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Stellenbosch Human Rights Lecture 2018

"The Human Rights Duties of Companies and other Private Actors in South Africa"

Justice Mbuyiseli Madlanga, Constitutional Court of South Africa

Introduction

Let me start by thanking Professor Sandra Liebenberg for the invitation and Professor Nicola Smit, the Dean of the Law Faculty, for being my wonderful host.

It is humbling and special to present the Annual Human Rights Lecture. It is humbling because I present it following a number of luminaries in the Human Rights discipline who have presented the lecture before. It is special because this year is the 100th anniversary of the birth of Mam'uAlbertina Sisulu and Tat'uNelson Rolihlahla Mandela who both made immeasurable personal sacrifices and were subjected to untold suffering so that you and I could enjoy human rights in a constitutional democracy. It is special because this year is also the 100th anniversary of the existence of the University of Stellenbosch; a university which – with other white universities – were part of the symbols of the domination of the black majority by the white minority. I say so because black people found themselves in these universities only on sufferance. The racist, segregationist policies of the successive colonial and apartheid governments played themselves out in these universities.[1] And apartheid's "logical" conclusion was the establishment of black universities from the late 1950s.[2] Many apartheid notables were educated here at Stellenbosch: Dr DF Malan was educated here when this institution was still called Victoria College; Dr Hendrik Verwoerd was educated here; Mr Balthazar Johannes or John, as he preferred to be called, Vorster was educated here;[3] and many a member of the Afrikaner Broederbond must have been educated here. Whatever else the Broederbond might have been a think-tank for, it was most certainly also a think-tank for

[1] See M A Beale *Apartheid and University Education, 1948-1970* (A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy at the University of the Witwatersrand) at 3. Here the author says:

> "Nationalists clearly believed that education could be used to support apartheid. Through its university education policies in the 1950s and 1960s, the Nationalist government aimed to contribute to three key policy aims: first, to entrench segregation, which would also bring about the *de facto* compliance of academics and students with the ethnically segregated university system; second, to defuse political opposition by changing the political conditions within the universities and university colleges; and third, on the basis of separate institutions, to differentiate between the educational opportunities for different population groups, specifically favouring Afrikaners and disadvantaging black, and especially African, students.

[2] Id at p. 1.

[3] See South African Online "Stellenbosch University" at https://www.sahistory.org.za/place/stellenbosch-university.

crafting and propping up the heinous apartheid system.[4] Dr Verwoerd was an academic here.[5] The equally notorious Dr Werner Eiselen was a professor of – guess what – "*Bantology*" here at Stellenbosch University.[6] Surely, there were many others like them. One can only imagine what they taught. So, this university played a significant role in the tutelage of people who later featured prominently in the apartheid machinery.

That said, in recent years Stellenbosch University has made some strides towards transforming itself. Were it not for those strides, we would not have had Professor Russel Botman, a black person, as a Vice Chancellor of this university. Were it not for efforts at chipping away at the foundations of the *status quo*, patriarchy and misogyny, apartheid's cognate evils,[7] would have been barriers to the appointment of, for example, Professors Sonia Human and Nicola Smit, both women, as deans of the Faculty of Law or Professor Sandra Liebenberg, another woman, as a Distinguished Professor who occupies an endowed professorship as the H F Oppenheimer Chair in Human Rights Law. I am mindful of the Centenary Restitution Statement issued by this university's Rector, Professor Wim De Villiers.[8] The importance of this statement lies in its acknowledgement of the university's contribution towards the injustices of the past, the university's unreserved apology to those it excluded from the privilege it enjoyed and the university's commitment to become an inclusive institution.

This is just the beginning. More is expected of the university. The commitment in the Centenary Restitution Statement must become a reality; and the detail of what that reality will be must be thought out carefully, and in a manner that is itself inclusive. I trust that it will take far less than another 100 years for more significant transformative efforts to emerge.

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[4] See in the context of this University Linda Vergnani 'Revelation of Incoming Rector's Ties to Secret Society Angers Faculty' The Chronicle of Higher Education (21 October 1992) at A47.

[5] See Andrew Bank "*The Berlin Mission Society and German Linguistic Roots of Volkekunde: The Background, Training and Hamburg Writings of Werner Eiselen, 1899–1924*" (2015) 41 *Kronos* 166 at 190.

[6] Id at 189, 190 and 192.

[7] Mary-Anne Plaatjies Van Huffel "Patriarchy as empire: A theological reflection" (2011) 37 *Studia Historiae Ecclesiasticae* 259.

[8] This statement declares:

> "Stellenbosch University (SU) acknowledges its inextricable connection with generations past, present and future. In the 2018 Centenary Year, SU celebrates its many successes and achievements. SU simultaneously acknowledges its contribution towards the injustices of the past. For this we have deep regret. We apologise unreservedly to the communities and individuals who were excluded from the historical privileges that SU enjoyed and we honour the critical Matie voices of the time who would not be silenced. In responsibility towards the present and future generations, SU commits itself unconditionally to the ideal of an inclusive world-class university in and for Africa."

