 8. Broadly speaking, s 8(1) deals with *direct vertical application*. It describes the circumstances in which law and conduct of the state may be challenged for being inconsistent with the Bill of Rights. Section 8(2), on the other hand, deals with *direct horizontal application*. It sets out the circumstances in which the conduct of private individuals may be attacked for infringing the Bill of Rights. Section 8(3) grants powers to the courts to remedy such infringements.

We are concerned at this point with direct application. Remember though that the Bill of Rights also applies *indirectly* in both the vertical and horizontal axes. Indirect application means that, instead of the Bill of Rights directly imposing duties and conferring rights, rights and duties are instead imposed by the common law or legislation. In turn, the development and interpretation of the common law and legislation is influenced by the Bill of Rights. Indirect application is dealt with in 3.4 further below.

[40] Ibid 270H–I.

[41] Section 8(1): 'The Bill of Rights . . . binds the legislature, the executive, the judiciary and all organs of state'

(ii) *Direct vertical application: duties of state actors*

Section 8(1) provides that the legislature, the executive, the judiciary and all organs of state are bound by the Bill of Rights. An applicant may therefore challenge the conduct of any of these state institutions as a breach of their duties under the Bill of Rights.

(aa) Legislatures

The term 'legislature' refers to the institutions that exercise the legislative authority of the Republic: Parliament, the provincial legislatures and the municipal councils.[42] The primary duty and principal form of conduct of all of these bodies is legislating. The output of the legislative process — legislation of the central, provincial and local governments, as well as any form of delegated legislation — must comply with the Bill of Rights. This is because, in the words of s 8(1), the Bill of Rights 'applies to all law'.

As far as conduct of the legislatures other than law-making is concerned, the implication of s 8(1) is that legislatures and their committees and functionaries are bound by the Bill of Rights when they perform non-legislative functions, such as the determination of internal arrangements, proceedings, rules and procedures. In *De Lille v Speaker of the National Assembly*,[43] the High Court stated:

> The National Assembly is subject to the supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It subject in all respects to the provisions of our Constitution . . . [T]he nature and exercise of parliamentary privilege must be consonant with the Constitution. The exercise of parliamentary privilege which is clearly a constitutional power is not immune from judicial review. If a parliamentary privilege is exercised in breach of a constitutional provision, redress may be sought by an aggrieved party from law courts whose primary function is to protect rights of individuals.[44]

The matter arose when Patricia De Lille, a member of the National Assembly, was suspended for fifteen parliamentary working days for alleging in a meeting of the Assembly that some of the members of the governing party had acted as spies on behalf of the apartheid government. Although the Assembly resolved to suspend De Lille, the decision was largely based on the recommendation of an ad hoc committee of the Assembly that had been appointed to investigate the issue. In setting aside the suspension, the High Court held that the Assembly's resolution violated several provisions of the Constitution. First, a suspension of a member of the Assembly from Parliament for contempt is not consistent with the requirements of representative democracy. A suspension would amount to punishment calculated not only to penalise the member, but also his or her party and the electorate who voted for that party and who are entitled to be represented in the Assembly by their proportionate number of representatives.[45]

[42] Section 43 of the Constitution.

[43] *De Lille v Speaker of the National Assembly* 1998 (3) SA 430 (C).

[44] Ibid paras 25 and 33.

[45] Ibid para 27. The court derived the principle of representative democracy from several provisions of the Constitution, including ss 1*(c)*, 42(3), 57(1)*(b)* and 57(2)*(b)*.

Secondly, because De Lille was not given a proper hearing before the ad hoc committee, her right to just administrative action was violated. Thirdly, since the committee was dominated by the majority party and in fact biased, De Lille was not afforded a fair hearing by an independent and impartial tribunal, as required by s 34 of the Constitution. Finally, her right to freedom of expression was violated. These infringements of the Bill of Rights could not be justified under the general limitation clause as they were not authorised by 'law of general application'. In any event, the infringements failed to meet the other requirements of the limitation clause.[46]

(bb) The executive

The Bill of Rights binds the 'executive . . . and all organs of state'. This means that conduct of the executive and organs of state can be tested against any of the provisions of the Bill of Rights with the exception of s 33, which can only be applied to conduct of the executive and organs of state that amounts to 'administrative action'.[47] Although the executive and organs of state are primarily responsible for executing the law, it must be kept in mind that the Bill of Rights also binds these actors when they make law. All delegated legislation may therefore be directly tested against the Bill of Rights for this reason and for the reason that the Bill of Rights applies to 'all law'.

The 'executive' can be taken to refer to the party-political appointees who collectively head the government, whether it be at the national, provincial or local government level. At the national level of government, for example, the executive consists of the President, the Deputy President, the Ministers and the Deputy Ministers.[48] On this definition, it is difficult to envisage conduct of the 'executive' that would not also amount to conduct of an 'organ of state' as defined in s 239.

The reference to the 'executive' in s 8(1) may specifically prevent the courts from using a method developed in other jurisdictions for excluding conduct of the executive from Bill of Rights review. In the United States, this method is known as the political question doctrine. The description of the doctrine by the US Supreme Court in *Baker v Carr*[49] is frequently referred to:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the

[46] Ibid 37–8. The decision of the Cape High Court was confirmed on appeal on a narrower ground. The Supreme Court of Appeal held that there was no constitutional authority for the Assembly to punish a member of the Assembly for making a speech, by means of an order suspending the member from the proceedings of the Assembly: *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA). See, further, on the constitutionality of parliamentary procedures, *Smith v Mutasa* 1990 (3) SA 756 (ZSC); *Mutasa v Makombe NO* 1998 (1) SA 397 (ZSC); *Federal Convention, Namibia v Speaker, National Assembly Namibia* 1994 (1) SA 177 (NSC).

[47] Section 33 is given effect to by the Promotion of Administrative Justice 3 of 2000. The Act applies to administrative action as defined. See, further, 29.3 in Chapter 29 below.

[48] In this Chapter, we use examples relating to the national executive, but the same would apply to provincial and local government.

[49] *Baker v Carr* 369 US 186 (1962).

impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political question already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[50]

The effect of labelling an issue 'a political question' is to allow a court to avoid dealing with it. In other words, since the question is 'political' the courts consider themselves to be the inappropriate institution to deal with the matter and, by declining to make a decision, leave the question to be resolved by political processes. The political question doctrine is therefore a self-imposed limitation on the US courts' power to review conduct of the executive.

The specific reference to the 'executive' in s 8(1) makes it unlikely that the South African courts will adopt a similar doctrine.[51] Section 83*(b)* in any event requires the President to uphold, defend and respect the Constitution as the supreme law of the Republic.[52] While our courts are likely to subject all executive conduct to constitutional scrutiny, they are at the same time likely to show considerable deference to executive choices of a political nature. The Constitutional Court has already articulated such a position vis-à-vis policy decisions made by the legislature. In *Ferreira v Levin NO*,[53] Chaskalson P wrote the following for the court:

Whether or not there should be regulation and distribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decisions to undertake such policies conforms with the Constitution. It should not, however, require the legislature to show that they are necessary if the Constitution does not specifically require that this be done.[54]

The same reasoning should apply to political decisions made by the executive. It will, in particular, apply to an exercise of the constitutionally entrenched powers of the President and Cabinet. In principle, policy developed by the Cabinet under the executive powers listed in s 85(2) must not be inconsistent with the Bill of Rights. Further, an applicant will be entitled to appropriate relief where a failure to implement legislation or to execute a law amounts to a violation of the Bill of Rights. In such circumstances, there is no reason why a court should not grant a

[50] Ibid 217.

[51] See *Pharmaceutical Manufacturers* (note 12 above) paras 19, 76 (the law 'called for political judgment by the President that had to be made consistently with [the purpose of the enabling Act] and the requirements of the Constitution'; exercise of political judgment nevertheless reviewable); *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC) para 78 (exercise of all public power is subject to constitutional control and is justiciable, including an allegation that government has failed to respond appropriately to a request for diplomatic protection).

[52] The obligation to 'respect' the rights in the Bill of Rights imposed on 'the state' by s 7(2) clearly requires the President not to infringe fundamental rights.

[53] Note 26 above.

[54] Ibid para 180.

mandamus compelling the government to enforce the law.[55] The principle is therefore clear. In reality, however, the courts will show deference to political decisions made by the executive.[56]

In the *SARFU* case, the Constitutional Court reiterated that there are significant constraints upon the exercise of the President's Head of State powers (listed in s 84(2) of the Constitution).[57] The case concerned the s 82(2)*(f)* power of the President to appoint a commission of enquiry. But if one considers the list of legal restraints listed by the court (the President must act alone, not infringe the Bill of Rights, observe the principle of legality and must act in good faith and not misconstrue his powers) it is hard to imagine a successful challenge to the exercise of these powers. The same applies to the Constitutional Court's judgment in *Pharmaceutical Manufacturers*, although the court actually invalidated the exercise of the power to put a law into operation in this case. Since the law was put into force prematurely, the decision overturned the President's decision for violating the rule of law. The court held that, at the very least, the exercise of public power by the executive will be tested against the rule of law, which requires that decisions must be rationally related to the purpose for which the power was given, otherwise they will be arbitrary and inconsistent with the Constitution.[58] However, as long as such political decisions are objectively rational, a court will not interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately.[59]

(cc) Organs of state

The phrase 'organ of state' is defined in s 239 of the Constitution. In terms of this definition, the conduct of organs of state may be divided into three categories. First, conduct of any department of state or administration in the national, provincial or local spheres of government is conduct of an organ of state. The second category is conduct of any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution. The third is conduct of any functionary or institution exercising a public power or performing a public function in terms of any legislation. A court or a judicial officer is specifically excluded from the definition.[60]

[55] Section 7(2), which provides that the 'state must respect, protect, promote and fulfil the rights in the Bill of Rights', provides further support for this conclusion. See, in this regard, *Chavunka v Commissioner of Police* 2000 (9) BCLR 949 (ZS); *Commissioner of Police v Commercial Farmers' Union* 2000 (9) BCLR 956 (ZS).

[56] See *Kaunda* (note 51 above) paras 79–80 (executive decisions relating to diplomatic protection can be reviewed for inter alia irrationality or bad faith and a court can require government to deal with the matter properly; government nevertheless has a broad discretion in such matters which must be respected by the courts).

[57] *SARFU III* (note 30 above) para 147.

[58] *Pharmaceutical Manufacturers* (note 12 above) para 85.

[59] Ibid para 90. See, in respect of a Premier's power to dismiss provincial MECs, *Mphele v Government of the Republic of South Africa* 1996 (7) BCLR 921 (Ck).

[60] Courts and judicial officers are not organs of state, but this does not mean that the Bill of Rights does not bind them. On the contrary, s 8(1) specifically refers to the judiciary. The reason for the exclusion of the judiciary from the definition in s 239 is that, for purposes of certain provisions of the Constitution, the term organ of state must not be taken to include judicial officers. For example, s 41(1)(ii) provides that organs of state must assist and support one another. However, in order to secure respect for human rights, the judiciary will often have to do exactly the opposite by disciplining the other branches of government.

