

The application of socio-economic rights to private law

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Prologue

It was a great honour for me to serve with Ig Rautenbach as a member of the technical committee advising the constitutional assembly on the bill of rights in the 1996 constitution. Ig was supportive of the innovative provisions in the bill of rights – including socio-economic rights, a separate clause dealing with children’s rights and the horizontal application of fundamental rights. He understood the aspiration of many people that the bill of rights should facilitate the transformation of the unjust social and economic legacy of the colonial and apartheid eras. He had faith in the ability of the courts, assisted by the general limitations clause, to develop principled and pragmatic responses to the challenges posed by these innovative provisions.

Ig’s considerable experience and expertise in comparative constitutional law, his openness to novel approaches, and his wicked sense of humour contributed enormously to the smooth functioning and progress of the work of the technical committee and the committees of the constitutional assembly it advised.

This article, which explores the application of socio-economic rights in private law, is dedicated to Ig.

1 *Introduction: socio-economic rights and private power*

The constitution is explicitly committed to redressing and transforming socio-economic exclusion and marginalisation. This is manifest, amongst other constitutional provisions, in the entrenchment of a comprehensive range of socio-economic rights read together with the provisions relating to substantive equality,¹ land reform² and environmental rights.³ Moreover, the constitution contains a number of express provisions signalling that the rights and values in the bill of rights are intended to apply to private relations and to influence the development of the common law and customary law. Sections 8(1)-(3) and 39(2) are the primary provisions governing the application of the bill of rights to private parties.

In South Africa (as is the case in other societies based on a market economy) powerful private actors such as landlords, banks, medical aid schemes, insurance

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¹ s 9. See Albertyn “Substantive equality and transformation in South Africa” 2007 *SAJHR* 253.

² S 25 (the property clause) aims to balance the objectives of protecting existing property rights (s 25(1)-(3)) with the goals of increasing access to property through land reform and property restitution (s 25(4)-(9)).

³ The environmental clause strives to reconcile the promotion of “justifiable economic and social development” with securing “ecologically sustainable development and use of natural resources” (s 24(b)(iii)).

companies and utility companies delivering public services such as water exercise significant control over people's access to socio-economic rights. Common-law rules and institutions structure access to socio-economic resources in diverse areas of contract law, property law, delict, family law and succession.⁴ As Michelman observes:

“Suppose everyone has a constitutionally super-valued interest in having ‘access to sufficient food and water’. Food-sellers exercising powers under the law of contract to set highly profitable prices for their wares, and landowners exercising rights and privileges under the law of property to convert land from food production to game parks, may threaten those interests as gravely as any state official ever would be likely to do.”⁵

In this context, sections 8 and 39(2) are crucial mechanisms to ensure that private entities and law can be held accountable for infringements of the socio-economic rights in the bill of rights. Cumulatively these provisions establish that no exercise of public or private power is immune from critical scrutiny and re-evaluation in the light of constitutional rights and values of the constitution. There are no immunised zones, only better or worse constitutional justifications for leaving intact, invalidating or changing the particular legal rule (whatever its source) which is subject to challenge.

Any attempt to shield common-law rules from judicial review in terms of constitutional rights and values will operate to entrench and perpetuate the power and privileged position of those who already enjoy access to socio-economic resources. And it will operate to reinforce the exclusion and marginalisation of those who currently lack the means to participate meaningfully in the social and economic institutions of society. This will entrench rather than transform South Africa's legacy of colonialism and apartheid which systemically deprived black people of access not only to political power, but also of access to a range of socio-economic resources and services.

2 *Applying socio-economic rights in private law: sections 8 and 39*

As noted above, the two main constitutional provisions mandating and providing a methodology for the horizontal application of rights in the bill of rights are sections 8 and 39(2). The interpretation of the two provisions and their interrelationship and application remains a source of on-going controversy and debate.⁶ Despite the application of section 8 to the common-law rules of defamation in *Khumalo v Holomisa*,⁷ subsequent jurisprudence of the constitutional court evinces a preference for relying on section 39(2) to give effect to the application of rights in the bill of rights in legal

⁴ Decisions exemplifying the effect of the rules of succession, personal status and family law on people's access to resources include *Satchwell v President of the Republic of South Africa* 2002 6 SA 1 (CC); *Volks NO v Robinson* 2005 5 BCLR 466 (CC); *Daniels v Campbell NO* 2004 5 SA 331 (CC); *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC).

⁵ Michelman “The bill of rights, the common law, and the freedom-friendly state” 2003-2004 *Miami LR* 401 414; Brand “Introduction to socio-economic rights in the South African constitution” in Brand and Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 1 39-40.

⁶ For a comprehensive discussion of this issue, see Woolman “Application” in Woolman *et al* (eds) *Constitutional Law of South Africa* (2005) ch 31.

⁷ 2002 5 SA 401 (CC).

relations between private parties,⁸ or when common law rules are at issue in cases involving organs of state.⁹

The courts have not always been consistent, nor have clear criteria been provided as to when it is appropriate to rely on sections 8, 39(2) or a combination of these provisions in invalidating or developing common law rules to ensure constitutional consistency. This article will not examine this debate in detail. However, I agree with the views expressed by Woolman that an independent significance and meaning must be given to section 8.¹⁰ It should not simply be ignored in cases which give rise to the question whether a right in the bill of rights applies in a legal dispute between private entities. I will therefore focus on the significance of both sections 8 and 39(2) for applying socio-economic rights in legal relations between private parties.

2.1 Section 8

2.1.1 Section 8(1)

The statement in section 8(1) that the bill of rights applies to “all law” and binds “the judiciary” also suggests, at least on its face, that the bill of rights is intended to apply directly also to the common law and customary law in cases involving private litigants relying on common law provisions. However, in *Khumalo v Holomisa*, O’Regan J held this interpretation of the binding of the judiciary in section 8(1) would render section 8(2) and (3) redundant.¹¹ Thus the direct application of a right in the bill of rights to the common law in disputes between private parties is primarily governed by sections 8(2) and 8(3). In *K v Minister of Safety and Security*,¹² O’Regan J further held that the inclusion of the judiciary in section 8(1) together with section 39(2) creates “an expressly normative legal system founded on the norms articulated in our constitution”.¹³

2.1.2 Section 8(2)

Section 8(2) determines under which conditions a right in the bill of rights will bind a private party. Its formulation suggests that there are no definitive categories of rights or duties which can be excluded from horizontal application in any *a-priori* fashion. Thus section 8(2) provides: “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.”