Traditional or conventional thinking has always been that, because human rights "were designed to curb excesses of public power, rather than to regulate 'private' commercial or interpersonal relationships", they are not suited to apply to non-state actors.[9] Tonight I ask that we turn our gaze away from the state. I ask that we look at the human rights duties of private actors. That is, companies and, indeed, ourselves, individuals.[10]

I will speak under the following themes. I first discuss the progress, or lack of it, made in the international arena on human rights obligations of corporations.[11] I next explore the constitutional basis in South Africa for attaching human rights duties to corporations and private individuals. Excluding those instances where it is stated expressly that the right in issue does apply to private persons, that basis is, of course, section 8 of the Constitution. I believe that the section's drafting history and the false start under the interim Constitution support a construction of the provision that private persons are duty-bearers under many Bill of Rights provisions. The debate under section 8 will include a discussion of: the difference between direct and indirect application of the Bill of Rights; and the positive / negative duty controversy. Finally, I briefly discuss two examples of proscriptions of unfair discrimination by private persons under section 9(4) of the Constitution, namely discrimination on grounds of sexual orientation and race.

International law

With all the shortcomings that South Africa may still have, we are nonetheless ahead of most in the rest of the world. In the international law context, there is still a debate whether private parties – particularly multinational corporations – ought to have human rights obligations.

At international law there is an approach that says business corporations need only have a social (not legal) responsibility to respect rights.[12] According to Professor David Bilchitz this has been understood to say that corporations do not have positive obligations towards the fulfilment

[9] See Marius Pieterse 'Indirect Horizontal Application of the Right to Have Access to Health Care Services' (2007) 23 *SAJHR* 157.

[10] Depending on context, where I use the terms "private actors" or "private persons", I am referring to natural and juristic persons.

[11] This term is used in a context that does not include organs of state as defined under section 239 of the Constitution whose obligations under the Bill of Rights I believe are beyond question.

[12] See UN Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 (21 March 2011) Principle 11.

of human rights.[13] He argues that this is deeply flawed and that at the heart of human rights is human dignity. Human rights violations can emanate from many sources; not just the state. He explains that in our globalised world, corporations can both exacerbate, and aid in alleviating, poverty. It is no wonder then, as Professor Bilchitz points out, that states are required under international law to ensure that human rights are not violated by third parties – which must include corporations. He suggests that a binding treaty that imposes human rights obligations on corporations will be necessary. He explains that—

> "confusion reigns supreme as to the exact nature and status of corporate obligations in this regard. These circumstances demonstrate the need for an international treaty expressly to recognise and clarify that businesses have legal obligations flowing from international human rights treaties."[14]

While there is an ongoing process pushed by our very own government and Ecuador to draft a treaty that is meant to "regulate, in international human rights law, the activities of transnational corporations and other business enterprises",[15] at this point it seems that concrete results are not going to be achieved any time soon.[16] The first draft that was released recently follows the trend set by Professor John Ruggie[17] that says corporations only have a social responsibility to respect rights, which at best requires them not to interfere where people are already enjoying access to various rights.[18]

It is time the dithering came to an end and concrete action were taken to make private persons bound by human rights that can appropriately be applicable to them. Some corporations, in

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[13] David Bilchitz 'A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles' in Surya Deva & David Bilchitz (eds) *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?* (2013) at 107-8.

[14] David Bilchitz 'The Necessity for a Business and Human Rights Treaty' (2016) 1 *Business and Human Rights Journal* 203 at 207.

[15] See UN Human Rights Council, Resolution 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (Res. 26/9), A/HRC/26/L.22/ Rev. 1 (25 June 2014) Preamble.

[16] See the discussion in Doug Cassel 'The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty' (2018) 3(2) *Business and Human Rights Journal* 1.

[17] The former Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

[18] See Preamble "Zero Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises" put forward by the Open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights (established under A/HRC/26/L.22/Rev.1 25 June 2014) available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

particular multinational corporations, are so powerful that it would be folly to continue to train our sights only on the traditional target for challenges against human rights abuses – the state. We just can no longer afford to do that. As we all know, money has the unfortunate effect of causing many to bow to whatever whim they may be subjected to by those who dangle it. Put differently, money gives immense power. Undoubtedly, most multinational corporations have both – money and power. Some make greater profits than the gross domestic product of many countries. In 2016, the *Independent* reported that the revenue of the 10 biggest corporations – which include the likes of Apple and Walmart – was greater than the GDP of over 180 countries! South Africa is included in that count.[19] What is more, their combined revenue exceeded the tax collection of China for that year.[20] As Professor Allan Hutchinson explains:

> "There is no choice in dealing with corporations, for their activities pervade the lives of every citizen. How we put food on the table, what food we put on the table, what we pay to put food on the table, and what food we think we should put on the table are all questions that are deeply shaped by the actions of corporations and the life-images that they project."[21]

Axiomatically, with that kind of power and reach comes the potential for abuse and tyranny.

Some of these large multinational corporations operate here in South Africa. And we have our own huge companies operating in a number of industries. Their operations too have an enormous impact on the lives of ordinary people. A few examples of the industries in which they operate are manufacturing, retail, mining and banking. Our large domestic corporations also wield a lot of power.

