SOCIAL NORMS AND CONSTITUTIONAL TRANSFORMATION: TRACING THE DECLINE OF THE APPLICATION DISTINCTION IN SOUTH AFRICA

ZIONA TANZER[*]

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I. INTRODUCTION

The question of the relationship between institutions of democracy and societal norms has long troubled legal scholars. The view that constitutional rights operate against the state but do not permeate the private sphere or private law has been subject to waves of devastating criticism.[1] Critics attack what has come to be known as the vertical

∗ B.A., LL.B., LL.M. (University of Witwatersrand); LL.M., S.J.D. (Harvard Law School). This Article has benefited from the exceptionally generous comments of Frank Michelman. It was completed during my stay as a Visiting Scholar at the Center for International and Comparative Law, University of Michigan Law School. I am grateful to Virginia Gordon for the institution's support. All errors are mine alone.

1. The literature critiquing the divide between the public sphere and private law is extensive.

application of human rights.[2] The verticalist position is based on the understanding that power imbalances experienced in the relationship between citizen and state in the public sphere are not replicated in the private sphere and its governing law, the common law.[3] Coupled with this is the commitment to a conception of the common law as innocuous background law based on freedom and neutrality.[4] The United States' state action doctrine has come to represent the archetypal verticalist approach to constitutional rights.[5]

More recently, an alternative approach has come to prominence—the horizontal application of rights—which signifies that constitutional rights can permeate the private sphere and the common law.[6] Horizontal application has been adopted in various forms by the EU and by several countries, including Canada, Germany, Ireland, and most importantly for the purpose of this paper, South Africa.[7]

Yet it would be a mistake to characterize verticality or horizontality in any absolutist manner, since there are degrees of horizontality both between and within legal traditions. For instance, it is worth noting that even within the verticalist tradition of the United States, there are powerful pockets of horizontal application evident in the decisions of *Shelley v. Kraemer*[8] and *New York Times Co. v. Sullivan*.[9] Similarly, the variation in

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The earliest critics, the American legal realists, paved the way for subsequent schools of criticism. For a sampling of their literature, see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 488–89 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12–14 (1927); Louis Jaffe, *Lawmaking by Private Groups*, 51 HARV. L. REV. 201 (1937). *See also* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (2d ed. 1992).

2. *See* Frank I. Michelman, *On the Uses of Interpretive 'Charity': Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa*, 1 CONST. CT. REV. 1, 6 n.17 (2008).

3. *See generally* Michelle Parlevliet, Berghof Research Ctr. for Constructive Conflict Mgmt., *Rethinking Conflict Transformation from a Human Rights Perspective* 3 (2009), http://www.berghof-handbook.net/documents/publications/parlevliet_handbook.pdf.

4. *See* Frank I. Michelman, *The Bill of Rights, the Common Law, and the Freedom-Friendly State*, 58 U. MIAMI L. REV. 401, 419 (2003) (discussing conceptions of common law as facilitative rather than regulatory).

5. United States v. Stanley (*The Civil Rights Cases*), 109 U.S. 3 (1883); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). *See also* Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063 (2000); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003); Michelman, *supra* note 4; Stephen Gardbaum, *Where the (State) Action Is*, 4 INT'L J. CONST. L. 760 (2006).

6. *See* Michelman, *supra* note 2, at 5–6.

7. *See infra* notes 10–12. See also Gardbaum, *supra* note 5, for a comprehensive discussion of comparative application jurisprudence.

8. 334 U.S. 1 (1948). The Court held that "state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or

degrees of horizontal application between systems ranges from models of direct horizontal application[10] to the more prevalent positions adopted in Canada[11] and Germany[12] of indirect horizontal application. In those countries, constitutional norms operate frontally or directly when government actors are involved, but indirectly influence the interpretation of doctrine rather than overrule it in cases involving non-state actors. The implication here is that the more indirect judicial intervention is, the less encroachment there will be on the system of common law and individual liberty. A great deal is thought to be at stake in this distinction between direct and indirect horizontal application and what it might signify. Arguably, it is the most contentious issue in the contemporary application debate.

This Article will argue, through a detailed chronological study of South African case law, that the application debates, which have taken the outward form of disputes over the choice between direct and indirect horizontal application and exactly how to understand the difference, amount to very little in the end. In fact, indirect application sometimes leads to more radical intrusion of judges in the private sphere, while direct application often comes to signify judicial unwillingness or inability to intervene. Ultimately, attempting to distinguish instances of direct from indirect application in case law becomes an intractable exercise.[13]

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taken by a judicial official in the absence of statute." *Id.* at 16.

9. 376 U.S 254 (1964). The Court decided that the law of defamation in Alabama unconstitutionally impaired the right of freedom of speech. *Id.* at 264–65.

10. See the Irish case, C. M. v. T. M., [1991] I.L.R.M. 268 (Ir.), in which Judge Barr held that the common law doctrine determining that a wife's domicile is dependent on that of her husband was inconsistent with the principles of equality before the law and equality between husband and wife that are embodied in articles 40 and 41 of the Irish Constitution. *Id. See also* JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND (2d ed. 1992).

