

THE SOUTH AFRICAN COMMON LAW AND THE CONSTITUTION: REVISITING HORIZONTALITY

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ABSTRACT

Despite an initial flurry of interest in the direct horizontality of human rights, the doctrine's place in South African constitutional law is now accorded a diminishing importance in judgments and journals. I argue that this is a result of a misunderstanding, by both courts and academics, of what horizontality is for and how it works. Since direct horizontality, properly understood, is central to the coherent development of South Africa's rights jurisprudence, I aim to reinvigorate debate about horizontality by offering a new and comprehensive account of its mechanics and purpose. The account turns on a distinction between 'horizontal' and 'direct horizontal application', the implications of which run counter to some of the most widely accepted views about the Constitution's influence on the private law.

Key words: horizontality, constitutional interpretation, Constitution of the Republic of South Africa, 1996, fundamental rights

There was a time, not so long ago, when South African law journals were brimming with writing about the effect of human rights on the private law.¹ Of course, it was always clear from both the interim Constitution of 1993 and from the final Constitution of the Republic of South Africa, 1996 that human rights were intended to shape the private law in some way or another. The

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1 J van der Walt 'Justice Kriegler's Disconcerting Judgment in *Du Plessis v De Klerk*: Much Ado About Direct Horizontal Application (Read Nothing)' (1996) 4 *TSAR* 732; S Woolman & D Davis 'The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 *SAJHR* 361; J van der Walt 'Perspectives on Horizontal Application: *Du Plessis v De Klerk* Revisited' (1997) 12 *SAPL* 1; H Cheadle & D Davis 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 *SAJHR* 44; C Sprigman & M Osbourne '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; J 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; J van der Walt 'Horizontal Application of Fundamental Rights and the Threshold of the Law in View of the *Carmichele* Saga' (2003) 19 *SAJHR* 517; S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 762. Beyond the law journals, see D Davis *Democracy and Deliberation* (1999) 99; A Cockrell 'Private Law and the Bill of Rights: A Threshold Issue of "Horizontal"?' in *Bill of Rights Compendium* (2001) 3A-3; I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 50–5, 64–78.

debate then was about the *form* of that impact, and an early decision of the Constitutional Court framed its terms: human rights could either influence the private law indirectly – by influencing the development and interpretation of the law – or rights could be of ‘direct horizontal application’.²

That debate appears largely to have died down. In part, that is because s 8(2) of the Constitution cured the ambivalence towards horizontality which existed under the interim constitutional order, in that it states expressly that ‘[a] provision of the Bill of Rights binds a natural or a juristic person’.³ The direct application of human rights under the final Constitution was definitively confirmed by O’Regan J in *Khumalo v Holomisa*, where she held that ‘the right to freedom of expression is of direct horizontal application’ to the law of defamation.⁴ By implication and in principle, that holding extends to other areas of private law.

The debate also lost steam because it was unclear what was at stake between the direct and indirect models. Even the most ardent proponents of direct horizontal application eventually conceded that the difference would only be material in a small number of cases, and even then a ‘progressive’ version of indirect horizontal application would adequately serve the ends of justice.⁵ In the result, two of South Africa’s most prominent constitutional theorists declared that direct horizontal application is ‘nearly redundant’ and that much of the horizontality debate is ‘irrelevant’.⁶

My aim in this article is to reinvigorate discussion about the horizontality of human rights in post-apartheid South Africa. My primary claim is that judges and academics have been mistaken in viewing the distinction between direct/indirect application as exhausting the debate about horizontality. That view is not only conceptually problematic, but it has caused serious detriment to the rigorous development of South Africa’s nascent human rights jurisprudence.

My argument makes reference to three separate theses that can be discerned from the horizontality literature: (i) *The Validity Thesis* – according to this thesis, s 8 of the Constitution entails that the rights in the Bill of Rights are

2 In the context of the interim Constitution, these issues were discussed in depth by the Constitutional Court in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

3 See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 34; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 30; R Spitz & M Chaskalson *The Politics of Transition A Hidden History of South Africa's Negotiated Settlement* (2000) 269; L Du Plessis ‘Learned Staatsrecht from the Heartland of the Rechtsstaat’ (2005) 8 *Potchefstroom Electronic LJ*.

4 *Khumalo* *ibid* para 33.

5 Van der Walt ‘Progressive Application’ (note 1 above); D Bhana & M Pieterse ‘Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited’ (2005) 122 *SA LJ* 865, 869–70. Various judgments in *Du Plessis* (note 2 above) also argue that indirect application can achieve whatever horizontal application is supposed to do: see paras 60–2, 72, 110 & 142. Stu Woolman also appears to accept this possibility (Woolman (note 1 above) 766 fn 6). Note that arguments calling for the horizontal impact of socio-economic rights are now also focused on indirect application: M Pieterse ‘Indirect Horizontal Application of the Right to have Access to Health Care Services’ (2007) 23 *SAJHR* 157; S Liebenberg ‘The Application of Socio-economic Rights to Private Law’ (2008) *TSAR* 464.

6 Currie & De Waal (note 1 above) 50–5. Christopher Roederer put it this way: ‘it is very difficult to see what the fuss about s 8 versus s 39 can possibly be about.’ C Roederer ‘Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law’ (2003) 19 *SAJHR* 57, 79.

part of the criteria of legal validity which must be satisfied by any rule of law (statute or common law) governing a dispute between private parties. Substantive content must therefore be given to rights, and law must be evaluated against that content; (ii) *The Remedy Thesis* – according to this thesis, s 8 entails that a court has both the power and the duty to develop rules and remedies when the existing law (including the common law) does not adequately protect the rights in the Bill of Rights; and (iii) *The Dichotomy Thesis* – according to this thesis, ‘direct horizontal application’ takes place in terms of s 8, while ‘indirect horizontal application’ is the province of s 39(2). That being so, they exclude each other’s range of application – a court must choose between deciding a case in terms of s 8 or s 39(2).

In the course of this article I will show that while both the Validity Thesis and the Remedy Thesis are true, we have thus far failed to distinguish them appropriately from one another, in part because we use the same terminology (‘direct horizontal application’) to talk about both. We have also failed to explain how these two theses map on to the text of the Constitution, and to explain what they mean for the methodology of human rights adjudication.

I will also demonstrate that the Dichotomy Thesis, almost universally accepted by academics and the courts, is patently false. Instead, I argue that s 39(2) is not about indirect horizontal application, or indeed any kind of horizontal application at all. Contrary to the widely held view, s 39(2) does not have the conceptual resources to set tests for the validity of the common law.

Against this background, this article seeks to offer a coherent and relatively complete account of horizontality under the Constitution. It does not repeat (apart from some brief remarks in part I) the important moral justifications which have elsewhere been offered in support of horizontality,⁷ nor does it aim to offer an account with explanatory power in other jurisdictions.⁸ It is

7 See, for example, D Chirwa ‘In Search of Philosophical Justifications and Suitable Models for the Horizontal Application of Human Rights’ (2008) 8 *African Human Rights LJ* 294; J van der Walt ‘Blixen’s Difference: Horizontal Application of Fundamental Rights and the Resistance to Neocolonialism’ (2003) 1 *Law, Social Justice and Global Development J* 1.

8 On the horizontality debate outside South Africa, see L Alexander ‘The Public/Private Distinction and Constitutional Limits on Private Power’ (1993) 10 *Constitutional Commentary* 361; M Hunt ‘The Horizontal Effect of the Human Rights Act’ (1998) *Public Law* 423; B Markesinis ‘Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany’ (1999) 115 *LQR* 47; I Leigh ‘Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?’ (1999) 48 *ICLQ* 57; G Phillipson ‘The Human Rights Act, “Horizontal Effect” and the Common Law: A Bang or a Whimper?’ (1999) 62 *Modern LR* 824; W Wade ‘Horizons of Horizontality’ (2000) 116 *LQR* 217; D Oliver ‘The Human Rights Act and the Public Law / Private Law Divide’ (2000) *EHRLR* 343; T Raphael ‘The Problem of Horizontal Effect’ (2000) *EHRLR* 393; S Gardbaum ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102 *Michigan LR* 387; M Tushnet ‘The Issue of State Action/Horizontal Effect in Comparative Constitutional Law’ (2003) 1 *Int J of Constitutional Law* 79; D Chirwa ‘The Horizontal Application of Constitutional Rights in a Comparative Perspective’ (2006) 10 *Law, Democracy and Development* 21–48; the chapters by Lo Fastrich, A Young & A Colombi Ciacchi in K Ziegler (ed) *Human Rights and Private Law Privacy As Autonomy* (2007); D Hoffman (ed) *The Impact of the UK Human Rights Act on Private Law* (2011); G Phillipson & A Williams ‘Horizontal Effect and the “Constitutional Constraint”’ (2011) 74 *Modern LR* 878; A Young ‘Horizontality and the Constitutionalisation of Private Law’ in K Ziegler & P Huber (eds) *Current Problems in the Protection of Human Rights* (2013).

concerned exclusively with the way in which horizontality is intended to work in the South African legal order.