The second reason for bringing private persons within the binding force of human rights is a little more homegrown. It is about individual to individual interactions. We are all aware of how apartheid, even though it was state driven, invaded and pervaded some of the most intimate

[19] See Zlata Rodionova 'World's largest corporations make more money than most countries on Earth combined' (13 September 2016) https://www.independent.co.uk/news/business/news/worlds-largest-corporations-more-money-countries-world-combined-apple-walmart-shell-global-justice-a7245991.html.
[20] Id.
[21] Allan C. Hutchinson 'Mice under a Chair: Democracy, Courts, and the Administrative State' (1990) 40 *University of Toronto Law Journal* 374 at 379-380.

aspects of people's personal lives. This went so far as to pervert our interactions with one another. The daily news and law reports are replete with examples of how, despite nearly 25 years of democracy, our interactions are still poisoned by the legacy of our past. Economic power still reflects that of apartheid. To a large extent, so does social power. Business after all benefitted from apartheid policy.[22] Concentrated economic power, within the context of our peculiar racist history and present, may and does encourage abuse. If we are to take seriously the transformative injunction of our Constitution to "[i]mprove the quality of life of all citizens and free the potential of each person",[23] then our private interactions cannot be left out of the reach of those human rights obligations that may appropriately be borne by private individuals. We cannot take a business as usual approach and maintain the status quo insofar as our private interactions are concerned.

Many other countries also do have economic and social inequalities. This South African homegrown justification for extending the application of human rights to private actors must apply to them as well.

The South African position

Section 8 of the Constitution

Where better to start than the Constitution? Section 8(2) expressly imposes human rights obligations on private persons. How did we get here? It is no secret that the text of our Bill of Rights has part of its genesis in the body of international human rights law. It was within this historical context that the Constitutional Court recently explained in *Gijima* that "fundamental rights are meant to protect warm-bodied human beings *primarily* against the State".[24] This is often referred to as a "vertical application" of the Bill of Rights, because it pertains to the relationship between the State and its subjects.

Our interim Constitution itself had an "application clause" which differed markedly from section 8. I needn't dwell on the textual differences.[25] What is important is that the interim

[22] See Nicoli Nattrass 'The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation' (1999) 98 *African Affairs* 373.
[23] Preamble to the Constitution. See further P Langa 'Transformative Constitutionalism' (2006) 3 *Stell LR* 351; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146.
[24] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) para 18.
[25] Section 7 of the interim Constitution of the Republic of South Africa Act 200 of 1993 provided:

Constitution did not *expressly* state that the Bill of Rights imposed duties on private actors – often referred to as a "horizontal" application. Notwithstanding this, the newly established Constitutional Court was quickly confronted with a matter where a party tried to impose human rights obligations on a private individual. *Du Plessis*[26] was a defamation case between private individuals based on the common law. The defendants, a newspaper and its owner, were sued for alleged defamatory articles about the plaintiffs. They raised a defence that the comments at issue were lawful and protected by the right to freedom of expression.[27]

The majority of the Court famously held that the Bill of Rights under the interim Constitution had no direct horizontal application. In coming to this conclusion, the lead judgment by Kentridge AJ focused closely on the text of the interim Constitution's application provision.[28] Ackermann J's concurrence goes into some philosophical concerns about imposing obligations on private individuals. So, the Bill of Rights under the interim Constitution was held to operate only as between the State and its subjects. Iain Currie and Johan De Waal argue that the conclusion of the majority comports with a traditional or even narrow view of what a Bill of Rights ought to be: a "charter of *negative* liberties".[29] I revert later to these authors' conception of the majority's approach.

The dissenting judgments of Kriegler J and Madala J come to a different conclusion, and in doing so set out a different philosophical – and dare I say political – vision for the interim Constitution. Kriegler J's harsh dissent takes issue with the concerns raised by the majority and some theorists towards imposing human rights duties on individuals. This is how he describes that concern:

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(1) This Chapter shall bind all legislative and executive organs of state at all levels of government.
(2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.
(3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.

[26] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).
[27] Id para 5. Section 15 of the interim Constitution. The case came before the Constitutional Court after the High Court below refused an application for an amendment of the defendant's plea on two grounds: (i) the alleged unlawful conduct occurred before the interim Constitution came into effect; and (ii) that the Bill of Rights had no horizontal application (see id para 6).
[28] *Du Plessis* above n X paras 45-7.
[29] Iain Currie and Johan De Waal *The Bill of Rights Handbook* 6 ed (2013) at 30.

> "The second point concerns a pervading misconception held by some and, I suspect, an egregious caricature propagated by others. That is that so-called direct horizontality will result in an Orwellian society in which the all-powerful state will control all private relationships. The tentacles of government will, so it is said, reach into the marketplace, the home, the very bedroom. The minions of the state will tell me where to do my shopping, to whom to offer my services or merchandise, whom to employ and whom to invite to my bridge club. That is nonsense. What is more, it is malicious nonsense preying on the fears of privileged whites, cosseted in the past by *laissez faire* capitalism thriving in an environment where the black underclass had limited opportunity to share in the bounty. I use strong language designedly. The caricature is pernicious, it is calculated to inflame public sentiments and to cloud people's perceptions of our fledgling constitutional democracy. 'Direct horizontality' is a bogeyman."[30]

Madala J focuses on South Africa's racist apartheid past and the legacies of advantage and disadvantage resulting from it. He says:

> "Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society."[31]

How does the majority address these concerns? It does so through the indirect application of the Bill of Rights.[32] Indirect application occurs where a court interprets a statute or develops the common law in a manner that imports the values of the Bill of Rights.[33] That, of course,

[30] *Du Plessis* above n X para 120.
[31] Id at para 163.
[32] Id at paras 62-3.
[33] See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at para 33.

would have an impact on private legal relations. And this has become a very popular approach to applying human rights in disputes between private individuals by our courts.