11. Retail, Wholesale & Dep't Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 (Can.).

12. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (F.R.G.). *See also* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 181–89 (1994).

13. Nevertheless in the pages that follow, I attempt to classify various judgments as being instances or purported instances of direct and indirect application. My classifications of the judgments are based on the original or "classic" conception of the difference between direct and indirect applications and what the two distinct methodologies were originally designed to achieve. My characterization of the judgments, like the distinction itself, is tenuous, since ultimately both direct and indirect applications lead to the same remedy—development of the common law. Hence, the classification exercise is a fraught one. In a remarkable article, Professor Frank Michelman argues that the South African Constitutional Court operates on an altered application paradigm that departs from the original conception of the distinction, but that arguably, nothing of substance rests on the distinction. See Michelman, *supra* note 2, at 8, for a synopsis of the altered Constitutional Court paradigm.

However, the debates are still vitally important because they are the site of overlapping conflict among divergent conceptions of common law baselines, constitutional text and purposes, and the appropriate relationships among the following five institutional sources of normative legal authority in South Africa: the drafters of the Constitution, the current South African Government and Parliament, South African society at large, the Constitutional Court, and the common law judiciary.

By way of thematic introduction, I will outline some of the myriad, disparate ways in which the application clauses have functioned within South African common law and customary law jurisprudence. The academic advocates of indirect application were particularly concerned with distinguishing judicial from legislative lawmaking, a position that had deep resonance in the Apartheid-era system of parliamentary sovereignty that was predicated on the supremacy of legislative will.[14] Correspondingly, in pre-constitutional common law discourse, judges maintained that they "made" law in the rarest circumstances.[15] The case law dealing with *boni mores*, community norms, was an instance of unmasked judicial lawmaking where the common law judicial task was to reflect the community's evolving sense of justice.[16] However, this lawmaking role was strictly limited to adjudication involving open-ended standards inherently thought to require a degree of judicial discretion.[17] Issues involving determinate rules were considered by judges to be out-of-bounds, exclusively within the legislative mandate.[18]

In the post-Apartheid constitutional era, this concept of limited judicial lawmaking and the distinction between open-ended standards and rules feed into the early construction of the distinction between direct and indirect application. Indirect application signifies that through open-ended standards, constitutional norms and values will permeate the common law. Proponents of direct application view both the common law's open-ended standards and its determinate rules as equally subject to constitutional scrutiny and potential striking out for invalidity.[19]

Underlying this distinction are different understandings of the Bill of Rights and the way it functions. In the first view, the Bill of Rights represents the new *boni mores* in a predominately unaltered common law

14. *See* Michelman, *supra* note 4, at 417.
15. *See infra* note 123.
16. *See* Michelman, *supra* note 2, at 8.
17. *See infra* note 182.
18. *See* Tushnet, *supra* note 5, 85–86.
19. *See infra* note 88.

that continues to reflect changing norms and circumstances.[20] In fact, the constitutional values are construed by judges as representing community norms and values, and the common law judicial role maintains its time-honored function of reflecting social change incrementally.

In opposition to this view is the disconnect often manifested between the empirical values of the community and constitutional values. Here, judges decide that their allegiance is to the new legal order, and as a result the common law judicial role of recognizing *boni mores* is altered because constitutional values maintain hegemony over community norms and sense of justice. Institutionally, substituting constitutional values for community norms in common law adjudication has, on occasion, allowed High Court judges to overrule appellate court precedent.[21]

A related but distinct issue, also reflected in the difference between direct and indirect application, is the tension between a conception of the common law as a repository of historically accumulated humanitarian and libertarian wisdom and the common law as a product of Apartheid-era politicization and corruption. In the first approach, judges have refused to see a conflict between *boni mores* and constitutional values, but see constitutional values as codifications of common law freedoms.[22] Alternatively, in the second approach, judges view common law values to be in conflict with constitutional values and ultimately determine that the latter prevails over the former.[23] The rhetoric here pulls in the opposite direction to the common law discourse of inevitability and certainty. This understanding of values in conflict can be seen as the beginnings of the politicization of common law discourse, for when there is conflict, the judge has to make an often politically charged choice. The more explicit the choice between values, the more it looks like legislative rather than judicial lawmaking.

Another frequent instance of the distinction between direct and indirect application is the tension between incremental versus fundamental development of the common law. Here, indirect application becomes associated with the argument that the judicial role should be limited to common law incrementalism, while radical development accompanying direct application should be reserved for the legislature because issues of great social importance should involve the public. The distinction here raises the stark question of whether the court is as legitimate a lawmaker

20. *See infra* note 195.
21. *See infra* note 119.
22. *See infra* note 151.
23. *See infra* note 160.

as the legislature, since both are involved in the task of vindicating the Constitution.