⁸ See, for example *Barkhuizen v Napier* 2007 5 SA 323 (CC), particularly at par 23-30: constitutional challenges to contractual terms should ordinarily occur through the development of the notion of public policy consistent with “the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights” (par 29-30). Compare the views of Langa CJ in his separate judgment disagreeing with the judgment of Ngcobo J (for the majority) to the extent that it holds that that the only acceptable approach to challenging the constitutionality of contractual terms is indirect application under s 39(2). The chief justice preferred to keep open the possibility of a direct application in terms of s 8 of certain rights in the bill of rights to contractual terms or the common law that underlies them (par 186).

⁹ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Masiya v Director of Public Prosecutions*, Pretoria 2007 5 SA 30 (CC); *Murray v The Minister of Defence* case number 383/2006 2008 SCA 44 (31 March 2008) (unreported).

¹⁰ See Woolman “The amazing, vanishing bill of rights” 2007 *SALJ* 762.

¹¹ (n 7) par 30-31.

¹² 2005 6 SA 419 (CC).

¹³ *K* case (n 12) par 15 and 19. This case concerned a delictual claim based on vicarious liability against an organ of state.

In *Khumalo v Holomisa* the constitutional court gave an indication of the considerations relevant to determining whether a right in the bill of rights has direct horizontal application.¹⁴ The case concerned whether the right of freedom of expression in section 16 affected the common law requirements in a defamation action against the media. The court held that the right of freedom of expression “is integral to a democratic society” and is “constitutive of the dignity and autonomy of human beings”.¹⁵ The media play a central role in upholding democracy and the right to freedom of expression enables them to fulfil this role.¹⁶ It went on to hold that:

“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.”¹⁷

A court must accordingly decide in the context of a particular dispute between private parties whether the nature of the particular right at issue in the case, and the nature of any duty imposed by that right make it capable and appropriate of application in the dispute. The degree to which a particular right will be binding on a private party thus depends on a contextual evaluation of the nature of the right and duties which are in question in particular cases, and the nature of the private entity concerned.¹⁸ This inevitably involves a policy judgment as to whether a duty imposed by the right should be imposed on a private party in the particular context of the case. However, as Currie and De Waal caution, this broad discretion to apply the bill of rights horizontally in the context of particular cases “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”.¹⁹ It is not necessary for the power of private conduct to approximate that of the state. It is enough that the exercise of private rights and private conduct can significantly impair the enjoyment of rights by others in society. The commitment of the constitution to transform existing inequitable power relations and patterns of poverty supports an expansive interpretation of the provisions in the constitution governing horizontal application.

As early as *Government of the RSA v Grootboom*, the constitutional court suggested that at least some of the duties imposed by socio-economic rights were binding on private parties. Thus it held that section 26(1) of the constitution imposes “at the very least, a negative obligation upon the State *and all other entities and persons* to desist from preventing or impairing the right of access to adequate housing”.²⁰ The court did not elaborate on its understanding of the “negative duty” imposed by socio-economic rights. However, in *Jaftha v Schoeman; Van Rooyen v Stoltz*,²¹ the court held, in the context of housing rights, that “any measure which permits a person to be deprived of

¹⁴ (n 7).

¹⁵ *Khumalo* case (n 7) par 21.

¹⁶ *Khumalo* case (n 7) par 24.

¹⁷ *Khumalo* case (n 7) par 33.

¹⁸ As Cockrell “Private law and the bill of rights: A threshold issue of ‘horizontality’” in *Butterworths Bill of Rights Compendium* (RS 13 Oct 2003) ch 3A 13 notes, s 8 (2) “proceeds on the assumption that constitutional rights might be agent-relative and context-sensitive, inasmuch as their direct application against private agencies will depend on the circumstances of the case and the characteristics of the particular person.”

¹⁹ Currie and De Waal *The Bill of Rights Handbook* (2005) 53.

²⁰ 2001 1 SA 46 (CC) par 34 – emphasis added.

²¹ 2005 2 SA 140 (CC).

existing access to adequate housing, limits the rights protected in s 26(1)".²² It went on to observe that such measures could be justified in terms of section 36. This suggests that private law rules or conduct which permits people to be deprived of the existing access which they enjoy to socio-economic rights is inconsistent with sections 26(1) and 27(1) of the constitution, and is subject to justification in terms of section 36.

The situation in relation to the positive duties imposed by socio-economic rights is more complex. Sections 26(2) and 27(2) place a duty on the state to adopt positive measures to advance access to the relevant rights. Does the fact that sections 26(2) and 27(2) expressly place this positive duty on the state imply that the positive duties imposed by socio-economic rights cannot bind private parties in appropriate circumstances? Such a reading would confine the scope of sections 26(1) and 27(1) to negative duties. There is some suggestion to support this reading in *Minister of Health v Treatment Action Campaign (No 2)* when the court holds:

"We therefore conclude that s 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in s 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to 'respect, protect, promote and fulfil' such rights. The rights conferred by ss 26(1) and 27(1) are to have 'access' to the services that the State is obliged to provide in terms of ss 26(2) and 27(2)."²³

However, this statement can also be read simply to indicate that any positive duties imposed by section 27(1) are not unqualified and that compliance must be assessed taking into account the constraints of available resources and the latitude of a reasonable time period for fulfilment. Secondly, it is not incontrovertible that sections 26(2) and 27(2) exclude all forms of horizontal application.²⁴ Klaaren argues that the requirement of "reasonable legislative and other measures" in sections 26(2) and 27(2) read in conjunction with sections 26(1) and (2) can be interpreted to include judicial measures thereby requiring the courts to develop the common law so as to promote access to socio-economic rights.²⁵

My preferred approach is not to rely on a rigid and a-contextual distinction between negative and positive duties for the purpose of determining the extent of horizontal application of the socio-economic rights in sections 26 and 27.²⁶ The purpose of sections 26 and 27 read as a whole are to protect and advance people's access to socio-economic rights. As Ellman observes, "Section 27(2) states part of what the state must do to implement these rights; it does not tell us that only the state need do anything."²⁷

²² *ibid* par 34.

