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Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland

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The horizontal application of human rights to non-state actors (NSA) is an evolving and contested legal area both comparatively and at the international level. In light of this, the article discusses mechanisms by which NSA who violate constitutional economic and social rights (ESR) may be held directly accountable by ESR-holders. Its central focus is the horizontal application of constitutional ESR protections to private relationships, where neither party has a state/public function or state nexus. The article reviews developments in two domestic constitutional systems, those of Ireland and South Africa, in order to demonstrate and explain the different approaches that have been adopted to the issue of horizontality by both the constitutional drafters and the courts in those jurisdictions. It employs this comparative analysis to explore many of the key normative objections that have traditionally been raised under liberal constitutional theory in relation to the application of human rights obligations—and those imposed by ESR in particular—to NSA. The article concludes with an evaluation of the effectiveness of the Irish and South African legal models and approaches in terms of holding NSA liable for violations of ESR, outlining key lessons that these national experiences have for the direct horizontal application of ESR at the international level.

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1. Introduction

Across the globe, providers of key goods and services that relate to economic and social rights (ESR) are ever more likely to be non-state actors (NSA),[1] while the power and influence of NSA such as multinational corporations, international financial institutions, and non-governmental organizations are increasing. This reality has led to growing concern, internationally and domestically, about the role of such actors in relation to the realization of ESR, including the impact that their actions (and omissions to act) may have on the enjoyment of such rights.

This article will discuss mechanisms by which NSA who violate constitutional ESR may be held *directly* accountable by ESR-holders. Its central focus will be the direct horizontal application of constitutional ESR protections to private relationships, where neither party has a state/public function or state nexus. I will review developments in two domestic constitutional systems, those of Ireland and South Africa, in order to demonstrate the different approaches that have been adopted to the issue of horizontality by both the drafters of the constitutions and the courts in those jurisdictions. This comparative analysis will explore many of the key normative objections that have traditionally been raised under liberal constitutional theory in relation to the application of human rights obligations—and those imposed by ESR in particular—to non-state actors.[2] These include alleged "objections from democracy" and claims about the impact of the direct horizontal application of rights on the values of liberty, autonomy, and privacy.[3] I evaluate the effectiveness of these domestic legal models and approaches in terms of holding NSA liable for violations of ESR, drawing

[1] There have been numerous attempts to define "non-state actors." With regard to economic, social, and cultural rights context, the UN Committee on Economic Social and Cultural Rights (CESCR) has said that relevant NSA that may interfere with the enjoyment of ESR include "individuals, groups, corporations and other entities as well as agents acting under their authority." *See* UN Committee on Economic, Social and Cultural Rights, General Comment No. 15, Right to water (2002), ¶ 23. The definitions of some commentators include a requirement that a non-state actor must engage in transnational relations. *See, e.g.*, the definition of Josselin and Wallace critiqued by Philip Alston, *The Not-a-cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* Non-State Actors and Human Rights 1, 15–16 (Philip Alston ed., 2005). However, I prefer to follow the broader approach of the CESCR as its definition captures both non-state actors that operate solely in one jurisdiction, as well as those with a transnational element to their activities. In this article, I will use the term "private actor" as synonymous with NSA.

[2] A wide range of objections have been raised to the legitimacy of the direct horizontal application of ESR. These are premised on both international law and features of particular domestic frameworks. Other arguments center on the efficacy of the application of human rights standards to relationships between private actors in terms of ensuring effective protection of ESR. In this article, I will focus primarily on those legitimacy-related arguments that are based on liberal constitutional theory. Obviously, the relevance of such arguments will vary depending on the domestic constitutional framework at issue and I am not suggesting that the issues dealt with in this article will be equally relevant to every jurisdiction.

[3] For useful examples of argumentation based on alleged objections to the direct application of ESR to NSA from liberal constitutional theory, *see* Chris Sprigman & Michael Osborne, *Du Plessis is* Not *Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes*, 15(1) S. Afr. J. Hum. Rts 25 (1999); and Halton Cheadle & Dennis Davis, *The Application of the 1996 Constitution in the Private Sphere*, 13 S. Afr. J. Hum. Rts 44 (1997).

conclusions with regard to lessons that the successes and shortcomings of the Irish and South African constitutional experiences have for the direct horizontal application of ESR at the international level. [4]

The idea of holding NSA accountable for rights violations is highly topical, and there is a growing body of literature on the subject, much of which refers to the South African experience and a small amount of which addresses the Irish jurisprudence, albeit frequently only in a cursory way.[5] So far, however, there has been no systematic comparison of these legal orders with regard to the horizontal application of constitutional ESR. Nor has the horizontal application of constitutional ESR (as opposed to constitutional rights generally) in Irish constitutional law been fully explored. This article seeks to address these lacunae. The article also contributes to broader debates about the extent to which ESR can—or should—be horizontally applicable, directly addressing the question of the horizontality of the positive obligations imposed by ESR—a debate that has not yet been fully played out either in the courts or in academic literature. Finally, the piece feeds into the evolving discussion on the direct horizontal application of ESR at the international level, highlighting how the South African and Irish experiences can and should influence developments in this area.

There are other reasons why the survey proposed here is valuable and necessary. First, while the Irish Constitution is the oldest in Europe and largely predates the international discourses on human rights (including ESR) and horizontality, the South African Constitution of 1996 was heavily (and self-consciously) influenced by both of those factors. Second, in contrast to the very limited recognition of ESR under the Irish Constitution, the South African Constitution enshrines a broad range of ESR. Third, unlike the Irish position, where horizontal application occurred as a result of judicial decision-making as opposed to express textual prescription, the drafters of the South African 1996 Constitution explicitly embraced horizontality. A consideration of these two constitutional experiences therefore serves as an excellent framework for a discussion of both the theory and practice of the direct horizontal application of ESR. In addition to highlighting precisely where the Irish and the South African Courts stand on the issue of the horizontal application of ESR and explaining why this is so, it is crucial that attention should be focused on the forthcoming developments in this field in those jurisdictions. This is especially important given the implications that the "local" protection of human rights may have for their "global" protection in this context.

[4] For a discussion of the liability of NSA under regional and international human rights law, *see, e.g.*, Jan A. Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 Buff. Hum. Rts L. Rev. 21 (2005); John Knox, *Horizontal Human Rights Law*, 102 Am. J. Int'l L. 1, 1 n. 86 (2008); Manisuli Ssenyonjo, *The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?*, 12(5) Int'l J. Hum. Rts 725 (2008).

[5] *See, e.g.*, Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 Mich. L. Rev. 387, 396 (2003) where the extensive Irish experience is summed up in two paragraphs.

2. Horizontality and ESR

When researching in this area, one is immediately struck by the similarity between the arguments made against the direct horizontal application of human/constitutional rights and those made in relation to the constitutionalization or adjudication of legally binding ESR. One circumstantial reason for this is the fact that such assertions are frequently proffered in the context of discussions of the South African Constitution, which provides for both horizontality and ESR. The second, weightier, reason is that giving effect to horizontality and ESR by the courts will frequently require redistribution and the alteration of the status quo both in terms of the allocation of power and other resources and in terms of pre-existing legal frameworks and relationships. Thus, both ESR and horizontality raise similar concerns for those who argue that decisions in relation to distribution and law-making should be the sole preserve of democratically elected representatives.

A key element of both the Irish and the South African experiences is a rejection of the notion that the judicial horizontal application of ESR is absolutely barred as it requires "a political choice" which should be taken by the elected branches of government, rather than a judicial elite. This relates to the notion of the "counter-majoritarian objection" to what is perceived as "excessive" judicial activity—a central aspect of liberal constitutional theory.[6] In fact, opposition to the horizontal application of rights on the grounds that such activity is undemocratic is generally symptomatic of a more fundamental discomfiture with the broader conception of judicial review of the action of politically accountable representatives per se, rather than being specific to ESR adjudication or the horizontality context.[7] In this context, it is worth recalling that where a constitution has been adopted by an electorate (as the Irish Constitution was) or by a constitutional assembly (as occurred in South Africa), that instrument and its provisions represent a political choice by the people.[8] Where, as in the South African case, the Constitution expressly contains a commitment to horizontality, it cannot be argued that the application of that provision by the courts in appropriate circumstances is illegitimate. This is particularly so where, as under both the Irish and the South African constitutional frameworks, it is accepted that the courts are the final arbiters of the constitution.[9] The issue is admittedly more complex where, as in Ireland, the horizontal application of constitutional rights has occurred as a result of judicial interpretation of constitutional provisions that make no explicit reference to horizontality. However, if, as in the Irish context, one accepts that the courts may legitimately identify

[6] For a discussion of the "counter-majoritarian objection" to this kind of judicial activism within constitutional liberal theory, *see* Alexander Bickel, The Least Dangerous Branch—The Supreme Court at the Bar of Politics (1962).

[7] *See, e.g.*, Sprigman & Osborne, *supra* note 3.

[8] Stephen Ellman, *Labor Law: A Constitutional Confluence: American "State Action"; Law and the Application of South Africa's Socio-economic Rights Guarantees to Private Actors*, 45 N.Y.L. Sch. L. Rev. 21, 41, 42 (2001).

[9] See S. Afr. Const., 1996, § 167(3)(c), 167(7), *available at* http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf, last accessed 12 January 2014. For an illuminating discussion of the Irish approach, *see* the statements of Finlay CJ in Crotty v. An Taoiseach [1987] I.L.R.M. 400 at 449.

unenunciated/implied rights and principles, there can be no absolute objection to the courts doing so in the context of horizontal application in particular.

Nor is the objection to judicial horizontal application on the basis that it entails "judicial law-making"[10] (and hence violates a formal (and contested) conception of the separation of powers according to which the legislature makes law and the courts apply that law to specific fact situations in the context of resolving disputes between parties)[11] exclusive to debates about horizontal application. While the horizontal application of rights by judges certainly seems to offer broad scope for judicial law-making, the same is true where the courts are involved in vertical application of constitutional rights against the state and its actors—or indeed any situation in which courts delineate the precise content and scope of constitutional rights which are expressed in a general way. Admittedly, such judicial law-making may be more likely in the context of horizontal application of constitutional rights due to the fact that constitutional guarantees have traditionally been perceived as, and formulated in terms of, determining relationships between states and citizens, rather than those between citizens. Crucially, however, the difference here is one of degree, rather than of principle. Hence, horizontality is not necessarily incompatible with the presumptions underlying liberal constitutional theory.

Nor will such judicial law-making, where it occurs, necessarily result in the disempowerment of the legislature when it comes to regulating the relationships between private citizens. The fact that the courts may in some circumstances hold that rights have horizontal application (and the dearth of cases involving such a finding in the South African context since 1997 as well as experiences in jurisdictions such as Germany, Canada and Colombia would seem to indicate that the courts will not rush to do so)[12] will not serve to prevent legislatures from spelling out the horizontal scope of the rights guarantees in legislation.[13]

Before moving on to consider the Irish and South African models of horizontal application in practice, it is important to address (albeit briefly) objections to the horizontality of ESR that are founded on the alleged relative institutional incapacity of the courts to apply ESR horizontally.[14] Similar arguments in relation to judicial capacity

[10] For such a claim, *see* Cheadle & Davis, *supra* note 3, at 56.

[11] For a discussion of such an understanding of the doctrine, *see* Maurice Vile, Constitutionalism and the Separation of Powers 2 (1967). For an in-depth discussion of the separation of powers in the context of ESR adjudication, *see* Aoife Nolan, Children's Socio-economic Rights and the Courts ch. 4 (2011).