In contrast, in the jurisprudence on African customary law, an analogous system of law within South African legal pluralism to which the Constitution equally applies, the distinction between direct and indirect application represents different concerns than those found in common law reasoning.[24] During Apartheid, many African customary law principles and institutions were either denied recognition or granted a secondary status to the common law because they were considered contrary to the empirical community's sense of morality or legal norms.[25] After the demise of Apartheid and the advent of constitutionalism, there was an initial judicial reluctance to enter what was perceived to be a private sphere of culture, governed by its own rules and protected by its own checks and balances.[26] This approach was quickly altered from non-application to direct application of the Constitution to customary law. The present difficulty facing judges is identifying the content of actual, lived customary law.

In one judicial approach, common law standards become associated with the subjection of African customary law to the common law and are considered a colonial vestige, causing the ossification of African customary law.[27] However, the discourse surrounding application of the Constitution to customary law is used as a way to claim equal space for customary law, and to re-conceptualize African customary law and the common law as parallel systems, equal but separately subject to the Constitution. Here, the role of history, particularly the history of customary law's subjugation to common law, is pivotal in giving content to the distinction's construction.

In cases adopting the opposite approach, direct application and the striking out of customary law rules are employed because the court is deemed to lack institutional competence to develop customary law as it cannot ascertain what actual, lived customary law is.[28] A contrasting judicial approach acknowledges the difficulties of ascertaining actual, lived customary law but maintains that indirect application and the development of a customary law rule should always take priority over striking out the rule in order to preserve, rather than destroy, a system

24. *See infra* note 249.
25. *See infra* note 234.
26. *See infra* note 62.
27. *See infra* note 297.
28. *See generally infra* note 311.

given special recognition by the Constitution.[29] Here, indirect application comes to be equated with survival of African customary law and a greater commitment to multiculturalism, while direct application signifies the limitations of liberal tolerance and judicial institutional competence. Equally, indirect application signifies an increased judicial role, whereas direct application represents the limitation of legitimate judicial reach.

This Article will attempt to tease out how these underlying issues play out in the application clauses jurisprudence, since all these manifestations of the distinction between direct and indirect application raise fundamental questions about the nature of the Bill of Rights. Tension exists over the choice to view the Bill of Rights as a set of libertarian protections against potentially oppressive majoritarian rule or as a set of principles and commitments to guide a process of social transformation.[30] The application clauses cases also raise essential institutional questions, not only about the crucial relationship between judicial and legislative lawmaking, but also more pointed questions regarding the appropriate relationships and degrees of deference that constitutional and common law adjudicators ought to follow in calibrating (1) divergent norms and values reflected in the pre-constitutional common law, (2) those norms found in constitutional text and history, and (3) those norms currently prevailing in South African society at large.

Part II of this Article reviews the different academic positions on the application debate, which I divide into first and second generations of thought on these issues. Part III looks briefly at Apartheid regulation of marriage through the common law, and how the conception of common law *boni mores*, public policy, was the chief doctrinal vehicle by which Apartheid values permeated the fabric of the common law. Through examining the late Chief Justice Michael Corbett's leading law review article in the 1980s, I suggest that the early insistence on constitutional values permeating common law through the vehicle of flexible standards rather than rules was primarily premised upon a particular conception of the role of judges—namely that their policymaking function was largely limited to instances where they were expressly mandated to use open-ended legal standards in adjudication; therefore, when authorized, policymaking was thought to inherently require judicial discretion.[31] The implication here is that for reform of common law rules, the legislature was better suited to carry it out.

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29. *See infra* note 320.
30. *Cf. infra* note 63 with *infra* note 59.
31. *See infra* note 114.

Part IV of this Article traces the issues of recognition of same-sex and Muslim marriages through the post-Apartheid courts and argues that the prevailing form of application has been indirect. Courts used the traditional common law vehicle of public policy to import the egalitarian values of the Constitution with varying implications for judicial articulation of the relationship between social norms and constitutional values. This part explores three different approaches to the construction of the relationship between *boni mores* and constitutional values and argues that each approach represents an increasingly constitutionalized understanding of common law adjudication. By this I mean that common law concepts, reasoning, and baselines seem to merge into and become indistinguishable from constitutional inquiry. The traditional common law judicial function of reflecting change in societal norms incrementally is slowly deconstructed by the judicial problematizing of the notion of a coherent community with homogenous values.[32] What ultimately emerges is the exact opposite view. Even if the community disagrees with the outcome, common law judicial allegiance is not to the norms of the empirical community, but rather to the vindication of constitutional values.[33]

This part further argues that simultaneously, each approach becomes increasingly constitutionalized. The form of indirect application deployed in cases combines elements of direct application into an indirect applications analysis. This culminates in the Supreme Court of Appeal decision in the *Fourie*[34] case, which can be seen as an example of a "one law" approach[35] and stands as an example of constitutionalized common law. Here, it is difficult to see whether the case is one of direct or indirect application. Hence the distinction becomes, for all intents and purposes, insignificant.

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32. *See infra* note 123.

33. *See infra* note 126.

34. *Fourie v. Minister of Home Affairs* 2005 (3) SA 429 (SCA) (S. Afr.).