When it came to drafting section 8 of the final Constitution, the *Du Plessis* judgment must have loomed large and, with that in the collective mind, the Constitutional Assembly rejected the approach of the majority. It made explicit provision for the horizontal application of human rights. In a nutshell that is how we came to have section 8. The provision is complemented by section 39(2) of the Constitution which has the effect of requiring the indirect application of the Bill of Rights.[34] But it seems to me the explicit provision for horizontal application of the Bill of Rights did not remove much of the resistance to this idea. And that explains why – to this day – one cannot say there is clarity on this subject. The roots for the resistance are deep; so deep, in fact, that they start with notions of the nature of fundamental rights that should and should not bind even the state itself.

The philosophical underpinnings of the resistance stem from what Professor Sandra Liebenberg and other scholars characterise as a fiction. A fiction that sees civil and political rights to exclusively impose negative duties on the state and socio-economic rights to amount to no more than policy goals or aspirations.[35] What informs this fiction is the notion that civil and political rights are "politically neutral, since their enforcement does not require the judiciary to make policy choices with distributional implications".[36] Professor Liebenberg sees this as the "privileging of [the] negative duties" applicable to the state[37] and essentially argues that it is fallacious. She says:

> "[T]he privileging of negative duties fails to recognise that policy choices are made when judges elect to protect only negative liberties, and fail to respond to the claims of those who lack the resources to participate as equals in society. In other words, enforcement of only negative duties is not an ideologically neutral adjudicative approach. An approach which privileges negative duties, furthermore, fails to

[34] See my earlier reference to *Carmichele* id on the indirect application of the Bill Rights through section 39(2). Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[35] Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* pp 54-5.
[36] Id p. 54.
[37] Id p. 55.

> interrogate the way in which existing legal rules operate to reinforce poverty and social marginalisation."[38]

What one gleans from this is a restrictive view of the breadth of human rights, and one that attaches to the nature of fundamental rights that should bind the state. This view must surely apply with more force when it comes to whether human rights should apply to private actors at all, and – if so – to what extent. The function of bills of rights has traditionally been seen as one of "shield[ing] citizens against unwarranted state intrusions in their 'natural' rights and liberties".[39] That must mean traditionally bills of rights are not seen as being about shielding individual against individual.

To my mind this goes a long way towards explaining the long road we have travelled, and I believe we are still to travel, before crafting a South African jurisprudence that plainly and fully tells us what section 8(2) of the Constitution truly provides for. Strewn along that road must have been (and continue to be) notions that find the step of imposing human rights obligations on private actors anathema to constitutionalism.

Before I discuss the handful of cases where our courts have given meaning to section 8(2) in a manner that directly applies human rights, I want to say a few words about Currie and De Waal's "charter of negative liberties" characterisation of the interim Constitution as interpreted by the *Du Plessis* majority. Sir Isaiah Berlin's lecture on *Two Concepts of Liberty*[40] is said to capture the philosophical ideal of liberty or freedom which animates such conception. He spoke of negative and positive forms of the concept, preferring the former and describing it in these terms:

> "What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?"[41]

[38] Id.
[39] Id.
[40] Isaiah Berlin "Two Concepts of Liberty" in *Four Essays on Liberty* (Oxford University Press, 1969) at 121.
[41] Id at 121-2.

Sir Isaiah was concerned about coercion and an infringement on the autonomy of individual human beings. A charter of negative liberties thus places a check on the coercion of individuals by the state. Our Constitutional Court has had much to say about this conception. And in the early days there was a split in the Court as evidenced by the disparate approaches in the majority and minority decisions in *Du Plessis.*[42]

Today we have appropriately left that behind, by recognising that the status quo cannot be maintained under the guise of a charter of negative liberties. For one thing, the Constitution not only inhibits the state from taking certain action, in many respects it requires it to "respect, protect, promote and fulfil the rights in the Bill of Rights".[43] A specific example is section 25(5):

> "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

Furthermore, in South Africa freedom cannot alone come down to individual autonomy and only be understood from a western liberal perspective. The importance of emphasising freedom within our context cannot be understated. Freedom cannot be disassociated from liberation from our colonial and apartheid past. So, in order for the potential of all South Africans, black and white, to be truly realised, the social and economic structures of apartheid society must be undone. Only then can the majority of the country robbed of their dignity through various forms of dispossession and deprivation be considered truly free. So, negative liberties that value individual autonomy at the expense of redressing the injustices of the past are ill-suited to the South African situation. This approach gives meaning to Madala J's words in *Makwanyane* that ubuntu is a "concept that permeates the Constitution generally and more particularly [the Bill of Rights] which embodies the entrenched fundamental human rights".[44]

How does this all relate to section 8(2)? Simply put: if we refuse to impose human rights obligations on private individuals for fear of interfering with their autonomy, we risk maintaining a perverse status quo which entrenches a social and economic system that

[42] See also the decisions in *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC).
[43] Section 7(2) of the Constitution.
[44] *S v Makwanyane* 1995 3 SA 391 (CC) para 237.

privileges the haves, mainly white people in the South African context. By imposing certain human rights obligations on private individuals and companies, we acknowledge that our current social and economic realities have arisen out of our perverted past and cannot be sanitised.