The first category refers to any department of state or administration in the national, provincial or local spheres of government. When read in context, the implication of this provision is that state departments and the administration are bound by the Bill of Rights whether they exercise a power in terms of legislation or act in another capacity.[61] State departments will therefore be bound by the Bill of Rights when, for example, they decide whether to enter into contracts.[62]

By providing that the exercise of a power or the performance of a function in terms of the Constitution — or a provincial constitution — amounts to conduct of an organ of state, s 239 makes it clear that the exercise of constitutional executive powers (sometimes referred to as prerogative powers) may be challenged for consistency with the Bill of Rights.[63]

Finally, a functionary or an institution qualifies as an 'organ of state' in terms of s 239 when it exercises a public power or performs a public function in terms of legislation. This provision means, first, that the functionary or the institution must derive powers from a statute or perform a function in terms of a statute (as opposed to merely being incorporated pursuant to a statute, such as all companies and close corporations are). Secondly, it means that the nature of the power or function (and not the nature of the functionary or institution) must be 'public'. It is not always easy to distinguish between public and private functions. Private functions are usually performed for private gain, whereas public functions are performed for public-regarding reasons, in the public interest. State financial support may be a factor indicating that the function is public, but it will not always be decisive since so many entities are assisted by the state in one way or another.[64]

[61] Section 239 distinguishes between state departments (first category) and other functionaries or institutions exercising powers or functions in terms of legislation (third category). The latter are considered to be 'organs of state' only when they exercise a public power or function in terms of legislation.

[62] *Transnet Limited v Goodman Brothers* (note 28 above) paras 7-9. However, once a contract is concluded, the power to cancel the contract derives from the terms of the contract and the common law and an exercise of the power will not amount to administrative action: *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 (3) SA 1013 (SCA) para 18.

[63] This confirms the Constitutional Court's interpretation of the interim Constitution in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). See also *Pharmaceutical Manufacturers* (note 12 above) para 41.

[64] See the following judgments decided under the interim Constitution: *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B) (wide definition of public function to include 'activities in the public domain'); *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T) (narrower definition of 'organ of state', including only state departments and those institutions outside the public service controlled by the state, such as Telkom); *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T), 1073–4 and *Lebowa Granite (Pty) Ltd v Lebowa Mineral Trust* 1999 (8) BCLR 908 (T), 914F (applies 'control test' of *Directory Advertising Cost Cutters*). In *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T), Van Dijkhorst J held that the control test, developed by him under the interim Constitution, also applies under the 1996 Constitution. On the basis of this test, the Health Professions Council was not an organ of state. The applicant was nevertheless granted access to documents held by the Council since they emanated from a state hospital, which was considered to be an organ of state. In our view the case illustrates that the control test is too narrow to give effect to a central objective of the 1996 Constitution, which is to impose a culture of justification and transparency on private persons and institutions, at least in so far as they perform public functions. The control test must either be expanded or replaced with a broader test. The former was done in *Esack NO v Commission on Gender Equality* 2000 (7) BCLR 737 (W), 744I where the court held that 'control' means that government can prescribe what the function of the body is and how it is to be performed. Because the Gender Commission performs a government function, it was then held to be an organ of state. A broader test was opted for by Davis J in *Inkatha Freedom Party v TRC* 2000 (3) SA 119 (C), 133D. In finding the Truth and Reconciliation Commission to be an organ of state, the court held that although the TRC was not under the direct control of government, it was sufficient that it was 'designed to fulfil objectives identified in the Constitution and the Act'. The Constitutional Court covered all the bases in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 23 (holding that Transnet is an organ of state because it is a statutory body; it is under the control of the state; it has public powers and it performs public functions in the public interest).

(dd) The judiciary

When judges and magistrates act in a judicial capacity (ie, when they adjudicate legal disputes) they are required to conduct themselves in a way that complies with the Bill of Rights. Some provisions of the Bill of Rights, such as s 35(5) which provides for the exclusion of evidence in certain circumstances, are indeed specifically directed at the conduct of the judiciary when presiding over criminal trials. In addition, when members of the judiciary perform administrative actions they are bound to comply with the administrative justice right in s 33.[65]

The difficult issue is to determine the extent to which the judiciary is bound when it makes law. Every court decision can be considered to become part of the common law and add to the common law (unless and until it is overturned by a higher court or the legislature). If this is so, it can be argued that no court may give legal effect to private conduct that is inconsistent with the Bill of Rights.[66] This would mean that, for practical purposes, private persons will always be bound by the Bill of Rights because they will be unable to seek the assistance of the courts to enforce their unconstitutional conduct.

However, this argument has been rejected by the Constitutional Court on the basis that it would make s 8(2) and s 8(3) redundant.[67] The 1996 Constitution specifically provides that private individuals are directly bound by the Bill of Rights in some instances and not in every instance. This means, in effect, that common-law rules and principles may only be directly tested against the Bill of Rights in so far as they are relied upon by actors who are directly bound by the Bill of Rights. Whenever such an actor, private or state, is bound, the Bill of Rights becomes directly applicable law which overrides the common law in so far as it is inconsistent with the Bill of Rights. In disputes between private parties regulated by common law, the extent to which the Bill of Rights applies to private conduct therefore determines its reach or direct application to the common law.

(ee) Summary

In respect of state actors, the Bill of Rights applies directly:

1. To the common law and to legislation of the central, provincial and local government legislatures as well as to non-legislative conduct of these legislatures;
2. To administrative action which must, in addition, comply with the criteria

[65] *Ferela v Commissioner for Inland Revenue* 1998 (9) BCLR 1085 (T), 1095 E. See also *S v Naidoo* 1998 (1) BCLR 46 (D), 88B (invalidating a direction issued by a judge in terms of the Interception and Monitoring Prohibition Act 127 of 1992).

[66] The argument derives from the US Supreme Court decision in *Shelley v Kraemer* 334 US 1 (1948).

[67] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) paras 30–1.

listed in the just administrative action right in s 33 and in the Promotion of Administrative Justice Act;
3. To conduct of organs of state as defined in s 239;
4. To conduct of the executive (deference will however be shown to political decisions taken by the executive, particularly when exercising the constitutional executive and Head of State powers);
5. To non-lawmaking conduct of the judiciary (the conducting of trials, administrative action).

(iii) *Direct horizontal application: duties of private actors*

(aa) The near-redundancy of direct horizontal application

Like its predecessor, the 1996 Constitution provides for direct vertical application of the Bill of Rights but, unlike its predecessor, is not confined to this form of direct application. Section 8(2) clearly envisages direct application of the Bill of Rights in the horizontal relationship in certain circumstances. However, the 1996 Constitution also permits, in s 39(2), indirect application of the Bill of Rights in horizontal cases.

The presence of s 35(3) of the interim Constitution (now s 39(2)), Kentridge AJ prophetically stated in *Du Plessis*, 'makes much of the vertical/horizontal debate irrelevant'.[68] Since *Du Plessis*, under both the interim and 1996 Constitution, the courts routinely approached the issue of the effect of the Bill of Rights on the common law indirectly. The invitation of s 8(2) — to apply rights directly in horizontal situations — was snubbed. Why did direct horizontality, this deliberate innovation in the 1996 Constitution, threaten to become a dead letter? There are a few possible explanations.[69] Certainly, one attraction of indirect application was that courts did not have to confront the opacity and apparent circularity of s 8 (the Bill of Rights was to be applied to private actors 'where applicable'). Our own view is that indirect application was (and remains), in accordance with the principle of avoidance, preferred to direct application. In common-law disputes between private parties, a direct application of the Bill of Rights will seldom offer significant advantages for a litigant over an indirect application. In most cases, a litigant will motivate for a change in the common law and it matters little whether a court is persuaded to do so with reference to an argument based on direct or indirect application. One of the few instances where direct application to the common law seems to make sense is when common-law offences or rules are challenged with the purpose of 'invalidating' them.[70] An indirect application — that is the development of the common law — seems impossible in such cases. Another advantage of a direct application of

[68] Note 4 above, para 60.
[69] C Sprigman & M Osborne '*Du Plessis* is Not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes (1999) 15 *SAJHR* 25 (the legislature and not the judiciary should be reforming the common law; indirect application is the best way to leave space for the legislatures to act).)
[70] *Shabalala v Attorney-General Transvaal* 1996 (1) SA 725 (CC) (challenging the 'docket privilege') or *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (challenging the crime of sodomy) See also the text accompanying notes 179 and 180 below

the Bill of Rights may be found in the generous approach to standing which the courts apply in fundamental rights litigation. However, as we argue in 4.1*(a)* in Chapter 4 below, the common law of standing will have to be developed to make it consonant with standing in Bill of Rights cases.

Another reason for the reluctance of private parties to invoke the Bill of Rights directly is that constitutional remedies for the private violation of fundamental rights are often difficult to envisage or unattractive to litigants. We discuss these problems in greater detail in 8.8 in Chapter 8 below. However, when challenging legislation and state conduct, constitutional remedies are not unattractive. On the contrary, by removing parliamentary sovereignty and replacing it with constitutional supremacy, the Constitution has provided litigants with a completely new basis to challenge legislation and state conduct. Moreover, in areas where the South African public law was underdeveloped the direct application of the Bill of Rights presented a litigant with a useful tool to challenge state conduct. Not only has the Bill of Rights and the Constitution greatly increased the grounds for such a challenge, but the remedy flowing from a finding of inconsistency between the Bill of Rights and state conduct is the invalidation of the conduct. This remedy will usually be an attractive one for a litigant.

In contrast, by extending the direct operation of the Bill of Rights to private relations, the 1996 Bill of Rights has not contributed much to the resolution of private legal disputes. In most cases, the remedies that apply to such disputes, particularly common-law remedies, appear to be sufficiently flexible to be considered appropriate for a horizontal infringement of the Bill of Rights. It is, in any event, difficult to imagine alternative and more appropriate remedies for these types of infringements.

Whatever the reasons, indirect horizontality provided the default form of application by which courts approached the common law. The trouble with this was that, besides rendering s 8(2) irrelevant, the 'model of indirect application or, if you will indirect horizontality' as Kentridge AJ pointed out in *Du Plessis*, 'seems peculiarly appropriate to a judicial system which, as in Germany, separates constitutional jurisdiction from ordinary jurisdiction'.[71] But, under the 1996 Constitution and in a deliberate alteration of the position under the interim Constitution, South Africa no longer separates constitutional jurisdiction from ordinary jurisdiction. Moreover, indirect application suggests that there is a body of common law that is conceptually separate from the Constitution, exercising a mediating influence between the actors to whom it applies and the Constitution. This is difficult to accommodate in the remodelled constitutional system in which there is 'only one system of law'.[72]

Khumalo v Holomisa[73] is therefore an extremely significant decision. It is the Constitutional Court's first (and so far only) use of the direct horizontality provisions of the 1996 Constitution. It can be read as bringing to end the long reign of indirect application of the Bill of Rights to the common law. It holds (although admittedly not in so many words) that the Bill of Rights must be

[71] Note 4 above, para 60
[72] *Pharmaceutical Manufacturers* (note 12 above) para 44
[73] Note 67 above

applied directly to the common law wherever appropriate. It should be directly applied, in other words, in many (perhaps most) of the horizontal cases that have previously been treated as indirect application cases (ie, cases involving private litigants relying on common-law provisions).

(bb) How to interpret s 8(2)

The Bill of Rights binds private persons in certain circumstances. According to s 8(2), a provision of the Bill of Rights applies to the conduct of a private person or a juristic person only to the extent that the provision is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. In *Khumalo* the Constitutional Court had regard to what it described as the 'intensity of the constitutional right in question'.[74] The meaning of this opaque phrase appears, in context, to have something to do with the scope of the right: the applicants were members of the media who are expressly identified as bearers of the constitutional right to freedom of expression). The second factor considered by the court was the 'potential of invasion of that right by persons other than the State'. The result was a holding that the right to freedom of expression was horizontally applicable in a defamation case.[75]

In our view, these two factors form part of a broader inquiry consisting of five general considerations that must be kept in mind when interpreting s 8(2):

[74] Ibid. Here is the full passage interpreting and applying the formula in s 8(2) (ibid, para 33): 'In this case, the applicants are members of the media who are expressly identified as bearers of constitutional rights to freedom of expression. There can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution. The first question we need then to determine is whether the common law of defamation unjustifiably limits that right. If it does, it will be necessary to develop the common law in the manner contemplated by section 8(3) of the Constitution'.