[12] For a discussion of the German and Canadian experiences, *see* Gardbaum, *supra* note 5. For a brief discussion of the Colombian experience, *see* Magdalena Sépulveda, *Colombia: The Constitutional Court's Role in Addressing Injustice*, *in* Social Rights Jurisprudence: Emerging Trends in Comparative and International Law 127, 146 (Malcolm Langford ed., 2008).

[13] While such legislation would be open to judicial review by the courts against judicially applied (and sometimes determined) constitutional standards, the same is true of any legislation, including that relating to the vertical application of rights.

[14] For instance, Ellman argues that a potential result of constitutionalizing spheres of private activity may be damaging to the quality of government decision-making. *See* Ellman, *supra* note 8, at 42. He states that it is reasonable to believe that elected political officials are, in general, better equipped than courts to make complex policy judgments and compromises such as those required by the horizontal application of rights.

have frequently been raised in debates surrounding the constitutionalization of legally binding ESR.[15] There is growing recognition, however, that such institutional concerns are frequently overstated and there are a range of models, mechanisms and remedies that courts can employ to ensure the effective adjudication of ESR.[16] There is no reason to assume that the same is not the case with regard to horizontality. This is particularly so given courts' proven ability to deal competently both with vertical ESR cases and a range of different, complex private law actions between individuals.

Furthermore, in a system of constitutional supremacy such as those in South Africa and Ireland under which courts are mandated to uphold the provisions of a Constitution, it is unacceptable for them to refuse to meet their obligation to give effect to constitutional rights and principles—including the horizontal application of ESR where relevant—on the grounds of alleged (as opposed to clearly established) incapacity. The fact that other bodies are better placed to make policy decisions, does not mean that a court can avoid deciding "policy questions" (such as those that allegedly arise in cases involving ESR and/or horizontal effect) where such questions coincide with questions of constitutional law.

3. Horizontal application of ESR—two national experiences

Before beginning a consideration of specific domestic experiences, it is important to differentiate between different models of constitutional protection against rights violations caused by private actors.[17] Under the traditional constitutional model—the "vertical" model—constitutional rights apply exclusively against the state and its actors—the classic example being the US Constitution. Under a horizontal model such as those in Malawi, Argentina, and Ghana, constitutional rights are (at least potentially) directly enforceable against private actors in some circumstances.[18] In between, there are variants, or "diagonal models," under which constitutional rights have "indirect horizontal effect." This means that whilst constitutional rights cannot be applied directly to the law governing private relations and are not actionable per se, they may be relied on directly or indirectly to influence the interpretation and application of preexisting law.[19] "Indirect horizontal effect" can be either "weak" or "strong"

[15] For a discussion of the alleged judicial incapacity in dealing with ESR claims, *see* Aoife Nolan, Bruce Porter & Malcolm. Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, CHRGJ Working Paper No. 15 (2007), *available at* http://www.chrgj.org/publications/docs/wp/NolanPorterLangford.pdf, last accessed 12 January 2014.

[16] There is a vast literature on this point. For examples of key discussions of such, see SOCIAL RIGHTS JURISPRUDENCE, *supra* note 12; SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: A CRITICAL ASSESSMENT (Helena Alviar García, Karl Klare and Lucy Williams eds., 2014).

[17] For an excellent discussion of the different definitions employed by commentators in relation to models of constitutional protection of rights, with a specific focus on horizontality, *see* Stephen Gardbaum, *Where the (State) Action Is*, 4(4) INT'L J. CONST. L. 760 (2006).

[18] *See* GHANAIAN CONSTITUTION, 1992, art. 12(1); CONSTITUTION OF MALAWI, 1995, § 15(1); GAMBIAN CONSTITUTION, 1997, art. 17(1); CONSTITUTION OF CAPE VERDE, 1990, art. 18; CONSTITUTION OF SWAZILAND, 2005, § 14(2); and ARGENTINEAN CONSTITUTION, 1994, art. 43.

[19] Gavin Phillipson, *The Human Rights Act, "A Horizontal Effect" and the Common Law: a Bang or a Whimper*, 62(6) MOD. L. REV. 824, 826 (1999).

in nature. Under the strong version of indirect effect, judges may apply conditional protection in a suit between private parties where one party relies on law which is unconstitutional.[20] The weak version of "indirect horizontal effect" only permits judges to read in constitutional values when deciding cases between private parties. The Canadian Supreme Court[21] and the German Federal Constitutional Court[22] have adopted variations of this approach. As discussed below, constitutional frameworks may contain vertical and horizontal elements. In addition, they may permit both direct and indirect horizontal effect. In this article, however, I will focus primarily on direct horizontal effect.

3.1 ESR and the Irish Constitutional Framework

The Irish Constitution contains a number of ESR-related provisions of both a justiciable and non-justiciable nature. [23] Most notably, Article 42 makes provision for the right to primary education[24] and states that "in exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child." This duty necessarily has a corresponding right, which can be used as the basis of a claim against the State.

Many of the ESR accorded under the Irish Constitution are "unenumerated" personal rights, which are primarily guaranteed under Article 40.3.1° of the Constitution. That provision states that: "[t]he State guarantees in its laws to respect, and, as far as practicable by its laws to defend and *vindicate* the personal rights of the citizen" (emphasis added). It is clear that this provision imposes a duty on the State to take positive action in appropriate circumstances.[25] Article 40.3.2° provides further that the State shall, "in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." As we will see below, in some circumstances, the courts have not limited the obligation of the State (which they have interpreted broadly in order to include the courts) to "defend and vindicate the personal rights of citizens" solely to attacks by organs of the State. In *Ryan v. The Attorney General*, Justice Kenny in the High Court held that the "personal rights" mentioned in Article 40.3.1° are not exhausted

[20] Andrew Clapham, Human Rights Obligations of Non-State Actors 437 (2006).

[21] *See, e.g.*, the decision of the Canadian Supreme Court in Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd. [1986] 2 S.C.R. 573.

[22] For an explanation of the difference between the Canadian and German models of indirect horizontal effect, *see* Gardbaum, *supra* note 5, 402–407.

[23] For an extensive discussion of ESR jurisprudence under the Irish Constitution, *see* Paul O'Connell, Vindicating Socio-Economic Rights: International Standards and Comparative Experiences (2012); Irish Human Rights Commission, Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document (2005).

[24] Article 42(2) provides: "The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

[25] Gerry Whyte, Social Inclusion and the Legal System—Public Interest Law in Ireland 19 (2002).

by the rights to "life, person, good name and property rights" expressly enumerated in Article 40.3.2°,[26] a position confirmed by the Supreme Court in the same case.[27] Court-identified, unenumerated (i.e. unwritten) ESR under Article 40.3.1° include various rights of the child,[28] the right to bodily integrity,[29] including the right not to have health endangered by the state,[30] and the right to work or to earn a livelihood.[31] The Irish Courts have therefore been prepared to recognize that the Constitution protects unenumerated ESR, although only the first two of these rights have been held to give rise to a positive obligation on the state.

In terms of other constitutional protections, civil and political rights such as the right to life (Article 40.3.2°)[32] also have the potential to serve as sources of ESR or to be applied in such a way as to protect those rights.[33] Furthermore, Article 45 of the Irish Constitution sets out a number of expressly non-justiciable directive principles of social policy, which are intended for the general guidance of the Oireachtas.[34] Some of these principles have clear implications for the enjoyment of ESR.[35] Article 45 has been used by the Irish courts as an interpretive instrument with regard to, amongst other things, the identification of unenumerated personal rights under Article 40.3 of the Constitution. [36] It has not, however, been employed innovatively by courts to give effect to ESR in the way that has occurred with regard to constitutional directive principles in jurisdictions such as India or Bangladesh.[37] I will not address these directive principles in any significant detail due to their non-justiciable nature.

In recent years, concerns about the implications of adjudication of ESR for the separation of powers and the involvement of the courts in what are deemed issues of "distributive justice" have resulted in a general reluctance on the part of Irish courts to recognize and give proper effect to such rights. Not only has the Supreme Court generally refused to recognize the existence of additional unenumerated ESR, but it has gone so far as to question the existence of ESR previously identified by other courts.[38]

[26] Ryan v. Attorney General, [1965] IR 294, 312–313 (Ir.).

[27] *Id.* at 344.

[28] *See, e.g.*, FN v. Minister for Education [1995] 1 IR 409 (Ir.).

[29] *See* Ryan [1965] IR at 313.

[30] *See, e.g.*, The State (C) v. Frawley [1976] IR 365 (Ir.).

[31] *See* Murtagh Properties v. Cleary [1972] IR 330 (Ir.) discussed *infra*; Murphy v. Stewart [1973] IR 97 (Ir.); and Minister for Posts and Telegraphs v. Paperlink [1984] ILRM 373 (Ir.).

[32] *See, e.g.*, G v. An Bord Uchtála [1980] IR 32, 69 *per* Walsh J (Ir.).

[33] *See, e.g.*, Constitution Review Group, Report of the Constitution Review Group 236 (1996).

[34] The Houses of the Oireachtas—Dáil Éireann and Seanad Éireann—are the Irish houses of parliament.

[35] *See, e.g.*, art. 45(4)(i).

[36] One example is the case of Murtagh Properties [1972] IR 330 discussed *infra*. For more on the content and judicial treatment of art. 45, *see* J.M. Kelly: the Irish Constitution 2077–2086 (Gerry Whyte & Gerard Hogan eds, 4th ed., 2003); and Gerard Hogan, *Directive Principles, Socio-Economic Rights and the Constitution*, 36 Irish Jurist 174, 179–181 (2001).

[37] For more, *see* S. Muraldhir, *India*, *in* Social Rights Jurisprudence, *supra* note 12, 102; and Iain Byrne & Sara Hossain, *South Asia*, *in* Social Rights Jurisprudence, *supra* note 12, 125.

[38] *See, e.g.*, TD v. Minister for Education [2001] 4 IR 259 (Ir.). For an example of a positive (albeit limited) departure from the strident, "anti-unenumerated ESR" views expressed by the Supreme Court in TD [2001] 4 IR 259, *see* the Supreme Court decision in *In re* Article 26 and the Health (Amendment) (No. 2) Bill [2005] IESC 7.

Furthermore, even where the Supreme Court has been prepared to hold that the State is in violation of its constitutional ESR-duties, it has refused to grant mandatory orders directing the State to take steps to comply with its obligations,[39] thereby further weakening the effect of ESR under the Irish Constitution. Indeed, there is evidence that the Courts are adopting an ever-more restrictive approach towards the definition of positive obligations imposed by constitutional ESR—a fact that is particularly evident in the context of the judicial identification of the level of service provision which the State is constitutionally obliged to provide under Article 42.4 in the context of education.[40]

3.2 Ireland, ESR, and horizontality: from a bang to a whimper?

While the wording of Articles 40.3.1°, 42.4, and 42.5 refers expressly to the duties of the State to give effect to constitutional rights, the Irish Supreme Court has made it clear that constitutional rights (including ESR) may have direct horizontal effect and are not binding on the State alone.[41] They have done so through the development of the constitutional tort, which arises where an individual's right is interfered with by a third party. The remedies granted by the courts for such an action include damages and injunctive relief.[42]

The most significant early case dealing with the issue of horizontal application is that of *Meskell v. CIE*.[43] Here the plaintiff's contract of employment was terminated by the defendant employers. Unlike his fellow employees, he was not reemployed due to his refusal to accept a special condition of (re)employment that he be a member of a trade union on the grounds that it infringed his individual freedom of choice. This case was argued on the basis of the right to abstain from joining associations or unions rather than the right to livelihood. It is thus arguably more appropriately considered to be a civil and political rights case than an ESR one.