Thus, my article begins by offering a revised interpretation of ss 8(2) and 8(3) of the Constitution, in the course of which I explain in more detail how the discussion of horizontality in South Africa has confusingly focused on the misunderstood notion of ‘direct horizontal application’. Since I ultimately locate ‘indirect horizontal application’ in s 8(3), I go on to offer an alternative interpretation of s 39(2). Parts II and III of the article compare my interpretation of these sections to the prominent competing interpretations offered by Professor Stu Woolman and by the former Justice of the Constitutional Court of South Africa, Laurie Ackermann.

I RE-READING SECTION S 8 AND SECTION S 39(2)

Constitutional interpretation is a holistic and parochial enterprise. It is holistic because each provision must be interpreted, as far as possible, in harmony with other constitutional provisions, and in the light of the purpose which the particular constitution (and the provision in question) was meant to achieve.⁹ It is parochial because a constitution must be interpreted against a given legal community’s history and its present political traditions and institutions.¹⁰

Insofar as we are concerned with the interpretation of ss 8 and 39(2), these features of constitutional interpretation indicate how important it is, in the first place, to understand that the final Constitution positions itself expressly in response to South Africa’s history of institutionalised racial oppression. Perhaps unsurprisingly, given the role of the law during apartheid, the Constitution privileges law as a tool for overcoming apartheid’s injustices. This feature of the South African Constitution – its vision for achieving social justice through law – has been described as embodying the notion of ‘transformative constitutionalism’, which Karl Klare famously defined as:

a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.¹¹

9 J Raz ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ and ‘Interpretation without Retrieval’ in his *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009); R Dworkin *Law’s Empire* (1986) chapters 7 & 10; A Kavanagh ‘The Idea of a Living Constitution’ (2003) 16 *Canadian J of Law and Jurisprudence* 55. This is the approach followed by the Constitutional Court: see *S v Zuma* 1995 (2) SA 642 (CC) paras 13–8; *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC) paras 12, 83.

10 Raz *ibid*.

11 K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 146, 150. See also P Langa, ‘Transformative Constitutionalism’ (2006) 3 *Stellenbosch LR* 351, 352; D Moseneke ‘The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication’ (2002) 18 *SAJHR* 309.

Furthermore, the Constitution recognises that the rebuilding of South Africa is a mammoth undertaking, and cannot be the responsibility of the government alone. It therefore embodies the idea that the power of the community can (and must) be deployed to foster the material conditions that will nurture and encourage people's capacity for self-determination.¹² The Constitution thus confronts South Africa's tragic past not only idealistically, but also realistically: it recognises that the pervasive injustices of apartheid not only have to be eliminated from public life, but also have to be rooted out of the private sphere.¹³

Seen against the backdrop of South Africa's past, the demand for horizontality is immediately apparent. Firstly, it commits individuals to the rebuilding of the ethical relations so radically shattered during apartheid, through the undertaking of legal duties to improve their communities. Secondly, given the enormous task of reconstruction faced by the new South Africa, the limited resources of the state, and the grossly unequal and enormous wealth which resides in the private sector, horizontality breathes new hope into the possibility of creating a more equal and just society in the medium term. Thirdly, by requiring individuals to uphold their moral duties towards one another and to cooperate in realising a new vision for a shared future, horizontality reaffirms the human dignity of those who bear such duties as much as it does those who benefit from their performance. Insofar as direct horizontality contributes to the realisation of substantive equality and the establishment of the conditions necessary for an autonomous life, it promotes freedom and fosters a culture in which the infinite worth of each person is respected and valued.¹⁴

It is unsurprising then that the Constitutional Assembly expressly included a provision in the final Constitution binding private actors to uphold the rights in the Bill of Rights. Indeed, in response to concerns that the Bill of Rights would not be given full effect in the private sphere, the final Constitution not only included a new provision which expressly provided for the horizontality of human rights, but also added the judiciary to the list of state organs which were to be bound by the Bill of Rights.¹⁵

12 Klare *ibid* 153.

13 See also the comments in *Du Plessis* (note 2 above) para 163 (per Madala J) and para 145 (per Kriegler J).

14 On the relationship between material conditions, freedom and human dignity, see for example A Sen *Development as Freedom* (1999); M Nussbaum *Women and Human Development: The Capabilities Approach* (2000); S Fredman *Human Rights Transformed* (2008).

15 The omission of the judiciary from the provision of the interim Constitution allowed the Constitutional Court in *Du Plessis* (note 2 above) to follow the reasoning in *Retail, Wholesale & Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573, where, in the context of a similar provision, the Canadian Supreme Court held that Charter rights would only have an indirect horizontal effect on the common law. See the analysis in Tushnet (note 8 above).

(a) The mandate of horizontality

This then is the historical and political background against which we must interpret the spirit and letter of s 8(2) of the Constitution. That section reads as follows:

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 the duty imposed by the right.

At the outset, it is worth making three relatively uncontroversial points about the subsection. First, it has to mean *something*, as does the rest of s 8. More particularly, the meaning of each section must make a unique contribution to the Constitution as a whole. As the Constitutional Court itself has stated, no section of a statute, and particularly not a section of the Constitution, should be interpreted as being redundant.¹⁶

Second, whether or not one thinks horizontality is justified as a matter of political morality, there can be no doubt that s 8(2) makes rights in the Bill of Rights binding on individuals as a matter of law.

Third, despite the fact that s 8(2) unambiguously imposes human rights obligations on individuals, it also makes the obvious point that individuals do not bear those obligations in the same way as the state, and not necessarily in respect of all rights – whether they bear duties, and the extent of those duties, depends on the nature of the right involved. Thus, while it is difficult to imagine circumstances in which a private individual might infringe another's right to just administrative action, it is easy to see how he might infringe another's right to freedom of expression, or to freedom from discrimination.

With these preliminaries in mind I turn now to my interpretation of s 8(2). Almost – for in order properly to understand s 8(2), we must begin with s 2 of the Constitution, which provides:

The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Section 2 is what makes consistency with the Constitution part of the criteria of validity for all law and conduct in South Africa. Section 2 thus presupposes that content must be given to the Constitution through the interpretation of its provisions in order to establish criteria against which the validity of law and conduct can be tested. Although this is not explicitly spelled out in the Constitution, it is logically necessary, since the establishment of criteria is prior to their application.¹⁷ Sections 7 and 8 of the Constitution make it clear that the rights in the Bill of Rights form part of those criteria. Therefore, *before* we test law and conduct for constitutional validity, we have to interpret the implicated rights in the Bill of Rights to determine the scope of their protection.

¹⁶ See *Khumalo* (note 3 above) para 32.

¹⁷ See also Woolman (note 1 above) 769, 777.

I have belaboured this seemingly obvious point because I think it is neglected in the interpretation of s 8(2). Section 8(2) comes into play when one private party alleges that another private party, through their conduct or reliance on law, has violated a right or rights in the Bill of Rights. In such circumstances, s 8(2) (read in line with the interpretation of s 2 just offered) sets out the following stages of the court's inquiry: (i) The court must first determine the ambit of the right or rights involved for both parties, which includes 'taking into account the nature of the right and the nature of the duty imposed by the right' (unlike disputes between individuals and the state, in which the state bears no rights, disputes between private parties typically involve a clash of competing rights);¹⁸ and (ii) On determining the scope of each implicated right, the court must balance those rights against one another and thereby come to an all-things-considered determination of what the Bill of Rights requires of the private parties in the instant case.

The duties which private actors bear, we learn from s 8(2), are the duties it makes sense for them to bear. Of course there will be moral disagreement amongst judges, lawyers and academics about which duties can sensibly be placed on private actors, but that kind of disagreement is inherent in constitutional adjudication.