For all its significance, this is a particularly baffling paragraph. What does 'the intensity of the constitutional right' mean? Perhaps, it means the force, or strength of the right (taking the phrase literally). But how is that measured? Preceding this paragraph is a discussion of the right to freedom of expression which might provide a clue. The right to freedom of expression, the court holds, 'is integral to a democratic society', it is 'constitutive of the dignity and autonomy of human beings' (para 22). The media have an important place in a democracy and freedom of expression is essential to protect that place (para 24). Freedom of expression is 'fundamental to our democratic society' but it is 'not a paramount value' (para 25). This appears to indicate that the right to freedom of expression is sufficiently 'intense' (extensive?) to be a candidate for direct horizontal application. It extends, in other words, to protect the interests of the print media in writing about political figures. Coupled with the possibility of violation of that right by non-state actors, 'it is clear that the right to freedom of expression is of direct horizontal application in this case'. 'In this case' is also a troublesome phrase. Does it mean, only in this particular case, or, the general case of defamation actions involving the media?

[75] Ibid para 33. Direct application is the testing of an allegation that an aspect of the common law is inconsistent with the Constitution. The question for decision in *Khumalo* was phrased as follows by the Constitutional Court: 'whether, to the extent that the law of defamation does not require a plaintiff in a defamation action to plead that the defamatory statement is false in any circumstances, the law limits unjustifiably the right to freedom of expression as enshrined in section 16 of the Constitution' (para 4). According to the court, since the law of defamation limits the right to freedom of expression in the interests of protecting the right to dignity, the enquiry entails asking 'whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other' (para 28). The answer was yes, an answer already reached via an indirect application of the Bill of Rights in *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA). See, further, 16.5*(c)* in Chapter 16 below.

1. First, s 8(2) states that a 'provision' may apply to private conduct. It does not say that a 'right' may apply to private conduct. It is therefore possible, and quite reasonable, that some provisions of the Bill of Rights may apply to the conduct of a private person or juristic persons while other provisions in the same section (and pertaining to the same right) will not apply to such conduct. For example, the right of access to health care services (s 27(1) and (2)) probably does not apply horizontally.[76] However, the right not to be refused emergency medical treatment (s 27(3)) probably does apply horizontally.[77] Also, the freedom to make political choices (s 19(1)) and the right to vote (s 19(3)) may be violated by private conduct, but the right to free, fair and regular elections only places duties on the state.
2. Second, questions concerning the horizontal application of the Bill of Rights cannot be determined a priori and in the abstract. Although this is not explicitly stated, whether a provision of the Bill of Rights applies horizontally also depends on the nature of the private conduct in question and the circumstances of a particular case. This explains why s 8(2) states that a provision in the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable. The extent to which a provision is applicable can only be determined by reference to the context within which it is sought to be relied on. For example, the right of every arrested person to be informed promptly of the right to remain silent is of a nature that makes it generally inapplicable to private arrests. But there may be circumstances in which the right should apply to private arrests. There is no reason why a private security officer, who knows of the existence of the s 35(1)*(a)* right or who may reasonably be expected to know of the right, should not observe it. Conversely, the right to assemble peacefully and unarmed generally applies on the horizontal level. The right to assemble in, for example, shopping malls and on the property of an employer is therefore guaranteed. But in some circumstances it may be inappropriate to apply the right horizontally. For example, it is unlikely that the right to assemble can be relied on to justify demonstrations in or in front of someone's private home.[78]

   However, a resort to context or the circumstances of a particular case should not be used to frustrate the clear intention of the drafters of the 1996 Constitution — to extend the direct operation of the provisions of the Bill of Rights to private conduct. It is not permissible to argue, for example, that it is only when private persons find themselves in a position comparable to the powerful state, that s 8(2) binds them to the Bill of Rights. It may be that most private or juristic persons do not have the capacity to infringe human rights in a manner and on a scale comparable to the state. But any interpretation of s 8(2) must avoid relying on such gross generalisations. The subsection was after all included to overcome the conventional assumption that human rights need only be protected in vertical relationships.

[76] The reason is that the duty imposed by the right is too burdensome to impose on private individuals. See *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 15.

[77] See, further, 26.5*(b)* in Chapter 26 below.

[78] See, further, 17.3*(b)(i)* in Chapter 17 below.

3. The purpose of a provision is an important consideration in determining whether it is applicable to private conduct or not. For example, the purpose of the right to leave the Republic (s 21(2)) is, in principle, to prevent the state from keeping persons captive in their own country. The right to reside anywhere in the Republic (s 21(3)) is aimed at preventing the state from reintroducing group areas-style legislation that divides the country into racial zones. It follows that these rights are not intended to have general horizontal application. On the other hand, the purpose of the right to human dignity does not necessarily demand differentiation between state and private conduct. The right is to protect an individual against assault on his or her dignity from any source, whether private or public. The proper interpretation of a right in terms of its purpose may therefore sometimes result in a right not being applicable to private conduct, either generally or in a particular situation.
4. The nature of any duty imposed by the right must be taken into account. This recognises that private or juristic persons are often primarily driven by a concern for themselves. On the other hand, the state is supposed to be motivated by a concern for the well-being of society as a whole. The application of the Bill of Rights to private conduct should not undermine private autonomy to the same extent that it places restrictions on the sovereignty of the government. This consideration is of particular importance when it comes to the imposition of duties which entail the spending of money. Since the conduct of private persons has to be funded from their own pockets, the same duties may not be imposed on them as can be imposed on an organ of state which relies on public funds. For example, a private hospital cannot, unlike a state hospital, be saddled with the duty to provide every child with basic health care services (s 28(1)*(c)*).
5. In some instances, indications are found in the Bill of Rights itself as to whether a particular right may be applied to private conduct or not. Section 9(4), for example, states that 'no person' may discriminate directly or indirectly against anyone on one or more of the grounds listed in s 9(3). The state is already prohibited from discriminating by s 9(3). The formulation of s 9(4) therefore indicates that the right not to be unfairly discriminated against will always apply to private conduct.[79] Similarly, s 12(1)*(c)* is explicitly made applicable to the conduct of private and juristic persons. The section states that the right to freedom and security of the person includes the right 'to be free from all forms of violence from either public or private sources.'

Subject to the five considerations discussed above, it may be said that the nature of citizenship rights (ss 20 and 21 (3) & (4)); the right to just administrative action (s 33) and the rights of detained, arrested and accused persons (s 35) generally preclude them from being directly applied to private conduct. Also, it can be said that the nature of the positive duties imposed by the right to have

[79] Note that it is only the prohibition against unfair discrimination that is explicitly binding on private conduct. Section 9(4) is not concerned with the right to equal protection and benefit of the law.

legislative and other measures taken to protect the environment (s 24*(b)*), to realise the right to housing (s 26), the right to health care, food, water and social security (s 27) and the right to education (s 29) would usually result in them not being applicable to private conduct.[80] The remaining rights in the Bill of Rights can, depending on the circumstances of a particular case, be applied horizontally, so as to impose duties on private individuals to conform their conduct to the Bill of Rights.

(c) Temporal application of the Bill of Rights

(i) *Which Constitution applies?*

An unconstitutional law becomes invalid at the moment the Constitution comes into effect. This is the effect of the supremacy clause of the Constitution: all law and conduct inconsistent with the Constitution is invalidated by it.[81] When making an order of invalidity a court simply declares invalid what has already been made invalid by the Constitution. This means that an unconstitutional law in force at the time of commencement of the interim Constitution is invalidated by the interim Constitution with effect from 27 April 1994. If the law is challenged in litigation brought during the period of operation of the 1996 Constitution the invalidity of the law should be assessed in terms of the interim Constitution.[82]

The doctrine described above is known as 'objective constitutional invalidity'. It means that an applicant will always have a choice between the interim and 1996 Constitutions when challenging old-order (ie, pre-1994) laws. In other words, nothing prevents an applicant whose cause of action arose after the commencement of the 1996 Constitution came into force from arguing that an old-order law was invalidated by the interim Constitution. For example, in *Prince v President, Cape Law Society*[83] the Constitutional Court held, in litigation brought under the 1996 Constitution, held that the requirement in the Supreme Court Act 59 of 1959 that eleven judges of appeal must sit in cases in which the validity of an Act of Parliament was in question was inconsistent with the interim Constitution.[84] According to the Constitutional Court, the quorum requirement in the Supreme Court Act was in conflict with the interim Constitution, which expressly provided that the Appellate Division lacked jurisdiction to enquire into the constitutional validity of legislation.[85] To the extent

[80] That is not to say that the negative aspect of these rights (the duty to refrain from interfering with existing access to social goods) is not horizontally binding. See, further, the discussion in 26.2*(b)* in Chapter 26 below.

[81] *Ferreira v Levin NO* (note 26 above) paras 26, 158. See, further, 4.2*(b)* in Chapter 4 below.

[82] The interim Constitution came into effect on 27 April 1994. The 1996 Constitution (which repealed its predecessor) came into effect on 4 February 1997.

[83] *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC).

[84] The sub-section, inserted by the Appellate Division Quorum Act 27 of 1955, formed part of the notorious 'court packing' episode of the 1950s, in which the size of the appellate division was increased from five to eleven judges to ensure passage of amendments to the Constitution that abolished the non-racial franchise in the Cape Province. The constitutional crisis of the 1950s is surveyed in I Currie & J de Waal *The New Constitutional and Administrative Law* Vol 1 (2001) 46–50, 53–4.

[85] *Prince* (note 83 above) para 35.

that the Supreme Court Act provided that the Appellate Division had jurisdiction to adjudicate the constitutionality of Acts of Parliament, it was invalid. Moreover, it had been invalid since the moment of commencement of the interim Constitution on 27 April 1994.[86]

Clearly, there is no difficulty with the application of the rule in *Prince* if the interim Constitution and 1996 Constitution contain substantively identical provisions. If law in force at the time of commencement of the interim violates that Constitution it is invalid with effect from 27 April 1994. It will remain an invalid violation of the 1996 Constitution, notwithstanding the repeal of the interim Constitution by its successor. *Prince* however confronts the situation of a law invalidated by a provision of the interim Constitution that has no equivalent in its successor. The 1996 Constitution granted the SCA the constitutional jurisdiction that it had been denied under the interim Constitution, including jurisdiction to adjudicate on the constitutional validity of Acts of Parliament. Did this mean that s 12(1)*(b)* was resuscitated? No, according to the Constitutional Court, though its explanation for this answer is far from clear:

> Once section 12(1)*(b)* became invalid because of its inconsistency with the interim Constitution, it could not be validated simply by the fact that under the Constitution the SCA now has constitutional jurisdiction. Section 168(2) of the Constitution which stipulates that the quorum of the SCA shall be determined by an Act of Parliament must therefore, in the absence of the proviso in section 12(1)*(b)*, refer, at present, to section 12(1) of the Supreme Court Act which determines that the ordinary quorum of that Court shall be five judges. This result is consistent with the new constitutional order. Section 12(1)*(b)* of the Supreme Court Act was enacted at a time when the SCA was the highest court of appeal. That is no longer the case. Its decisions on the constitutionality of an Act of Parliament or conduct of the President have no force or effect unless confirmed by this Court. Its powers in this regard are therefore no different from those conferred upon the High Court.[87]

Despite the court's evasiveness on the issue, it is probably safe to say that, as a general rule, law invalidated by the interim Constitution remains invalid after its repeal, notwithstanding any substantive difference that there might be in the provisions of the two Constitutions. This is the logical implication of item 2 of Schedule 6 of the 1996 Constitution: '[a]ll law that was in force when the new Constitution took effect, continues in force. . .'. Repeal of the interim Constitution does not deprive it of the legal effect that it had while it was in force. One effect was the automatic invalidation of all inconsistent law. Such law is therefore not in force at the time of the transition to the 1996 Constitution and cannot be resuscitated by it.