The Supreme Court held that the right of citizens to form associations and unions, guaranteed by Article 40.6.1 of the Constitution, necessarily recognized a correlative right to disassociation. In this case, the plaintiff was entitled to damages because, amongst other things, he had suffered loss caused by the NSA defendant employers' conduct in violating a right guaranteed to him by the Constitution. The Court stated, *per* Justice Walsh, that "a right guaranteed by the Constitution or granted by

[39] *See, e.g.*, the decision in TD [2001] 4 IR 259.

[40] *See, e.g.*, the significant contrast between the different tests applied by the courts in determining the extent of the state's constitutional obligation in relation to the right to education of children with special needs in the 1996 decision of O'Donoghue v. Minister for Health [1996] 2 IR 20 (Ir.) and, nine years later, in O'Carolan v. Minister for Education [2005] IEHC 296 (Ir.).

[41] For more on the horizontal application of constitutional rights under the Irish Constitution generally, *see* Andrew Butler, *Constitutional Rights in Private Litigation: A Critique and Comparative Analysis*, 22 Anglo-Am. L. Rev. 1 (1993).

[42] For a detailed discussion of how the "constitutional tort" has operated, *see* Colm O'Cinneide, *Grasping The Nettle: Irish Constitutional Law and Direct Horizontal Effect*, *in* Human Rights in the Private Sphere 213 (Jorg Fedtke & Dawn Oliver eds, 2007).

[43] Meskell v. CIE [1973] IR 121 (Ir.)).

the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it." It followed that "if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right."[44] The Court expressly referred to and agreed with the statement of Justice Budd in another trade union case, *Educational Company of Ireland Ltd. v. Fitzpatrick (No. 2)*,[45] that "if one citizen has a right under the Constitution there exists a correlative duty on the part of *other citizens* to respect that right and not to interfere with it. . . . It follows that the Courts will not so act as to permit any body of citizens to deprive another of his constitutional rights and will in any proceedings before them see that these rights are protected, whether they be assailed under the guise of a statutory right or otherwise."[46]

O'Cinneide has observed that the defendants in *Meskell* were a semi-state nationalized corporation—and hence not an entirely private entity.[47] In subsequent cases, however, Irish courts have held that constitutional rights can apply horizontally to purely private bodies, including in cases involving ESR such as the right to livelihood. [48] Butler has argued that it was a desire to protect the employee's exercise of his autonomy expressed through the exercise of his choice not to participate in a trade union that motivated the approach adopted by the Irish Supreme Court in *Educational Company of Ireland* and several other cases involving trade unions.[49] This is significant in light of the fact that one of the most-cited objections to the horizontal application of ESR from a liberal constitutional theory perspective is the alleged threat posed to the values of liberty, autonomy and privacy by the intrusion of constitutional rights into the private sphere. [50] It is argued that a rigid distinction exists between the private

[44] *Id.* at 133. For a similar judicial statement (in the very different context of the constitutional right to life of the unborn) *see* in Attorney General (Society for the Protection of the Unborn Child (Ireland) Ltd.) v. Open-Door Counselling Ltd. [1988] IR 593 *per* Hamilton P.

[45] Educational Company of Ireland Ltd. v. Fitzpatrick (No. 2) [1961] IR 345, 368 (Ir.) (emphasis added).

[46] Meskell [1973] IR at 133. *See also id.* at 305. *See also* Justice Costello's statement *in* Hosford v. Murphy & Sons Ltd. [1988] ILRM 300, 304 (Ir.) that, "[u]niquely, the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials."

[47] O'Cinneide, *supra* note 42, at 220.

[48] *See* Murtagh Properties [1972] IR 330 which involved the right to livelihood/work. *See also* Lovett v. Grogan [1995] 3 IR 132 (Ir.), a right to livelihood case in which the defendant was a private, unlicensed bus company.

[49] Butler, *supra* note 41, at 26–32. Interestingly, concerns about Nationalist Party-appointed judges empowered by a horizontally applicable Bill of Rights to interfere with labor law protections, led to some in the ANC to oppose horizontality as a general application being included in the South African Interim Constitution of 1993: *see* Matthew Chaskalson & Richard Spitz, The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement 270–271 (2000).

[50] It is worth noting that the definitions of "liberty," "autonomy," and "privacy" defended by commentators arguing against horizontal application tend to be narrow and formal. For a critique of the liberal notion of autonomy and a proposal of a more substantive form of autonomy in the context of constitutional rights application, *see* Stuart Woolman & Dennis Davis, *The Last Laugh:* Du Plessis v De Klerk, *Classical Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions*, 12 S. Afr. J. Hum. Rts 36 (1996).

and the public spheres and that the purpose of fundamental rights protection is to preserve the integrity of the private sphere against coercive intrusion by the state.[51] Such an argument fails to acknowledge that those exercising private power are actually exercising power conferred on them by laws creating and regulating market behavior. This results in the implication of the state in all private decisions and demonstrates the "illusory" nature of the proffered public/private distinction.[52] The notion of rights as imposing predominantly negative obligations and operating as a "buffer against the state"—a key feature of liberal theory—is inconsistent with the transformative and redistributory vision underlying ESR, which frequently entail positive action on the part of the State. Furthermore, if one regards rights simply as concerned with protecting right-holders against government interference, one will almost inevitably object to the horizontal application of any right to private actors. Such a narrow view of rights, and of the conceptions of liberty and autonomy that allegedly underpin or justify rights, is reflective of a limited liberal conception of rights and contrasts with other, more expansive notions of human rights based on dignity and equality, such as those found under international human rights law, for example.

It follows that a refusal to extend the applicability of a constitution to private relationships due to concerns about the impact that this may have on the individual liberty and autonomy of those private actors upon whom the obligations are imposed may result in the impact that private action may have on the liberty, autonomy, and rights of others being ignored. Apart from the trade-union employee example, another instance would be where a parent refuses to allow a school doctor to perform a health check on her child on the grounds of family privacy or parental autonomy. This refusal may have direct implications for the child's future capacity for autonomy.[53]

It is clear from the statements made by the courts in *Meskell* and *Educational Company of Ireland*, as well as in other Irish horizontality decisions detailed in this article, that the Irish courts have not appeared to consider or engage with any of the key objections from liberal constitutional theory to the horizontal application of constitutional rights—including ESR—to private actors in their reasoning.[54] This is in striking contrast to the extensive debate that surrounded the provision for horizontality under

[51] Murray Hunt, *The "Horizontal Effect" of the Human Rights Act*, Public Law 423, 424 (1998).

[52] Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1(1) Int'l J. Const. L. 79 (2003).

[53] A key issue to note with regard to the horizontal application of the positive obligations imposed by ESR in the context of privatization in particular, is that the arguments made against imposing such duties on private individuals on the basis of the alleged implications of such obligations for individuals' autonomy and liberty are only tangentially relevant. *See* Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties 58 (2008). Fredman observes that the subjects of such duties in this context are not private individuals but corporate bodies or unincorporated associations (legal persons). Hence it is not obvious that they have freedoms or rights in the same sense as private individuals (*id.*). Nor is it convincing to argue that there is the same moral onus to ensure the autonomy and liberty of these actors as there is in relation to natural persons.

[54] That is not to suggest that the decisions of the Irish courts in this context cannot be analyzed using a "personal autonomy" lens. *See, e.g., the* discussion in Butler, *supra* note 41. Rather, it is just that the courts have not explicitly employed such reasoning to any significant degree in their horizontality decisions.

the final version of the South African Constitution.[55] It has been suggested that the emergence of the Irish model of constitutional rights in which the private and public spheres are fused (or at least, undifferentiated) is attributable to two factors. First, the fact that the Irish Constitution is based on natural law philosophy, according to which rights inhere in people by virtue of their humanity rather than being accorded by a positive legal system.[56] From a natural law perspective, constitutional rights precede and underpin the constitution and must be protected against threats from all sources, not just those posed by the state which is given form by the positive legal system. A natural law justification for horizontality has, however, not been explicit in any of the relevant Irish jurisprudence. Second, the *Meskell* doctrine came into being at a time when the Irish judiciary was extremely willing in judicial review cases to employ constitutional rights as limitations upon the power of the elected branches of government (particularly the executive). The courts' approach in *Meskell* and other early horizontal-effect cases is consistent with this judicial concern with the primacy and protection of constitutional fundamental rights, regardless of the state/non-state nature of the violator.

The wording employed by Justice Budd in *Fitzpatrick* would suggest that the horizontal application of constitutional rights under the Irish Constitution gives rise to a negative obligation of non-interference. Indeed, the Irish courts have yet to apply ESR under the Constitution to impose a positive obligation on a NSA. In addition, the right to equality before the law, which has proved a vital tool in terms of addressing ESR violations by NSA in some jurisdictions, has thus far not been held to be capable of horizontal application by the Irish Courts,[57] a situation that is arguably reflective of the wording of Article 40.1, which refers to the "state" and "equality before the law." This is in direct contrast to the approach to equality under § 9(4) the South African Constitution, which provides that "no person may unfairly discriminate directly or indirectly against anyone" and requires that national legislation be enacted to prevent or prohibit such unfair discrimination.

In Ireland, the issue of the direct horizontal application of constitutional ESR has also arisen in the context of the right to education. In *Crowley v. Ireland*[58] teachers in a particular area withdrew their services because of a dispute between themselves and their trade union on the one hand and the manager of the schools in that area on the other. Subsequently, the teachers' trade union instructed the teachers in schools in neighboring areas not to enroll the students from the aforementioned area in their schools. The trade union later withdrew that instruction. Some time later, the Department of Education arranged for buses to bring children affected by the teachers' strike in the original area to schools in the neighboring areas and to bring them home at the end of the day. A number of children brought an action against, amongst

[55] *See infra* note 84.

[56] Bryan McMahon & William Binchy, Irish Law of Torts ¶ 1.77 (3d. ed. 2000).

[57] Art. 40.1. For more on this, *see* Siobhán Mullally, *Substantive Equality and Positive Duties in Ireland*, 23 S. African J. Hum. Rts 291 (2007).

[58] Crowley v. Ireland [1980] IR 102 (Ir.).

others, the Department of Education and the trade union. The High Court held that the trade union's circular was an unlawful interference with the constitutional right of the plaintiffs to free primary education under Article 42.4, which was actionable at the suit of the children.[59]

The Irish Constitution contains one provision which expressly furnishes one group—children—with an ESR operable against persons other than the state. Article 42.1 provides that parents are obliged "to provide, according to their means, for the religious and moral, intellectual physical and social education of their children." The constitutional duty imposed on parents by that article accords a corresponding right to children to seek the provision for such education from their parents where their parents fail to provide such.[60] Thus far, this provision has not been the subject of considerable judicial discussion in an ESR context.[61] Applying Article 42.5 to Article 42.1, it would appear that where parents fail in their duty to provide for the religious and moral, intellectual, physical and social education of their children, the State "by appropriate means shall endeavour to supply the place of the parents." It would therefore seem that Article 42.1 may also serve as the basis for ESR claims of children against the State—albeit that the proof required to show that the state failed to intervene is extremely high. The extent and nature of such a claim presumably depend on the interpretation adopted of what is required of the state where it "*endeavour[s]* to supply the place of parents" (emphasis added). Thus an ESR duty, which is envisaged as having primarily horizontal application under the Constitution, may, in some situations, also have vertical application.