The words of Mahomed J in describing the interim Constitution were prescient:

> "The South African Constitution is different: it … represents a decisive break from, and a ringing rejection of, that part of the past which … accepted, permitted, perpetuated and institutionalised pervasive and manifestly unfair discrimination against women and persons of colour; [parts of the Constitution] seek to articulate an ethos which not only rejects its rationale but unmistakenly recognises the clear justification for the reversal of the accumulated legacy of such discrimination."[45]

If section 8 is to have the effect that the Constitution truly wants it to have, it must be a tool that plays a role in dismantling the legacy of colonialism and apartheid. With that in mind, let us turn to the text of the section. Subsection (1) provides that the Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

The crucial subsection (2) specifies 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 first case in which the Constitutional Court considered the applicability of a fundamental right under section 8(2) was *Holomisa*, another matter where a newspaper was sued for defamation. O'Regan J held:

> "Given the intensity of the [right to freedom of expression], coupled with the potential invasion of that right which could be occasioned by persons other than

[45] Id para 261.

> 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."[46]

With the exception of those rights which – as appears from the language of the section in which they are entrenched – plainly apply to private persons or the state,[47] there should generally speaking be no categorical or bright line approach. On rights enjoyed as against the state, it might be said that their nature makes them more amenable to fulfilment by the state than by private persons, and may not be capable of direct application against private parties.[48] Citizenship rights perhaps best fit neatly into this category.[49] Others have argued that the right to just administrative action should be treated similarly,[50] although that should be read subject to the provisions of PAJA and in accordance with the Constitutional Court's decision in *Allpay 2*.[51] Under some rights, obligations are expressly borne by, or proscriptions are against, the state. Examples are the right not be unfairly discriminated against by the state,[52] the right of detained and accused persons to have access to state-sponsored legal representatives[53] and the right to access information held by the state.[54]

On the other hand, the nature of some rights makes them directly applicable to private persons. An example is the right to fair labour practices under section 23. Other rights are expressly made applicable to private persons. Take, for example, section 12(1)(c) which specifies that everyone has the right "to be free from all forms of violence from either public or *private*

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[46] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 33.
[47] Section 9(4) proscribes unfair discrimination by any person against anyone on the grounds listed in subsection (3).
[48] See Currie and De Waal at 50.
[49] Sections 20 and 21 of the Constitution provide:

> 20. No citizen may be deprived of citizenship.
> 21. …
> (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
> (4) Every citizen has the right to a passport.

[50] See Currie and De Waal above n 30 at 50 and Cora Hoexter *Administrative Law in South Africa* (2011) at 127-8 and 161.
[51] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* (*Allpay 2*) 2014 (4) SA 179 (CC).
[52] This is contained in section 9(3) of the Constitution.
[53] These are contained in section 35(2)(c) and 3(g) of the Constitution.
[54] This is contained in section 32(1)(a) of the Constitution.

sources". Also, section 9(4) stipulates that "*no person*" may unfairly discriminate against anyone on one or more of the grounds listed in section 9(3).[55]

But many other rights fall somewhere between these two ends of the spectrum. The socio-economic rights are a good example. Many of them are phrased in the following manner:

> "(1) Everyone has the right to have access to [the relevant socio-economic claim concerned].
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

Textually the nature of these rights seems to suggest that they are not applicable to private parties. That cannot be the end of the story. Section 27(3) provides that "[n]o one may be refused emergency medical treatment". Must it be read to apply only to public hospitals and related public facilities like state ambulances? Venturing my personal opinion, I would say I think not. In *Soobramoney* emergency medical treatment was said to be required where "[a] person … suffers a sudden catastrophe".[56] Such a person "should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment".[57] As we know, in some such emergency situations, the ticking away of a few minutes may mean the difference between life and death. With that in mind, imagine a situation where a private hospital is the only facility within a proximity beyond which the patient in need of emergency medical care would die. Can it ever be that this private hospital would be entitled to let that patient die within its property by refusing her or him access to its building? I think not. Unsurprisingly, Currie and De Waal suggest the obligation created by section 27(3) applies to private hospitals.[58]

What there is now no dispute on is that there is a negative duty against all, including private persons, not to impair the enjoyment of socio-economic rights. As Yacoob J held in *Grootboom* "there is, at the very least, a negative obligation placed upon the state and all other

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[55] Section 9(3) proscribes unfair discrimination by the state on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

[56] *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) at para 20.

[57] Id.