Where the interim Constitution is more protective that the final, the implications of *Prince* may be significant. For example, an applicant may choose to attack an old order law for inconsistency with the right to freedom of economic activity (s 26 of the interim Constitution) rather than relying on the narrower right to professional freedom (s 22 of the 1996 Constitution).[88]

[86] Ibid para 36.
[87] Ibid para 38.
[88] See *S v Jordan* 2002 (6) SA 642 (CC) paras 2–4. On the comparative scope of the two provisions see 22.3*(a)* in Chapter 22 below.

Logically speaking, the doctrine of objective invalidity means that in the case of old-order legislation, invalidity must first be assessed in terms of the interim Constitution, notwithstanding that the cause of action may have arisen during the operation of the 1996 Constitution. This, however, does not happen in practice. In *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council (Moise II)*[89] the Court dealt with an application to amend the order that it had made earlier in *Moise v Greater Germiston Transitional Local Council (Moise I)*.[90] In *Moise I*, the court had confirmed the declaration of invalidity by a High Court of s 2(1)*(a)* of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970. The point made by the applicants in *Moise II* was that the Limitation Act was pre-constitutional legislation. It was found by the High Court to be a violation of the right of access to court in s 34 of the 1996 Constitution. Section 22 of the interim Constitution also contained a right of access to court in all relevant respects identical to the one in s 34. One would therefore have expected, in the light of the *Prince* decision, that the sub-section had become invalid at the moment of commencement of the interim Constitution.

The Constitutional Court dismissed the application for an amendment on the basis that the consistency of the Limitation Act with the interim Constitution had not been raised or canvassed in the High Court. Arguably, and if properly raised, a court should consider whether a law should be declared invalid with reference to the interim Constitution if it survives a challenge under the 1996 Constitution.[91]

(ii) *The non-retrospectivity rule*

Neither the interim nor the 1996 Constitution is retrospective in its operation. A law is retrospective if it states that, at a past date, the law shall be taken to have been that which it was not, so as to invalidate what was previously valid or vice versa. Neither the interim[92] nor the 1996 Constitution[93] reaches backward so as

[89] *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council (Moise II)* 2001 (4) SA 1288 (CC).
[90] *Moise v Greater Germiston Transitional Local Council (Moise I)* 2001 (4) SA 491 (CC).
[91] See also *S v Jordan* (note 88 above) in which the Constitutional Court, after holding that the High Court had erroneously applied the 1996 Constitution to an equality challenge to conduct arising during the period of operation of the interim Constitution, held that the error was not fatal to the hearing of the appeal by the Constitutional Court. This was because '[t]here is no material difference between the provisions of section 8 of the interim Constitution and section 9 of the Constitution, both of which deal with discrimination. It therefore matters not which Constitution was applied by the High Court in reaching its conclusion that . . . [the challenged legislation] was discriminatory and therefore inconsistent with the Constitution. We [ie, the Constitutional Court on appeal] can therefore apply the interim Constitution' (para 4).
[92] *Du Plessis* (note 4 above) para 13. According to the Constitutional Court the rule of non-retrospectivity is subject to a possible exception: 'we leave open the possibility that there may be cases where the enforcement of previously acquired rights would in the light of our present constitutional values be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis' (para 20). In *Tsotetsi v Mutual and Federal Insurance Company Ltd* 1997 (1) SA 585 (CC), O'Regan J stated that 'Such a case could only arise first, if it was clear that the challenged provision or conduct was a gross violation of the provisions of the Bill of Rights, and secondly, if there special and peculiar reasons which would suggest that an order with retroactive effect should be made in a particular case' (para 9). To date there has been no use of the exception by the Constitutional Court or any other court: *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) para 35.

to invalidate actions taken under laws valid at the time, even if those laws were contrary to fundamental rights. The corollary also holds: the Constitution cannot retrospectively validate actions that were unlawful in terms of pre-1994 law.[94] Also, the Constitution does not interfere with rights that vested before it came into force.[95]

The rule that the Constitution does not apply retrospectively affects challenges to violations of human rights that occurred before the commencement of the Constitution. Put another way, the rule means that a litigant can only seek constitutional relief for a violation of human rights that occurred after commencement.[96] As we have seen, the implication of the doctrine of objective constitutional invalidity is that on the date of the Constitution's commencement, laws that are inconsistent with the Constitution cease to have legal effect.[97] But this does not mean that acts performed and things done under such (unconstitutional) laws before the Constitution came into force are also invalid. Since the Constitution does not operate retrospectively, they remain valid and an applicant who complains about such actions will not be allowed to challenge the constitutionality of the enabling laws. The constitutional validity of the enabling law becomes irrelevant since the conduct authorised by the law remains valid.

For example, in *Rudolph v Commissioner of Inland Revenue* agents of the Commissioner, acting in terms of s 74(3) of the Income Tax Act 58 of 1962, searched the home and business premises of the applicants and seized various documents. The actions took place in October 1993 and on 22 April 1994. The applicants contended that s 74(3) was unconstitutional and therefore that the search and seizures were invalid. The Constitutional Court held that because the actions complained of took place before commencement of the interim Constitution in terms of legislation valid at the time they could not be impugned.[98] The rule of non-retrospectivity only applies to violations that took place before commencement. It obviously does not apply to violations of rights that take place after commencement of the Constitution but that are connected to matters

[93] *S v Pennington* 1997 (4) SA 1076 (CC) para 36 (nothing in the 1996 Constitution which suggests that the non-retrospectivity rule is no longer applicable, or that it was intended that the 1996 Constitution should have retrospective application).

[94] *S v Basson* 2005 (1) SA 171 (CC) para 36.

[95] *Tsotetsi* (note 92 above) para 12. There is an exception. Both Constitutions provide expressly for their retroactive application to dispossessions of rights in land that took place after 19 June 1913 (s 121(2) and (3) of the interim Constitution and s 25(7) of the 1996 Constitution). See *Alexkor* (note 92 above) para 36.

[96] See *Gardener v Whitaker* 1996 (4) SA 337 (CC) para 13 ('the right to freedom of speech [in the interim Constitution] . . . cannot be invoked as providing a defence to an action for damages founded upon a defamation uttered before the Constitution came into force'); *Key v Attorney-General* 1996 (4) SA 187 (CC) para 6 ('none of the events of which the applicant complains can be said to constitute a breach of any of his rights under the Constitution. Such rights had not yet come into existence when the events took place. Nor did — nor could — the subsequent advent of the Constitution, by affording rights and freedoms which had not existed before, render unlawful actions that were lawful at the time at which they were taken').

[97] *National Coalition For Gay & Lesbian Equality v Minister of Justice* (note 70 above) para 84.

[98] *Rudolph v Commissioner of Inland Revenue* 1996 (4) SA 552 (CC) para 15: 'Chapter 3 of the interim Constitution is irrelevant for the determination of the case because the acts of issuing the authorisations and of searching for and seizing the documents in question were all completed before the interim Constitution came into operation'.

arising prior to commencement. For example, in *S v Makwanyane*[99] the accused was convicted of murder and sentenced to death well before the commencement of the interim Constitution. Nevertheless he was able to successfully contend that the death penalty was unconstitutional. The reason is, of course, that a violation of his rights would take place *after* commencement, when the death penalty was carried out. The same goes for fair trial and other procedural rights. If a criminal trial begins on 26 April 1994, the accused should, on 27 April 1994, be entitled to complain that the procedures used in the trial are a violation of the fair trial rights in the Constitution.

The rule of non-retrospectivity only limits the 'reach' of the Bill of Rights. In other words, it only covers the *direct* application of the Bill of Rights and it does not prevent the courts from applying the Bill of Rights indirectly to the law when developing the common law or interpreting a statute, even if the dispute arose before the commencement of the Constitution. This is because the post-constitutional development of the common law or reading down of statutes with reference to the Constitution does not result in the Constitution working retroactively. Judge-made law is always retrospective in its operation.[100] It must be added however that the Constitutional Court has not explicitly decided that the rule of non-retrospectivity does not hold for the indirect application of the Bill of Rights.[101]

In *Du Plessis v De Klerk*, the Constitutional Court expressly left open the question whether a litigant could rely on s 35(3) of the interim Constitution in respect of a common-law claim which arose prior to the date on which the interim Constitution came into force.[102] Kentridge AJ nevertheless remarked that 'it may be that a purely prospective operation of a change in the common law will be found to be appropriate when it results from the application of a constitutional enactment which does not itself have retrospective operation'.[103] However, in *Gardener v Whitaker*, Kentridge AJ seemed to condone the indirect application of the Bill of Rights to the law of defamation in relation to an alleged defamation that took place before the commencement of the interim Constitution.[104] Similarly, in *Key v Attorney-General* a search and seizure of documents had been completed before the interim Constitution came into force. This meant

[99] *S v Makwanyane* 1995 (3) SA 391 (CC).

[100] *Du Plessis* (note 4 above) para 65.

[101] In *Brummer v Gorfil Brothers Investments* 2000 (2) SA 837 (CC) para 5 the Constitutional Court assumed that it could exercise a discretion to develop the common law retrospectively in appropriate cases. It not clear why the retrospective development of the common should be a matter of 'discretion'. Section 39(2) demands such a development. In *Mthembu v Letsela* 2000 (3) SA 867 (SCA) paras 36–40 the SCA applied the standard used for direct retroactive application (ie, the previously acquired rights would be considered grossly unjust and abhorrent in the new order) to an argument for the indirect application of the Bill of Rights to customary law. Applying the test, the court saw no need to intervene with a rule of customary law that prevented illegitimate children from inheriting. The decision was overruled in *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) paras 98–100.

[102] Note 4 above, paras 65–6. In *Alexkor* (note 92 above) the court again left open for future decision the 'question whether a court, when considering the common law applicable at a time before both the interim Constitution and the Constitution came into force, may develop the common law in the light of provisions of the Constitution as provided for by section 39(2) of the Constitution' (para 38).

[103] Note 4 above, para 66

[104] *Gardener* (note 96 above) para 13.

that the statutory provisions authorising the search and seizure could not be attacked as violations of the Constitution. Kriegler J nevertheless stated that if the evidence obtained by way of the search and seizure was tendered in criminal proceedings against the applicant, he would be entitled to raise Constitution-based objections to its admissibility.[105] While the non-retrospectivity rule prevented the applicant in *Key* from challenging the provisions of the Investigation of Serious Economic Offences Act 117 of 1991 before or during the trial, a discretion to exclude otherwise admissible evidence could be developed by indirectly applying the Bill of Rights.

(iii) *Application of the Bill of Rights to matters pending at the date of commencement*

Court proceedings that commenced prior to the coming into effect of the interim or 1996 Constitutions, but that had not yet been finalised when those Constitutions took effect are governed by item 17 of Schedule 6:

> **Cases pending before courts**
> **17.** All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise.

This means that court proceedings that commenced before the coming into effect of the 1996 Constitution but after the coming into effect of the interim Constitution must be decided in terms of the interim Constitution, unless the interests of justice require otherwise.[106] Proceedings that commenced before the coming into effect of the interim Constitution must be dealt with in accordance with the law in force at the time, unless the interests of justice require otherwise.

The meaning of the term 'pending proceedings' is not entirely clear. In *S v Pennington*,[107] the appellants were convicted of fraud in the Supreme Court in January 1992. They appealed to the Appellate Division (now the Supreme Court of Appeal) against their convictions and sentences. During the period between the noting of the appeal and the hearing the interim Constitution came into force and was then superseded by the 1996 Constitution. The appeals were dismissed by the Supreme Court of Appeal on 16 May 1997. On 26 May 1997, the appellants appealed to the Constitutional Court against the decision of the Supreme Court of Appeal on the grounds that the appellants' rights to human dignity and to a fair trial in the 1996 Constitution had been infringed during their trial in 1991–92. Their argument was that, because the appeal had not yet been finalised by the time the 1996 Constitution took effect, the matter was 'pending' at commencement of the Constitution and that therefore item 17 applied. They argued further that the interests of justice required that the appellants should be entitled to rely on their fundamental rights.