This interpretation of s 8(2) helps us to distinguish between two important concepts which have thus far been conflated in the literature. Section 8(2) embodies what we should properly describe as 'horizontal' – the general constitutional *mandate* to give content to the rights in the Bill of Rights as they apply to private actors, and to test law for consistency with that content. I propose to distinguish horizontality, thus understood, from the notion of 'direct horizontal *application*', which is concerned with a particular *remedy* for inconsistency, and which I discuss further below in relation to s 8(3).¹⁹

On this view, horizontality requires that in a dispute between private parties, a court must interpret and balance rights in the Bill of Rights, to the extent that they are implicated in the dispute, in order to determine whether and to what extent each party bears human rights obligations. This is a logical precursor to the determination of whether the law or conduct in question is in accordance with the requirements of the Constitution. Seen in this way, the rights in the Bill of Rights are *always* horizontal, period.

This reading of s 8(2) explains why the Validity Thesis is true – s 8 entails that all law governing disputes between private parties (whether enshrined in statute or the common law) must be tested against the substantive content of the Bill of Rights. It also helps us to understand the relationship between the Validity Thesis and the Remedy Thesis. The Remedy Thesis presupposes the Validity Thesis – the duty to bring the law into line with the Bill of Rights presupposes a way of knowing that it is out of line in the first place. We can

¹⁸ See the discussion in part III.

¹⁹ In other jurisdictions, the language of 'application' is also confusingly used to mean that a right places duties on private actors, instead of, as I am suggesting it here, to mean a particular *remedy* required by horizontality. See, for example, Young (note 8 above) 37.

determine whether the law is out of line because the Validity Thesis is true. But note that the Remedy Thesis does not necessarily follow from the Validity Thesis, for it is possible to subscribe to the Validity Thesis while believing (as is the case in the United Kingdom) that courts cannot change the rules to remedy human rights violations by a private actor.²⁰

(b) ‘Application’

Let me turn now to discuss in more detail the claim that ‘direct horizontal application’, and the corresponding concept ‘indirect horizontal application’, are concerned solely with remedies, and how these remedies are located in s 8(3).

I stated above that once the rights in the Bill of Rights have been given substance in terms of s 8(2), and a standard has been set against which the validity of law or conduct can be evaluated, a court can then proceed to an analysis of whether the law or conduct in question meets the constitutional standard. Section 8(3) explains how this analysis must proceed:

When applying a provision of the Bill of Rights to a natural or juristic person in terms of [section 8(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.

The first thing to note about this section is that its wording²¹ reinforces the interpretation I have given to s 8(2) – s 8(3)(a) only comes into the picture once we have already determined what a given right requires. Section 8(3) (a) proceeds to explain *how* the right must be applied, and it is only at this point that a discussion concerning the direct or indirect ‘application’ of the rights becomes relevant at all. Put differently, s 8(2) is an injunction on courts to give content to the Bill of Rights in the context of all disputes between private litigants, while s 8(3)(a) is concerned only with the remedial powers of courts in such disputes, once it has been determined that the law or conduct in question is out of step with constitutional requirements.

Like s 8(2), s 8(3)(a) offers clear stages for a court’s analysis in this regard: (i) The court must first determine whether existing legislation gives effect to what is required by an all-things-considered determination of what the implicated rights require;²² (ii) In the event that legislation does not give full effect to the requirements imposed by the Bill of Rights, the court must determine whether the gap in legislative protection is filled by the existing common law;²³ (iii) To the extent that the existing common law is also

20 See the Human Rights Act 1998 (United Kingdom) s 4.

21 ‘When applying’, ‘to give effect to’.

22 Perhaps a court might find not only that legislation does not give proper effect to the Bill of Rights, but positively violates it. It is at this stage that the court should declare legislation invalid, if necessary, and determine whether an appropriate alteration to the legislation might cure the problem.

23 This reflects the fact that legislation outranks common law in the hierarchy of legal sources in common law systems.

deficient, the court must consider whether the common law is capable of being developed in order to give effect to the Bill of Rights. Importantly, this is what is commonly understood as ‘indirect horizontal application’; and (iv) Finally, if a court finds that neither legislation nor the common law (as it is or through its possible development) is capable of giving effect to constitutional demands, then the court would be required to create ‘fresh’ common law on the basis of the substantive right (where the common law is repugnant rather than just silent, the creation of fresh common law would follow an invalidation of the common law rule).²⁴ It is only such an instance that is accurately termed ‘direct horizontal application’,²⁵ and it is this dimension of s 8(3)(a) which makes the Remedy Thesis true. I return to some complexities about ‘creating fresh common law’ below.

(c) Horizontality in *Khumalo* and *Smith*

The interpretation of ss 8(2) and 8(3)(a) that I have offered here finds support in the spirit (if not the letter) of O’Regan J’s judgment in *Khumalo v Holomisa*.²⁶ That case concerned the well-known leader of a South African political party who brought an action for defamation against persons responsible for the publication of a particular newspaper. The case raised the question whether the common law of defamation was inconsistent with the Constitution, to the extent that it unjustifiably limited the right to freedom of expression as enshrined in s 16. Since the dispute was between two private parties, it necessarily invoked the horizontality of the right to freedom of expression.

In the course of her judgment O’Regan J analyses the ambit of the right to freedom of expression, and explains the tension that exists in defamation cases between that right and the right to have one’s dignity respected and protected.²⁷

24 See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); and *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC). Note that in *Fourie* the court does not create fresh common law but places the legislature on terms to provide a remedy.

25 The need to create fresh law and remedies to deal with unjust social interactions taking place beyond the reach of positive law was one of the primary arguments traditionally offered in favour of ‘direct horizontal application’ is that it was needed (see, for example, Van der Walt, ‘Justice Kriegler’, ‘Perspectives’, and ‘Progressive Indirect Application’ (note 1 above); Davis (note 1 above) 118). The argument does not demonstrate a grave need for horizontal application, which is partly why many have come to view it as irrelevant. Firstly, in the modern state a claimant will almost always be able to implicate the law to a degree sufficient to found a cause of action (see Van der Walt ‘Perspectives’ (note 1 above); *Du Plessis* (note 2 above) para 79). Secondly, it was held in *Carmichele* (note 3 above) that s 39(2) of the Constitution mandated courts to develop causes of action in line with the Constitution. On one reading of the case there is merely a ‘simple threshold of seriousness that the case must meet in order to be heard by a court’ (see Van der Walt ‘*Carmichele* Saga’ (note 1 above)). Once again, this obviates the need for ‘direct horizontal application’. Finally, legal language, like the principles of the common-law, is flexible and open-textured, capable of being interpreted or developed in line with the Constitution. Combined with the broad powers to ‘make any order which is just and equitable’ given to courts by s 172 of the Constitution, a court will rarely, if ever, have to fashion a fresh constitutional remedy when the common law is already implicated.

26 *Khumalo* (note 3 above).

27 Ibid paras 21–8.

After giving substance to the right to freedom of expression, the right to respect for dignity, and the balance that ought to be struck between the two, O'Regan J concludes that the right to freedom of expression is of 'direct horizontal application'.²⁸ Though O'Regan J is here talking the language of 'application' (which I think is mistaken), in essence she is following the interpretive injunction of s 8(2) as I have explained it above. By following that injunction, and consistently with the account I have set out here, she sets herself up well to evaluate the constitutional validity of the common law rules of defamation (which are set out earlier in the judgment)²⁹ against what she has determined to be the demands of the Bill of Rights.

As it turns out, O'Regan J held that the common law already gives adequate expression to the balance which had to be struck between the rights at play, and she did not therefore have reason to engage in the more detailed mechanics of s 8(3)(a). But the possibility existed, of course, for the common law to fall short of constitutional demands. In that event, s 8(3)(a) would have required O'Regan J to give effect to those demands through an interpretation of legislation and/or the common law, failing which she would have had to develop the common law or, as a last resort, create a fresh common law remedy by *directly applying* the rights in question.

In the result, it is probably a mischaracterisation to describe *Khumalo* as 'bringing an end to the long reign of indirect application'.³⁰ Certainly the decision is a significant one, in that it demonstrates that s 8(2) can cogently and fruitfully be applied to disputes between private parties. However, properly understood, the decision is neither an example of direct nor of indirect horizontal application at all.³¹ Rather, it is an instance of horizontality simpliciter; that is, of a court relying on the interpretive injunction in s 8(2) to determine whether the law is in accordance with the demands of the Bill of Rights. If, and only if, O'Regan J had determined that the common law was out of step with the Bill of Rights, would the question of direct or indirect horizontal application have arisen at all (since, on my interpretation, those doctrines are concerned solely with *remedies* for inconsistency).