[58] Currie and De Waal (above n X) at 49 & 593; S. Liebenberg "Health, Food, Water and Social Security" *Fundamental Rights in the Constitution: Commentary and Cases* D Davis, H Cheadle and N Haysom (eds) (Juta & Co Ltd, Cape Town, 1997) 354 – 359.

entities and persons to desist from preventing or impairing the right of access to adequate housing".[59] In *Treatment Action Campaign 2* the Court held that the "'negative obligation' applies equally to the section 27(1) right of access to 'health care services, including reproductive health care'".[60]

What about so-called "positive duties"? Loosely, I would say a positive duty enjoins the duty bearer to take some action to make possible the enjoyment of the right by the right bearer. The question is: does the Bill of Rights impose positive duties on private persons? Different cases, where different rights were asserted, have come to different results. In *Juma Musjid*, a matter concerning the eviction of a school from premises owned by a private party, the Court held that "there is no primary positive obligation on the [private entity] to provide basic education to the learners".[61] The Court concluded that this obligation rests on the Member of the Executive Council responsible for education in each province.[62]

In *Blue Moonlight* the Court did impose a positive obligation on the owner, a company, by requiring it to continue to house unlawful occupiers who would have been rendered homeless if they were evicted immediately.[63] Interestingly, what motivated the Court coming to this conclusion was the nature of the lessor and its business:

> "It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted."[64]

[59] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 34. [60] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para 46.
[60] *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para 46.
[61] *Governing Body of the Juma Musjid Primary School v Essay N.O.* 2011 (8) BCLR 761 (CC) at para 57.
[62] Id.
[63] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).
[64] Id para 40.

Those who are averse to accepting the applicability of positive duties to private persons may want to see this as no more than a negative obligation not to evict and render homeless the unlawful occupiers before they have found suitable accommodation elsewhere. Of course, that cannot be correct. The plain reality is that, although *Blue Moonlight* may not expressly have used language that says it was imposing a positive obligation, that is exactly what it did. It told the owner company that the occupiers would "not be evicted before the City [had provided] them with temporary accommodation".[65] So, the owner was being told that he had to provide accommodation to the occupiers for a while. If that is not a positive obligation, I don't know what is. The Court's own language made plain that the owner was required to "provide" accommodation. It said that "a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period".[66] Although this is stated in the negative, it means until the unlawful occupiers had to vacate, which would be after a few months, the owner had to accommodate them.

I would be arrogant not to respect the view the minority in *Daniels*[67] took of the effect of the order in *Blue Moonlight*. Although I am to deal with the *Daniels* matter shortly, I must touch on this issue now as it is relevant to the *Daniels* minority's interpretation of the *Blue Moonlight* order. The minority held that the *Blue Moonlight* order amounted to no more than the Court's exercise of its just and equitable remedial power under section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[68] (PIE).[69] The subtext of this was that this was not a recognition by the Court of an imposition of a positive obligation by the Bill of Rights. Whilst I respect this view, here is an answer I would venture. Amongst others, PIE obviously seeks to prevent evictions that are inconsonant with the provisions of section 26(3) of the Constitution. This section proscribes evictions of people from their homes or the demolition of their homes without an order of court made after considering all relevant circumstances. The preamble to PIE uses this exact language. PIE's procedure before evictions which culminates in the just and equitable remedial power in section 4(8) is but a process aimed at guaranteeing that the eviction of people from their homes meets the requirements of section 26(3). It would be artificial then to suggest that the order in *Blue Moonlight* was not about the right under section 26 of the Constitution.

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[65] Id para 103.
[66] Id para 40.
[67] *Daniels v Scribante* 2017 (4) SA 341 (CC).
[68] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
[69] *Daniels* above n X para 178.

This positive / negative duty debate came to a head recently in the *Daniels* matter.[70] Now I am embarrassed because I am going to sound like those parents who unendingly and nauseatingly boast to other parents about not so great achievements by their children. That is so because, as you all know, I penned the majority judgment in *Daniels*. But I hope you will excuse me. This matter concerned the question whether Ms Daniels, an ESTA[71] occupier, could – in the face of resistance by the two respondents who were private persons[72] – effect improvements to her home situated on the property of one of the respondents at her own expense. The proposed improvements were modest: the levelling of floors; paving part of the outside area; and installing water supply, a wash basin and ceiling inside the home and a second window. Crucially, the respondents accepted that, without the improvements, the home was not fit for human habitation. In particular, they admitted that the condition of the home constituted an infringement of Ms Daniels's right to human dignity. That notwithstanding, the respondents argued that Ms Daniels was not entitled to effect the improvements. Amongst others, they contended that if the Court concluded that Ms Daniels was entitled to make the improvements, that would be tantamount to indirectly placing a *positive* duty on them to ensure enjoyment by Ms Daniels of her right under section 25(6) of the Constitution. The respondents claimed that the indirect positive duty would arise as a result of the provisions of section 13 of ESTA. Section 13 makes it possible for a court to order an owner or person in charge of the property on which an occupier's home is situated, to pay compensation for improvements made by the occupier upon her or his eviction. The respondents argued that, because a court *may* order compensation, an owner or person in charge in effect finances the improvements.

The majority took the view that this positive / negative obligation debate needed to be confronted head-on.[73] We further said that on a proper reading of section 8(2) of the Constitution, there is no basis for reading that section to mean that, if a right in the Bill of Rights has the effect of imposing a positive obligation, it does not bind private persons.[74] Instead, whether or not a right binds private persons depends on a number of factors. In this regard we said:

[70] Above n X.
[71] ESTA is the Extension of Security of Tenure Act 62 of 1997.
[72] They were a company, the owner of the property on which the home was situated, and the person who – in terms of ESTA – is "the person in charge" of the property.
[73] *Daniels* para 38.
[74] Id para 39.