²³ 2002 5 SA 721 (CC) par 39.

²⁴ For a suggestion to this effect, see Pieterse "Indirect horizontal application of the right to have access to health care services" 2007 *SAJHR* 157 163: "Subject to the (express and implied) limitations on horizontal application derived from s 8 of the constitution, all obligations inherent in s 27(1)(a) *except* for that set out in s 27(2) should in principle be viewed as capable of attaching to private entities."

²⁵ See Klaaren "A remedial interpretation of the *Treatment Action Campaign* decision" 2003 *SAJHR* 455 460-461; Klaaren "An institutional interpretation of socio-economic rights and judicial remedies after *TAC*" in Botha, Van der Walt and Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2004) 105.

²⁶ For a critique of the negative and positive duties distinction in the context of socio-economic rights, see Craven "Assessment of the progress on adjudication of economic, social and cultural rights" in Squires, Langford and Thiele (eds) *The Road to a Remedy Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) 27 34-36.

²⁷ Ellman "A constitutional confluence: American 'state action' law and the application of South Africa's socio-economic rights guarantees to private actors" in Andrews and Ellman (eds) *The Post-Apartheid Constitutions Perspectives on South Africa's Basic Law* (2001) 444 461.

Both public and private institutions and law can operate to unjustifiably deprive people of their access to socio-economic rights. Similarly, both public and private law and conduct can make it more difficult for people to gain access to these rights.

Section 8(2) suggests a nuanced and contextual approach for determining whether in a particular case it is appropriate and reasonable to place either a negative or positive duty imposed by a particular right in the bill of rights on a private actor. This will inevitably be a value judgment which must be made in the light of the transformative commitments and founding values of the constitution. These commitments include the redress of socio-economic deprivations and systemic inequality.

There are many examples which illustrate the potential application of both negative and positive obligations in the context of socio-economic rights claims to private actors. Thus in the context of the right of access to adequate housing, private law rules of property which permit people to be unjustifiably deprived of their access to adequate housing can be regarded as inconsistent with section 26 of the constitution.²⁸ Similarly, the contractual arrangements between medical aid schemes and their members may unreasonably and unjustifiably allow for the termination of membership or the coverage of particular medical treatments previously funded.²⁹

Contexts where it may be appropriate to impose positive duties on private actors to protect or facilitate people's access to socio-economic rights may arise from situations where there is a special relationship between the parties, or where the private entity has significant power to control access to the particular social goods or services. Thus, for example, the constitutional court has held that the duty to secure the socio-economic rights of children in section 28(1)(c) rests primarily on their parents and families, and only in default of such parental or family care, on the state.³⁰ Furthermore, it may be appropriate to impose a legal duty on large corporations to make provision for the housing needs of their workers in contexts where the company relies primarily on migrant labour. The health rights in sections 27, 28(1)(c) and 35(2)(e) can (and I would argue, should) be interpreted to place duties on large pharmaceutical companies to ensure that their patent rights do not undermine the economic accessibility of crucial drugs and medical treatments.³¹ While such cases may not manifest in a direct claim against the corporation concerned, recognition of an obligation on powerful private entities not to unjustifiably impede access to critical socio-economic goods and services should influence the interpretation of relevant international agreements,³² and legislation relevant to pharmaceutical pricing.³³

²⁸ See the discussion of *Brisley v Drotsky* (n 34-42 below) and accompanying text.

²⁹ While the relationship between medical aid schemes and their members is regulated by the Medical Schemes Act 131 of 1998, the act nonetheless allows a wide latitude in terms of the autonomy of schemes and their members to regulate their contractual arrangements for medical aid.

³⁰ *Grootboom* case (n 20) par 70-79.

³¹ On the possible application of s 27 in this scenario, see Ellman (n 27) 444 459-469.

³² Of particular significance in this context is the World Trade Organisation's treaty on the Trade Related Aspects of Intellectual Property Rights and the Doha Declaration on that treaty and Public Health WT/MIN(01)/Dec/2, 14 Nov 2001.

³³ Such legislation in the South African context includes the Patents Act 57 of 1978, the Medicines and Related Substances Act 101 of 1965, and the Competition Act 89 of 1998. For a discussion of the significance of health care rights to the intellectual property entitlements of pharmaceutical companies, see Chirwa "The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine" 2003 *SAJHR* 541; Onyemelukwe "Access to anti-retroviral drugs as a component of the right to health in international law: examining the application of the right in Nigerian jurisprudence" 2007 *African Human Rights Law Journal* 446.

Section 8(2) thus requires courts to do sustained interpretative work in coming to grips with the nature of the particular socio-economic right and the duties at stake in a legal dispute between private parties. *Khumalo v Holomisa* suggests that the application of any right in the bill of rights to a private party should depend on the power of the private party concerned to undermine the interests and values protected by the particular right. Given the significant power of a network of private law rules to influence access to socio-economic rights, courts should be slow to conclude that a particular socio-economic right is not applicable in a dispute between private parties, particularly when the social and economic context reveals significant disparities of power between the parties.

However, even in cases where the direct horizontal application of a socio-economic right on the common law in terms of section 8(2) is acknowledged, the courts have tended to minimise the impact of the relevant provision on the common law. In *Brisley v Drotsky*,³⁴ the supreme court of appeal conceded that section 26(3) of the constitution could be applied to the common law applicable to the eviction by a landlord of a tenant holding over after cancellation of a lease.³⁵ However, it neutralised the potential transformative impact of this provision on the common law by confining the “relevant circumstances” to which a court must have regard in evictions of people from their homes to the existing common law and statutory law rules.³⁶ In doing so, it rejected an interpretation which would give a court any discretion in relation to an eviction application taking into account a broader set of circumstances relating to the dealings between the parties and the personal circumstances of the former tenant.³⁷ Although judicial oversight of evictions is a vital safeguard, the supreme court of appeal’s interpretation of “relevant circumstances” in section 26(3) strips this phrase of substantive significance.³⁸ Its impact on evictions has been mitigated, to some extent, through the application of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 to a tenant holding over subsequent to the lawful termination of a lease agreement,³⁹ and the substantive interpretation accorded to this statute by the constitutional court in *Port Elizabeth Municipality v Various Occupiers*.⁴⁰ However, the shadow cast by *Brisley v Drotsky* still lingers over eviction applications not governed by Act 19 of 1998 or similar legislation⁴¹ as well as the restrictive interpretation of other legislation authorising evictions.⁴²

³⁴ 2002 4 SA 1 (SCA).