To date there is very limited Irish ESR-specific case law dealing with the issue of the application of constitutional rights to private parties and to horizontal, as opposed to merely vertical, relationships. Nor does it seem likely that any such case law is likely to come into existence in the near future due to the recent animosity of the Supreme Court to justiciable ESR[62] and the growing reluctance of Irish courts to apply constitutional rights to private relationships. Indeed, it is notable that while the courts in the early Irish horizontal application cases did not address or dwell upon the alleged challenges posed to the horizontal application of ESR by arguments based on formal,

[59] *See also* Hayes v. Ireland [1987] ILRM 65 (Ir.); Conway v. Irish National Teachers' Organisation and Ors. [1991] ILRM 497 (Ir.).

[60] For more on this, *see* A.G. v. Dowse & Anor. [2006] IEHC 64 *per* MacMenamin J (Ir.).

[61] For an interesting case involving the obligations owed by a non-state actor who was *not* a parent in terms of art. 42.1, *see* Hosford [1988] ILRM 300.

[62] *See, e.g.*, the Supreme Court's decisions in Sinnott v. Minister for Education [2001] 2 IR 545 (Ir.) and TD [2001] 4 IR 259. For analysis, *see* Nolan, *surpra* note 11. For a slightly more positive view, *see* William Binchy, *Promoting Economic, Social and Cultural Rights in Ireland*, paper presented at Irish Human Rights Commission and the Law Society of Ireland, Annual Human Rights Conference: Economic, Social and Cultural Rights: Making States Accountable, Nov. 21, 2009, who argues that "there is some evidence that the robust philosophical antipathy to justiciability is losing its pre-eminence. Other voices are beginning to be heard at both High Court and Supreme Court levels which suggest an openness to protecting these rights" (at 3). As Binchy notes, however, this has largely been the result of judicial interpretation and application of ESR-related provisions of the European Convention of Human Rights Act 2003—not constitutional ESR.

narrow conceptions of democratic decision-making and the separation of powers such as those historically found under liberal constitutional theory, the deployment of such conceptions has formed a key part of the Supreme Court's justifications of its more recent reluctance to enforce constitutional ESR.[63]

Unfortunately, the horizontal application of ESR in the Irish constitutional framework suffers from the general problems surrounding the constitutional tort. McMahon and Binchy, O'Cinneide, and others, have highlighted the serious lack of conceptual clarity that exists in relation to when, how, and to what extent horizontal effect should be given to constitutional rights by the Irish courts.[64] In a number of cases from the late 1980s onwards, the Irish courts have attempted to limit the principle set out in *Meskell* by holding that a constitutional tort action will not lie where constitutional rights are regulated and protected by existing common law or legislation.[65] Thus, although the courts have not repudiated the *Meskell* principle, they have sought to mitigate its practical effects by looking to pre-existing law (whether common law or statutory) as the medium through which the constitutional remedy should be channeled in most cases.[66]

3.3 ESR and the South African constitutional framework

Unlike the Irish constitutional framework, a wide range of ESR are expressly included in the South African Constitution.[67] The rights of "everyone" to have access to adequate housing,[68] health care services, sufficient food and water, social security,[69] and further education[70] are expressly qualified by available resources and a duty of progressive (rather than immediate) realization. In contrast, the right of everyone to a basic education,[71] the rights of children to basic nutrition, shelter, basic health care services, and social services,[72] and the right of prisoners to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material, and medical treatment[73] are not. This latter group of rights *prima facie* imposes a direct and immediate obligation upon the state to meet the ESR needs of those groups. This is not,

63 *See, e.g.*, Sinnott v. Minister for Education [2001] IESC 63, ¶ 374 *per* Hardiman J. *See also* TD [2001] 4 IR 259.

64 McMahon & Binchy, *supra* note 56, ¶¶ 1.07–1.83; O'Cinneide, *supra* note 42, at 213.

65 *See, e.g.*, Hanrahan v. Merck Sharp & Dohme (Ireland) Ltd. [1988] ILRM 629 (Ir.). For an analysis and critique of this and other recent decisions on the constitutional tort, *see* McMahon & Binchy, *supra* note 56, ¶¶ 1.18–1.84.

66 McMahon & Binchy, *supra* note 56, ¶ 1.60.

67 For an excellent overview of South African ESR literature and jurisprudence Constitution, *see* Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, *in* Constitutional Law of South Africa ch. 33 (Stuart Woolman et al. eds., 2d. ed. 2007).

68 S. Afr. Const., § 26.

69 *Id.* § 27.

70 *Id.* § 29(1)(b).

71 *Id.* § 29(1)(a).

72 *Id.* § 28(1)(c).

73 *Id.* § 35(2)(e).

however, the way in which the provisions furnishing the ESR of children[74] and prisoners[75] have been interpreted, although the same is not true with regard to the right to basic education.[76] As well as delineating specific ESR, the Constitution also states that no one may be arbitrarily evicted from their home or refused emergency medical treatment.[77] In addition to the internal limitation clauses included in the wording of specific rights provisions, all ESR may be limited in terms of the umbrella limitation clause in § 36.[78]

Unlike the Irish courts, with the exception of the early *Soobramoney* case,[79] the South African courts have, until recently, generally not flinched when dealing with ESR. In adjudicating the positive obligations imposed on the state by ESR under §§ 26 and 27 of the Constitution, the Constitutional Court has adopted a "reasonableness" test in order to evaluate the constitutionality of state action (or inaction).[80] So far, the Court has refused to recognize that the ESR of "everyone" can give rise to a minimum core obligation on the part of the state to provide a basic level of services to every individual in need, although it has stated that there may be future cases in which it is possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable.[81] As we will see below, the Constitutional Court has recognized on several occasions that constitutional ESR impose a negative obligation upon the State and all other entities and persons to desist from interfering with ESR.

[74] For more on this, *see* the Constitutional Court's decision in Government of the RSA & Ors. v. Grootboom & Ors. 2000 (11) BCLR 1169 (CC) (S. Afr.), which is discussed *infra*. The Court has not yet found that § 28(1)(c) imposes a direct, immediate obligation on the state in any case that appears before it, preferring consistently to consider the state's duty to children through the lens of the duties owed by the State to "everyone" under §§ 26(2) and 27(2).

[75] In B v. Minister for Correctional Service 1997 (6) BLCR 789 (C) (S. Afr.).

[76] *See* Governing Body of the Juma Musjid Primary School & Ors. v. Essay NO and Ors. [2011] ZACC 13 (CCT 29/10) (Apr. 11 2011) (S. Afr.) in which the Constitutional Court stated, "unlike some of the other socio-economic rights, this right [to basic education] is immediately realizable" (*id.* ¶ 37).

[77] S. Afr. Const., §§ 26(3) and 27(3) respectively.

[78] *Id.* § 36(1) states that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

[79] Soobramoney v. Minister of Health (Kawzulu-Natal) 1998 (1) SA 765 (CC) (S. Afr.).

[80] For the elements of a "reasonable" government programme, *see* Grootboom 2000 (11) BCLR 1169, ¶¶ 34–43, and Minister of Health and Others v. Treatment Action Campaign and Others (No. 2) (CCT8/02) [2002] ZACC 15, ¶ 123.

[81] *See Grootboom* 2000 (11) BCLR 1169, ¶ 33, and TAC, ¶ 35. It is not clear, however, whether the Constitutional Court will ever, in practice, be prepared to regard constitutional ESR as imposing minimum core obligations. In the case of Mazibuko & Ors. v. City of Johannesburg & Ors. [2009] ZACC 28 (CCT 39/09) (S. Afr.), the Constitutional Court refused to set a minimum level of water to be provided to "everyone" in order to satisfy the right to have access to sufficient water under art. 27(1).

3.4 South Africa, ESR, and horizontality: largely a case of theory rather than practice?

The approach adopted towards horizontal application in the Final Constitution of 1996 ("the Constitution"/"the South African Constitution") is very different from that under the Interim Constitution of 1993, which contained no express reference to horizontal application[82] and which did not explicitly state that the Bill of Rights was directly binding on the judiciary.[83] All rights in the Bill of Rights in the Constitution of 1996—including ESR—impose a mix of obligations on the state. Section 7 of the Constitution provides that the state is obliged to respect, protect, promote and fulfill the rights in the Bill of Rights.[84] However, in addition to the vertical application of the Bill of Rights to relationships between the state and private actors, the text of the Constitution also makes express provision for the horizontal application of rights. This is arguably no surprise given that,

> against the backdrop of South Africa's past, the demand for horizontality is immediately apparent. In the first place, 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. In the second place, given the enormous task of reconstruction faced by the new South Africa, given the limited resources of the state, and given 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 realizing 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.[85]

While the Irish decisions did not expressly address or take into account the arguments frequently raised in relation to the application of constitutional rights to horizontal relationships, these were considered at length both by the drafters of the South African Constitution and the Courts.[86] Thus, while the Irish Courts embraced horizontal application of ESR in a rather unselfconscious way and have not felt the need to take the comparative experience of other jurisdictions on board, this has very much not been the case in South Africa.[87]

[82] For more on horizontal application of Chapter 3 (Bill of Rights) of the 1993 Constitution, *see* Cheadle & Davis, *supra* note 3, at 45–54.

[83] S. Afr. (Interim) Const., § 7(1) provided that "[Chapter 3] shall bind all legislative and executive organs of state at all levels of government." The leading case in this area under the Interim Constitution was Du Plessis v. De Klerk 1996 (3) SA 850 (CC) (S. Afr.).

[84] S. Afr. Const., § 7(2) provides that: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[85] Nick Friedman, *Human Rights and the South African Common Law: Revisiting Horizontality* (Draft, May 30, 2005), *available at* http://denning.law.ox.ac.uk/news/events_files/Nick_Friedman_-_Revisiting_Horizontality_-_30_May_2012.pdf, last accessed 12 January 2014. That is not to suggest that all constitutional drafters were in favor of horizontal application—whether direct or indirect. For more, *see* Matthew Chaskalson & Richard Spitz, The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement 270–279 (2000).

[86] For more, *see* Stuart Woolman, *Application*, *in* Constitutional Law of South Africa, *supra* note 67, ch. 31.

[87] This is not simply a result of judicial attitudes to international and comparative law: while both Ireland and South Africa have dualist legal systems, § 39(1) of the South African Constitution states that when

The primary decision dealing with the issue of horizontal application under the Interim Constitution was that of *Du Plessis v. De Klerk*,[88] a defamation case. Having considered the application of constitutional rights in a range of different jurisdictions, including the US, Canada, Germany, and Ireland, Acting Justice Kentridge speaking for the majority of the Court concluded that comparative examination "shows at once that there is no universal answer to the problem of vertical or horizontal application of a Bill of Rights." After briefly referring to the Irish position, he noted that "[v]ery different models of constitutional adjudication are to be found elsewhere,"[89] appearing to regard the Irish position as something of an anomaly. Ultimately, a majority of the Constitutional Court concluded that rights under the Interim Constitution could not be directly invoked by one private litigant against another, embracing instead the notion of "indirect horizontal effect" of constitutional rights.[90] The Court did, however, hold that the Bill of Rights could apply indirectly to proceedings between private individuals as the principles of common law would have to be applied and developed by courts "with due regard to the spirit, purport and objects" of the Bill of Rights in light of § 35(3) of the Interim Constitution.[91] All of the majority judgments clearly subscribed to classic liberal political theory.[92]

Davis has noted that perhaps the most surprising aspect of the majority approach in *Du Plessis* was that the judgment was delivered at a time when the Constitutional Assembly had already agreed to a formulation which subjected private power to constitutional scrutiny: "as this decision was widely known, the majority of the Court had placed themselves at intellectual odds with the new Constitution."[93] Shortly after *Du Plessis*, the Constitutional Court explicitly recognized that § 8 could have direct horizontal application and found this to be consistent with the Constitutional Principles, including the separation of powers, with which the Final Constitution had to comply.[94]

I focus here on how that provision has—and might—operate in relation to ESR specifically. [95] Section 8(1) of the Final Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of

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interpreting the Bill of Rights, a court, tribunal or forum must, *inter alia*, consider international law and *may* consider foreign law. In practice, judges in both the lower courts and the Constitutional Court have not hesitated to be guided by and to invoke international law to support their findings. *See* John Dugard, *International Law and the South African Constitution*, 8(1) Eur. J. Int'l L. 1, 14 (1997). This contrasts with the restrictive approach adopted by the Irish courts to comparative and international law. For more, *see* International Law in Practice: An Irish Perspective (Gernod Biehler ed., 2005).