35. See Pharma. Mfrs. Assoc. of S. Afr. *In re* The *Ex Parte* Application President of the Republic of S. Afr. 2000 (3) BCLR 241, ¶ 44 (CC) (S. Afr.), where Justice Arthur Chaskalson stated:

> I cannot accept this contention which treats the common law as a body of law separate and distinct from the Constitution. These are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including common law derives its force from the Constitution and is subject to constitutional control.

See also Frank I. Michelman, *The Rule of Law, Legality and the Supremacy of the Constitution*, Constitutional Law of South Africa (Juta) 11-1 (2005) (teasing out the implications of the doctrine of legality and conception of constitutional supremacy).

Part V of this Article looks at African customary law and its structural and ideological relationship to both the Constitution and the common law. Initially, post-Apartheid courts showed reluctance to enter into the substance of African customary law and left law reform in this area to the legislature.[36] This approach quickly changed in the case of *Mabuza v. Mbatha*,[37] where a High Court developed a customary rule of marriage and asserted that customary rules that did not comply with the Constitution would be invalidated. Consequently, the discourse of non-application was altered, positioning customary law as equally subject to judicial scrutiny for constitutionality. Ultimately, in the groundbreaking *Bhe* case,[38] the Constitutional Court used direct application to strike out the customary law rule of primogeniture.

Part VI concludes that there is a new stage in common law discourse, evidenced in the arena of family law, where indirect application has subsumed direct application to the point that it makes little sense to talk meaningfully about the distinction—there is little direct application could have achieved that could not otherwise be reached by indirect application. By contrast, in the context of applying the Constitution to African customary law, common law incrementalism and indirect application are strikingly rejected in favor of direct application. Both within the common law tradition and African customary law, the moment has arrived when the distinction between direct and indirect application is less significant than is the realization that the judicial branch is taking upon itself a greater lawmaking role than it previously enjoyed under the system of parliamentary sovereignty.[39] While the significance of this once controversial distinction appears to dissolve, the discourses animating each type of application still bear an imprint of the attitudes towards common law and social transformation that framed the initial debate.

II. APPLICATION CLAUSES AND SOCIAL NORMS: THE INITIAL DEBATE

The application clauses are among the most innovative and progressive provisions of the new Constitution of the Republic of South Africa, with their sanction of greater scope for the horizontal application of the Bill of Rights and the potential consequent constitutionalization of the common

36. *See infra* note 206.
37. 2003 (1) All SA 706 (CC) (S. Afr.).
38. *Bhe v. Magistrate Khayelitsha* 2005 (1) SA 580 (CC) (S. Afr.).
39. *See infra* note 250.

law.[40] Section 8(2) of the Constitution provides the apparent mandate for direct application in its provision that 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."[41] Section 8(3) further elaborates that in order to give effect to a right, courts "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right[,] and may develop rules of the common law to limit the right."[42] At the same time, Section 39(2) authorizes indirect application, providing that "[w]hen 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."[43] This part of the Article traces a shift in the application debate over the last sixteen years of South African constitutionalism and what are arguably two generations of thought on the philosophical, institutional, and technical implications of the transition.

Karl Klare coined the expression "transformative constitutionalism," which has become a catchphrase to describe South African constitutionalism.[44] Unlike classical liberal constitutions, the South African Constitution guarantees economic, social, and cultural rights, embraces a substantive vision of equality, and imposes affirmative duties on the state to promote social welfare and assist individuals in the exercises of their rights.[45] Klare calls such a characterization "post-liberal" as it seeks to guarantee maximum freedom by simply prohibiting state intervention in private matters and is concerned with transformation, not preservation, of the status quo.[46] The clauses of the Constitution dealing with its application to the common law are an outstanding example of this transformative agenda.[47] Yet a transformative text does not necessarily

40. S. AFR. CONST. 1996.

41. *Id.* s. 8(2).

42. *Id.* s. 8(3).

43. *Id.* s. 39(2).

44. Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146 (1998).

45. *Id.* at 153–56.

46. *Id.* at 150, 151.

47. Those writers who advocated in favor of a more extensive scope of application for the Constitution also argued in favor of a more transformative text. They maintained that limiting the scope of the Constitution to state action would not account for the realities of modern distribution of power, where it is often the exercise of private power that poses the greatest threat to fundamental rights. This is particularly true in the South African context where economic power remains largely in the hands of whites. Many feared that the Constitution would be unable to transform the social and economic hierarchy, and would effectively privatize Apartheid. Accordingly, they called for the Bill of Rights to have horizontal effect and operate between citizens. *See* Stuart Woolman, *Application*,

translate into transformative jurisprudence, especially given the judicial institutional scheme set in place under the interim Constitution that essentially created separate but parallel constitutional and common law jurisdictions and threatened to insulate the common law from constitutional interference.[48] It quickly becomes apparent that an analysis of the manner in which the application clauses have functioned in post-Apartheid common law jurisprudence raises the larger question of the institutional and cultural impact of the Bill of Rights on the traditional common law judiciary and its mode of jurisprudence.