³⁵ *Brisley* case par 40. The prevailing common law rules were laid down in *Graham v Ridley* 1931 TPD 476.

³⁶ *Brisley* case par 42-43.

³⁷ *Brisley* case par 41; 44-45.

³⁸ For criticisms of the interpretation in the *Brisley* case, see Van der Walt *Constitutional Property Law* (2005) 422-424; Roux “Continuity and change in a transforming legal order: The impact of section 26(3) of the constitution on South African law” 2004 *SALJ* 466 484-491.

³⁹ *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA). In *Transnet (Pty) Ltd v Zaaiman* case no 326/07 (SECLD) (11 March 2008) unreported, Erasmus J held that a court will generally “be less sympathetic to recalcitrant ex-lessees and ex-owners than it is to squatters; not by virtue of legal principle, but because usually such persons are less deserving of protection in the circumstances surrounding their occupancy” (par 34).

⁴⁰ 2005 1 SA 217 (CC).

⁴¹ The correctness of the approach in the *Brisley* case (n 34) to the impact of s 26(3) on the common law acquires particular significance in the light of the proposed amendments to Act 19 of 1998 that will undo the ruling in the *Ndlovu* case (n 39) by excluding its application to tenants holding over. See Prevention of Illegal Eviction From and Unlawful Occupation of Land Amendment Bill [B8 – 2008] s 2.

⁴² See (n 52) below.

2.1.3 Section 8(3)

Having established that a right binds the private entity in a particular case, section 8(3) prescribes the mechanism through which this “horizontal” application is to take effect. In the first place a court must consider whether there is legislation which gives adequate effect to the right. If not, the court must consider whether an existing common-law rule gives effect to the right. If the existing common law rules are deficient in this respect, the court is obliged to develop the common law to give effect to the right and may at the same time develop rules of the common law to limit the right in accordance with section 36(1).

This provision establishes a preference for giving effect to the horizontal application of the rights in the bill of rights through legislative measures. This is understandable given the democratic legitimacy of legislation. Apart from being adopted by those democratically elected by the people, the legislative process should also involve broad and inclusive public deliberation and participation. Such processes should ideally enable legislatures to craft nuanced and systemic schemes which take into account and attempt to reconcile all conflicting rights, interests and values at stake.⁴³ It is therefore preferable that legislation be enacted which gives full effect to the socio-economic rights in public and private relationships.

Moreover, an important nexus exists in this context between the duties imposed by socio-economic rights on private parties and the duty of the state “to protect” the socio-economic rights of more vulnerable members of society against powerful private actors.⁴⁴ This duty to protect places an obligation on the state to enact and enforce the necessary legislation to regulate and enable private actors to fulfil their duties in socio-economic spheres. Where legislation does exist which regulates constitutional rights, litigants are required to rely on such legislation to protect their rights.⁴⁵

However sound the theoretical justifications for preferring legislative measures for giving effect to the horizontal application of socio-economic rights, it is premised on an idealised conception of the role and functioning of legislatures. This conception does not reflect the current realities both in South Africa and other jurisdictions. The South African parliament and provincial legislatures, like most other modern legislatures, are subject to the constraints of time and resource pressures, they are at a relative disadvantage to the executive in relation to technical expertise and resources, and subject to capture by powerful business and interest groups in society. This situation results in imperfect legislation which may disregard or neglect the rights of particular groups, frequently those who are political, economically and socially marginalised.⁴⁶

⁴³ The significance of public participation in legislative processes was highlighted in *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC).

⁴⁴ For a discussion of the state’s “duty to protect” discourse in the context of constitutional property law jurisprudence, see Van der Walt “Transformative constitutionalism and the development of South African property law” (part I) 2005 *TSAR* 655 and Van der Walt 2006 *TSAR* 1.

⁴⁵ See *SA National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) 420 par 52. The court in the *Grootboom* case (n 20) stated: “A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing” (par 35).

⁴⁶ For a discussion of the “blind spots” and “burdens of inertia” in legislative processes, see Dixon “Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited” 2007 *I Con* 391 402-406.

In situations where the legislature has not fulfilled its duty to protect socio-economic rights by enacting legislation giving effect to these rights, there are manifest legal difficulties in the way of obtaining an order to compel the enactment of such legislation. In these circumstances, litigants must look to the courts in terms of section 8(3) to find a remedy in terms of the existing common law or, where necessary, to develop a new constitutionally sourced remedy to give effect to the relevant constitutional rights. In this context, courts have to fulfil their constitutional duty to vindicate constitutional rights and should be wary of abdicating this responsibility on grounds such as deference to legislative choices. In dissenting from the decision of the majority to suspend its declaration of invalidity in respect of the common law definition of marriage in *Fourie v Minister of Home Affairs* to enable parliament to come up with a holistic scheme for the recognition of gay marriages,⁴⁷ O'Regan J states:

“There can be no doubt that it is necessary that unconstitutional laws be removed from our statute book by Parliament. It is equally necessary that provisions of the common law which conflict with the Constitution are developed in a manner that renders them in conformity with it. It would have been desirable if the unconstitutional situation identified in this matter had been resolved by Parliament without litigation. The corollary of this proposition, however, is not that this Court should not come to the relief of successful litigants, simply because an Act of Parliament conferring the right to marry on gays and lesbians might be thought to carry greater democratic legitimacy than an order of this Court. The power and duty to protect constitutional rights is conferred upon the courts and courts should not shrink from that duty. The legitimacy of an order made by the Court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of the Constitution. Time and time again, there will be those in our broader community who do not wish to see constitutional rights protected, but that can never be a reason for a court not to protect those rights.”⁴⁸

Section 8(3) clearly indicates that constitutional rights, which are not adequately protected in legislation or the existing common law, must be vindicated through the development of new constitutionally inspired remedies. This resonates with the injunction of the court in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President RSA* not to treat the common law and the constitution as two distinct spheres of law, but rather as a single system which “derives its force from the constitution and is subject to constitutional control”.⁴⁹

2.2 Section 39(2)

Section 39(2) of the constitution imposes a general duty on every court, tribunal or forum when interpreting any legislation, and when developing the common law or customary law to “promote the spirit, purport and objects of the bill of rights”.