88 Du Plessis 1996 (3) SA 850.

89 *Id.* ¶ 36.

90 *Id.* ¶ 62. *See also id.* ¶ 49.

91 *Id.* ¶ 63.

92 For more on this and an extensive critique of the approach adopted by the majority of the Constitutional Court in Du Plessis, *see* Woolman & Davis, *supra* note 50, at 36. *See also* Du Plessis 1996 (3) SA 850 (diss. op. Kriegler J).

93 Dennis Davis, Democracy and Deliberation 106 (1999).

94 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), ¶¶ 53–56 (S. Afr.).

95 For a general discussion of the different interpretations of Section 8 and an account of how it has been interpreted by the South African courts, *see* Woolman, *supra* note 86, at ch. 31.

state.[96] Thus, Courts are obliged to ensure that their decisions are consistent with the Bill of Rights. From one perspective, this statement taken alone requires the automatic imposition of horizontal obligations on non-state actors by courts. However, in its first decision on § 8(2), *Khumalo v. Holomisa*,[97] the Constitutional Court disagreed with the applicants' argument that, because in terms of § 8(1) the Bill of Rights applies to all law and binds the judiciary, the substantive provisions of the Bill of Rights should be taken to apply to all "law"-governed disputes between private actors,[98] (be such law judge-made or otherwise). The Court did so on the ground that if the effect of § 8(1) and (2) read together were to be that the common law in all circumstances would fall within the direct application of the Constitution, § 8(3) would have no apparent purpose and be redundant. Ultimately, the Court ruled that the right to freedom of expression was of direct horizontal application in this case, stating 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."[99] However, the Court concluded that the ambit of this right was outweighed by the Constitution's commitment to dignity which was advanced through the common law of defamation that was being challenged in this instance.

Section 8(2) states explicitly that 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." The wording of § 8(2) acknowledges the varying extent to which rights (and the duties imposed by those rights) may apply to private actors, effectively according a margin of judicial discretion in terms of the application of particular obligations to different NSA. Such an approach is appropriate. In practice, given international trends in housing delivery, it is easier to contemplate circumstances in which the right to have access to adequate housing will be held to be applicable to NSA, than would be the case in relation to the

[96] Section 239 defines an organ of state as "(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution, (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation." (It does not, however, include a court or a judicial officer.) It is thus clear that the Bill of Rights directly imposes obligations on semi-private actors exercising a power or performing a constitutional or public power or function. Section 239 potentially re-characterizes many semi-private actors as state organs. *See* Ellman, *supra* note 8, at 23. Whether or not a "functionary" or "institution" will be held to qualify as a state or non-state organ will depend on the nature of the power or function exercised by that actor or body and, ultimately, how the Constitutional Court chooses to define a "public," or "constitutional" "power" or "function" in its jurisprudence. It seems unlikely that the Court would be prepared to hold that private institutions are organs of state where they have no nexus or are not under the control of the state. The focus of this article is on fully private bodies, so I will not dwell on this point further.

[97] Khumalo v. Holomisa [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (S. Afr.).

[98] Woolman, *supra* note 86, 31–7. Woolman provides an excellent critique of this decision at 31–6 to 31-12, 31–42 to 31–56.

[99] Khumalo [2002] ZACC 12 ¶ 33.

right to have access to social security or social assistance—a socio-economic good that has traditionally been provided by the state rather than the private sector.

Section 8(3) provides that, in order to provide an effective remedy for ESR violations by private parties in terms of Article 8(2), a court "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right."[100] This is sometimes called direct–indirect horizontal application or direct-mediated horizontal application: "the Constitution directly applies and persons are directly bound by Section 8(2), but the remedy is not a separate constitutional remedy [as one sees in the Irish context] but one that integrates what is constitutionally required with the development of the common law under Section 8(3)."[101]

Section 8(3) is linked to the requirement in § 39(2) that, when interpreting any legislation, (and most importantly) when developing the common law or customary law, "every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[102] Liebenberg observes that one ESR provision of the Bill of Rights, § 26(3) prohibiting arbitrary evictions, has already had an impact on the common law of property[103] and the common law of eviction proceedings, with the Supreme Court of Appeal stating on at least one occasion that the provision is capable of horizontal application.[104] The South African experience in this context differs from that of Ireland where the courts have generally applied common law tort principles in isolation from the constitutional perspective.[105]

In striking contrast to the Irish judicial dicta, Article 8(2) would *prima facie* appear able to give rise to a situation in which constitutional rights may impose positive obligations on non-state actors, rather than simply a duty to respect or not interfere with these rights. Ellman claims that it is possible to interpret the constitutional inclusion of horizontality and ESR to extend the reach of the Constitution to a truly vast range of activity by private citizens. He argues, however, that the language of the relevant provisions, does not compel this reading. In his view "[o]ne reason to hesitate is that most of the socioeconomic rights sections are qualified, even as applied to the state itself, by constitutional recognition of the limited resources available to the state for

[100] Liebenberg, *supra* note 67, 33–57.

[101] Christopher Roederer, *The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy*, 37 Colum. Hum. Rts L. Rev. 447, 503 (2006).

[102] Section 39(2) clearly allows for indirect horizontal effect of ESR. However, as the focus of this article is direct horizontal effect, I will not consider it any further here. For further discussion, see Sandra Liebenberg, *The Application of Socio-Economic Rights to Private Law*, 3 Tydskrif vir die Suid Afrikaanse Reg (TSAR) 464 (2008), *available at* http://justiciabilityconference.wikispaces.com/file/view/Liebenberg+-+Application+of+socio-economic+rights+to+private+law.pdf, last accessed 12 January 2014.

[103] Sandra Liebenberg, *South Africa*, *in* Social Rights Jurisprudence, *supra* note 12, 75, at 79. For a discussion of the development of the common law in relation to § 8, *see* Liebenberg, *supra* note 67, 33–57 to 33–60; Andre van der Walt, *Normative Pluralism and Anarchy: Reflections on the 2007 Term*, 1 Const. Ct. Rev. 77 (2008).

[104] Brisley v. Drotsky 2002 (4) SA 1 (SCA) (S. Afr.). Unfortunately, at the time of writing, this judgment was not available in English. Therefore, the above information has been taken from Liebenberg, *supra* note 67, 33–60.

[105] Binchy, *supra* note 62, at 13. Despite its name, the "constitutional tort" is a constitutional action, rather than one premised on tort law.

realizing them."[106] He claims that, if private actors are bound by these provisions at all, there surely must be some similar limit on their obligations. While this is probably correct, it is important to note, however, that not all ESR are internally qualified.

Even those commentators on the South African Constitution who accept that some constitutional rights should be applicable to actors beyond the state objected to the extension of horizontal application to ESR. In contrast to those such as Cheadle and Davis who took this view, [107] Chirwa has argued convincingly that the fact that socio-economic rights generally serve as a vehicle for facilitating social equality and that the state is the key player in securing that goal should not be used to downplay the role that other actors play towards attaining this bigger vision.[108] While the reference to the duty of the "state" to take reasonable "legislative" measures in §§ 26(2) and 27(2) might suggest that these duties are meant to be solely operative against the state, the reference to "other measures" in those provisions would suggest that some of the measures that are envisaged under those subsections are certainly capable of being performed by NSA. Furthermore, as Chirwa notes, there is also no basis for precluding the application of the rights guaranteed in those two subsections in the private sphere when other constitutional ESR seem to so apply.[109]

More broadly, efforts to argue that the horizontal application of ESR would constitute an even greater encroachment of liberty/freedom (and particularly economic freedom) than the horizontal application of civil and political rights due to the positive obligations and implications for resource allocation that ESR allegedly give rise to, are doomed to failure. The liberal theory-premised claim that "classical" civil and political rights are cost-free and give rise to exclusively negative duties has been comprehensively disproved.[110] Furthermore, it is clear that ESR do not merely impose positive obligations: Where someone enjoys an ESR, the state is prohibited from acting in a way that would interfere with or impair the individual's enjoyment of that right.

That said, while neither category of right exclusively imposes one kind of duty, is always cost-free, or unfailingly requires the expenditure of resources, ESR are, on average, somewhat more dependent for their full realization on positive state action than their civil and political counterparts.[111] Efforts to vindicate such rights are often

[106] Ellman, *supra* note 8, at 23. *See, e.g.*, § 27(2), which states that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [health care services, sufficient food and water, and social security, including social assistance]."

[107] *See* Cheadle & Davis, *supra* note 3. *See also* Iain Currie & Johan De Waal, The Bill of Rights Handbook 54–56 (5th ed. 2006), although these commentators restrict themselves to saying that "the nature of the positive duties imposed by [ESR] . . . would usually result in them not being applicable to private conduct" (*id.* at 55).

[108] Danwood Chirwa, *Obligations of Non-state Actors in Relation to Economic, Social and Cultural Rights under the South African Constitution*, Socio-Economic Rights Project, Community Law Centre, University of the Western Cape (2002).

[109] *Id.*

[110] For more on this, *see, e.g.*, G. Van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views*, in The Right to Food 97 (Philip Alston & Katarina Tomasevski eds, 1984); and Philip Alston & Gerard Quinn, *The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 Hum. Rts Q. 156 (1987).

[111] Alston & Quinn, *supra* note 110, at 184.

more likely to entail the expenditure of resources than efforts to assure civil and political rights. This is due to the more directly resource-dependent nature of ESR, as well as the fact that the mechanisms necessary to ensure civil and political rights are more likely to already be in place. Thus, one might claim that ESR pose a particular challenge in relation to horizontality in light of the fact that the horizontal application of such rights is more likely to result in the imposition of positive duties on non-state actors than would be the case where civil and political rights are at issue. Ultimately, however, bearing in mind that all human rights impose both positive and negative obligations and entail varying levels of resources, the mere fact that ESR may give rise to positive obligations and may have resource implications cannot be taken to serve as an absolute bar on their horizontal application if the same objection is not raised in relation to civil and political rights.

But what of the practice? The South African ESR horizontality case study is primarily significant because of the degree to which ESR and the principle of horizontality are enshrined in the Constitution, rather than on account of the jurisprudence that has developed on the basis of § 8. Thus far, there has only been one case, the *Juma Musjid* decision discussed below,[112] in which the South African courts have addressed the horizontal application of ESR under the Final Constitution in any detail and very few where the issue of the direct application of ESR to private actors has been considered at all.

Even before its first decision on § 8, the Constitutional Court had acknowledged that at least some of the duties imposed by ESR are binding on private parties. Liebenberg stresses that, in its landmark housing rights decision of *Government of the Republic of South Africa v. Grootboom and others*,[113] the Constitutional Court held that § 26(1) 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."[114] In the subsequent case of *Minister of Health v. Treatment Action Campaign (No. 2)*,[115] the Constitutional Court stated that that "negative obligation" applies equally to the § 27(1) right of access to health care services, including reproductive health care.[116] In the context of § 26 specifically, the Constitutional Court stated in *Grootboom* that "[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."[117] The Court thus acknowledged the role that private actors might play in relation to the provision of housing.