> "Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right by persons other than the State or organs of state'; and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that."[75] (Footnotes omitted)

Applying these factors, we then engaged in a balancing exercise and held:

> "The issue at hand arises from a matter of detail: what is the extent of an occupier's constitutional entitlement as expounded in ESTA? Does it go so far as to create an entitlement to make improvements to her or his dwelling with the potential – as the respondents argue – of imposing the positive obligation they are complaining about? This is the question on which the respondents peg their argument on section 13 of ESTA. The positive obligation that the respondents argue an owner or person in charge is exposed to is the possibility of an order of compensation upon the eviction of an occupier.
>
> Whether an owner will be so ordered depends on a variety of considerations. It may or may never happen. This must be weighed against the need of an occupier to improve her or his living conditions and lift them to a level that accords with human dignity. If indeed an occupier is living under conditions that subject her or him to a life lacking in human dignity, the possibility of an order of compensation pales in comparison. The right to security of tenure with the potent cognate right of human dignity are extremely important rights. On the other hand, the possibility of an order of compensation upon the eviction of an occupier, is tenuous at best. That must be compared with the fact that this argument is being made in the context of an occupier who has assumed the truly positive and immediate duty of carrying the cost of the improvements."[76]

[75] Id.
[76] Id paras 50-1.

Here is how I see the significance of this judgment. As much as *Blue Moonlight* did impose a positive obligation on a private person, it did not expressly say it was doing so. That explains why – in *Daniels* – the respondents thought they could argue that the Bill of Rights does not impose a positive obligation on private persons. *Daniels* helps put that debate to rest. That it took this long for this to happen, is it because up to now there haven't been suitable cases where the Constitutional Court could have grasped the nettle? Is it perhaps because – despite the existence of section 8(2) – the bogeyman Kriegler J cautioned against in *Du Plessis* continued to lurk in the darkness?[77] I will not answer these questions. But I will say this much: this is difficult to comprehend. That is especially so regard being had to the fact that it is now 21 years since section 8(2) took effect.

Section 8(2) does not expressly exclude rights that create positive duties from binding private persons. The binding effect is bounded by "the nature of the right and the nature of any duty imposed by the right". The reference to "nature of any duty imposed by the right" does not inexorably lead to the conclusion that rights that create positive obligations can never bind private persons. Positive obligations differ in oppressiveness. Thus there is no reason to think that "nature" of necessity translates to a distinction between "negative" and "positive". In some instances a positive obligation may not be applicable to private persons depending on the magnitude of its oppressiveness. The tenuous positive obligation complained of in *Daniels* is proof that it cannot be that there is a blanket ban on the applicability to private persons of rights that create positive obligations.

Daniels is only the beginning. We cannot even begin to suggest that it has said all that need be said on this subject. The parameters of the reach of section 8(2) must still be clearly delineated. For now we must take comfort that the initial illusive step has been taken. And we must hope that the bogeyman has been slain for good.

I next deal with the last topic, two examples of proscriptions of unfair discrimination under section 9(4).

[77] *Du Plessis* above n X para 120.

Section 9(4) proscriptions

On this I deal with unfair discrimination on grounds of sexual orientation and race. The discussion is to be only on very limited aspects of each of these two facets of unfair discrimination. This subject warrants discussion not because of lack of clarity on what the Constitution decrees.[78] It warrants discussion because unfair discrimination by private persons on the grounds listed in section 9(3) occurs at alarming proportions.

Unfair discrimination on grounds of sexual orientation

All I want to touch on is what perplexes me with some people's attitudes towards same-sex relationships. Not infrequently, some justify these attitudes on the basis of their religious beliefs. Let me immediately make the point that I am quite mindful of the sensitivities that attach to the subject of religion and the need for a delicate balancing exercise when one deals with this subject. Here is what the Constitutional Court said in *Christian Education*:

> "[R]eligious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way."[79]

That said, we often hear of the denial of services, goods or facilities to people involved in same-sex relationships by businesses that otherwise serve the public. This, on grounds of religious belief. One often wonders how far this goes. Does it deny services in all instances where religious belief is implicated? If so, how is that achieved practically? Or, does the denial of services selectively target same-sex couples? If it does, is that not thinly veiled homophobia?

[78] Section 9(4) provides that "[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)".
[79] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 34.

Religious texts have a number of proscriptions. Take, for example, the Ten Commandments in the Bible.[80] One says, "Thou shalt not commit adultery." There must be weddings – and quite a number of them – between people whose unions are the result of adultery that get solemnised at venues that refuse to host same-sex weddings. This may be happening exactly because the owners of the venues never ask questions. But then here is a problem that I have. It is fairly easy to detect that it is a same-sex couple that is requiring the use of a venue or whatever other service. If the denial of services to same-sex couples is genuinely founded on religious belief, it cannot be that the provider of the service will leave it to chance and catch only the conspicuous. Otherwise the provider of the service may well be guilty of what Greenberg JA eloquently described as "fraudulent diligence in ignorance" in *R v Myers*.[81]

I deliberately do not answer the question whether a private service provider who is genuine in her or his religious belief and who applies it to all possible permutations requiring its application would be constitutionally entitled to deny goods or services to same-sex couples.

Each individual has an obligation not to discriminate unfairly on any of the grounds listed in section 9(3) of the Constitution, including sexual orientation. The Constitution has consciously chosen to impose this obligation on private persons. It is an obligation that each of us must take seriously. And none must mask their personal prejudices behind religious belief.