As indicated above, section 8(3) requires courts to look to legislation in the first place to remedy infringements of constitutional rights by private parties. Section 39(2) requires courts to interpret legislation, without unduly straining the legislative text and scheme,⁵⁰ to protect and give effect to the rights and foundational constitu-

⁴⁷ .2003 5 SA 301 (CC).

⁴⁸ *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) par 132 -156 and 171.

⁴⁹ 2000 2 SA 674 (CC) par 44.

⁵⁰ In *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 1 SA 545 (CC) par 24.

tional values.⁵¹ In the context of socio-economic rights, this implies that legislation should be interpreted to promote the purposes and values underlying these rights.⁵² The purpose of these rights is to ensure that everyone has access to the socio-economic goods and services referred to in the relevant provisions. These goods and services must be adequate in quality and quantity so as to facilitate the development of people to their full potential and their participation as equals in all spheres of our society. Legislation impacting on people's socio-economic rights should therefore not be interpreted with a view to preserving as far as possible a common law normative baseline. Rather, such legislation should be constructed purposively to advance and protect the interests and values underpinning the relevant rights.

In *Port Elizabeth Municipality v Various Occupiers*,⁵³ the constitutional court indicated that Act 19 of 1998 had to be interpreted in the light of section 26 (3) of the constitution. Interpreting this act through the lens of section 26(3) transforms the traditional common law-rules relating to eviction applications. Instead of “privileging in an abstract and mechanical way the rights of ownership over the right not to be possessed of a home, or vice versa”, courts must strive for a just solution which balances and reconciles the competing interests in the context of the specific case.⁵⁴ In *Grobler v Msimanga*,⁵⁵ the high court gave a restrictive interpretation of the act, holding that “it could never have been the intention of the legislature to provide a discretion to a court to refuse an eviction order if a property owner is entitled to such an order, and therefore that the intention of the legislature was never to vary the common law in this regard”.⁵⁶ According to the court this would constitute an expropriation or constructive expropriation, rendering the state liable for compensation.⁵⁷ Du Plessis AJ construed sections 4(7)-(12) of Act 19 of 1998 to be confined to the “principles and procedures according to which the courts should grant eviction order, and in particular, to emphasize circumstances and facts which should be taken into account by the courts in formulating eviction orders”.⁵⁸ This judgment does not sit comfortably with the transformative approach endorsed by the constitutional court to the interpretation of the act in the *Port Elizabeth Municipality* case notwithstanding the fact that the latter case was concerned with an eviction at the instance of a public authority.⁵⁹

⁵¹ See *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA) par 11; *Hyundai Motor Distributors* case (n 50) par 22.

⁵² An example of the interpretation of legislation (albeit in the context of litigation against a public authority) so as to promote the objectives and values underlying the right of access to adequate housing in s 26, is to be found in *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 5 BCLR 475 (CC). In this case, the constitutional court overruled the supreme court of appeal's holding that a local authority was not obliged to consider relevant circumstances, including the availability of suitable alternative accommodation, before issuing a notice to residents to vacate their homes in terms of s 12(4)(b) when it “deems it necessary for the safety of any person”. The court said that “[t]he Supreme court of Appeal did not wholly embrace the inter-relationship between section 12(4)(b) of the Act and s 26(2) of the constitution” (par 45).

⁵³ (n 40).

⁵⁴ See *PE Municipality* case (n 40) par 17-23 and 30-38.

⁵⁵ case no 05/29099 (WLD) (judgment of 29 Feb 2008 unreported).

⁵⁶ *Grobler* case (n 55) par 180. See the express reliance by the court on the presumption that “an Act does not alter the common law more than necessary” (par 136).

⁵⁷ *Grobler* case (n 55) par 177.

⁵⁸ *Grobler* case (n 55) par 180.

⁵⁹ The shacks in question in the case were built on privately owned land: see the *PE Municipality* case (n 40) par 49.

In *Carmichele v Minister of Safety and Security*,⁶⁰ the constitutional court held that section 39(2) places a general duty on the courts to develop the common law and customary law so that it is consonant with the “objective normative value system” established by the constitution.⁶¹ Section 39(2) indicates that the development of the common law and customary law must be guided not only by the textual provisions of the particular rights protected in the bill of rights, but by the underlying purposes, values and spirit of the bill of rights. The court’s duty is “to promote” the underlying normative purposes and values of the bill of rights in developing common law and customary law. This suggests an active attempt to bring common law and customary law rules and doctrines into alignment with the spirit and values of the bill of rights. As O’Regan J states in *K v Minister of Safety and Security*:

“The overall purpose of s 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of s 39(2). The obligation imposed upon courts by s 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.”⁶²

As a number of legal scholars have pointed out, a significant constraining factor on the transformation of common law doctrines and rules under the influence of the normative value system of the constitution is the nature of legal culture⁶³ in South Africa and the understanding of the “internal logic” and processes through which common law development takes place.⁶⁴ According to this understanding the inherent nature of the common law is that its evolution or development takes place incrementally in accordance with its own conceptual structures and doctrines on a case-by-case basis to fill gaps in the law. The legislature is understood to be the appropriate institution, given its democratic legitimacy, to bring about any far-reaching changes in the doctrinal structure and normative content of the common law.⁶⁵ The influence of this understanding of the common law continues as a powerful undercurrent in the constitutional era.⁶⁶ It runs beneath the surface of the controversy regarding the nature and extent to which the bill of rights should influence developments in various spheres of the common law, and the respective roles of the judiciary and legislature in realising constitutional rights. It is also manifest in arguments that the values which the constitution proclaims as foundational to the

⁶⁰ (n 9) par 54.

⁶¹ See also *S v Thebus* 2003 6 SA 505 (CC) par 27-28.

⁶² (n 12) par 17.

⁶³ See Klare “Legal culture and transformative constitutionalism” 1998 *SAJHR* 146; Van der Walt “Legal history, legal culture and transformation in a constitutional democracy” 2006 *Fundamina* 1.

⁶⁴ Van der Walt (n 63) 7-8.

⁶⁵ Van der Walt (n 63) 8-9. However, as the discussion above in relation to the *Grobler* case (n 55) indicates, there is still a tendency to interpret social legislation restrictively in the light of background common law principles.