In the first generation of the debate, direct application of the Bill of Rights to private legal relations was considered by some academics to be the more progressive stance because it could reach areas of private inequity traditionally thought to be outside the reach of law.[49] On the other hand, indirect application signified the influence of constitutional values over the interpretation of common law doctrine without overriding it.[50] Further, indirect application was considered more conservative because its construction of horizontality signified that the Constitution would limit itself to ensuring that legal norms comported with it, yet constitutional values would not have direct access to "extra-legal" social spaces.[51] Provisions of the Constitution would operate in the context of private disputes, not as statements of subjective rights, but as values guiding the development of law.[52]

This understanding was voiced in the first generation of thought by the authors of *The Bill of Rights Handbook* ("*The Handbook*"), which defines indirect application as a set of values that must be respected whenever ordinary law is interpreted, developed, or applied.[53] *The Handbook* states that with indirect application, the Bill of Rights does not override ordinary law or generate its own remedies.[54] Rather, the Bill of Rights respects the procedural rules and remedies of ordinary law, but does require the

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Constitutional Law of South Africa (Ctr. Human Rts.) 10-1, 10–43 (1st ed. 1999). *See also* THE BILL OF RIGHTS HANDBOOK 45–80 (Johan De Waal et al. eds., 4th ed. 2001); DENNIS DAVIS, DEMOCRACY AND DELIBERATION 103 (1999).

48. Michelman, *supra* note 2.

49. *See* Woolman, *supra* note 47, at 10-2.

50. *Id.*

51. *Id.* at 10-3.

52. J. W. G. Van der Walt frames the question as "whether someone can invoke the Constitution to terminate extra legal social practices between private individuals that are clearly irreconcilable with the values embodied in the Constitution." J. W. G. Van der Walt, *Perspectives on Horizontal Application:* Du Plessis v. De Klerk *Revisited*, 12 SA PUBLIEKREG/SA PUBLIC LAW 1, 2 (1997).

53. THE BILL OF RIGHTS HANDBOOK, *supra* note 47, at 64.

54. *Id.*

operation of ordinary law to further the values of the Bill of Rights.[55] In contrast, direct application indicates the types of legal disputes to which the Bill of Rights is directly applicable.[56] In these cases, the Bill of Rights generates its own set of remedies and overrides ordinary law as well as any conduct inconsistent with the Bill of Rights.[57]

The authors of *The Bill of Rights Handbook* comment that the distinction between direct and indirect application is not merely technical, but rather fundamental, as the purpose and effect of each differs.[58] While the purpose of direct application is to uncover any inconsistency among law, conduct, and the Bill of Rights, the purpose of indirect application is to determine whether inconsistency between the law and the Bill of Rights can be avoided by a proper interpretation of the two.[59] According to *The Handbook*, "direct application rules out certain possibilities as constitutionally invalid (they are struck down) whereas an indirect application merely proposes a possible construction of the law that conforms with the Constitution."[60]

Advocates of direct application criticized indirect application as "potentially immunizing from direct constitutional scrutiny a whole range of feudal and racist relationships" and is thus ill suited for the radical social transformation required of South African society.[61] They feared that choices made with respect to application would reflect traditional liberal political theory, which requires liberty to include government non-intervention in the private affairs of individuals.[62] They were concerned

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55. *Id.*

56. *Id.* at 35.

57. *See id.* A corollary of this is that the common law courts would have final jurisdiction over a matter involving indirect application, whereas the Constitutional Court would have final jurisdiction over a matter involving direct application. But, in terms of both the interim and final Constitutions, the Constitutional Court makes the final decision as to whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter. *See* S. AFR. CONST. 1996 s. 167(3)(c); S. AFR. (Interim) CONST. 1993 s. 98(2)(f).

58. THE BILL OF RIGHTS HANDBOOK, *supra* note 47, at 64.

59. *See id.* at 64–67.

60. *Id.*

61. Dennis Davis & Stuart Woolman, *The Last Laugh:* Du Plessis v. De Klerk*, Classical Liberalism, Creole Liberalism and the Application of the Fundamental Rights under the Interim and the Final Constitutions*, 12 S. AFR. J. ON HUMAN RTS. 361, 383 (1996). *See also* Stuart Woolman, *Defamation, Application, and the Interim Constitution: An Unqualified and Direct Analysis of* Holomisa v. Argus Newspapers Ltd, 113 S. AFR. L.J. 428 (1996); J. W. G. Van der Walt, *Justice Kriegler's Disconcerting Judgment in* Du Plessis v. De Klerk*: Much Ado about Direct Horizontal Application (Read Nothing)*, 1996 J. S. AFR. L. 732, 734 (1996); Van der Walt, *supra* note 52.