[112] Juma Musjid (CCT 29/10) [2011] ZACC 13.

[113] Grootboom 2000 (11) BCLR 1169 (CC).

[114] *Id.* ¶ 34 (emphasis added). *See also* Jaftha v. Schoeman & Ors 2005 (2) SA 140 (CC), ¶ 34 (S. Afr.); Machele & Ors v. Mailula & Ors 2010 (2) SA 257 (CC), ¶ 26 (S. Afr.).

[115] Minister of Health v. Treatment Action Campaign (No.2) 2002 (5) SA 721 (CC) (S. Afr.).

[116] *Id.* ¶ 46.

[117] Grootboom 2000 (11) BCLR 1169 (CC) ¶ 35. Chirwa argues that this statement confirms that private actors have positive obligations in relation to ESR. *See* Danwood Chirwa, *Non-state Actors' Responsibility for Socio-economic Rights: The Nature of Their Obligations Under the South African Constitution*, 3(3)

Prior to the *Juma Musjid* decision, the ruling in which the South African courts gave the most attention to the horizontal application of ESR was *President of the Republic of South Africa & Anor. v. Modderklip Boerdery.*[118] This decision revolved around the state's failure to enforce an eviction order granted by the High Court against illegal occupiers of private land. It involved a conflict between the housing rights of illegal occupiers and the property rights of landowners. In the Supreme Court of Appeal, Acting Justice Harms rejected the earlier conclusion of the High Court that the right of access to adequate housing is not one enforceable against an individual landowner in terms of the Constitution.[119] Justice Harms stated that, "circumstances can indeed be envisaged where the right would be enforceable horizontally but the present is not such a case."[120] The horizontal application of § 26 was not dealt with by the Constitutional Court.[121] Since then, the horizontality of § 26 has only been the subject of explicit judicial consideration on one occasion, when a private landowner brought eviction proceedings against occupiers. In this instance, the High Court held that the Constitution did not impose a duty on a private landowner "to provide housing or for that matter access to adequate housing let alone suitable alternative accommodation to homeless people or unlawful occupiers in the position of the applicants."[122]

When appealing the Supreme Court of Appeal's decision in *Modderklip*, the State argued that § 25(1) (the guarantee that no one may be deprived of property except

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ESR Rev. (2002), *available at* http://www.communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/ESR%20Review/Volume%203%20No%203%20-%20November%202002.pdf, last accessed 12 January 2014. While this may well be true, it seems unlikely that this is the point that the court was making here. The full relevant quotation from the judgment reads: "[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, last accessed 12 January 2014 including individuals themselves, must be enabled by legislative and other measures to provide housing." This statement would seem to indicate that the state is not the only housing provider; it does not necessarily imply that private individuals are *obliged* to provide such housing under the Bill of Rights.

118 President of the Republic of South Africa & Anor. v. Modderklip Boerdery (CCT 20/04), 13 May 2005.

119 Modderklip Boerdery (Pty) Ltd. v. Modder East Squatters & Anor. 2001 (4) SA 385 (W) at 394J–395A–B (S. Afr.).

120 *Id.* ¶ 31.

121 One of the reasons for this was the fact that the judgments of the lower courts focused largely on the competing constitutional rights of private landowners to property and the housing rights of unlawful occupiers. *In contrast,* the Constitutional Court held that it was not necessary "to reach any conclusions . . . [on] whether Modderklip's Section 25(1) right to property and the rights of the unlawful occupiers under Sections 26(1) and (2) have been breached and if so, to what extent" (¶ 26). Instead, it primarily based its ruling on Modderklip's constitutional right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or another independent, impartial tribunal of forum" (§ 34) as read with the constitutional principle of the rule of law (§ 1(c)).

122 *See* Lingwood v. the Unlawful Occupiers of R/E of ERF 9 Highland, Case No. 2006/16243, S. Afr. High Ct. (Witwatersrand Local Div.), ¶ 19. Justice Mogagabe did acknowledge that the obligation "to provide housing or for that matter access to adequate housing" in § 26 of the Constitution may, in certain appropriate circumstances, find horizontal application, "provided a proper case is made thereanent and provided 'other agents within our society, including individuals themselves are enabled by legislative and other measures to provide housing' (*sic.*)" (*id.* ¶ 19). However, in doing so, he may have misapplied the Grootboom dicta (which he cited in a footnote) as he seemed to suggest that the Section 26 duty at issue could only have horizontal effect where non-state actors (or 'other agents') have been 'enabled by legislative and other measures to provide housing'.

in terms of law of general application) does not apply to private conduct[123] and that it has no horizontal application. In its judgment, that Court avoided engaging in a debate about horizontality by premising the breach of the state's duties to both the owner and the occupants on the constitutional duty to protect set out in § 7(2) of the Constitution. In its subsequent judgment, the Constitutional Court expressly stated that it did not consider it necessary in this case to reach any conclusions on the question of whether or not § 25(1) has horizontal application and if so, under what circumstances.

Thus far, the Constitutional Court has been prepared to hold that an ESR imposes an obligation on a non-state actor in only one of its decisions. In the *Juma Musjid* case, a private property owner, the Juma Musjid Trust, sought to evict a public school conducted on its property. This was due to a commercial dispute between the Trust and the MEC for Education in Kwazulu-Natal. In its decision, the High Court found that the defendant trust was not exercising a public function and that it owed no constitutional obligation to the Governing Body of the school or to the learners at the school; rather the obligation to respect the learners' right to basic education was an obligation of the Member of the Executive Council (MEC) for Education. In doing so, the High Court emphasized the Trust's own constitutional rights to property.

The Constitutional Court took a different approach. It ruled that there was no primary positive obligation on the Trust to provide basic education to the learners; rather, that primary positive obligation rested on the MEC. Nor was there an obligation on the Trust to make its property available to the MEC for use as a public school, although it had chosen to do so in accordance with legislation by forming an agreement with the MEC.[124] Crucially, however, the Court ruled that the private Trust *did* have a negative constitutional obligation to respect, and not impair, the learners' right to a basic education under § 29 of the Constitution.[125] While, having regard to all the circumstances of the case, including the aforementioned obligation, the Trustees had acted reasonably in approaching the High Court for an eviction order, that was not sufficient reason for the High Court to grant the order. In this instance, the High Court had failed to consider properly the best interests of the learners and their right to a basic education when evaluating the eviction application.

So what does *Juma Musjid* tell us about how the Constitutional Court may treat § 8 in future cases? First, it is notable that this case centered on a negative obligation on the part a non-state actor. The Court was not asked to address the potentially thornier issue of positive obligations imposed by ESR. Indeed, in their amicus submission, the Children's Law Centre and the Socio-economic Rights Initiative stated that "it is accepted that difficult questions will arise in the future regarding the extent to which positive duties flowing from this section may be binding on private parties."[126] They asserted that the position is different where, as in this case, the potential interference with existing enjoyment of an ESR by the conduct of non-state parties is involved.

[123] That is, conduct that is not authorized by law.
[124] Juma Musjid [2011] ZACC 13 ¶ 57.
[125] *Id.* ¶¶ 58, 60.
[126] Amici Heads of Arguments, ¶ 9.1.

While the amici's approach can be viewed as a strategic argument linked to the particular facts of the case and directed at persuading the Court that § 8(2) could be applied at all, one might question whether it will come back to haunt future ESR advocates arguing in favor of the enforcement of positive ESR obligations.[127] Leaving that point aside, there is nothing explicit in the *Juma Musjid* decision that suggests the Court would be as open to finding a positive ESR obligation to be directly applicable to NSA.

In terms of the test to be applied with regard to § 8(2), the court followed the approach in *Khumalo*, stating that the application of § 8(2) depends on 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."[128] *Juma Musjid* involved the right to basic education which, the Court highlighted, plays an essential role in developing a child's personality, talents, and mental and physical abilities to his or her fullest potential and in providing a foundation for lifetime learning and work opportunities.[129] Notably, however, the judgment also highlighted the importance of the right to basic education in terms of its importance for "individual *and societal development in our democratic dispensation in the light of the legacy of apartheid*" (emphasis added).[130] Thus, it seems likely that, in future jurisprudence, the intensity of a right for the purposes of § 8(2) is to be evaluated both in terms of its importance to the individual ESR-holder as well as its function with regard to the particular post-apartheid socio-economic context in South Africa.

Unlike the Irish courts' horizontality jurisprudence, the Court in *Juma Musjid* engaged with a number of objections to the direct application of ESR to NSA. First, the Court addressed the issue of the potential intrusion of direct horizontal application on the autonomy of the private constitutional duty-bearers head on, stating that "the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right."[131] However, despite this lip-service to private actor autonomy, the Court was prepared to intrude on such here. The Court also highlighted the fact that, historically, because of the clear distinction between the public law and private law, private entities had been held to be free to engage in their economic and social interests without state interference; "as a result, over emphasis (*sic.*) on the differences between the exercise of private and public power often sheltered private power used for public purposes."[132] The Court thus underlined how the alleged watertight distinction between public and private power would serve to disguise private power's public dimension, thereby challenging the liberal constitutional theory presumption of an impermeable divide.

A final key issue that arose in the *Juma Musjid* case was the potentially conflicting constitutional rights of residents and property owners. The Constitutional Court

[127] The amici stated later: "The *Khumalo* approach makes clear that (at least) the *negative* duty not to impair existing access to a basic education is binding on private parties such as the Trust" (*id.* ¶ 9.2).

[128] *Juma Musjid* [2011] ZACC 13 ¶ 58, *citing* Khumalo [2002] ZACC 12.

[129] *Id.* ¶ 43.

[130] *Id.* ¶ 42.

[131] *Id.* ¶ 58.

[132] *Id.* ¶ 55.

cited its previous jurisprudence that the Constitution "imposes new obligations on the courts concerning rights relating to property. . . . It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home."[133] The Court here stated that "normal ownership rights are not counterposed only to constitutional housing rights, but also, as this case shows, to other fundamental rights. What must be weighed against the right of ownership, in each case, will depend on the content of each specific countervailing right."[134] As such, despite the Court's statement that "the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights," *Juma Musjid* makes it clear that the protection of autonomy manifested in property rights will not necessarily trump ESR obligations imposed by § 8(2) on non-state actors. This appears to be particularly likely to be so where a conflict arises between the implementation of an ESR that is perceived by the court as addressing the consequences of apartheid with a property right that is being employed in such a way as to imperil those efforts.

3.5. Moving beyond § 8

In addition to § 8, the Constitution imposes other direct ESR-related duties on non-state actors.[135] For instance, § 27(3), which states that that "no one may be refused emergency medical treatment" seems likely to be capable of applying to private health service providers.[136]

As we have seen, the same is true of § 26(3). In the context of the right to education, § 29(3) provides that, while everyone has the right to establish and maintain, at their own expense, independent educational institutions, such institutions must not discriminate on the basis of race or maintain standards that are inferior to standards at comparable public educational institutions. The rights of everyone to fair labor practices and to form and join a trade union set out in § 23 would also seem obvious contenders for horizontal application, as such rights have been in the Irish context. Similarly, the right of persons to an environment that is not harmful to their health or well-being seems predisposed to being applicable against NSA.[137]

As with Ireland, the South African constitutional framework can be construed as imposing child ESR-related obligations on NSA. Section 28(1)(b) provides that children have a right to family care or parental care, or to appropriate alternative care when removed from the family environment. Section 28(1)(c) states that every child

[133] Port Elizabeth Municipality v. Various Occupiers 2004 (12) BCLR 1268 (CC), ¶ 23 (S. Afr.).