⁶⁶ See the cautious approach to reforming the common law suggested by the constitutional court in *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 4 SA 753 (CC) par 55 and the *Masiya* case (n 9) par 31.

democratic order are already “inherent” in the common law thus obviating the need for any dramatic changes.⁶⁷

There is an evident tension between the notion of common law development requiring gradual, cautious changes, and the transformative character of the constitution which envisages substantive change in both public and private patterns of socio-economic disadvantage and marginalisation.⁶⁸ This tension is particularly manifest in the sphere of the horizontal application of socio-economic rights given the absence of a conceptual foundation in our existing common law for recognising everyone’s entitlement to have access to adequate socio-economic resources and services. In this sphere, the unarticulated privileging of conceptions of negative liberty and rights constitutes a significant constraint on the development of positive duties on both public and private agencies to advance equitable access to socio-economic rights.⁶⁹

Nowhere is this more evident than in the narrow and formalistic interpretation given to socio-economic rights in contractual disputes.⁷⁰ In *Afrox Healthcare Bpk v Strydom*,⁷¹ the supreme court of appeal rejected a challenge to a clause in a contract between a patient and a private hospital exempting the hospital from liability for the negligence of its staff. The respondent alleged that the exemption clause was contrary to the public interest which had to be interpreted, as required by section 39(2), to promote the spirit, purport and objects of the bill of rights, particularly the right of access to health care services in section 27(1)(a) of the constitution.⁷² Alternatively, it was argued that the cause was unenforceable as it was unreasonable, unfair and in conflict with the principle of *bona fides*. The court acknowledged that the notion of public policy had to be interpreted in the light of the rights and values enshrined in the constitution.⁷³ According to the court, the respondent correctly conceded that the exemption clause was not in conflict with section 27(1)(a) in that it did not prevent access to health care services, and that it did not prohibit hospitals from insisting on legally acceptable conditions for the rendering of medical services. The respondent’s argument was that the clause was contrary to the public interest in that it undermined a core value protected by section 27(1)(a), namely the rendering of medical services in a professional, non-negligent manner.⁷⁴ The court rejected this interpretation on the basis that the hospital nursing staff’s professional conduct was secured by relevant professional codes and the sanction of damage to the

⁶⁷ For an insightful discussion of the disjuncture encountered in the jurisprudence between a transformative interpretation of the foundational constitutional values of human dignity, freedom and equality and a preservative, classic liberal interpretation, see Bhana and Pieterse “Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited” 2005 *SALJ* 865 876-884. See also the following debate: Cook and Quixley “Parate executie clauses: is the debate dead?” 2004 *SALJ* 719-730; Scott “A private-law dinosaur’s evaluation of summary execution clauses in light of the constitution” 2007 *THRHR* 289-299.

⁶⁸ Klare (n 63); Pieterse “What do we mean when we talk about transformative constitutionalism” 2005 *SAPR/PL* 155; Liebenberg “Needs, rights and transformation: adjudicating social rights” 2006 *Stell LR* 5.

⁶⁹ See Barber “Fallacies of negative constitutionalism” 2007 *Fordham L Rev* 651. On the conceptual power of negative liberty and rights in South African constitutional law, see Woolman and Davis “The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of rights under the interim and final constitutions” 1996 *SAJHR* 361.

⁷⁰ On the relevance of socio-economic rights to the law of contract, see Pearmain “Contracting for socio-economic rights: A contradiction in terms?” (1) 2006 *THRHR* 287 and (2) 2006 *THRHR* 466.

⁷¹ 2002 6 SA 21 (SCA).

⁷² *Afrox* case par 15-16.

⁷³ *Afrox* case par 8.

⁷⁴ *Afrox* case par 20.

hospital's reputation and non-competitiveness should its staff render services in a negligent manner. Furthermore, the competing "constitutional" value of contractual autonomy⁷⁵ which finds expression in the doctrine of *pacta sunt servanda* militated against the interpretation argued for by the respondent. The court's reasoning rests on a particularly formalistic and impoverished interpretation of section 27(1)(a) and the values and interests it protects. Section 39(2) specifically mandates the courts to transcend a literal interpretation of the relevant provisions and to look to their "spirit, purport and objects". The right of access to health care services incorporates a qualitative dimension in international law and implies the rendering of services to an appropriate professional and scientific standard.⁷⁶ Moreover, the court provides no substantive reasoning as to why the doctrine of *pacta sunt servanda* should be preferred in the specific circumstances of the case over the value of ensuring a remedy to those who suffer damages as a result of negligent medical care. The latter value has its origin in the constitutionally enshrined right of access to health care services – one of the socio-economic rights which the constitutional court has held are fundamental to the transformative objectives of the constitution.⁷⁷ Sanctity of contract, on the other hand, as Pearmain points out, "is not a right in the bill of rights. It is a principle of the common law that is not inconsistent with the constitution in certain, but not all, circumstances".⁷⁸ The court in the *Afrox* case treated the contract in question as simply another commercial transaction instead of evaluating the public policy considerations relating to the enforcement of the exemption clause in the light of the special nature of a contract between a patient and a hospital for the provision of health care services.⁷⁹ This was a contract for the provision of a constitutionally enshrined right and the values and interests which this right protects, as well as the inequalities in bargaining power inherent in relationships between health service providers and patients,⁸⁰ should have played a far greater role in the court's evaluation of enforceability of the exemption clause.

The decision in the *Afrox* case can be contrasted to the more substantive reasoning adopted by Satchwell J in *Mpange v Sithole*⁸¹ in developing the common-law remedies of specific performance and reduction of rental in the context of a landlord's duty to maintain the premises let in a reasonably fit condition. It has generally been assumed that the lessee will be in a position to undertake the repairs him or herself and recover the costs from the lessor either in the form of a set-off against

⁷⁵ The court cited Cameron J's concurring judgment in *Brisley v Drotzky* (n 34) at par 94 in which the value of contractual autonomy was related to the constitutional values of freedom and dignity.

⁷⁶ See the interpretation by the UN Committee on Economic, Social and Cultural Rights of the right to health in article 12 of the International Covenant on Economic, Social and Cultural Rights: General Comment No 14 (Twenty-second session, 2000), UN doc E/C12/2000/4, par [12] (d). See further Pieterse (n 24) 166-167.