62. Davis & Woolman, *supra* note 61, at 383.

that covert white interests in limiting the reach of transformation were behind the advocacy for indirect application.[63]

This topic came before the Constitutional Court in *Du Plessis v. De Klerk*,[64] the first case to consider the question of applying the interim Constitution to the common law.[65] There, the majority of the Constitutional Court cast its vote with indirect application. Acting Justice Sydney Kentridge, writing on behalf of the majority, affirmed Canadian precedent by finding that in a constitutional democracy, it is the legislature and not the judiciary that has the major responsibility for law reform.[66] He also wrote that the task of the judiciary is to confine itself to those developments necessary to keep the common law in step with society.[67] Methodologically, he maintained that the common law develops incrementally, not by being stricken.[68] He also did not think the role of the Constitutional Court was to decide between competing versions of the common law.[69] While rejecting the possible invalidation of common law rules on the basis of unconstitutionality, Kentridge endorsed a conception of indirect application where constitutional values permeated the common law in all its aspects.[70] The implication here was that indirect application correlated to incremental development, whereas direct application signified an out-of-bounds, more radical development.[71]

63. *See id.* at 403.

64. 1996 (3) SA 850 (CC) (S. Afr.).

65. *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) (S. Afr.).

66. *Id.* ¶ 61.

67. *Id.* (citing the Canadian case, *R v. Salituro*, [1992] 8 C.R.R. (2d) 173 (Can.)).

68. *Id.* "The radical amelioration of the common law has hitherto been a function of Parliament; there is no reason to believe that Parliament will not continue to exercise that function." *Id.* ¶ 53. Yet, this judgment, heard under the interim Constitution was very much a product of the institutional architecture set up under that Constitution, where there were essentially two legal systems, common law and constitutional, operating in tandem—each with separate jurisdictions and serving different functions. *See Du Plessis*, 1996 (3) SA 850, ¶ 57 (Kentridge, J.) (stating that if direct application were permitted, the Appellate Division would be deprived of a substantial part of its civil jurisdiction).

69. *Id.* ¶ 58.

70. *Id.* ¶ 62.

71. This debate was fleshed out in the positions of Justices Mahomed and Kriegler in *Du Plessis*. *See id.* ¶¶ 79, 120–135. While Mahomed favored indirect application, the implications of his reasoning are that there is no strict distinction between legal and social disputes, and the role of law is constitutive or at least legitimative of society. This view of indirect application captures within each reach the question of private power thought—in the first generation—only to be achieved through the use of direct application. Whilst Kriegler, who favored direct application, maintained a rigid distinction between the social and the legal—while direct application can ensure that all law complies with the Constitution, social and economic interactions that occur in the realm of the social are outside the reach of the law and direct application. In many ways, the two judgments read together illustrate how the meanings and consequences of direct and indirect application were cloaked in ambiguity from the start. This is not to say that common rules have not been examined and struck down by the Constitutional Court for falling short of the constitutional standard, but that it has been the rarer

However, the mandate to common law transformation *Du Plessis* put in place gained urgency in the 2001 case of *Carmichele v. Minister of Safety*.[72] As if in response to an institutional reluctance of common law courts to fully engage with constitutionalism, the Constitutional Court imposed a non-discretionary obligation on common law judges to interrogate and transform common law rules found to be constitutionally wanting.[73] Although the Court again acknowledged that it is the legislature and not the courts that have the major responsibility, it added that the duty cast upon judges in South Africa is different in degree to those of judges in foreign jurisdictions because the:

> interim Constitution brought into operation in one fell swoop, a completely new and different set of legal norms, and in these circumstances the courts *must remain vigilant* and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights.[74]

The implication is that law takes the lead in the evolutionary processes of society, and the common law judicial role is no longer limited to reflecting incremental developments necessary to keep law in step with society.

The judgment in *Carmichele* was a call for accelerated or strengthened indirect application, which significantly upped the ante of the *Du Plessis* majority's formulation of judicial function in common law adjudication.[75] The decision can be seen to signify the beginnings of a second generation of thought on application, where constitutional values are considered in all

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occurrence in the earliest judgments of the Court. *See, e.g.*, *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1998 (12) BCLR 1517 (CC) (S. Afr.); *Shabalala v. Attorney-General* 1995 (12) BCLR 1593 (CC) (S. Afr.).

72. *Carmichele v. Minister of Safety & Sec.* 2001 (10) BCLR 995 (CC) (S. Afr.).

73. *Id.* ¶ 36.

74. *Id.* ¶ 33.

75. The *Carmichele* injunction was expanded upon and extended in later cases. *See, e.g.*, *S v. Thebus* 2003 (10) BCLR 1100 (CC) (S. Afr.) (Indirect application takes place when a rule is inconsistent with a constitutional provision, but also when a rule of common law falls short of its spirit, purport and objects.); *K v. Minister of Safety & Sec.* 2005 (9) BCLR 835, ¶ 16 (CC) (S. Afr.) (The obligation imposed upon courts by s. 39(2) is extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is at issue, but also in cases where the incremental development of the rule is in issue.); *Phumelela Gaming & Leisure Ltd v. Grundling* 2006 (8) BCLR 883, ¶ 26 (CC) (S. Afr.) (High Courts and the Supreme Court of Appeal should at all times view the interpretation of legislation as well as the development of common law and customary law in light of the spirit, purport and objects of the Bill of Rights.).

cases and the compartmentalization of common law and constitutional law can no longer be easily maintained.[76]