[105] *Key* (note 96 above) para 12
[106] See *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) para 7, *S v Jordan* (note 88 above) para 2.
[107] Note 93 above

The Constitutional Court emphasised that the 1996 Constitution was not retrospective. The appellants had been tried and convicted at a time when there was no Bill of Rights. They were fairly tried in accordance with the law then in force and they were correctly convicted in accordance with that law. The subsequent introduction of a Bill of Rights in the interim Constitution and the 1996 Constitution did not convert what were regular proceedings at the time of their trial into irregular proceedings.[108] The phrase 'unless the interests of justice require otherwise' did not make the provisions of the 1996 Constitution applicable retroactively. In any event it could hardly be said to be in the 'interests of justice' to allow completed trials to be re-opened and to be dealt with in accordance with laws of procedure and evidence which were not in force at the time of the trial.[109]

The Constitutional Court has stated that the phrase 'interests of justice' 'denotes an equitable evaluation of all the circumstances of a particular case' and, in that evaluation, 'an important test is whether the individual's position is substantially better or worse under the final Constitution that under the interim Constitution'.[110] This must require giving a litigant the benefit of rights granted by the 1996 Constitution, that were not granted by the interim Constitution. *S v Naidoo*[111] provides a good example. The state sought to tender evidence that had allegedly been obtained illegally during the period of operation of the interim Constitution. The proceedings were pending at the date of commencement of the 1996 Constitution. The High Court held that the interests of justice required hearing the matter under the 1996 Constitution. This was because the 1996 Constitution contained a provision beneficial to the accused that the interim Constitution lacked — s 35(3) expressly providing that illegally obtained evidence must be excluded if its admission would make the trial unfair.

What of procedural differences between the 1996 and interim Constitutions? One would think that, in principle, litigants should be given the advantage of the extensive jurisdictional competence granted to the High Courts and the Supreme Court of Appeal by the 1996 Constitution. This is illustrated by *S v Meaker*.[112] This was a challenge to a reverse-onus provision contained in the Road Traffic Act 29 of 1989 and took the form of an appeal to the Witwatersrand High Court that was 'pending' before the commencement of the 1996 Constitution. If it was adjudicated under the interim Constitution, this would mean that the High Court would have no jurisdiction to decide the appeal, but would have to refer the matter to the Constitutional Court. This was because, under the interim Constitution, the Constitutional Court had exclusive jurisdiction to decide the constitutionality of Acts of Parliament. For this reason, the High Court held, it was in the interests of justice to adjudicate the case under the 1996 Constitution.

[108] Ibid para 35
[109] Ibid para 36
[110] *Sanderson v Attorney-General (Eastern Cape)* 1998 (2) SA 38 (CC) para 17
[111] Note 65 above
[112] *S v Meaker* 1998 (8) BCLR 1038 (W).

A year after the 1996 Constitution took effect, '[p]ractical efficiency and uniformity seem to make it desirable that, where their application will prejudice neither party, the procedures and wording of the new Constitution should guide the courts' handling of constitutional challenges to statutes'.[113]

However, the Supreme Court of Appeal took a different approach. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,[114] the SCA held that there was no merit in arguing that the interests of justice required it to exercise the constitutional jurisdiction that it had under the 1996 Constitution but lacked under the interim Constitution. 'This cannot be the correct approach', Mahomed CJ held. 'If it was correct the Court would have to exercise jurisdiction in all proceedings which were pending when the new Constitution took effect'[115] Item 17 should be taken to mean that, generally, pending cases were to be dealt with under the interim Constitution's procedures, unless there were shown to be compelling reasons why, in a particular case, the interests of justice required the application of the 1996 Constitution.

The Constitutional Court then considered the issue,[116] favouring the *Meaker* approach. According to the Court, the continued application of the jurisdictional provisions of the interim Constitution to cases pending before the SCA leads to disruptions, delays and unnecessary costs in the process of disposing of appeals. In addition, it leads to the expertise of the SCA not being brought to bear in constitutional matters. If the SCA were to deal with pending matters under the 1996 Constitution, no injustice would be done to the litigants in such cases. In applying the 1996 Constitution, the SCA would have regard to the date on which the alleged infringement of the Constitution occurred (and unless the interests of justice required otherwise) it would deal with the matter under its constitutional jurisdiction by applying the law in force at the time the infringement occurred. In other words, it would deal with such matters in exactly the same way as it would have dealt with them if the proceedings had commenced after 4 February 1997.[117]

One could summarise the item 17 jurisprudence up to this point as follows.

1. Item 17 does not affect the rule that neither the interim nor the 1996 Constitution is retrospective in its operation and that the constitutionality of conduct is to be determined by the substantive law applicable at the time of the conduct.[118]
2. Proceedings pending before the 1996 Constitution came into effect must be dealt with in terms of the interim Constitution unless the interests of justice require otherwise. The interests of justice generally require that litigants should get the benefit of rights granted by the 1996 Constitution where there is no similar right in the interim Constitution, or where the wording of the 1996 Constitution is more generous. (This must not be read as an exception to 1, however. Conduct that took place under the interim Constitution must be assessed in terms of that Constitution.)
3. Where the applicable sections of the two Constitutions are substantially the same, or where they are only minor differences in wording, there is no need to apply the 1996 Constitution.[119]
4. Litigants should get the benefit of the jurisdictional and procedural provisions of the 1996 Constitution.

[113] Ibid 1044A–C
[114] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 1115 (SCA)
[115] Ibid 1126A–B
[116] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC)
[117] See also *Pharmaceutical Manufacturers* (note 12 above) para 30, *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Service* 2001 (3) SA 210 (W), 218-9
[118] *Fedsure* (CC) (note 116 above) para 113

(d) Territorial application of the Bill of Rights

Though it is obvious that the Constitution applies throughout the national territory it is less obvious whether it has any extraterritorial application. The question was considered by the Constitutional Court in *Kaunda v President of the Republic of South Africa*.[120] The case arose from an incident in which the applicants, all South African citizens, had been arrested in Zimbabwe on charges that they had plotted to stage an coup in Equatorial Guinea. The applicants sought relief in the form of an order directing the South African government to seek assurances from the governments of Zimbabwe and Equatorial Guinea that the death penalty would not be imposed on them. The basis of the application was a contention that the applicants' constitutional rights to a fair trial, to dignity, life and freedom and security of the person were being infringed in Zimbabwe and were likely to be infringed if they were extradited to Equatorial Guinea. The state's duty to protect the rights of the applicants (stemming from s 7(2)) required them to be provided with diplomatic protection.

This argument, Chaskalson CJ held for the majority of the court, required acceptance of the proposition that 'the rights nationals have under our Constitution attach to them when they are outside of South Africa, or that the state has an obligation under section 7(2) to "respect, protect, promote, and fulfil" the rights in the Bill of Rights which extends beyond its borders'.[121] According to the court, to the extent that the Constitution provides the framework for the governance of South Africa it is territorially bound and has no application beyond the borders of the Republic.[122] As for the Bill of Rights, though foreigners are entitled to require the South African state to respect, protect and promote their rights they lose the benefit of that protection when they leave the national territory.[123] The argument of the applicant, to the effect that s 7(2) places a more extensive obligation on the state to respect, protect and promote the rights of South Africans when they are in foreign countries, was rejected. The bearers of

[119] *S v Ntsele* 1997 (11) BCLR 1543 (CC) para 17, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 12
[120] *Kaunda* (note 51 above)
[121] Ibid para 32.
[122] Ibid para 36
[123] Ibid

the rights in the Bill of Rights are people in South Africa and the Bill of Rights does not have general application beyond the national territory.[124]

3.4 Indirect Application of The Bill of Rights

Indirect application means that the Constitution and the Bill of Rights does not directly bind actors. Instead, the influence of the Bill of Rights is mediated through other law: statutory or common law. In principle, where possible, a legal dispute should be decided in terms of the existing principles or rules of ordinary law, properly interpreted or developed with reference to the values contained in the Bill of Rights, prior to any direct application of the Bill of Rights to the dispute.[125] When it comes to statutory law the principle simply means that a court must first attempt to interpret legislation in conformity with the Bill of Rights (indirect application) before considering a declaration that the legislation is in conflict with the Bill of Rights and invalid (direct application). When it comes to the common law, the principle supports the courts' longstanding and routine practice of developing the common law in conformity with the Bill of Rights (indirect application) in preference to assessing whether the common law is in conflict with the Bill of Rights (direct application).[126]

(a) Indirect application to legislation: 'reading down'

Since the Bill of Rights binds all the original and delegated lawmaking actors, it will always apply directly to legislation. But, before a court may resort to direct application and invalidation, it must first consider indirectly applying the Bill of Rights to the statutory provision by interpreting it in such a way as to conform to the Bill of Rights.

Section 39(2) places a general duty on every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.[127] Statutory interpretation must positively promote the Bill of Rights and the other provisions of the Constitution, particularly the fundamental values

[124] Ibid para 37. The court went on (para 44) to discuss the possibility of 'special circumstances where the laws of a state are applicable to nationals beyond the state's borders', but held that this was only a permissible under international law if the application of the law did not interfere with the sovereignty of other states. This would be the case where there are formal agreements or informal acts of cooperation between states which sanction the one state's exercise of jurisdiction in the territory of the other. In such cases, according to the Constitutional Court, 'questions of sovereignty do not arise and thus nationals affected by their state's action in a foreign territory may conceivably invoke the protection of their Constitution' (fn 31).

[125] *S v Mhlungu* 1995 (3) SA 867 (CC) para 59 ; *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) paras 2-5; *Ferreira v Levin NO* (note 26 above) para 199; *S v Bequinot* 1997 (2) SA 887 (CC) para 12. The continued application of the principle under the 1996 Constitution was confirmed in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21 and *Ex parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC) para 64.

[126] As we have seen, the correctness of this practice is in some doubt since the decision in *Khumalo* (note 67 above) paras 29–34 which seems to indicate that, where applicable, direct application is the appropriate method of application to the common law.

[127] See, for example, *Batchelor v Gabie* [1999] 2 All SA 65 (C) where the court indirectly applied the Bill of Rights to the interpretation of a statute 'though neither party to the litigation has raised or relied on any section of the Bill'.

in s 1.[128] In other words, the legislature is presumed to have intended to further the values underlying the Bill of Rights by passing legislation that is in accordance with the Bill of Rights, unless the contrary is established.

The general duty to promote the Bill of Rights becomes particularly important when it is possible to avoid an inconsistency between a legislative provision and the Bill of Rights by interpreting the legislation so that it conforms to the Bill of Rights. Under the interim Constitution such a process of interpretation became known as 'reading down'. According to s 35(2) of the interim Constitution, where legislation was capable of being read in two ways — as a violation of fundamental rights or, if read more restrictively, as not violating rights — the latter reading was to be preferred.[129] Section 35(2) is not repeated in the 1996 Constitution, but the courts and other tribunals are still permitted, and indeed required, to 'read down' by virtue of s 39(2). In any event, s 35(3) of the interim Constitution, which is the predecessor to s 39(2), always encapsulated the notion of reading down without any need for it to be expressly spelled out in the section.[130]

In *Govender v Minister of Safety and Security*[131] the Supreme Court of Appeal set out a standard formula for dealing with constitutional challenges to legislation. A judge or magistrate is required:

(a) to examine the objects and purport of the Act or the section under consideration;
(b) to examine the ambit and meaning of the rights protected by the Constitution;
(c) to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, ie by protecting the rights therein protected;
(d) if such interpretation is possible, to give effect to it, and

[128] See *Hyundai Motor Distributors* (note 22 above) para 22 ('purport and objects' of the Constitution find expression in the fundamental values identified in s 1); *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC) para 18: 'The Constitution is the supreme law of the land. It is unnecessary for legislation expressly to incorporate terms of the Constitution. All legislation must be read subject thereto.'