⁷⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) par 8-9; the *Grootboom* case (n 20) par 23.

⁷⁸ Pearmain (n 70) 299. For further critiques of the *Afrox* decision (n 71), see Naudé and Lubbe "Exemption clauses – a rethink occasioned by *Afrox Healthcare Bpk v Strydom*" 2005 *SALJ* 441; Bhana and Pieterse (n 67) 865; Tladi "One step forward, two steps back for constitutionalising the common law: *Afrox Health Care v Strydom*" 2002 *SAPR/PL* 473; Brand "Disclaimers in hospital admission contracts and constitutional health rights" 2002 *ESR Review* 17.

⁷⁹ See further Naudé and Lubbe (n 78) 459-462.

⁸⁰ The court held that there was no evidence indicating that the respondent was in a weaker bargaining position than the appellant hospital at the time of the conclusion of the contract (the *Afrox* case (n 71) par 12).

⁸¹ 2007 6 SA 578 (W).

the rental or in a claim against the lessor.⁸² However, as Satchwell J pointed out this option is not easily available to poor tenants (such as the one's before the court) who lack the resources and skills to undertake the renovations required to render the premises habitable. Accordingly, courts should exercise their discretion in favour of specific performance in circumstances where the tenants are too poor to cover the costs of repairing the building themselves.⁸³ Such development is indicated by the values underpinning the right of access to adequate housing in section 26(1) of the constitution⁸⁴ as well as the rights to dignity and privacy in sections 10 and 14. Although the remedy of specific performance could not be awarded in the case as the registered owner of the property had not been joined, the court granted a remedy in the form of an interdict against the landlord from charging a specified reduced rental.⁸⁵ In this regard the court also departed from a line of cases which held that where a lessee remains in occupation of the premises let, he or she remains liable for the full rental even though they do not have full use and enjoyment thereof.⁸⁶

In conclusion, section 39(2) requires the courts when adjudicating run-of-the-mill commercial, contractual, family and property law cases to consider whether applicable common and customary law principles require development to give effect to the underlying purposes and values of the bill of rights, including the socio-economic rights provisions. Underlying these provisions is a concern to ensure that people have access to adequate resources and social services, and that greater equity and social justice in the sphere of socio-economic relations in South Africa is promoted. This understanding emerges particularly when an approach to the interpretation of the bill of rights is adopted which takes the interrelationship between rights such as socio-economic rights and the right to equality seriously. Thus, for example, section 9(2) of the constitution defines equality to include "the full and equal enjoyment of all rights and freedoms". This includes the socio-economic rights in the constitution.⁸⁷ The courts should therefore not adopt a narrow, formalistic textual analysis to the relevant socio-economic rights provisions when developing the common law in terms of section 39(2) in areas of private law which impact on people's access to resources and services.⁸⁸

⁸² *Mpange* case (n 81) par 37 and cases cited at n 20 of the judgment.

⁸³ *Mpange* case (n 81) par 36-58.

⁸⁴ The court referred in this regard to the qualitative dimension of the right to adequate housing as well as the need for effective remedies against landlords who fail to maintain dwellings let in an adequate and healthy condition endorsed by the UN Committee on Economic, Social and Cultural Rights in General Comment No 4 (Sixth session, 1991) *The Right to Adequate Housing* (a 11(1) of the Covenant), UN doc E/1992/23 par 8 and 17.

⁸⁵ *Mpange* (n 81), par 64-74; 83-89.

⁸⁶ See the cases cited in *Mpange* (n 81) par 66 and n 35.

⁸⁷ On the implications of an interdependent interpretation of equality and socio-economic rights, see *Grootboom* (n 20) par 23; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) par 40-45. See further Liebenberg and Goldblatt "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" 2007 *SAJHR* 335.

⁸⁸ In *Barkhuizen v Napier* (n 8), the constitutional court gave a restrictive interpretation of the impact of the constitutional right of access to courts (s 34) on the validity of a 90 day time limitation clause for instituting legal proceeding in a standard-form short-term insurance contract. The court held that this clause was not so unreasonable or unfair that it offended against public policy or good faith in that no evidence had been provided by the applicant for his failure to comply with the clause. Contrast the detailed contextual and substantive reasoning in the minority judgments of Sachs J and Moseneke DCJ finding that public policy, informed by constitutional rights and values, dictated that the time-bar clause should not be enforced in the particular circumstances.

2.3 Development of existing common law remedies or the creation of a new constitutional remedy?

The question as to when it is appropriate to develop existing common law remedies and doctrines to give effect to constitutional rights and values or to develop an entirely new remedy sourced in the constitution is complex. This question is relevant whether the path taken to the horizontal application of constitutional rights is section 8 (2) read with (3), or section 39(2).

This is illustrated by the case law dealing with the relationship between common law and constitutional remedies to vindicate constitutional rights. Although these cases involved organs of state as parties, the issues canvassed are relevant also to the interaction between common law and constitutional remedies in private disputes. In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*,⁸⁹ the supreme court of appeal was reluctant to develop the common-law remedy of the *mandament van spolie* to provide the relief of reconstruction of dwellings unlawfully destroyed by municipal officials, but chose rather to craft a remedy “special to the constitution”⁹⁰ to provide this relief. The court did not clearly say which constitutional provisions this remedy was based on, but it appears from the judgment to be based primarily on section 26(3) read in conjunction with the foundational constitutional value of the rule of law.⁹¹ The court, per Cameron J, stated:

“The Constitution preserves the common law, but requires the Courts to synchronise it with the Bill of Rights. This entails that common-law provisions at odds with the Constitution must either be developed or put at nought; but it does not mean that every common-law mechanism, institution or doctrine needs constitutional overhaul; nor does it mean that where a remedy for a constitutional infraction is required, a common law figure with an analogous operation must necessarily be seized upon for its development. On the contrary: it may sometimes be best to leave a common-law institution untouched, and to craft a new constitutional remedy entirely.”⁹²

The judgment does not offer much guidance as to the circumstances in which it would be appropriate to develop existing common-law remedies to give effect to a constitutional right or craft an entirely new constitutional cause of action based on the right in question.⁹³

In *President of RSA v Modderklip Boerdery (Pty) Ltd* both the supreme court of appeal and the constitutional court granted relief to a private landowner in the form of an award of constitutional damages against the state for failing to assist the owner to execute an eviction order obtained in terms of Act 19 of 1998 against a large community occupying the land in question.⁹⁴ The supreme court of appeal engaged directly with the central issue at stake in the case – the clash between the landowner’s property rights and the right of access to housing of the unlawful occupiers, and

⁸⁹ 2007 6 SA 511 (SCA).