Another view, finding its thematic expression in both first and second generation scholars, contended that what was important about the application debate was not the question of protection for the status quo, since it was clear from the text of the Constitution that it was a transformative document.[77] This approach claimed that the important question was whether the legislature or the judiciary was best suited to the transformation of social institutions and the private sphere.[78]

In the second generation, Sprigman and Osborne argue that indirect application is different from direct application.[79] In the former, a court's decision is not a constitutional ruling but a common law ruling made in light of constitutional values; it is both amenable to repeal, and, within its duty of systematic, large-scale law reform, "unconstrained by the preclusive effect of the judiciary's ad hoc direct application of the Bill of Rights."[80]

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76. *Carmichele* can be seen to usher in a second generation of thought on application. In this second generation, theorists largely agree that both direct and indirect application can yield a new cause of action based on the constitution; all also similarly agree that remedy operates via the common law, and there are no separate constitutional remedies. *See, e.g.*, Johan van der Walt, *Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation between Common-Law and Constitutional Jurisprudence*, 17 S. AFR. J. ON HUMAN RTS. 343 (2001) (arguing that indirect application can found a new cause of action without reverting to using constitutional rights as direct causes of action, but instead by developing the common law to reflect the principles of the Constitution and concluding that such a bold approach renders the distinction between direct and indirect application is devoid of substantive significance); *see also* Christopher J. Roederer, *Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South Africa*, 19 S. AFR. J. ON HUMAN RTS. 1, 57 (2003) (arguing there is no difference between direct and indirect application because pre-constitutional common law only exists by virtue of its congruence with constitutional values, since constitutional values are the engulfing standard and everything that is outside this matrix of values ceases to exist). However, see also Stuart Woolman, *Application*, Constitutional Law of South Africa (Juta) 31-1, 31-95 (2d ed. 2002) (arguing that the distinction between direct and indirect application is still critical, particularly given the stare decisis scheme put in place in the *Afrox* judgment).

77. 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 S. AFR. J. ON HUMAN RTS. 25, 31 (1999).

78. *Id.* Sprigman and Osborne argue that the Court should "decline to apply the Bill of Rights in the 1996 Constitution to wholly private disputes." *Id.* at 26. In the earlier first generation debate, this view is expressed by Martin Brassey, *Labour Relations under the New Constitution*, 10 S. AFR. J. ON HUMAN RTS. 179 (1994). This view is also reflected in Justice Sachs's judgment in *Du Plessis*. *Du Plessis v. De Klerk* 1996 (3) SA 850, ¶¶ 180–189 (CC) (S. Afr.) (arguing courts should refrain from deciding polycentric legal questions that encompass many parties or may require policy decisions that have complex ramifications, including the question of horizontal direct application of constitutional rights between private individuals). *See also* Michael Osborne & Chris Sprigman, *Behold: Angry Native Becomes Postmodernist Prophet of Judicial Messiah*, 118 S. AFR. L.J. 693 (2001).

79. Sprigman & Osborne, *supra* note 77.

80. *Id.*

However, Sprigman and Osborne take their point further than the narrow jurisdictional one, arguing that those who worry that anything less than strong horizontalism will allow privatized Apartheid to flourish indefinitely mistakenly assume that Parliament will be unwilling to enact corrective legislation.[81] They conclude that such a lack of faith in the democratically elected legislature, accompanied by a high degree of confidence in the courts, reflects potent counter-majoritarianism.[82] In their view, direct application is an instance of gratuitous counter-majoritarianism because judicial review poses a unique threat in the context of a purely private dispute.[83] The reason for this is that in vertical cases, individual rights are in conflict with the state, while in horizontal cases, individual rights are in conflict with one another. Consequently, in horizontal disputes the question is not whether there has been violation of a right—as is in a vertical dispute—but rather which party's rights should prevail. In cases of direct application, this decision is a constitutional ruling that strikes the balance once and for all.[84] According to Sprigman and Osborne, this task of ranking rights requires a political choice that lies within the mandate and competency of the legislature because it can subject political choices to investigation, deliberation, and amendment by ordinary procedures.[85] It is also these characteristics that give the legislative process a democratic legitimacy that can never be attained by judicial value selection.[86]

From the start, the question of direct or indirect application seemed to correlate, in both legal doctrine and legal reasoning, with a larger theme of the post-Apartheid South African constitutional project as being committed to both continuity and change, and both stability and transformation.[87] Indirect application seemed to defer to a conception of incremental change and wariness about creating vacuums in the common

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81. *Id.*
82. *Id.*
83. *Id.* at 41.
84. *Id.* at 42.
85. *Id.* at 43.
86.

> [T]here is a pungent irony in the fact that those who claim to be personally committed to a progressive social and economic agenda, at the very moment when the legislature is for the first time firmly in the hands of the majority of South Africans, would so energetically advocate a massive enlargement of judicial power.

Id. at 51.