A matter that had the promise of answering some of the imponderables I raised around the denial of services and goods to same-sex couples is the United States Supreme Court case of *Masterpiece Cakeshop*.[82] Unfortunately, that case did not reach these questions. In that matter Mr Phillips, the owner of a bakery called the Masterpiece Cakeshop, refused to "create" a cake for Mr Craig and Mr Mullins, a same-sex couple that was soon to get married, because his religion was opposed to same-sex marriage. He explained this thus: "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into." Disappointingly, a case as important as this on the interplay

[80] Exodus 20:14.
[81] *R v Myers* 1948 (1) SA 375 (A) at 382 citing *Halsbury* (2nd ed., Vol. 23, sec. 59).
[82] *Masterpiece Cakeshop Ltd v. Colorado Civil Rights Commission* 584 US (2018); 138 S Ct 1719.

between the rights of same-sex couples, a vulnerable group,[83] and religious freedom – having gone all the way to the Supreme Court – turned on the facts.[84]

Unfair discrimination on grounds of race

I want to limit the discussion to a small but, in my view, important aspect. That is unconscious racism. Professor Charles R Lawrence says Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.[85] This is true of South Africans as well. We also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce in us negative feelings and opinions about those that belong to racial groups other than your own.[86] We sometimes do not realise how our racial, social and cultural backgrounds influence our beliefs about race or our inter-racial interactions.[87] Professor Lawrence then says that "a large part of the behaviour that produces racial discrimination is influenced by unconscious racial motivation".[88] I find his explanation on the underpinnings of unconscious racism quite enthralling. Please allow me to quote copiously:

> "First, Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognise those ideas, wishes and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.

[83] In *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 at para 25, the Constitutional Court recognised the vulnerability of gay and lesbian people.
[84] Recognising that the last word was yet to be spoken on this subject, the Court held at 18:
> "The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognising that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."

[85] Charles R. Lawrence, III 'The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism' (1987) 39 *Stanford Law Review* 317 at 322.
[86] Id.
[87] Id.
[88] Id.

> Second, the theory of cognitive psychology states that the culture – including, for example, the media and an individual's parents, peers and authority figures – transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings. …"[89]

Let me tell a brief illustrative anecdote. One evening I was driving between Dutywa and Mthatha. I came across a white family that had just been involved in a car accident. They were a man, a woman and a couple of young children. They did not appear to be seriously injured. I offered to get them an ambulance, which they accepted. It so happened that across the street from my home in Mthatha there was an ambulance depot. I called home and asked a family member to go across to the depot with her or his mobile phone. Once she or he was there, I asked for an ambulance on her or his mobile phone and gave full details of where the accident was. I was assured that an ambulance would be dispatched. Up to this point all the occupants of all the cars that stopped were black people. Soon thereafter, a car in which there were white people stopped. It was coming from the Mthatha direction. Its occupants came out and went to those of the car that was involved in the accident. Of the latter, I heard the man ask, "The car that bumped us, is it driven by white or black people?"[90] And as he asked, he was pointing in the Mthatha direction. I do not remember what the response was. But as it was dark, I doubt that those being asked would have had an answer. It was only then that I noticed for the first time that a few hundred metres down in the Mthatha direction there was a solitary stationary car. Please forgive me, but I was incensed by the man's enquiry. Why did the race of the driver of the other car involved in the accident matter? Would the man feel less aggrieved if the other driver was white? If so, why? Was it perhaps that if the driver was black, nothing better could be expected of her or him and, if white, it was more likely a true accident? I called those travelling with me and we immediately left. Not long thereafter, we met the ambulance. I had done my part.

[89] Id at 322-3.
[90] Or words of similar purport.

I am not even sure that this story illustrates unconscious or conscious racism; I can only hope that it typifies the former. All too often black people are subjected to what may be well-meaning but deplorable and sickening "compliments". "You are intelligent," the subtext of which is that this is an expression of surprise as intelligence was not expected of you as a black person. "You speak so well," which again evinces surprise at a black person's mastery of the English language, and not necessarily an acknowledgement of the person's oratory. At times the comments may be negative. For example, not infrequently, one has heard the disdain with which some white people will correct the pronunciation of some English words by some of us black people: "It's 'work', not 'wack'"; "It's 'Durban', not 'Derban'"; and so on. Yet, if a non-English speaking Caucasian not only mispronounces most words she or he is using (which happens quite a lot, by the way), but is also butchering the English grammar, that is understandable. At face value, that is on the simple basis that she or he is not a first language English speaker. In truth, it is because she or he is Caucasian. If that were not case, our pronunciation and accents should also be acceptable. Unsurprisingly, the accent of the Caucasian second language English speaker is even complimented for sounding refreshingly exotic.

From all this, we can see that unconscious racism is not benign. The underlying attitudes that inform it may and do insidiously lead to unfair racial discrimination.[91] In the face of the section 9(4) ban on unfair discrimination on listed grounds by private persons, there is no room for unconscious racism.

Conclusion

As the state is unquestionably obliged to honour its human rights obligations, private persons must likewise be so obliged where the fundamental rights in issue are applicable to them; and that must be so whether those fundamental rights impose positive obligations. One can only hope that more concrete and positive action will take place in the area of international law as well.

Thank you.

[91] Lawrence above n 85 at 322.