[129] Section 35(2): 'No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used prima facie exceeds the limits imposed in this Chapter, provided that such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.'

[130] *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 85; *Hyundai Motor Distributors* (note 22 above) para 23.

[131] *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA). See also *S v Walters* (note 125 above) paras 26–7 (challenges to legislation adjudicated first by determining whether the legislation limits rights; this entails examining, in the light of s 39(1) and (2) of the Constitution *(a)* the content and scope of the relevant protected right(s) and *(b)* the meaning and effect of the impugned enactment to see whether there is any limitation of *(a)* by *(b)*); *S v Thebus* 2003 (6) SA 505 (CC) para 29. While the *Govender* decision only refers to 'magistrates and judges' it must be kept in mind that it is not only courts that may indirectly apply the Bill of Rights, but also other tribunals and forums. All institutions involved in the resolution of legal disputes must therefore indirectly apply the Bill of Rights to the law. They must do so to avoid inconsistency between the Bill of Rights and the law, but they must indirectly apply the Bill of Rights even when there is no conflict between the Bill of Rights and the law. In other words the duty is a general one and it is not restricted to situations where there is conflict between the Bill of Rights and the law. In *Mkhize v Commission for Conciliation, Mediation and Arbitration* 2001 (1) SA 338 (LC) the Labour Court emphasized that the CCMA is a 'tribunal' within the meaning of s 39 of the Constitution and that a commissioner was therefore obliged by s 39(2) to entertain a constitutional argument relating to the exclusion of evidence obtained in violation of the right to privacy.

(e) if it is not possible, to initiate steps leading to a declaration of constitutional invalidity.[132]

This power of interpretation, considerable though it is, is not unconstrained. Taken to its limit, the power to read down legislation would mean that any legislative provision could be made to conform to the Constitution by a suitably dogged exercise of interpretative will. This would make the powers of the courts to declare legislation invalid superfluous and would deny the legislatures any significant role in the interpretation of the Constitution. Therefore, according to the SCA, an interpretation of legislation is constrained by the requirement that it must be 'reasonably possible'.[133] The Constitutional Court earlier expressed the same qualification in different words in the *Hyundai Motor Distributors* case: an interpretation should not be 'unduly strained'.[134] Both qualifications probably mean something along the lines of 'plausible' — the result of the interpretative process must be a reading of the legislation that is defensible using the repertoire of justificatory arguments supplied by the law of interpretation of statutes.[135]

The term 'reading down' should not be read to mean reading restrictively. Section 39(2) sometimes requires more than simply narrowing the ambit of legislation so as to avoid conflict with rights. A narrow construction of a legislative provision may sometimes result in avoiding an alleged conflict between the provision and the Bill of Rights, for example when discretionary powers conferred are too wide[136] On other occasions, the statute may have to be generously interpreted to avoid the conflict, for example where the constitutional invalidity lies in the lack of any express grant of discretionary power[137] The point is that, if the

[132] *Govender* (note 131 above) para 11.

[133] See also *Mateis v Ngwathe Plaaslike Munisipaliteit* 2003 (4) SA 361 (SCA) (cannot use interpretation to make a word in a statute mean something diffirent to its clear meaning. The approach must rather be a direct challenge to the constiutitonality of the provision.)

[134] Note 22 above, para 24. See, for example, *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA) para 31 (court declining to interpret words 'wife' and 'husband' in marriage formula to read 'spouse' so as to permit single-sex marriages since it is a substitution of one word for another; if statutory wording cannot reasonably bear the meaning that constitutional validity requires, it must be declared invalid and the 'reading in' remedy adopted). See also *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* (note 125 above) paras 23–24 (word 'spouse' cannot be read down to include same-sex partner; reading down differs from reading-in since the former, being an interpretative process, is limited to what the text is reasonably capable of meaning). Contrast *Daniels v Campbell NO* 2004 (5) SA 331 (CC) (terms 'spouse' and 'survivor' reasonably capable of being read down to include Muslim marriages, thereby avoiding unfair discrimination on grounds of religion). See also *S v Bhulwana* 1996 (1) SA 388 (CC) (phrase 'until the contrary is proved' cannot reasonably be read to mean 'unless the evidence raises a reasonable doubt'). On reading in see, further, 8.6*(a)*(ii)*(bb)* in Chapter 8 below.

[135] But the law of interpretation of statutes must itself be interpreted or developed to conform to the Constitution. See, generally, Lourens du Plessis *The Re-Interpretation of Statutes* (2002) (Constitution has an all-pervasive effect on interpreting statutes, and on the law relating to statutory interpretation).

[136] See *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) (when a statutory provision confers a broad discretion upon officials it may inevitably be read down to narrow the discretion, but a court should be slow to do so if the result would leave officials untrained in law with discretionary power to limit fundamental rights without legislative guidance).

[137] See *De Beer NO v North-Central Local Council & South-Central Local Council* 2002 (1) SA 429 (CC) para 24 (legislation interpreted to confer a discretion on a court not to grant an order of execution against property in circumstances where the property owner has not been given fair notice).

statutory provision is genuinely ambiguous or otherwise unclear, the interpretation which conforms with the Bill of Rights must be chosen.

Section 39(2) does not have any bearing on the interpretation of the Constitution or the Bill of Rights. The subsection deals with statutory interpretation only.[138]

(b) Indirect application to disputes governed by common law

(i) *The obligation to develop the common law*

As we have seen, legislation is approached by first interpreting it with the Constitution in mind, prior to any direct application of the Constitution (and any finding of unconstitutionality). In the case of the common law, the approach is similar but not identical, the difference lying in the extent of the remedial powers of the courts. If impugned legislation is found to limit a right and the limitation does not satisfy the justification standard in s 36 the court provides a remedy by declaring the legislation unconstitutional and, where possible, ameliorating the constitutional defect through reading in or notional or actual severance. 'In that event', according to Moseneke J in *S v Thebus*, 'the responsibility and power to address the consequences of the declaration of invalidity resides, not with the courts, but pre-eminently with the legislative authority'.[139] But the common law is different. It is the law of the courts and not the legislature.

> The superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution.[140]

According to the court, the need to develop the common law under s 39(2) could arise in at least two instances. The first was when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility was that 'a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects'. If so, 'the common law must be adapted so that it grows in harmony with the "objective normative value system" found in the Constitution'.[141] In a constitutional challenge of the first type the court must perform a 'threshold analysis', being whether the rule limits an entrenched right. If the limitation is

[138] The difference between interpreting the Bill of Rights and legislation has been explained as follows by George CJ in *Zimbabwe Township Developers (Pty) Ltd v Lou's Shoes (Pty) Ltd* 1984 (2) SA 778 (ZS) 783C. 'One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the [accepted] approach . . . Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution.'

[139] Note 131 above, para 30. The Constitutional Court was unanimous on this issue. See also See *Du Plessis* (note 4 above) para 63: 'The common law, it is often said, is developed on an incremental basis. Certainly it has not been developed by the process of "striking down" '.

[140] *Thebus* (note 131 above) para 31 (footnotes omitted).

[141] Ibid para 28, quoting *Carmichele* (note 1 above) para 56.

not reasonable and justifiable, the court itself is obliged to adapt, or develop the common law in order to harmonise it with the constitutional norm.[142]

In its earlier decision in *Carmichele*, the Constitutional Court emphasised that the constitutional obligation to develop the common law is not discretionary but is rather a 'general obligation' to consider whether the common law is deficient and, if so, to develop it to promote the objectives of the Bill of Rights.[143] The obligation applied in both civil and criminal cases, irrespective of whether or not the parties have requested the court to develop the common law.[144]

(ii) *The methodology of indirect application*

The indirect application of the Bill of Rights to the common law can take many forms. The first method is to argue for a change in the existing principles of the common law so that the law gives better effect to Bill of Rights. This argument has been made in the areas of defamation and restraint of trade.[145] In restraint of trade cases the argument that the incidence and content of the onus have to be reformed with reference to the s 22 right to occupational freedom has not been particularly successful.[146] The Supreme Court of Appeal has also been disinclined to reform the principles of the law of contract in a similar manner to its development of the law of delict.[147]

The second method is to 'apply' the common law with due regard to the Bill of Rights. This method was employed by Davis AJ in *Rivett-Carnac v Wiggins*[148] Davis AJ declined to consider the constitutionality of the presumption relating to animus iniuriandi in defamation cases but clearly took the Bill of Rights into account in reaching the conclusion that the statements made in this particular case were not defamatory. Davis AJ held that the 'boundary between criticising professional work without reducing such professional's reputation in the eyes of colleagues and the publication of defamatory statements about such a professional must be carefully drawn, particularly in the light of our new constitutional commitments'.[149]

[142] *Thebus* (note 131 above) para 32.
[143] Note 1 above, para 33.
[144] Ibid para 36.
[145] The line of defamation cases from *Holomisa v Argus Newspapers* 1996 (2) SA 588 (W) to *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) is surveyed in 16.5*(c)* in Chapter 16 below.
[146] See the discussion in 22.4 in Chapter 22 below.
[147] Compare *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (majority resisting the attempt to import good faith as a free-floating basis for setting aside contractual terms and reacted strongly to the idea of judicial discretion not to enforce unreasonable or unfair contractual terms) with the post-*Carmichele* line of 'duty to protect' cases discussed in 12.1*(e)* in Chapter 12 below.
[148] *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C). The technique can also be used to interpret contracts. See *Farr v Mutual & Federal Insurance Co Ltd* 2000 (3) SA 684 (C) (interpreting, in the light of the equality clause, an insurance contract excluding liability of the insurer for injury to 'a member of the policy holder's family normally resident with him' to include insured's long-term homosexual partner had been injured in a car accident while travelling with the insured). See also *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA) para 7 (contractual interpretation requires reading the contractual provision in the context of the contract as a whole in its commercial setting and against the background of the common law and, now, with due regard to any possible constitutional implication).
[149] *Rivett-Carnac* (note 148 above) 573D.

The third method, which is closely related to the second, is to give constitutionally-informed content to open-ended common-law concepts, such as 'public policy' or 'contra bonos mores' or 'unlawfulness'. It is well summed up by Van Dijkhorst J in *De Klerk v Du Plessis*:

> Section 35(3)[of the interim Constitution] is intended to permeate our judicial approach to interpretation of statutes and the development of the common law with the fragrance of the values in which the Constitution is anchored. This means that whenever there is room for interpretation or development of our virile system of law that is to be the point of departure. When in future the unruly horse of public policy is saddled, its rein and crop will be that value system.[150]

(iii) *Limits on indirect application to the common law*

Rules of the common law must be assessed for inconsistency with the Bill of Rights and, if necessary, developed within the 'matrix of . . . [the] objective, normative value system' established by the Constitution.[151] Courts have a great deal more scope to 'develop' the common law by way of indirect application than they have when they 'interpret' legislation, where they are bound to a reasonable interpretation of the statute.[152] Are there any limits on the power to develop the common law? The first limit is that when the common law is developed it must be done incrementally and on a case by case basis.[153] The development cannot take place in the abstract, but the court must apply the law as it is found to be in the case before it.[154] This approach has also found favour when the Bill of Rights is directly applied to the common law. Indeed it is even more important when the Bill of Rights is directly applied because, as we have pointed out, the consequences of a direct application differ from those of an indirect application. So for example, in *Shabalala v Attorney-General, Transvaal*[155] the Constitutional Court was careful, after striking down a common-law rule, to balance the need to provide guidance and with the danger of being prescriptive. Such care must also be taken when the Bill of Rights is indirectly applied. Some guidance on the new approach has to be provided, while room must be left for the courts to develop the principle on a case by case basis.