This reading of O'Regan J's judgment in *Khumalo* is consistent with the approach she adopts in her dissent in *NM v Smith*,³² a case which concerned the non-consensual publication of the names and HIV-positive status of three women in a biography of Patricia de Lille. In essence the judgment applies

28 Ibid para 33.

29 Ibid paras 17–20. Admittedly, the *Khumalo* analysis is worse off for the fact that it first discusses the merits of the existing defamation law before explaining what the Constitution requires of it. See S Woolman 'Application' in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (OS) 31-53 – 31-55.

30 Currie & De Waal (note 1 above) 51.

31 Compare Woolman (note 29 above) 31-55.

32 2007 (5) SA 250 (CC).

the requirements of ss 8(2) and 8(3)(a), as I have set them out here.³³ The judgment dedicates substantial time to fleshing out both the right to privacy and the right to freedom of expression, and comes to an all-things-considered determination of what the Constitution requires of the private sector media.³⁴ Testing the common law of the *actio iniuriarum* against that constitutional standard, O'Regan J held that it was appropriate that the law be developed:

to require the media when publishing private facts without consent to establish either that the publication is reasonable in the circumstances, in which case they will rebut wrongfulness, or that they have not acted negligently in the circumstances in which instance they will need to rebut the requirement of intention.³⁵

Again, however, while this case is an example of the horizontality of the Bill of Rights, it is seemingly not an example of direct horizontal application. Instead, the remedy here is perhaps more appropriately described as indirect horizontal application, since it proposes a 'development' of the common law.

I am deliberately cautious in characterising this remedy as indirect, as opposed to direct, horizontal application, since I think, in the end, this distinction may be a difficult one to make. The distinction requires us to separate a 'development' of the common law from the 'creation' of new common law, and further, to understand how these relate to a 'mere' application of the common law.³⁶ This project raises intractable philosophical problems about the individuation of laws, and about whether every interpretation of a rule has a creative aspect.³⁷

The difficulty of carving this distinction underscores the folly of making our choice of adjudicative methodology turn on an *ex ante* judgment of whether we will be 'applying' or 'creating' rules in our final remedy. The benefit of the approach I espouse is that these questions of application versus creation, of indirect versus direct horizontal application, are reduced to *ex post* questions about how to label what we have done at the end of the s 8(3) analysis. They are not, as with existing approaches to horizontality, conceptual triggers whose boundaries must be firmly drawn at the beginning of the analysis, so that we can choose which methodology governs our decision-making process in the case.

My interpretation of ss 8(2) and 8(3)(a) yields two important conclusions. First, it follows that cases involving legislation can be cases of horizontality. The fact that the state has chosen to legislate about what private parties owe

33 O'Regan J does not expressly mention in her judgment the section of the Bill of Rights in terms of which she considers her development of the law is taking place. Importantly, however, she does not make any reference to s 39(2), and instead refers to s 8(2) in a footnote in the course of her discussion (*ibid* para 132 fn 7).

34 *Ibid* para 147.

35 *Ibid* para 179.

36 I am in favour of understanding 'development' to encompass both the application of existing law and the creation of new law. See below.

37 Joseph Raz has dedicated considerable effort to delineating these problems. See J Raz 'On the Individuation of Laws' in his *The Concept of a Legal System* (1980); J Raz *The Authority of Law* 2 ed (2009) 90–7; and J Raz 'Interpretation without Retrieval' in his *Between Authority and Interpretation* (note 9 above).

to each other (as opposed to declining to change what they owe each other at common law) does not alter what private parties owe each other in terms of the Bill of Rights. It is the nature of the parties to the case, and not the type of law involved, which determines whether the dispute is vertical or horizontal, and thus how the Bill of Rights applies. There can be horizontal cases involving legislation just as there can be cases of vertical application involving the common law.³⁸

The second conclusion is that these two subsections deal exclusively and, above all, exhaustively with horizontality, with each forming a critical but conceptually distinct part of the overall analysis. If this is correct, then the trouble with the majority reasoning in cases like *Barkhuizen*³⁹ and *NM v Smith*,⁴⁰ contrary to the widely held view, is not their failure to engage in the direct horizontal application of the Bill of Rights. Their failure is that they do not follow the analysis dictated by ss 8(2) and (3) to give content to the implicated rights, and rely instead on a vague use of s 39(2).⁴¹ Neither case requires fresh rules of the common law to be created. Both cases require that the existing common law be rigorously tested against the demands of the Bill of Rights, and be developed accordingly.

(d) Section 39(2)

If I am right about this approach to ss 8(2) and (3), then we already have two reasons to think that the Dichotomy Thesis is false: (i) indirect horizontal application is not located in s 39(2); and (ii) s 8(3) and s 39(2) are not mutually exclusive. In the remainder of this section, I offer a third reason: the text of s 39(2) cannot plausibly ground indirect horizontal interpretation.

Section 39(2) states as follows:

When *interpreting any legislation*, and when *developing the common law* or the customary law, every court, tribunal or forum *must* promote the spirit, purport and objects of the Bill of Rights. (Emphasis added.)

In their description of ‘indirect horizontal application’, Deeksha Bhana and Marius Pieterse offer a description of s 39(2) which is exemplary of the current understanding of that section:

[I]t is necessary firstly to establish whether and to what extent the existing common law requires development in light of s 39(2) and thereafter to decide on the manner in which developments deemed necessary are to be effected.⁴²

38 Examples of the latter include *Carmichele* (note 3 above); *National Coalition for Gay and Lesbian Equality* (note 24 above); *Fourie* (note 24 above); and *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC).

39 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

40 *NM v Smith* 2007 (5) SA 250 (CC).

41 Woolman (note 1 above). This problem is evident also in *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC), in which the majority and minority only fleetingly refer to what the objects of the Bill of Rights require to justify completely divergent outcomes (para 103 per Ngcobo J, and para 148 per O’Regan J).

42 Bhana & Pieterse (note 5 above) 871.

This view of s 39(2) is more or less directly extracted from *Carmichele*:

The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives.⁴³

Thus, according to the ‘indirect horizontal application’ reading of s 39(2), a court must engage in the following inquiry: (i) a court must first establish if the common law needs to be developed; and (ii) if so, a court must develop the common law in line with the spirit of the Bill of Rights. Put more briefly, the interpretation holds that s 39(2) sets out the following condition for developing the common law: if the common law is bad, use the Bill of Rights to make it better.

That interpretation is mistaken. In truth, s 39(2) sets out this very different condition: if you are making the common law better, use the Bill of Rights. This is so because s 39(2) says nothing at all about *when* (if) we should make the common law better, ie develop it. Section 39(2) does not specify the conditions of its own application.⁴⁴ Rather, s 39(2) specifies a condition for furthering the objects of the Bill of Rights (namely, when you are developing the common law).

Under what conditions, then, do we develop the common law for the purposes of s 39(2)? Well, one condition is set out in s 8(3) – if the common law violates a right in the Bill of Rights, develop it. But while development under s 8 is a sufficient condition to trigger s 39(2), it is not a necessary condition – there are plenty of other reasons, besides s 8, to develop the common law, and thus to further the Bill of Rights. We also develop the common law, for instance, when we reconcile conflicting precedents, or when we overturn a past decision rendered per incuriam.⁴⁵ We develop the common law when we update it in accordance with modern thinking or technology.

In fact, we develop the common law each time we decide whether a new set of facts falls within the ambit of some existing cause of action or common law rule (and thus interpret and give substance to the meaning of the rule).⁴⁶ Indeed, the common law develops largely through the incremental application of rules to new sets of facts. As Justice Ackermann puts it:

At its most basic level the judicial role is concerned with determining the relevant facts in a case and applying the relevant law to them ... In my view whenever one has to ‘apply’ the common law to a different set of facts, one is willy-nilly involved in ‘developing’ the

43 *Carmichele* (note 3 above) para 40. See also *Thebus v S* 2003 (6) SA 505 (CC) paras 26–7.