[134] Juma Musjid [2011] ZACC 13 ¶ 70.

[135] There are also a number of other constitutional provisions imposing explicit obligations on non-state actors that may have implications for the imposition of obligations on non-state actors in an ESR context, e.g., § 9(4) of the Constitution, discussed above. Also relevant is § 32(1)(b) which provides that everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights. Neither provision has been the subject of a decision in the context of ESR.

[136] IAIN CURRIE & JOHAN DE WAAL, THE BILL OF RIGHTS HANDBOOK 49 (6th edn, 2013).

[137] § 24(a). Section 24(b), outlining the right of everyone "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures" may also be of horizontal application as it is foreseeable that "other measures" may include those relating to non-state actors.

has a right to basic nutrition, shelter, basic health care services and social services. In its jurisprudence, the Constitutional Court has held that § 28(1)(c) "encapsulates the conception of the scope of care that children should receive in South African society": § 28(1)(b) defines those responsible for giving care while § 28(1)(c) lists various aspects of the care entitlement.[138] In *Grootboom*, the Court held that "[t]hrough legislation and the common law, the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the State." [139] Therefore, parents are obliged to give effect to the ESR of their children to the best of their abilities. While a face-value reading of § 28(1)(c) would seem to suggest that it is primarily vertical in effect, the Constitutional Court's subordination of that provision to § 28(1)(b), resulting in the imposition of the primary duty to give effect to children's ESR on parents, renders it primarily horizontal in effect.[140] So far, however, there have been no instances of children asserting violations of § 28(1)(c) against their parents.[141] Such cases are unlikely for a number of reasons. First of all, there are certain ESR set out in the subsection that parents seem unlikely to be in a position to deliver (for instance, social services). Second, the right to family/parental care under § 28(1)(b) includes an economic aspect in terms of providing for the child's physical needs.[142] Thus, children are more likely to rely on that provision when seeking ESR-related goods from their parents. In the High Court case of *Jooste v. Botha*, Justice Van Dijkhorst appeared to be of the view that § 28(1)(b) was not intended to have direct horizontal effect. His opinion, however, seems to have been based on the fact that the predecessor of § 28(1)(b) in the Interim Constitution was only vertical in effect, due to the Constitutional Court's ruling in *Du Plessis*. This view is open to challenge in light of the fact that § 8 of the Final Constitution establishes a very different approach to the horizontal effect of the Bill of Rights of the Final Constitution—an issue which the judge acknowledged but to which he failed to accord proper weight in his conclusions in relation to the horizontal effect of § 28(1)(b).

In summary, in addition to the explicit reference to the potential horizontal application of the provisions of the Bill of Rights in § 8, the Constitutional Court has been prepared to identify and enforce obligations imposed on non-state actors. However, the dearth of jurisprudence to date demonstrates that despite the strong concerns expressed by some commentators in relation to the inclusion, and implications, of § 8, the South African Courts have been slow to get involved in the horizontal application of the Bill of Rights, including in an ESR context.

[138] Grootboom 2000 (11) BCLR 1169, ¶76.

[139] *Id.* ¶ 77.

[140] The Court went on to state that "[t]his does not mean, however, that the State incurs no obligation in relation to children who are being cared for by their parents or families. In the first place, the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28 . . . In addition, the State is required to fulfil its obligations to provide families with access to land in terms of Section 25, access to adequate housing in terms of Section 26 as well as access to health care, food, water and social security in terms of Section 27." (*id.* ¶ 78).

[141] For more on this issue, *see* Elsje Bonthuys, *Realising South African Children's Basic Socio-Economic Claims against Parents and the State: What Courts Can Achieve*, 22 Int'l J. L., Pol'y & Family 333 (2008).

[142] Jooste v. Botha 2002 (2) BCLR 187 (T) at 189 (S. Afr.).

4. Conclusion—evaluating effectiveness and domestic implications for the international dimension

By way of concluding, I will now make some comments in relation to the effectiveness of the domestic legal models and approaches of the judiciary in Ireland and South Africa in terms of holding NSA directly liable for violations of constitutional ESR. This will include suggesting how the efficacy of each model can be developed and improved. Finally, I highlight the lessons that can and should be taken from these two domestic experiences by those seeking to advance the direct horizontal application of ESR at the international level.

This article has shown there to be four key limitations on the potential effectiveness of the Irish "horizontality" model in relation to holding NSA to account for ESR violations. The first is the refusal of the Irish courts to interpret constitutional ESR (or any constitutional rights) as imposing positive obligations on NSA. Bearing in mind the significance of the positive obligations imposed by ESR, the failure of the Irish courts to engage with this issue significantly limits their ability to ensure that NSA will be held to account for violations of every kind of duty imposed by ESR. Ultimately, if the Irish courts will not address the positive obligations owed by NSA under the horizontal application of ESR in an environment of ever-increasing privatization and globalization, this will result in uneven and ineffective protection of ESR. The second obstacle to the effectiveness of the Irish model is the Irish courts' recent reluctance to ensure the enforcement of constitutional ESR by any actor, whether state or non-state in nature. If this judicial unwillingness continues, it seems extremely unlikely that the courts will be able (or indeed be willing) to hold NSA to account effectively. Another impediment to the effectiveness of the Irish horizontality model is the lack of clarity surrounding the constitutional tort action.[143] The final effectiveness-related challenge is the ever more evident disinclination of the Irish courts to apply constitutional rights horizontally. It is crucial at this point that the Irish courts take steps to clarify the doctrine of horizontal application under the Irish Constitution, particularly in relation to identifying the circumstances in which the constitutional tort arises. Whether the doctrine is to be abolished or retained, the courts must do so on the basis of strong, well-defended reasoning which directly addresses and resolves the conceptual confusion which currently prevails. The doctrine should not simply be left to languish in its current vague, unsatisfactory state.

While at this relatively early stage in the South African Constitution's history, it is very difficult to evaluate the effectiveness of the South African schema in terms of holding NSA to account, it seems more hopeful than the Irish one—on paper at least. One very important issue should be noted at this stage, however. While the Final

[143] This is not unique to the Irish context. In Malawi, the courts have also not always been clear on the issue of whether and when the Constitution permits direct constitutional actions against private actors – despite the fact that the Malawian constitutional framework appears to make provision for such (*see supra* note 18): see Danwood Chirwa, *A Full Loaf is Better than Half: the Constitutional Protection of Economic, Social and Cultural Rights in Malawi*, 49(2) J. Afr. L. 207, 236 (2005).

Constitution expressly enshrines horizontality, it does not mandate it in all circumstances. In each decision, courts will have to determine whether an ESR is applicable "taking into account the nature of the rights and the nature of any duty imposed by the right." While it seems likely—and, indeed, the Constitutional Court's statement in *Juma Musjid, Grootboom* and other cases suggest—that the courts will not be reluctant to hold that an ESR will be applicable to a NSA where a negative duty is at issue, it remains to be seen whether courts will be as willing to hold NSA to be bound by ESR violations where it is a positive obligation that is at issue.

Furthermore, as Pieterse has observed, the existence of § 39(2) of the Constitution (which mandates the South African courts to interpret legislation and develop common law in situations where this is necessary for the effective enjoyment of ESR) as well as the plethora of relevant legislative provisions regulating social service delivery and the vast body of common law that may be developed to give effect to ESR means that direct reliance on constitutional ESR provisions in private disputes is likely be a rare occurrence.[144] The South African Constitutional Court's growing tendency to rely on § 39(2) (and hence indirect application) rather than directly applying substantive constitutional rights provisions to the law or conduct at issue in the cases before them—whether such cases raise questions of either vertical or horizontal application—has been criticized as effectively undermining the Bill of Rights.[145] Indeed, Van der Walt notes that most academic commentators who were initially enthusiastic about direct application have given up on the debate or shifted their focus.[146] In addition, the scope for applicants to rely on § 8 to ensure the direct application of constitutional ESR to non-state actors seems further diminished in light of the Constitutional's Court's ever more extensive adoption of subsidiarity principles in its jurisprudence (whether involving vertical or horizontal application).[147] A strong indicator of the Court's approach was provided in an ESR context by the Court's last decision of the 2009 term, which centered on the delivery of ESR-related services to residents of an informal settlement.[148] In this case, the applicants had sought to rely both on Chapters 12 and 13 of the National Housing Code and a range of constitutional provisions, including ESR.[149] Both the applicants and the Constitutional Court regarded Chapters 12 and 13 as promulgated to give effect to the rights conferred

[144] Marius Pieterse, *Indirect Horizontal Application of the Right to Have Access to Health Care Services*, 1 S. Afr. J. Hum. Rts 157, 162–163 (2007).

[145] Stuart Woolman, *The Amazing, Vanishing Bill of Rights*, 124 S. Afr. L.J. 762, 762 (2007). It is notable that in the Juma Musjid case, the Court was also invited by the applicants to develop the common law of contract and trust in accordance with § 39(2) of the Constitution and the Court did not do so even though such an approach might have enabled it to avoid addressing § 8(2).

[146] Van der Walt, *supra* note 103, at 98.

[147] *See, esp.*, South African National Defence Union v. Minister of Defence and Others [2007] ZACC 10; 2007 (5) SA 400 (CC) (S. Afr.) and Bato Star Fishing (Pty) Ltd. v. Minister of Environmental Affairs and Tourism and Others [2004] ZACC 15; 2004 (4) SA 490 (CC) (S. Afr.). For more, *see* van der Walt, *supra* note 103 above.

[148] Nokotyana and Others v. Ekurhulni Metro and Others [2009] ZACC 33 (CC31/09). For another example of the Court discussing the subsidiarity principle in an ESR context, *see* Mazibuko & Others v. City of Johannesburg & Others [2009] ZACC 28 (Case CCT 39/09), ¶¶ 75–77. For further discussion of both cases, see *infra*.

[149] The applicants relied on the right to have access to adequate housing, guaranteed in § 26 of the Constitution, as well as §§ 2, 7, 10, 39, and 173 of that instrument.

by § 26 of the Constitution. Here, the Constitutional Court stated that it had "repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation or alternatively challenge the legislation as inconsistent with the Constitution."[150] Therefore, it concluded, the applicants were not permitted to rely directly on constitutional ESR provisions.

Bearing in mind the Constitutional Court's historic reluctance to engage strongly with horizontality (*Juma Musjid* constituting a notable exception), judges seem likely to remain keen to employ subsidiarity principles or § 39(2) in relation to situations potentially giving rise to the direct horizontal application of constitutional rights more than they would in other cases. At this stage, the full implications of the Court's embrace of subsidiarity for the direct horizontal application—and, indeed, direct vertical application—of ESR are unclear.

It will be particularly interesting to see how the South African courts develop their nascent approach to the direct horizontal application of ESR. While the Court has taken initial steps towards setting out the key considerations in relation to applying § 8(2), the guidance provided in the relevant judgments remains scant. It is, therefore, necessary to consider in greater depth how § 8(2) might, and should, be construed in future cases. It had been suggested that judicial willingness to impose ESR obligations on NSA should be linked to the "state connectedness" of the NSA—that is, the extent to which private actors are engaged in "state action."[151] Admittedly, *Khumalo* and authoritative commentators suggest that it is not necessary for the power exercised by a private entity to approximate that of the state.[152] However, it seems logical that those bodies which most resemble the state in terms of the nature and extent of their authority and function(s) should be liable to being subject to obligations which have traditionally been perceived as adhering to states—to some extent at least.[153] That said, it is clear that there are situations in which exclusive reliance on a "state-connectedness" test will not be adequate if ESR are to be given adequate protection from NSA violations. Indeed, the structure of the South African Constitution and its differentiation between the application of constitutional rights to broadly defined "organs of state", which are addressed in § 8(1), as opposed to "natural and juristic" persons, who are dealt with under § 8(2), makes it clear that the drafters were conscious that something more than simply the identification of

[150] Nokotyana [2009] ZACC 33 at 24.