One of the most important limitations on the power to develop the common law via the indirect application of the Constitution is the doctrine of stare decisis. This limitation is discussed in the following section.

[150] *De Klerk v Du Plessis* 1995 (2) SA 40 (T), 50. See, also, *Carmichele v Minister of Safety and Security* 2002 (10) BCLR 1100 (C) ('reasonableness, on which the legal convictions of the community are based is now to be found in the Constitution and not in some vague notion of public sentiment or opinion').
[151] *Carmichele* (CC) (note 1 above) para 54.
[152] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) BCLR 280 (C), 289A the High Court held that '[i]nterpretation concerns the giving of meaning to words as they appear within the context of a piece of legislation. A rule of common law may be incompatible with a fundamental right in a manner which is not amenable to mere interpretative treatment. The rule may then require a development, even a far-reaching development, in order to render it compatible with the Bill of Rights.'
[153] *Du Plessis* (note 4 above) para 63 ; *Carmichele* (note 1 above) para 36.
[154] *Gardener v Whitaker* (note 96 above) para 16.
[155] *Shabalala* (note 70 above).

(iv) *Stare decisis and indirect application*

In *Govender v Minister of Safety and Security* reading down was employed to hold that s 49(1)*(b)* of the Criminal Procedure Act was not unconstitutional. In a subsequent decision, the Transkei High Court in *S v Walters*,[156] confronted with the precedent of the SCA decision in *Govender*, held that it did not have to follow it. Appeal court decisions on the constitutional validity of legislation, according to Jaftha AJP, 'rank in the same level' as High Court decisions. The reason is that both decisions had no force unless confirmed by the Constitutional Court.[157] Since, in the view of Jaftha AJP, the SCA's decision on s 49(1)*(b)* in *Govender* was clearly wrong it did not have to be followed by the High Court and the subsection was struck down to the extent that it permitted the use of force to prevent a suspect from fleeing.

The High Court's stand on the issue merited a stern rebuke from the Constitutional Court in its confirmation decision:

> the trial court in the instant matter was bound by the interpretation put on section 49 by the SCA in *Govender*. The judge was obliged to approach the case before him on the basis that such interpretation was correct, however much he may personally have had his misgivings about it. High courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or . . . [the Constitutional Court] does so in respect of a constitutional issue.[158]

But this holding, Kriegler J emphasised, applied only to the binding effect of decisions of higher tribunals 'delivered after the advent of the constitutional regime and in compliance with the requirements of section 39 of the Constitution'.[159] The extent of application of stare decisis to pre-1994 decisions (if this is what 'the advent of the constitutional regime' means) and to direct applications of the Constitution was not decided.

The subsequent decision of the Supreme Court of Appeal in *Afrox Healthcare Bpk v Strydom*[160] fills the gap left open by the Constitutional Court. As regards the binding effect of pre-Constitutional authority of the appeal court there are three distinct situations that can arise:

(1) Direct application of the Constitution to the common law: 'the High Court is convinced that the relevant rule of the common law is in conflict with a provision of the Constitution'. In such situations pre-Constitutional authority is not binding on a High Court.[161]
(2) Pre-constitutional decisions of the appeal court based on open-ended considerations such as boni mores or public interest. In such situations, the High Court can depart from earlier authority if convinced, taking the values

[156] *S v Walters* 2001 (2) SACR 471 (Tk).
[157] Ibid para 19.
[158] *S v Walters* (CC) (note 125 above) para 61
[159] Ibid.
[160] Note 76 above.
[161] Ibid para 27 (our translation)

of the Constitution into account, that it no longer reflects the boni mores or the public interest.[162]
(3) The third situation is that of an indirect application of the Constitution to the common law, by way of s 39(2). Even if convinced that the rule must be developed to promote the spirit, purport and objects of the Bill of Rights, a High Court is obliged to follow the authority of pre-Constitutional decisions of the appeal court.[163]

One can put *Afrox* and *Walters* together in the following way:

(1) Post-constitutional decisions of higher courts are binding, whether they are on constitutional issues or not.
(2) Pre-1994 decisions of higher courts on the common law are binding, except in cases of direct conflict with the Constitution or in cases involving the development of open-ended standards such as boni mores.

The distinction between direct and indirect application is therefore crucial to the impact of the *Afrox* decision. Section 39(2), the SCA holds, does not authorise lower courts to depart from higher authority, whether pre- or post-constitutional.[164] The subsection must be read with s 173, recognising the inherent jurisdiction of the High Courts to develop the common law. It is that power which is exercised when the courts develop the common law in accordance with s 39(2). But the power has always been constrained by the doctrine of stare decisis. There is nothing to indicate that the Constitution has changed this.[165]

The *Afrox* and *Walters* decisions have been strongly criticised.[166] There is, however, a significant omission from the *Afrox* decision. As we have seen indirect application in terms of s 39(2) does not only involve development of the common law, but also statutory interpretation taking the spirit, purport and objects of the Bill of Rights into account. But the SCA in *Afrox* seems to confine itself to the first type of indirect application only. This can be taken to mean that 'post-*Afrox* High Courts still possess the jurisdiction to depart from pre-constitutional statutory interpretations of the AD'.[167] A great deal also turns on the distinction between direct and indirect application. We have seen that *Khumalo v Holomisa*[168] appears to treat direct horizontal application as a relatively simple and unexceptional process. If so, awkward appeal court precedent can easily be sidestepped. A High Court, by opting for direct application, will be understood

[162] Ibid para 28. The SCA presumably had cases in mind like *Carmichele* (note 1 above).
[163] *Afrox* (note 76 above) para 29.
[164] The decision therefore overrules *Holomisa v Argus Newspapers* (note 145 above) in which Cameron J held that the equivalent of s 39(2) — s 35(3) of the interim Constitution — 'requires the fundamental reconsideration of any common-law rule that trenches on a fundamental rights guarantee' (603).
[165] *Afrox* (note 76 above) para 29.
[166] Stuart Woolman & Danie Brand 'Is there a Constitution in this Courtroom? Constitutional Jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Public Law* 37. The two decisions, the authors note, 'limit severely the constitutional jurisdiction of the High Courts' and 'could have a deleterious effect on the development of our constitutional jurisprudence' (38).
[167] Ibid 79.
[168] Note 67 above.

to distinguish the case before it from a precedent arising from indirect application.[169]

3.5 The Manner of Application of The Bill of Rights in Legal Disputes

(a) Currency of the distinction between direct and indirect application

Under the 1996 Constitution, there is only one system of law.[170] The Constitution applies to all law, informing its interpretation and development by the courts and determining its validity.[171] This means that the parallel systems of 'constitutional' law and 'non-constitutional' law (and 'constitutional' and 'non-constitutional litigation') developed under the interim Constitution are no longer theoretically sustainable. Nevertheless, the distinction between the indirect and indirect methods of application of the Constitution to the law has not been abandoned and, as we saw in the discussion on stare decisis above, continues to have considerable practical significance, at least in so far as the common law is concerned. In what follows we attempts to state the current position as regards the two forms of application.

(b) Jurisdiction

We have seen that under the interim Constitution, the distinction between direct and indirect application of the Bill of Rights had important jurisdictional implications. The interim Constitution distinguished between constitutional matters and other matters and provided that the Constitutional Court could hear only the former and the Appellate Division only the latter. In *Du Plessis*, the Constitutional Court held that indirect application of the Bill of Rights to the common law was not a constitutional matter and therefore was within Appellate Division jurisdiction.[172] The main task of the Constitutional Court was to test the validity of the law and state conduct against the Constitution. In order to

[169] Woolman & Brand (note 166 above) 80. *Walters* (note 125 above) also poses interpretative difficulties. It is unclear whether Kriegler J's phrases 'the constitutional era' and the 'constitutional regime' refer to the period commencing with the interim Constitution in 1994 or the period of operation of the 1996 Constitution. Woolman and Brand argue convincingly that the latter interpretation makes more sense, both in the context of the *Walters* decision as whole and in the context of the different jurisdictional regimes in the two Constitutions. Under the interim Constitution, the Appellate Division had no jurisdiction to decide 'constitutional issues'. So, there is little sense in a High Court hearing a constitutional case being bound by a post-1994 and pre-1997 decision of the AD that does not engage the Constitution. This is because the absence of engagement is a result of a lack of jurisdiction rather than a principled decision by the AD that the Constitution had no application to the case. Then, in *Du Plessis v De Klerk* (note 4 above) the Constitutional Court held that the AD had the jurisdiction to develop the common law in accordance with the indirect application provisions of s 35 of the interim Constitution. Prior to this decision, the AD had taken the view that it had no authority to deal with the Constitution at all. This means, Woolman and Brand suggest, that AD decisions should have binding effect on subsequent courts only if delivered after the *Du Plessis* decision in effect conferred indirect application jurisdiction on the AD.

[170] *Pharmaceutical Manufacturers* (note 12 above) para 44.

[171] *Brisley v Drotsky* (note 147 above) para 88 (Cameron JA): 'All law now enforced in South Africa and applied by the courts derives its force from the Constitution. All law is therefore subject to constitutional control, and all law inconsistent with the Constitution is invalid'.

[172] *Du Plessis* (note 4 above) para 63.

trigger the jurisdiction of the Constitutional Court, it was therefore necessary to show that the Bill of Rights applied directly to the challenged law or conduct. Whenever the Bill of Rights merely applied indirectly to a dispute, the Appellate Division and not the Constitutional Court was primarily responsible.

Under the unitary jurisdictional system established by the 1996 Constitution all superior courts have the power to apply the Constitution directly and indirectly to the common law.[173] This means that the jurisdictional motivation for distinguishing between direct and indirect application no longer holds for common-law disputes. However, since decisions of the High Courts and the Supreme Court of Appeal declaring certain forms of legislation invalid must be confirmed by the Constitutional Court,[174] it remains important for jurisdictional reasons whether legislation is directly tested against the Bill of Rights or whether it is merely interpreted with reference to the Bill of Rights.

(c) The Bill of Rights is not always directly applicable in horizontal disputes

In *Du Plessis v De Klerk*[175] the Constitutional Court held that, in disputes between private individuals regulated by common law, the Bill of Rights in the interim Constitution could only be applied indirectly to the dispute. The interim Bill of Rights only applied directly to common-law disputes if the state was a party to the dispute, since private actors were not bound by the interim Bill of Rights. The reasoning in *Du Plessis* still holds for the 1996 Constitution when it comes to common-law disputes between private persons who are not, in terms of the formula provided for in s 8(2), directly bound by the provisions of the Bill of Rights. In such cases, the Bill of Rights can only apply indirectly to the common law.

In *Khumalo v Holomisa*, the Constitutional Court explicitly rejected the argument that the effect of binding the judiciary to the Bill of Rights was to subject the common law to the direct application of the Bill of Rights, regardless of the parties to the dispute and the particular rights relied on by the parties. This interpretation, the court held, would make s 8(3) superfluous.[176] It therefore remains necessary to distinguish between direct and indirect application as the Bill of Rights does not always apply directly to the common law in legal disputes.

(d) The purpose and effect of direct application differ from that of indirect application

The purpose of direct application is to determine whether there is, on a proper interpretation of the law and the Bill of Rights, any inconsistency between the two. The purpose of indirect application is to determine whether it is possible to

[173] Section 173. See, further, 5.3 in Chapter 5 below.

[174] Section 172(2)*(a)*. See, further, 5.4*(b)* in Chapter 5 below.

[175] Note 4 above.