44 This was recognised in *Thebus* *ibid* para 27; and in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 16.

45 In both these cases, we resort to the objects of the Bill of Rights to figure out what the new rule should be.

46 See also *K* (note 44 above) paras 16–7; and *S v Boesak* 2001 (1) SA 912 (CC) para 15. Compare A Fagan ‘The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law’s Development’ (2010) 127 *SALJ* 611; A Fagan ‘The Confusions of K’ (2009) 126 *SALJ* 156.

common law. The development may be modest and simple, but it nevertheless constitutes 'development' as meant in s 39(2).⁴⁷

Very seldom do courts engage in a dramatic overhaul of the law, still less are they inclined to announce when they are doing so. There are probably good political and pragmatic reasons for courts to pretend that they mainly 'apply' rules and seldom 'make' them, but just about every legal theorist recognises the masquerade.⁴⁸ If the application of common law rules does not count as development for the purposes of the Constitution, we may find, after having progressively 'applied' a rule to a series of cases overtime, one building on the next, that the rule we end up with is gravely at odds with constitutional demands. The only way to ensure that this does not happen is to pay attention to the Constitution every time we apply a legal rule.

Thus, in all the instances I have just described, we meet the condition – developing the common law – which triggers our s 39(2) resort to the Bill of Rights. The consequence of this reading, of course, is that s 39(2) does not add much to the analysis when we are already developing the law under s 8 – that is just my point. Instead, the section derives its meaning and value from the critical difference it makes when developing the common law for one of the many other reasons listed above.

Section 8(3)(a) thus applies to a much more limited range of disputes than s 39(2): specifically, s 8(3)(a) applies only to disputes where a private party alleges that one of her constitutional rights has been violated by another private party. It is only in such a case that horizontality is implicated, and s 8(3)(a) tells a court how to provide remedies in such disputes. Section 39(2), by contrast, applies to a much broader range of legal disputes. In fact, it applies to *every* legal dispute. Every time a court makes a legal pronouncement – whether the case involves the state or private persons, whether it involves legislation, common law or customary law – it is under a 'general obligation' to promote the spirit, purport and objects of the Bill of Rights.⁴⁹ The effect of s 39(2) is to ensure the courts will take positive, gradual steps to fashion the law into the kind of increasingly coherent, morally justified body of principles contemplated by the idea of the *Rechtstaat*.⁵⁰

Thus, for example, in any delictual action requiring an assessment of 'wrongfulness', a court must determine what is 'wrongful' by reference to the overall scheme of the Bill of Rights. Or when a court is considering whether a particular contractual provision is contrary to public policy, this too must

47 L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 259–60.

48 For an especially clear account, see J Raz 'Law and Value in Adjudication' (note 37 above). On the limited possibility of 'merely applying' legal rules, see T Endicott *Vagueness in Law* (2000) chapters 2 & 9.

49 Carmichele (note 3 above) paras 39, 54.

50 The court has, on occasion, shown a hesitance to embrace the full extent of this mandate: at some points it has qualified the obligation (see, for example, *Carmichele* *ibid* para 39), while at other points it has shown disagreement about what it requires in a particular case (see, for example, the disagreement between Yacoob J & Moseneke DCJ in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)). It may be that s 39(2) is inconsistent with the principle of avoidance. I do not take up that issue in this article.

be informed by the ‘spirit, purport and objects’ of the Bill of Rights. When a court is faced with having to interpret a particular piece of legislation, it is mandated to give that legislation an interpretation which is consistent with constitutional values. In each case that comes before it, a court should consider whether it raises constitutional issues.

These are mere examples of the broader point: that s 39(2) mandates all courts at all times to make an affirmative contribution to the ongoing project of building a coherent constitutional jurisprudence.⁵¹ As O’Regan J puts it in *K*:

The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.

Seen in this way, s 39(2) turns out to mean something quite different to ‘indirect horizontal application’ – instead, s 39(2) commands courts to take heed of the Constitution in every case they hear, and to participate actively in the collaborative process of doing justice through law.⁵²

If this analysis of s 39(2) is correct, how is it that this section came to be mixed up with indirect horizontal application to begin with? Part of the explanation is that the Constitutional Court, in *Du Plessis*, grounded indirect horizontal application in s 35(3) of the interim Constitution. In later cases, the court equated this section with s 39(2) of the final Constitution because of their similar wording (despite the very different constitutional texts).⁵³

The fault also lies partly with *Carmichele*. The Constitutional Court in *Carmichele* sets out to solve two distinct problems: (i) that the lower courts did not raise constitutional issues of their own accord; and (ii) that the existing common law did not provide the claimant with a cause of action. The mistake the court makes is to try to use s 39(2) to solve both of these problems. But s 39(2) solves only problem (i) – it does not (and cannot) solve problem (ii). Problem (i) arises because the lower courts did not take seriously the s 39(2) mandate to consider the Constitution in each case that comes before them. If they had paid the required attention to the Constitution, the lower courts would have discovered problem (ii) – that the common law did not come to the claimant’s aid as the Constitution demanded. However, having identified problem (ii), the focus ought then to have shifted away from s 39(2) to s 8: specifically, s 8(1), which requires the law to reflect the state’s duty to protect people like Alix Carmichele.

The overly demanding reading of s 39(2) in *Carmichele* explains why the section wreaks havoc in later cases like *Masiya* and *Barkhuizen*.⁵⁴ The

51 See *Du Plessis* (note 2 above) para 167.

52 Compare Woolman (note 29 above) 31-56: ‘39(2) does not, in fact, offer nearly as much promise of transformation as we would hope.’

53 See, for example, *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC) para 31.

54 Woolman (note 1 above).

Constitutional Court's application of the Bill of Rights to the common law lacks rigour in these cases precisely because s 39(2) does not provide the court with the analytical tools it needs. Those tools are provided only by s 8. Section 39(2) should instead have the very different transformative role I have set out above.

II WOOLMAN ON HORIZONTALITY

Perhaps the most prominent alternative to the Constitutional Court's own interpretation of ss 8 and 39(2) is put forward by Stu Woolman in his chapter on 'Application' for *Constitutional Law of South Africa*. Though I agree with much of what he has written there, Woolman's analysis of horizontality nevertheless fails to give a precise account of the nature of 'direct application' (as he calls it) and how it maps on to the text of the Constitution. In this part I expand on the weaknesses of his account.

The overarching difficulty with Woolman's analysis is that he never expressly defines what he means by 'direct application'. Sometimes it seems like what Woolman really wants is simply that the common law should be rigorously tested against the Bill of Rights. This appears first and foremost from his description of s 8: '[It] reminds us that ... rules of common law are, in fact, subject to *direct* constitutional review'.⁵⁵ We see it also in his claim that the effect of *Khumalo* is that 'less law is *immediately* and *unequivocally* subject to the substantive provisions of the Bill of Rights'.⁵⁶

If Woolman is advocating that all disputes between private parties, regardless of the type of law involved, must be tested against criteria developed from the Bill of Rights, his point is unassailable. But then it is unclear what explanatory work, if any, words like 'direct', 'immediately' and 'unequivocally' are meant to be doing here. As I argued earlier in this article, it seems to me that we would do better, when discussing the mandate to test law in private disputes against the Bill of Rights, to restrict ourselves to the term 'horizontality'. Continuing to use the phrase 'direct application' to describe this mandate conflates the Validity and Remedies Theses, and thus serves only to obscure our analysis of this phenomenon.

At other times Woolman appears to adopt a negative definition of 'direct application'. On this reading, 'direct application' is simply 'not application under section 39(2)', which (in line with the widely held view) he takes to be about 'indirect application'. One problem with this definition of 'direct application' is that it presupposes the Dichotomy Thesis. That thesis, as we have seen, is false, and I say more about it below in relation to Woolman's view of s 39(2). A further problem is that defining direct and indirect application in terms of their opposites still does not give us a sense of what each of these things is, and when we are meant to use them.

⁵⁵ Woolman (note 29 above) 31-76 fn 1, my emphasis. See also 31-44 – 31-45.

⁵⁶ Ibid 31-63, my emphasis. I am not concerned at present with whether this functions as an accurate interpretation of *Khumalo*.

Ultimately, Woolman appears to settle on a third meaning of ‘direct application’, which is about the possibility of invalidating common law and of developing fresh rules and remedies where none existed before. As I explained earlier, I think that understanding of direct horizontal application is sound. As we shall see in the next section, however, Woolman struggles to explain how that understanding maps on to the text of ss 8(2) and 8(3).