⁹⁰ *Tswelopele* case par 27.

⁹¹ *Tswelopele* case par 2 and 25-26.

⁹² *Tswelopele* case par 20 (footnotes omitted).

⁹³ For an argument that a restrictive interpretation of the *mandament van spolie* in the specific context of the destruction of an informal dwelling “that can quickly, easily and cheaply be replaced using fungible and even used materials” is unnecessary and out of step with the values and interests protected by s 26, see Van der Walt “Developing the law on unlawful squatting and spoliation” forthcoming in *SALJ* 2008. As Van der Walt points out, the requirements for this new constitutional remedy and its scope of application are unclear.

⁹⁴ *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) par 41-44; 51-52; *President of RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) par 53-68.

the state's responsibilities to protect and promote both these rights in the context of evictions.⁹⁵ The constitutional court, on the other hand, preferred to locate the owner's remedy in the safer territory of the right of access to court protected in section 34 and the rule of law enshrined in section 1(c) of the constitution.⁹⁶

In deciding whether to develop existing common law remedies or to fashion an entirely new remedy based on constitutional provisions, a judge should locate the existing common law applicable to a particular field in its historical context as well as examine its current social and economic consequences to determine whether its development would facilitate the achievement of greater social and economic justice.⁹⁷ For example, Van der Walt points out that given the central role of property law in serving the colonial and apartheid project in South Africa, it is appropriate to reconsider "the underlying structure of the property regime and its effect on the entrenchment of privilege and power embodied in property holdings" whenever the courts have to consider the appropriateness of common-law remedies in a particular case.⁹⁸ In other cases, such as *Modderklip*, the more effective form of relief may be a remedy based directly on the relevant constitutional provisions.⁹⁹

3 Conclusion

Until the nettle of the fundamental changes which the constitution intended to bring about in our entire political and legal order is grasped, the transformative potential of the socio-economic rights entrenched in the bill of rights will remain unrealised. There are undoubtedly many complex questions associated with the development of the common law under constitutional influence. These include how to fundamentally change the common law without undermining the coherence and predictability of our legal system as a whole, and the appropriate institutional space to allow to the legislature to adopt holistic legislation, through a broadly participatory process, to give effect to constitutional rights and values.

However, the complexities of the task and the measure of uncertainty inherent in a transforming legal and political order do not relieve the courts of their duty to closely scrutinise existing common law and customary law rules for their consonance with the rights, values and purposes of the constitution. Where the existing law fails to give effect to these rights and values, it must be changed, sometimes fundamentally. As Froneman J stated in the court *a quo* in *Kate v MEC for the Department of Welfare, Eastern Cape*:

"[T]he Judge who fails to examine the existing law with a view to ensuring the effective realisation of constitutional rights and values that were not recognised before is not, as is so often presumed by proponents of this course, merely neutrally and objectively applying the law. That will only ever be true if the existing common law proceeds from a fair and equal baseline, an assumption that will not

⁹⁵ *Modderklip* (SCA) case par 16-17, 21-28,

⁹⁶ *Modderklip* (CC) case par 39-51.

⁹⁷ One of the fundamental purposes of the adoption of the constitution is to "establish a society based on democratic values, social justice and fundamental human rights" (preamble).

⁹⁸ Van der Walt (n 93).

⁹⁹ See also *MEC, Department of Welfare, Eastern Cape v Kate* 2006 4 SA 478 (SCA). The supreme court of appeal confirmed an award of damages in the form of backpay and interest for an unlawful delay in the payment of a social grant in terms of the Social Assistance Act 59 of 1992. The court held that a direct constitutional remedy, as opposed to an indirect common law remedy of delictual damages, ensured the more effective and flexible relief required to vindicate the egregious breaches of the constitutional rights of access to social assistance and administrative justice at issue in the case (see particularly par 26-27).

often be open to the present judiciary in South Africa in cases such as the present, given our unequal past. More often than not such a supine approach will effectively result in a choice for the retention of an unequal and unjust *status quo*.¹⁰⁰

This applies with equal force in the area of private law, which has a deep and pervasive influence on people's ability to gain access to the socio-economic rights promised by our constitution. All forms of power which impede people's access to socio-economic rights should be subject to constitutional scrutiny and substantive evaluation in terms of purposes and values promoted by these rights.

SAMEVATTING

DIE TOEPASSING VAN SOSIO-EKONOMIESE REGTE OP DIE PRIVAATREG

In verskeie dele van die privaatreë struktureer bestaande reëls van die gemene reg toegang tot sosio-ekonomiese hulpbronne. Teen hierdie agtergrond word geargumenteer dat a 8(2) van die grondwet vereis dat die hof nie ligtelik bevind dat 'n besondere verpligting wat opgelê is deur 'n sosio-ekonomiese bepaling in die grondwet in 'n dispuut tussen private partye nie van toepassing is nie. Die outeur dui ook aan dat a 8(3) vereis dat waar fundamentele regte nie voldoende beskerming in bestaande wetgewing of gemeenregtelike reëls geniet nie, nuwe grondwetlik-geïnspireerde remedies ontwikkel moet word. Die outeur betoog voorts dat hof nie 'n formalistiese- of teksgebaseerde benadering moet volg wanneer hulle gemeenregtelike reëls ingevolge a 39(2) ontwikkel om die gees, strekking en oogmerke van die sosio-ekonomiese regte in die handves van regte te bevorder nie. Laastens betoog die outeur dat die roete na 'n effektiewe remedie, afhangend van die konteks, langs a 8(2) en (3) of a 39(2) te vinde kan wees. Die kompleksiteit van die ontwikkeling van bestaande privaatreëtelike reëls onder die invloed van sosio-ekonomiese regte bevry nie die regsprekende gesag van 'n plig om bestaande reëls en instellings noukeurig te ondersoek vir hul verenigbaarheid met dié regte en hulle onderliggende waardes nie.

¹⁰⁰ 2005 1 SA 141 (SE) par 16.