[176] *Khumalo v Holomisa* (note 67 above) paras 30–32.

avoid, in the first place, any inconsistency between the law and the Bill of Rights by a proper interpretation of the two.[177]

Direct application of the Bill of Rights generates a constitutional remedy whereas indirect application does not. The reason for this is that direct application is aimed at exposing inconsistency between the Bill of Rights and law or conduct. If there is, the court then declares that law or conduct constitutionally invalid. The effect of such a declaration, according to Ackermann J and Sachs J in *Du Plessis*,[178] is to restrict the legislature's options in amending the law or enacting a similar law. Much depends of course on the terms of the court's order and its reasoning and the application of the doctrine of stare decisis, but as a general rule direct application rules out certain possibilities as constitutionally impermissible, whereas an indirect application merely proposes a construction of the law that conforms with the Constitution. Although there is therefore a difference in principle between direct and indirect application, the problem alluded to by Ackermann J and Sachs J also depends on the extent to which a court is prepared to 'pronounce on the meaning' of the Constitution. Courts generally avoid making extensive pronouncements on what the Constitution demands the common law to be, whether they apply the Bill of Rights directly or indirectly. The preferred approach is to give narrow rulings limited to the facts before the court. Such orders will preserve considerable space for the legislature to reform the common law.[179] Direct application however inevitably rules out certain options. When a law or conduct is ruled to be inconsistent with the Constitution it can no longer form part of the law. The scope of the limitation on the legislature's discretion will therefore depend on the extent of the court's ruling.

That said, there is little practical difference between the two forms of application when it comes to the common law. This is because, though notionally methodologically distinct, direct and indirect application of the Bill of Rights end up at the same point: the need to develop rules of the common law in conformity with the Bill of Rights.

There are only a few common-law cases where the method of application is likely to make a substantive difference to the result. These are cases in which a plaintiff cannot find a cause of action in the existing common law. Since the

[177] The Bill of Rights can only be indirectly applied to law. This is because conduct, whether it is state conduct or private conduct, is either valid or invalid and cannot be 'interpreted' or 'developed' to avoid any inconsistency with the Bill of Rights.

[178] *Du Plessis* (note 4 above) para 111 (Ackermann J) and para 179 (Sachs J). The same point was made by Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 87: 'It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text [of a statute], its choice is not final. Legislatures are able, *within constitutional limits*, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them'. (our emphasis)

[179] See *Carmichele* (note 1 above) para 36: 'In exercising their powers to develop the common law, judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary'.

common law does not provide a right it will be necessary to invoke directly a right in the Bill of Rights.[180]

(e) The principle of avoidance: indirect application must be considered before direct application

In *S v Mhlungu*,[181] Kentridge AJ stated:

> I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.[182]

This statement was subsequently approved by the unanimous court in *Zantsi v Council of State, Ciskei*.[183] In this case, Chaskalson P referred to the 'salutary rule' which is followed in the United States 'never to anticipate a question of constitutional law in advance of the necessity of deciding it' and 'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied'.[184] This rule, Chaskalson P added,

> allows the law to develop incrementally. In view of the far-reaching implications attaching to constitutional decisions, it is a rule which should ordinarily be adhered to by this and all other South African Courts before whom constitutional issues are raised . . . it is not ordinarily desirable for a Court to give rulings in the abstract on issues which are not the subject of controversy and are only of academic interest . . . .[185]

There are several reasons for observing this 'salutary rule' under the South Africa Constitution. The first is procedural. The interim Constitution contained complicated provisions governing the referral of a constitutional issue to the Constitutional Court where that issue was beyond the jurisdiction of the Supreme Court. A referral was, for example, necessary whenever the

[180] Johan van der Walt '*Progressive* Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation Between Common-law and Constitutional Jurisprudence' (2001) 17 *SAJHR* 341, 352–3. But this conclusion depends on a particular conception of the purpose of indirect application and its limits. Indirect application means that the Bill of Rights is applied to the conduct of litigants through the mediating influence (mittelbare Drittwirkung) of a rule or principle of common law. If there is no rule or principle (if there is a gap in the common law), then there is nothing that can mediate between the Bill of Rights and the conduct of the litigants. But there is nothing to suggest, Van der Walt argues, that the 'development' of the common law required by s 39(2) does not include the filling of gaps to ensure conformity with the Bill of Rights (at 354). So conceived, the distinction between direct and indirect application of the Bill of Rights to the common law is reduced to 'a choice between two vocabularies, one which does not shy away from directly invoking constitutional principles within the context of the common law, and one that prefers to let common-law principles themselves perform the required mediation between existing law and the constitutional challenges to such law' (at 355). The latter vocabulary is preferable in principle, according to Van der Walt. In our view, it is also mandated by the principle of avoidance, discussed immediately below.

[181] *S v Mhlungu* 1995 (3) SA 867 (CC).

[182] Ibid para 59; see also *S v Melani* 1995 (4) SA 412 (E); *S v Eckert* 1996 (2) BCLR 208 (SE) 210–1; 1996 (2) BCLR 174 (E); *Schinkel v Minister of Justice* 1996 (6) BCLR 872 (N); *S v Friedland* 1996 (8) BCLR 1049 (W). For a similar approach in Namibia, see *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmS).

[183] *Zantsi v Council of State, Ciskei* 1995 (4) SA 615 (CC) para 8.

[184] Ibid para 2.

[185] Ibid paras 5 and 7.

constitutionality of an Act of Parliament was in dispute.[186] The statements in *Mhlungu* and *Zantsi* were meant to deter the divisions of the Supreme Court from referring irrelevant issues or issues that were within their jurisdiction to the Constitutional Court. Since the system of referrals has now been replaced by a wider High Court jurisdiction and a system of appeals,[187] this justification should no longer carry the same weight. However, it would be wrong to conclude that the justification did not survive the changes in constitutional jurisdiction brought about by the 1996 Constitution and the abolition of referrals.[188] It remains an important factor when considering applications for direct access to the Constitutional Court and applications for leave to appeal using the 'leapfrog' appeal procedure.[189] It also informs the doctrine of justiciability, particularly the principles that courts should not decide moot cases or cases that are not ripe for judicial resolution.[190]

There are also substantive reasons for observing the rule.[191] Courts should avoid making pronouncements on the meaning of the Constitution where it is not necessary to do so, so as to leave space for the legislature to reform the law in accordance with its own interpretation of the Constitution. Lengthy expositions of the Constitution may result in actual or perceived restrictions on the legislature — a 'constitutional straitjacket' — which makes it difficult for the legislature to respond to changing circumstances. The courts, and particularly the Constitutional Court, are not the only interpreters of the Constitution. They are, however, its final and authoritative interpreters. Before pronouncing on the meaning of the Constitution the courts should allow other organs of the government the opportunity to interpret and give effect to the Constitution. Practically, this means that the legislature should be given the opportunity to address an issue before a court decides on it. The legislature and the executive are better equipped to ascertain the needs of society and to respond to those needs. Once such a response finds expression in legislation, courts may then test the legislation against the provisions of the Bill of Rights. Even then, the Constitutional Court (the final court in constitutional matters) often seeks to avoid ruling on the constitutionality of a statutory provision until experienced trial and

[186] See s 102(1) of the interim Constitution. The Supreme Court could also refer constitutional issues to the Constitutional Court that had arisen in matters decided by the Supreme Court but that were considered to be of pressing public interest (s 102(8)).

[187] See Chapter 5 below.

[188] On the applicability of the principle under the 1996 Constitution see *S v Walters* (note 125 above) paras 64 and 65; *S v Dlamini* 1999 (4) SA 623 (CC) para 27: 'as a matter of judicial policy, constitutional issues are generally to be considered only if and when it is necessary to do so'. See also n 6 ('under both Constitutions, cases are resolved on constitutional grounds only where it is necessary to do so').

[189] *MEC for Development Planning and Local Government in the Provincial Government of Gauteng v Democratic Party* 1998 (4) SA 1157 (CC) para 32: 'Where there are both constitutional issues and other issues in the appeal, it will seldom be in the interests of justice that the appeal be brought directly to this Court'. See, further, 5.4*(c)* and 5.4*(d)* in Chapter 5 below.

[190] See, further, 4.3 and 4.4 in Chapter 4 above.

[191] Reasons can also be found in political philosophy. See I Currie 'Judicious Avoidance' (1999) 15 *SAJHR* 138.

appeal court judges have expressed their views on the effect of the provision and the likely consequences of invalidating it.[192]

When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only.[193] The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so. The principle has a number of important consequences.

1. Even when the Bill of Rights applies directly, a court must apply the provisions of ordinary law to resolve the dispute, especially in so far as the ordinary law is intended to give effect to the rights contained in the Bill of Rights. Many recent statutes, such as the Labour Relations Act 66 of 1995, the Promotion of Equality and Prevention of Unfair Discrimination Act and the Promotion of Administrative Justice Act are intended to implement the Bill of Rights.[194] They must first be applied, and if necessary interpreted generously to give effect to the Bill of Rights, before a direct application is considered.[195]

   The same applies to disputes governed by the common law. The ordinary principles of common law must first be applied, and if necessary developed with reference to the Bill of Rights, before a direct application is considered.[196]
2. When the Bill of Rights is directly applied in disputes governed by legislation, conduct must be challenged before law.[197] In other words, the implementation of the statute must be challenged before the provisions of the statute itself.[198]

[192] See Kriegler J in *S v Bequinot* 1997 (2) SA 887 (CC) paras 13–14.

[193] Ie, horizontal cases in which direct horizontal application is, in terms of s 8(2), inapplicable.

[194] See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 99 where Kriegler J remarked, in the context of constitutional remedies, that 'It would undermine the best efforts of the Legislature to exclude [the remedies contained in such laws] from a court's arsenal of remedial options'.

[195] See *S v Dlamini* (note 188 above) para 7 (the Criminal Procedure Act is the primary source to be consulted in looking for a specific answer to any bail question).

[196] *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753(CC) para 26.

[197] *Van Rooyen v S (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) paras 87–88 is, in our view, support for both the proposition that the indirect application must be considered before direct application and that the constitutional validity of conduct or decisions implementing law must be considered before the validity of the law itself.

[198] Legislation may either be 'facially' inconsistent with the Bill of Rights or the effect of the legislation may violate the Bill of Rights. *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) para 18. As far as effects are concerned, it must be carefully considered whether the impermissible effects are caused by the legislative provision itself, or by the way it is implemented or enforced. The legislation may only be challenged in the former instance, while in the latter instance it is the *conduct* of the administrators of the legislation that must be challenged. For example, in *New National Party* provisions of the Electoral Act 73 of 1998 which required proof of identity and citizenship for registration and voting by means of a particular type of identity document ('a green bar-coded identity document') were challenged. One of the disputed issues was whether the Department of Home Affairs was capable of issuing the required documents in time. To challenge the statute (as opposed to the failure of the Department to perform its statutory duties), the applicant was required to show that the machinery, mechanism or process provided for in the Act was not reasonably capable of ensuring that people who wanted to vote would be able to do so. (Para 37.)

However, to complicate matters further, the principle that constitutional issues should be avoided is not an absolute rule. It does not require that litigants may only directly invoke the Constitution as a last resort. As with many legal principles, its force depends on the circumstances of the case. Where the violation of the Constitution is clear and directly relevant to the matter, and there is no apparent alternative form of ordinary relief, it is not necessary to waste time and effort by seeking a non-constitutional way of resolving a dispute. This will often be the case when the constitutionality of a statutory provision is placed in dispute because, apart from a reading down, there are no other remedies available to a litigant affected by the provision. On the other hand, the principle of avoiding constitutional issues is particularly relevant when the interest of an applicant in the resolution of a constitutional issue is not clear, and where the issue is not ripe for decision or when it has become academic or moot.[199]

[199] See, further, 4.3 and 4.4 in Chapter 4 above