(a) Redundancy in section 8

Woolman’s interpretation of s 8 begins with an expansive reading of s 8(1). He argues that ‘all law’ in s 8(1) means that this section is what really provides the mandate for imposing human rights duties on private actors: s 8(1) means that ‘no genus of law is exempt from testing against the norms of the Bill of Rights’.⁵⁷ Even if this is correct, we should note that s 8(1) on its own does not tell us which rights apply against private actors and to what extent. To know this we need to ascribe to s 8(2) the meaning I have given it in this article.

Woolman’s own reading of s 8(2) is equivocal. At times, he argues that the purpose of s 8(2) is to put us on alert. It makes us ‘recognize that the law as it stands may not give adequate effect to a provision, or multiple provisions, in the Bill of Rights’.⁵⁸ It ‘calls attention to the potential gap between extant rules of law and the prescriptive content of the Bill of Rights’.⁵⁹ But that surely cannot be the unique contribution of s 8(2) to the constitutional scheme. Indeed, the Constitution’s very existence is premised on the gap between the law as it is and the law as it should be: it is not immediately clear why we need any particular section of the Constitution to draw our attention to that gap. Or if we do, why does that role not sit more comfortably with s 8(1), or s 2? Attributing this purpose to s 8(2) seems arbitrary.

At other times Woolman argues that s 8(2) is not just there to remind us about this gap, but also ‘requires courts to bridge it by bringing the law into line with the demands of the particular constitutional right’.⁶⁰ It ‘tells us to fill them in where appropriate’.⁶¹ However, take note of the function Woolman attributes to s 8(3): ‘8(3)(a) and (b) enjoin the court to develop new rules of law and remedies designed to give effect to the right infringed’.⁶² This reading gives s 8(2) and s 8(3)(a) identical meanings.

In the result, Woolman struggles to give a useful role to s 8(2). This is made clear by his summary of the purpose of the section:

[It] *eliminates any doubt* (a) about the application of the substantive provisions of the Bill of Rights to disputes between private parties, in general, and (b) about the ability to use the Bill of Rights to develop new rules of law and new remedies that will give adequate effect to the specific provisions of the Bill, in particular.⁶³

⁵⁷ Ibid 31-48. See also 31-62.

⁵⁸ Ibid 31-72.

⁵⁹ Ibid 31-46.

⁶⁰ Ibid 31-46.

⁶¹ Ibid 31-73.

⁶² Ibid 31-46 & 31-75–31-76.

⁶³ Ibid 31-73, my emphasis.

But recall that dispelling doubts about (a) is the role Woolman ascribes to s 8(1), and dispelling doubts about (b) is the role he gives to s 8(3). His account thus far gives s 8(2) no work to do.

There is, however, still a third meaning which Woolman attributes to s 8(2). On this reading, while s 8(1) covers ‘all law’, s 8(2) is intended to cover conduct which is ‘not adequately governed’ by an express rule of law.⁶⁴ The difficulty with this interpretation of s 8(2), which Woolman recognises, is that it commits him to some version of what he calls the ‘no-law thesis’ – that some aspects of life simply are not subject to law.⁶⁵ In *Du Plessis*, Mahomed DP expressed rightful scepticism about that thesis:

A landlord who refuses to let to someone because of his race is exercising a right which is incidental to the rights of the owner of property at common law ... [a] social club which black-balls Jews, Catholics or Afrikaners acts in terms either of its own constitution or the common law pertaining to voluntary associations or freedom of contract. I am not persuaded that there is, in the modern State, any right which exists which is not ultimately sourced in some law.⁶⁶

As Woolman himself accepts, all social relations can ultimately be linked back to the law in this way.⁶⁷ Woolman thus commits himself to a ‘weak version’ of the no-law thesis. According to that version, there exists a category of conduct which is not ‘adequately governed’ by an express rule of law, but which is nevertheless subject to ‘a body of extant rules – or even background norms – [that] may be said to govern a particular set of private relationships’.⁶⁸ This category of law, then, is the true province of s 8(2).

However, even this third interpretation of s 8(2) cannot succeed. Firstly, it is not clear which principles a court would use to distinguish between conduct which is or is not ‘adequately’ governed by express rules of law.⁶⁹ Secondly, if s 8(2) only applies in situations which are not governed by an express rule of law, how can the section be used (as Woolman thinks it can) to invalidate a rule of common law which, by virtue of the fact that it has to be invalidated, must have expressly pertained to the situation in question?

The third difficulty lies in Woolman’s belief that the test for invalidity happens under s 8(2), leaving s 8(3) to deal only with questions of remedy: ‘[i]f we decide [under s 8(2)] that the right invoked engages the conduct and that

64 Ibid 31-45–31-46 & 31-64–31-74. Note that Woolman moves between saying that s 8(2) is about ‘instances in which private conduct is not governed by an express rule of law’ (31-65) and saying that it is about cases instances ‘in which the existing body of rules do not do adequate justice to the demands of a given right’ (31-67). These are very different conceptions of s 8(2) – the former claim entails something like the ‘no-law’ thesis, while the latter does not.

65 Ibid 31-72.

66 *Du Plessis* (note 2 above) para 79.

67 Woolman (note 29 above) 31-45 – 31-46. See also Klare (note 11 above) 185; Van der Walt ‘Perspectives’ (note 1 above); J Balkin ‘Deconstruction’s Legal Career’ (2005) 27 *Cardozo LR* 719, 728; J Singer ‘Legal Realism Now’ (1988) 76 *California LR* 465, 482.

68 Woolman (note 29 above) 31-45 – 31-46.

69 This is not a problem if we only need to distinguish between these types of conduct at the remedies stage. It is a problem, however, if we use the distinction, as Woolman wants to, as a conceptual trigger for applying one or another section of the Constitution.

the right has been unjustifiably infringed, then we move on to [s] 8(3).⁷⁰ This view is incorrect. Section 8(2) is about establishing the constitutional standard – the criteria of constitutional validity against which the law must be tested. But s 8(2) cannot tell us whether the standard is met – the test itself takes place under s 8(3). To see why that is so, note that s 8(3) expressly allows for the possibility that existing law (in the form of legislation or the common law) may *already* give adequate effect to the demands of the rights in question (as the Constitutional Court often finds).⁷¹ Only if there is no legislation which can be interpreted to give effect to the right, and no common law which adequately protects it, are the courts required to develop the common law appropriately. If Woolman is right that the finding of a violation happens under s 8(2), it would make no sense to give a court the option to apply existing law to give effect to the right, as is possible under s 8(3).

The final problem with Woolman's analysis of s 8 is that even after this confusing interpretive work on ss 8(1) and (2), Woolman admits that his account still renders much of s 8(3) meaningless, arguing ultimately that the section is 'simply reinforcing' a court's already inherent power to develop the common law.⁷² We should be reluctant to conclude, as Christopher Roederer does, 'that the addition of s 8(2) and (3) to the 1996 Constitution was inelegant and it would have been nice if it could have been more clearly integrated with s 39'.⁷³ Meeting the conceptual challenge of horizontality by alleging that the Constitution was not properly drafted is not a responsible approach to constitutional interpretation.

(b) Section 39(2) and the 'vibe' of the Bill of Rights

According to Woolman, s 39(2) comes into play when no specific right in the Bill of Rights can be relied upon, but the general spirit and objects of the Bill of Rights nevertheless require development of the law.⁷⁴ It is implied that this inquiry often takes off where a failed s 8 analysis has ended. As Woolman puts it in a different essay: 'Only when one has determined [the right's ambit], and found that it does not speak to the issues raised by an ordinary rule of law, can one turn to the more open-ended invitation of section 39(2).'⁷⁵ In such an instance, s 39(2) requires courts to interpret legislation or develop the common law in line with the general spirit, purport and objects of the Bill of Rights.⁷⁶

70 Woolman (note 29 above) 31-46.

71 This does not, of course, vindicate an approach which the Constitutional Court is sometimes accused of taking, which is to avoid giving meaningful content to the Bill of Rights and to declare, without more, that the existing law is already in line with what those rights require, see Woolman (note 1 above). Section 8(2) and (3) clearly mandate that giving content to the Bill of Rights is prior to a finding that the existing law is already adequate.