[151] Ellman, *supra* note 8, at 21–22.

[152] *See, e.g.*, Sandra Liebenberg, Socio-economic Rights: Adjudication under a Transformative Constitution 327 (2010).

[153] For instance, in their heads of argument, the applicants in Juma Musjid argued that "the trust was 'a quasi-public body'" "exercising the equivalent of public power," and "performed a public function in facilitating the operation of a public school" (¶ 13.3, ¶ 50, and ¶ 57 respectively) and hence bound by the Public Administration of Justice Act (PAJA) 3 of 2000. In its ruling, Constitutional Court emphasized the fact that "in making contributions towards expenses associated with the running of a public school, the Trust acted consistently with its duties: to erect, maintain, control and manage the school in terms of the Deed of Trust establishing that Body" (¶ 59). The Court acknowledged that the trust performed "performed the *public function* of managing, conducting and transacting all affairs of the Madressas" (*id.*) (emphasis added) but held that it did not need to reach reached a conclusion on the PAJA argument, given its other findings. Despite its silence on this issue, the thrust of the Court's approach here could be construed as judicial recognition that the particular power exercised by the trust, as well as its purpose, rendered it particularly appropriate for that body to be subjected to horizontal education rights-related duties.

a nexus between the relevant NSA and the state would be necessary in order to ensure that constitutional rights were afforded maximum protection.

It is very important that the South African courts should interpret the "nature" of the right and/or of the duty imposed by that right broadly to take into account issues such as the position of the right-holder *vis-à-vis* the potential rights-holder. This should include a consideration of the level of dependence of the former on the latter, any responsibility that the NSA may owe the rights-holder as the result of a special relationship (e.g., parent–child, employer–employee). The courts should also take into account the importance to a rights-holder that a particular right be given effect to: where the enjoyment of a right is fundamental in terms of ensuring the survival and dignity of a rights-holder, the court should be more willing to impose obligations on NSA than they would in relation to other rights. Indeed, this latter condition is consistent with the Constitutional Court's finding in *Juma Musjid* (following *Khumalo*) that the application of § 8(2) depends on "the intensity of the constitutional right in question." Finally, and of particular importance in the context of positive obligations, the Court should bear in mind the likelihood that the right-holders' ESR needs will be met by other means, should the relevant NSA fail to do so. While *Juma Musjid* was concerned with the "invasion" of rights by ESR, it is certainly possible to contemplate situations in which the right to education might not be fulfilled for children where a NSA refuses to do so. One example might be where the state lacks resources to provide special education services necessary to ensure that children with disabilities are able to participate in mainstream education. If there was a school in a particular area that provides such education free of charge to members of particular religious groups but refuses to admit some children because they do not have the relevant religious affiliation despite their having equal need, then those children would not have the positive aspects of their right to education satisfied.

While some level of generality of approach is inevitable, it is crucial that, in interpreting and applying § 8(2), the South African courts adopt a clear test which is underpinned by a convincing conceptual justification.[154] Thus far, the Court has failed to do so. Woolman has highlighted the "gossamer thin fabric" of *Khumalo* and the same accusation can be leveled at the *Juma Musjid* decision.[155]

Worryingly, recent decisions such as that of the Constitutional Court in *Lindiwe Mazibuko & Others v. City of Johannesburg & Others*[156] appear to be reflective of an increasingly deferential and conservative approach on the part of the Court in the

[154] For a proposal of how the courts should do so in the context of the constitutional obligations of corporations, *see* David Bilchitz, *Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations*, 125(4) S. Afr. J.L. 754, 779 (2008).

[155] Woolman, *supra* note 86, ch. 31.

[156] Mazibuko [2009] ZACC 28. In this constitutional right to water case, the Court refused to find that the City of Johannesburg's highly controversial Free Basic Water policy and installment of pre-payment meters contravened § 27 of the Constitution, which sets out the right to everyone to have access to sufficient water: *see* Peter Danchin, *A Human Right to Water? The South African Constitutional Court's Decision in the* Mazibuko *Case*, *EJIL: TALK! Blog* (Jan. 13, 2010), http://www.ejiltalk.org/a-human-right-to-water-the-south-african-constitutional-court%E2%80%99s-decision-in-the-mazibuko-case, last accessed 12 January 2014.

context of ESR cases.[157] Such rulings do not bode well for the Court adopting an assertive approach to the enforcement of ESR against the state—let alone the horizontal application of positive ESR obligations against non-state actors.[158] This, together with the Irish experience, highlights that the effectiveness of the horizontal application of ESR is also attributable to judicial attitudes to constitutional ESR, rather than simply the particular model of horizontality adopted.

The successes and challenges of the Irish and South African experiences do not simply have implications for constitutional law in those jurisdictions or even such law in other constitutional systems. Rather, they feed into the evolving discussion of the horizontal application of human rights at the international level. The current non-enforceability of ESR against NSA at the international level is a serious lacuna in human rights framework in light of the growing power and responsibility of NSA with regard to the enjoyment of ESR. The most recent effort in this context has been the development of a "protect, respect and remedy" framework for business and human rights by John Ruggie, the former UN Secretary General's Special Representative on Business and Human Rights. In doing so, Ruggie rejected the notion that international human rights law directly imposed human rights obligations on corporations,[159] preferring instead to delineate a (legally non-binding) "corporate responsibility to respect," in terms of which business enterprises should avoid infringing on the human rights of others through "human rights due diligence" and should address adverse human rights impacts with which they are involved.[160] This framework—with its focus on negative, non-legally binding "responsibilities" was welcomed by business and states and was endorsed by the Human Rights Council in June 2011.[161]

The endorsement of the Guiding Principles by the Human Rights Council and a range of different stakeholders, despite extensive opposition from many in the international human rights sector, would appear to indicate that the principles are effectively "the only show in town." However, the issue of the application of international

[157] In Mazibuko [2009] ZACC 28, the Court stated that "ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right" (¶ 60).

[158] Another judgment evidencing a deferential approach on the part of the Constitutional Court is Residents of Joe Slovo Community & Ors v. Thubelisha Homes & Others [2009] ZACC 16 (Case CCT 22/08) (S. Afr.). For a critical discussion of this judgment, *see* Sandra Liebenberg, *Joe Slovo Eviction: Vulnerable Community Feels the Law from the Top Down*, Legalbrief Today (June 23, 2009). *See also* the Constitutional Court's decision in Nokotyana [2009] ZACC 33. For a critical discussion of this decision, *see Judgment weakens fight for socio-economic rights—professor*, Financial Mail (Jan. 13, 2009).

[159] For a justification of his approach, *see* Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Un Doc. A/HRC/4/35 (2007), at 33–44.

[160] Guiding Principles on Business and Human Rights: Implementing the United Nations "Respect, Protect and Remedy" Framework, March 21, 2011, UN Doc. A/HRC/17/31, Annex, at 14. According to the framework, states have a duty to protect against human rights abuses by third parties, including corporations and there should be greater access by victims to effective remedies, both judicial and non-judicial.

[161] UN General Assembly, Human Rights and Transnational Corporations and Other Business Enterprises (June 15, 2011), UN Doc. A/HRC/17/L.17/Rev.1.

human rights to non-state actors has not been definitively put to bed. This is because Ruggie's framework does not significantly add to the pre-existing schema in place for corporations and human rights—either in terms of enforceable standards or implementation mechanisms.[162] This bodes poorly for it solving the issues that led to interest in the issue of imposing human rights obligations on corporations in the first place.[163] Certainly, it seems a framework that focuses solely on "do no harm" in the context of ESR may not ensure the holistic protection of ESR given contemporary political and economic structural realities or assuage structural socio-economic inequalities. It thus seems inevitable that this issue will be revisited at some point in the not-too-distant future.

There are strong arguments in favor of taking domestic experiences into account when considering possible developments at the international level. First, there is considerable overlap between the arguments in favor of "vertical" human rights relations at both the international and the domestic levels—including the fact that such a model is justified on the basis that the state/individual relationship involves unequal power dynamics between the parties[164] and a concern that an emphasis on duties of private individuals will serve (a) to distract attention from the role of the state (b) will be used as an excuse to circumscribe rights. Second—and most crucially—the dearth of guidance on the issue of the horizontality of human rights at the international level means that domestic experiences constitute a key evidence base. Just as the domestic experience of the constitutionalization and adjudication of ESR in different jurisdictions has greatly progressed discussions at the international level on the justiciability of ESR,[165] resulting in the adoption of the OP-ICESCR by the Human Rights Council in December 2008, so too may domestic constitutional debates and experiences of the horizontality of ESR.

Those seeking to advance horizontality of ESR at the international level must acknowledge and learn from the shortcomings of the South African, Irish, and other national models of horizontal application in order to ensure a strong and effective model at the international level. If international ESR standards and principles are ultimately to be of local relevance then it is crucial that the lessons from the local level should be taken into account in their formulation. Furthermore, bearing in mind the fact that international human rights law is frequently invoked by human rights victims seeking protection at the local level, shortcomings at the international level are likely to undermine the authoritativeness (and hence the usefulness) of international

[162] For criticisms with regard to implementation mechanisms for example, *see, e.g.*, *UN Human Rights Council: Weak Stance on Business Standards*, Human rights watch (June 16, 2011), http://www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.

[163] *See, e.g.*, David Bilchitz, *The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?*, 12 Sur Int'l J. Hum. Rts 199 (2010).

[164] Manisuli Ssenyonjo, *The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?*, 12(5) Int'l J. Hum. Rts 725–726 (2008).

[165] *See, e.g.*, Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights: Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque, UN Doc. E/CN.4/2006/WG.23/2, Nov. 30, 2005, ¶ 62.

human rights law at the domestic level. In addition, they may be employed by those who have much to lose from the development of a strong doctrine of horizontal application to undermine more positive experiences at the domestic level. Problems with any international doctrine of horizontality will also provide fuel to those who oppose the justiciability of ESR generally, including in the Irish and South African contexts.

Based on the Irish experience, it is vital that any doctrine of the horizontality of ESR must be clear and coherent. The lack of a unified and consistent judicial approach to horizontality has greatly impacted upon the authoritativeness of the Irish model both in the domestic and the comparative contexts. In addition, it is crucial that those formulating or arguing in favor of such a doctrine should directly engage with the objections to the horizontal application of ESR that are founded on liberal constitutional theory. Otherwise, their work will be unconvincing and easily undermined. As we have seen above, these objections are hardly unanswerable. However, a failure to acknowledge them explicitly may augur that this is the case.

Another key issue for any doctrine of horizontal application of ESR will be the question of how—and to what extent—positive ESR obligations are to be imposed on NSA. While the South African experience may possibly be instructional on this point in future, the dearth of relevant case law means that, so far, we have little sense of how it will work out in practice. The South African experience with regard to the constitutionalization of ESR demonstrates that it is possible to largely overcome and move beyond the most common objections that have frequently been made against the justiciability of ESR. It remains to be seen whether the approach that is ultimately adopted by the South African courts will do the same for the horizontal application of such rights.