72 Woolman (note 29 above) 35-71, 35-76 – 35-77.

73 Roederer (note 6 above) 79.

74 Woolman (note 29 above) 31-46, 31-83 fn 1.

75 Woolman (note 1 above) 777.

76 Woolman (note 29 above) 31-78.

For Woolman, the effect of s 39(2) is thus to give a disappointed litigant a second bite at the apple: she can claim that the law still falls short of the ‘vibe’ of the Bill of Rights, despite not violating any particular right in question. This same approach to s 39(2) is evident in the Constitutional Court’s judgment in *Thebus*:

It seems to me that the need to develop the common law under section 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision ... The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects.

The first problem with this approach to s 39(2) is the implication that it is possible for a law to fall short of the Bill of Rights as a whole, despite not running afoul of any particular part of it. That cannot be right – it is impossible to violate a body of standards without violating at least some subset of the standards within it. If a law does not comport with the general objects of the Bill of Rights, it must be because it is out of step with what a group of rights, interpreted holistically and teleologically, demands. The interpretation of s 39(2) advanced by Woolman and implied by *Thebus* trades on an undesirably atomistic approach to the interpretation of each right in the Bill of Rights, which contradicts the Court’s usual approach of interpreting rights as a mutually reinforcing web of norms.⁷⁷

The second difficulty with this reading of s 39(2) is its implication that the section is *necessarily* vague, and involves never spelling out what specific rights in the Bill of Rights are affected by the existing law. However, once one accepts, as Woolman does, that the rights in the Bill of Rights, laden as they are with open-ended values, can be given meaningful content, then it must follow that s 39(2) can be given such content too.

The third problem with Woolman’s account of s 39(2) is that it requires us to know what remedy we are going to provide before we can know how to analyse the problem. According to Woolman, if the Bill of Rights requires that a rule of common law must be declared invalid, then we use ‘direct application’ under s 8(3); if the Bill of Rights simply requires the development of the common law, then we use ‘indirect application’ under s 39(2).⁷⁸ This reverses the order of the inquiry: we should want the core application provisions of the Constitution to help us decide what the right outcome is, rather than merely forming part of some ex post facto rationalisation of what we have already determined the outcome to be.

The final problem with Woolman’s analysis is that, like the Constitutional Court in *Carmichele*, Woolman wants s 39(2) to do too much. In addition to mandating indirect application, Woolman reads s 39(2) as a mandate that

⁷⁷ *National Coalition for Gay and Lesbian Equality* (note 24 above) para 114; *Smith* (note 32 above) para 66; *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) paras 51 & 111; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 21–5 & 83.

⁷⁸ Woolman (note 29 above) 31–84 – 31–85.

courts ‘must always infuse any law with the general spirit, purport and objects of the Bill’ and to raise constitutional issues of their own accord.⁷⁹ As I have argued above, the section cannot be both a mandate on courts to refer to the Constitution in every case, as well as a mechanism for the indirect application of the Bill of Rights to the common law in private party disputes. In my view, the section has the resources to be only the former, not the latter.

It turns out that the type of reasoning which Woolman castigates in ‘The Amazing, Vanishing Bill of Rights’⁸⁰ flows directly from his own interpretation of ss 8 and 39(2) in his chapter on ‘Application’.⁸¹ If a court needs to know the remedy before it can know what process of reasoning to follow, no wonder the Constitutional Court is ‘getting things back to front’, as Woolman puts it, by reasoning backwards from outcomes. Furthermore, if Woolman is right that there is a dichotomy between s 8 and s 39(2), and if Woolman is also right that s 8(2) and (3) are only concerned with the rare instances when a dispute is ‘not adequately governed by a rule of law’, then he is wrong to chastise the Constitutional Court’s more frequent resort to s 39(2). And finally, if section 39(2) does not require the court to talk about the ambit of specific rights, but instead allows the court to rely on the general feel of the Bill of Rights, then we are indeed resigned to precisely the type of vague reasoning in *Barkhuizen* and *Masiya* about which Woolman has rightly complained.

III JUSTICE ACKERMANN AND THE LIMITATION OF RIGHTS

In his recent book, *Human Dignity: Lodestar for Equality in South Africa*,⁸² Justice Ackermann engages in a lengthy discussion of the horizontality of the right to equality, and the role which dignity can play in balancing attendant conflicts of rights. In the course of that analysis, Justice Ackermann sketches a brief account of ss 8 and 39(2). Since the particular concern of his account is the horizontality of equality, Justice Ackermann avoids in-depth responses to at least some of the questions which arise for horizontality as a general matter. In particular, one drawback of Justice Ackermann’s argument is that, like Professor Woolman, he is not always clear about what he means by ‘direct horizontal application’, and certainly he does not distinguish this from ‘horizontality’, as I have explained that concept here.

Nevertheless, Justice Ackermann’s argument is compatible with mine in that he endorses both the Validity Thesis and the Remedies Thesis, and properly maps these onto ss 8(2) and 8(3), respectively. In his view, s 8(2) both mandates and qualifies the application of human rights obligations to private actors,⁸³ while s 8(3)(a) sets out a disciplined procedure for providing remedies when the law falls short of the Constitution.⁸⁴

79 Ibid 31-82.

80 Woolman (note 1 above).

81 Woolman (note 29 above).

82 Ackermann (note 47 above).

83 Ibid 264-5.

84 Ibid 265.

I believe Justice Ackermann would also reject the Dichotomy Thesis, to the extent that he interprets s 39(2) as imposing an extensive general obligation on courts to further the Bill of Rights in all matters that come before them.⁸⁵ In addition, he argues, as I have, that a court is *compelled* to resort to s 8 in a dispute between private parties – it cannot choose to rely on s 39(2) instead.⁸⁶

My main point of disagreement with Justice Ackermann, then, is about the role of s 8(3)(b), which provides:

When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

...

- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

In contrast with vertical application, which pits the rights of citizens against the interests put forward by the state, Justice Ackermann believes that one of the distinctive features of horizontality is that it almost always entails a clash of competing rights.⁸⁷ Justice Ackermann believes that the purpose of s 8(3)(b) is to direct courts to resolve such clashes by reference to a modified limitations analysis under s 36.⁸⁸

I think this interpretation of s 8(3)(b) is wrong on two counts, which I presently explain.

(a) Rights against interests, rights as interests

Justice Ackermann's approach to s 8(3)(b) wrongly assumes that there is a special difficulty attached to weighing rights against rights, as opposed to weighing rights against interests of the kind put forward by the state.

According to one prominent and compelling account of rights, interests – defined as aspects of our well-being – are what provide us with the foundation and justification for rights in the first place.⁸⁹ *A* has a right to the performance of a duty by *B* if an interest of *A* – her interest in not being subjected to violence, her interest in choosing her own government, her interest in housing, and so on – is a sufficient reason for holding *B* to the performance of that duty.⁹⁰ Interests ground rights and rights ground duties.⁹¹

85 Ibid 259–60.

86 Ibid 261, 265, 268–9, 292. On occasion, however, Justice Ackermann undermines the strength of this position by suggesting that s 39(2) remains concerned with indirect horizontal application (which I think is mistaken). See, for example, *ibid* 264.

87 Ibid 266.

88 Ibid 277.

89 The analysis I present here draws largely on the account of rights offered by Joseph Raz in his *The Morality of Freedom* (1988) chapter 7. The account has much in common with Dworkin's approach to rights – see R Dworkin 'Rights as Trumps' in J Waldron (ed) *Theories of Rights* (1984) 153. For a sympathetic treatment of Raz's account, see also J Waldron 'Rights in Conflict' (1989) 99 *Ethics* 503.

90 Raz *ibid* 166.

91 Note, however, that there can be interests which ground no rights, as well as duties which are not grounded in rights. See further Raz *ibid*.

What makes this view of rights attractive is that it explains four important features of the special justificatory role that rights play in practical reasoning. First, by operating as intermediate conclusions between ultimate values and concrete duties, rights summarise our first-order conflicts about interests, and can be used as reasons in further arguments.⁹² Two people may not agree on the interest which justifies the right to life, but they can nevertheless agree that we have that right, and use that right as a premise to generate successive waves of duties.⁹³

Second, the account explains why rights are not ordinary reasons. Duties, and therefore rights, have pre-emptive force in practical reasoning.⁹⁴ A right does not simply compete with other reasons in our decision-making – instead, a right pre-empts and replaces some or all of the other reasons which apply in the circumstances. It is this feature of rights which places limits on the kinds of utilitarian interests which can be relied on to override them.⁹⁵

Third, rights persist despite the fact that the duties they require are sometimes defeated by other interests (including the interests which ground the competing rights of others). The right to free speech exists despite the fact that it can be properly limited in the name of other duties.⁹⁶

Fourth, this account helps us understand why it is that rights conflict in the first place. Rights conflict because the competing duties they generate cannot all be performed at once – and those duties conflict because the interests they serve conflict.⁹⁷

I have set out this brief account of rights to demonstrate that clashes between competing rights are, in the end, clashes between interests (notwithstanding the fact that rights are intermediate conclusions *about* those interests). Describing a ‘clash between two rights’ masks what we are really arguing about – namely, how interests compete with one another to determine what duty is required in the particular circumstances.

If this is so, then it is wrong to single out horizontality as presenting special problems for human rights adjudication. Whether an individual claims a right against the state or a right against another individual, the form of the analysis is the same: we are weighing an individual’s interests (*A’s* right) against the interests of another individual (*B’s* right), or against the state’s promotion of aggregated individual interests (as set out in s 36).

However, rather than support Justice Ackermann’s argument for a resort to s 36 in cases of horizontality, this view of rights undermines it. For while the form of the analysis will be the same in both cases (interests against interests), the type and range of the competing interests will be very different. The

92 Ibid 181.

93 This is what Raz refers to as the ‘dynamic’ aspect of rights – ibid 171. See also Waldron ‘Rights in Conflict’ (note 89 above) 509–12.

94 Raz ibid 186.

95 Waldron ‘Rights in Conflict’ (note 89 above) 509, 516; R Dworkin *Taking Rights Seriously* (1977) xi.

96 Raz (note 89 above) 184; Waldron ‘Rights in Conflict’ (note 89 above) 510–2.

97 Waldron ibid 506–8, 512.

state, for its part, tries to justify a limitation of rights by reference to a wide variety of considerations. Briefly put, it must demonstrate the achievement of a legitimate government purpose (either because it advances the collective good, or because it protects the rights of others) at the least cost to the rights in question. In a ‘clash of rights’, on the other hand, *B*’s claim to limit *A*’s right is based on a much narrower set of considerations; namely, the relatively discrete set of interests which justify the rights on which they each rely.

Justice Ackermann believes that horizontality, like a s 36 analysis, involves an assessment of proportionality between interests. He is right about that, in that we are trying to balance the extent of the impairment of each person’s rights. But the need for a general proportionality analysis in the context of competing rights does not justify reference to the very specific proportionality analysis set out in s 36. Section 36 enumerates interests that are relevant to a proportionality analysis involving the state. Those interests do not track the interests we want to balance in a dispute between private parties. In a clash of rights, all we must consider is the nature of each right, and the extent of the limitations they impose on one another. It is clear from Justice Ackermann’s examples that he considers this to be the foundation of the analysis. But if that is so, the only useful factor we can extract from s 36(1) is ‘the nature and extent of the limitation’.⁹⁸

The analysis Justice Ackermann believes must take place under s 36 should properly take place under s 8(2). That section itself, by explaining that rights bind a private actor in a limited way, taking into account the nature of the right and the duty it imposes, already suggests a limitations analysis based on the only factor from s 36(1) worth keeping: we must consider the nature of each right and the extent of the limitation each imposes on the other. Section 8(2) tells us to unpack the background interests which the rights are meant to protect, and the duties they are meant to impose, and determine how the burden of obligation should ultimately be distributed.

This is the natural place to conduct the balancing exercise between claimants’ rights. There is no reason to artificially impose on the analysis of competing rights the very different methodology which the courts have fruitfully developed under s 36 in relation to the legitimate interests of the state. Indeed, as I set out in the next section, I believe that the very purpose of s 8(3)(b) is to provide a space for just those state interests in disputes between private parties.

(b) The state’s interest in private disputes

To see that it is necessary to make space for the state in private disputes, consider the following example. John alleges that a newspaper has defamed

98 Section 36(1)(c) renders both 1(a) & 1(b) redundant, since 1(c) allows us to consider both the nature (purpose) of each right, and the limitations each imposes; 1(d) & 1(e), for their part, do not make much sense in the context of competing rights. Of course, whatever limitation a court settles on must be reasonable and justifiable in an open and democratic society based on dignity, equality and freedom, but ss 1 & 7(1) tell us that already.

him by publishing damaging statements about his role in a national security scandal involving the state intelligence agency. John claims that the newspaper has infringed his right to dignity, while the newspaper relies on its right to freedom of expression – we are in the territory of horizontality. Let us imagine that the court decides that freedom of expression, in cases of national security, outweighs the claimant's right to dignity, and in the absence of applicable legislation, the court develops the common law to reflect this constitutional demand. As a matter of what the Bill of Rights requires between these two parties, that is the end of the analysis. However, the interests of John and the newspaper are not the only ones relevant to what the legal position should be. In addition to the arguments about dignity and expression, imagine the state intervenes with arguments concerning the need to limit the newspaper's right to freedom of expression in the name of national security. Over and above considering John's claim about dignity, the state asks the court to limit the newspaper's expression so as to protect state secrets. How is the court meant to analyse the state's argument here?

Here is another example. A group of patients suffering from a widespread disease launches a class action against a large pharmaceutical company, demanding that it reduce the costs of the medicine they need or licence the production of cheap generics. The patients argue that the company owes them duties in terms of the constitutional right to health care, while the company relies on its right to property. Perhaps in this particular case the court decides that the right to health care trumps the right to property, and permits the production of generic drugs. Once again, however, it is highly likely that the interests of the patients and the pharmaceutical company are not the only ones the court should consider. Imagine the state intervenes, asking the court to uphold the company's right to property. Failure to do so, the state could allege, will damage the state's investor relations or economic growth strategy, or violate its obligations under international law. How do these interests feed into the rights analysis?

Justice Ackermann's interpretation of s 8(3)(b) assumes that, in a given dispute between private litigants, the only relevant limitation on the right of the claimant is the competing right of the defendant. But the above examples demonstrate that the state will very often have a legitimate interest in the way the common law is developed in disputes between private parties.

This, I submit, is what explains the reference to s 36 in s 8(3)(b). Once a court has come to an all-things-considered determination (under s 8(2)) of what the Bill of Rights requires as between the private parties themselves, the court can then consider any legitimate interests the state may put forward to limit one or more of the rights in question, and take those into account in its development of the common law. Section 8(3)(b) tells the court to conduct this analysis of the state's interests according to its usual approach under s 36(1).

IV CONCLUSION

Against competing interpretations, I have sought to offer a comprehensive and coherent account of horizontality under the South African Constitution, which proceeds primarily by challenging the division of labour between ss 8 and 39(2) which the Constitutional Court currently endorses. I have offered this account because I believe that tying the fate of horizontality to the narrower remedial doctrines of direct and indirect application will continue to diminish its transformative potential, leading ultimately to what Woolman has described as the ‘amazing, but vanishing’ Bill of Rights.

If the analysis I have set out here is correct, then our approach to horizontality needs to change in several fundamental ways. First, we must restrict our use of the term ‘horizontal application’ and its associated phrases to discussions of remedies for law that is inconsistent with the Bill of Rights. Our current usage damagingly conflates several discrete issues, and continues to sow confusion about how horizontality is supposed to work.

Second, we must no longer posit a destructive dichotomy between s 8 and s 39(2). Section 39(2) has nothing to do with horizontality. It requires a court to pay heed to the Constitution in every dispute that comes before it, regardless of the parties to the case or the type of law involved.

Third, we must abandon the view according to which ss 8(2) and (3) come into play only when no law is implicated in the dispute. This is so not only because law is ultimately implicated in every dispute, but because these sections are the mandatory starting point of analysis for all disputes between private parties, regardless of the type of law involved or how ‘expressly’ it governs the case.

Fourth, we can no longer accept the claim made in various judgments and journal articles that s 8(3) and s 39(2) amount to the same thing. That claim wrongly creates redundancy in the Constitution, and ignores the clear differences in the text and logic of the two sections. Furthermore, it undermines the much more extensive role which s 39(2) is intended to play in the transformation of the law.

Finally, while the horizontality of human rights is mandated in every dispute between private parties, direct horizontal application itself is not an absolute good. Whether it is the right remedy is heavily contingent on the nature of the dispute in question, and it is likely only to be required in a limited number of cases. In many more cases, an appropriate interpretation of legislation or development of the common law will give an adequate expression to the demands of the Bill of Rights. But that can only be so if we rigorously give content to those demands, by taking seriously the mandate of horizontality in s 8(2).