87. Given that post-Apartheid South Africa was the product of a negotiated settlement, these contradictory themes permeate institutional set-up and jurisprudence. *See* RICHARD SPITZ WITH MATTHEW CHASKALSON, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT (2000).

law, whilst proponents of direct application seemed to advocate a more fundamental change in the sense that the constitution could invalidate a common law provision.[88] Similarly, indirect application was limited to existing common law causes of action and remedies, whereas direct application did not appear to be limited by existing doctrines.[89] Proponents of indirect application were viewed as either or both politically and socially conservative by those who felt that their approach left undisturbed all social relationships in which extant common law provided no cause of action.[90] Philosophically, indirect application seemed to reflect a more deferential attitude towards the evolutionary reasonableness or equitability of the common law, whereas direct application often reflected an understanding of common law as political and tainted by Apartheid ideology.[91] Institutionally, advocates of indirect application were concerned that judges not be allowed to intervene in the private sphere, and that transformation here was exclusively within the mandate of the legislature.[92] Proponents of direct application were concerned that indirect application would result in the immunization of common law liberty from constitutional scrutiny.[93]

III. APARTHEID CONCEPTIONS OF COMMON LAW ADJUDICATION AND FAMILY LAW

Historically, according to South African common law, a marriage was a "legally recognized voluntary union for life in common of one man and one woman, to the exclusion of all others while it lasts."[94] The late South

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88. *Du Plessis v. De Klerk* 1996 (3) SA 850, ¶ 53 (CC) (S. Afr.); THE BILL OF RIGHTS HANDBOOK, *supra* note 47, at 64.

89. *See id.*

90. *Id.* at 352.

91. Alfred Cockrell writes that the application of the Bill of Rights to the common law will not necessarily require the complete rewriting of the common law, since he views the common law as a resourceful body of doctrine that already recognized many of the rights that are now provided. Alfred Cockrell, *The Law of Persons and the Bill of Rights*, Bill of Rights Compendium (Butterworths), ¶ 3E3.5 (1996). Compare this to Justice Cameron in *Fourie v. Minister of Home Affairs*, 2005 (3) SA 429, ¶ 7 (SCA) (S. Afr.):

> More than anywhere else, apartheid enacted racism through minute elaboration in systematised legal regulation. As a consequence, the dogma of race infected not only our national life but the practice of law and our courts' jurisprudence at every level.

92. Sprigman & Osborne, *supra* note 77.

93. *Supra* note 47.

94. *See* H. R. HAHLO ET AL., THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE 12 (1975). This definition was taken from the 1905 case, *Ebrahim v. Essop*, 1905 T.S. 59, 61 (S. Afr.). W. J. HOSTEN ET AL., INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY 612 (W. J. Hosten et al. eds., 1983).

African writer, H. R. Hahlo, wrote that although marriage is a contract based on the consent of the parties, consent is not sufficient to create a legal marriage because the relationship it creates is not an ordinary contractual relationship, but involves a status of public character.[95] Consequently, certain marriage contracts were considered to be against public policy and thus void.[96] The most significant of such marriages was the polygamous union, which was considered to be fundamentally opposed to South African principles and institutions and hence unenforceable.[97]

The positivist version of this argument was that because the monogamous marriage of Roman Dutch law came to South Africa with the first Dutch settlers, it was the only form of marriage recognized by South African law, and "is open to members of all population groups, irrespective of race, nationality or religion."[98] However, a natural law conception that African customary marriages and Muslim marriages be refused recognition on the basis that polygamy is "reprobated by the majority of civilized peoples on the ground of morality and religion" also filtered through judicial pronouncements.[99] In the case of *Ismail v. Ismail*,[100] the Appellate Division declared a religious Muslim marriage contract to be unenforceable, holding that these contracts were not *contra bonos mores* in the natural law meaning of being immoral or reprehensible, but in the wider, positivist implication of being contrary to the "accepted customs and usages of a particular social group, that are usually morally binding upon all members of the group and are regarded as essential to its welfare and preservation."[101] The judge added that in light of the growing trend in favor of equality between spouses, the recognition of polygamous unions might even be regarded as a retrograde step.[102]

The primary policy of non-recognition was given effect in common law terms through the regulative concepts of *boni mores* or public policy.[103]

95. HAHLO ET AL., *supra* note 94, at 12.
96. *Id.*
97. *Id.*
98. *Id.* at 29.
99. *Seedat's Executors v. The Master (Natal)* 1917 A.D. 302.
100. 1983 (1) SA 1006 (A) (S. Afr.).
101. *Id.*
102. *Id.*
103. *See* Aquilius (Mr. Justice F. P. van den Heever), *Immorality and Illegality in Contract*, 58 S. AFR. L.J. 337, 346 (1941) ("What is immoral is a factual not a legal problem."). "A contract against public policy is one stipulating a performance which is not *per se* illegal or immoral but which the Courts, on grounds of expedience, will not enforce, because performance will detrimentally affect the

The conceptions of *boni mores* and public policy were explained in what is still a much cited 1987 *South African Law Journal* article on the role of policy in common law adjudication.[104] There, the late Chief Justice Michael Corbett wrote about the important policymaking function that South African courts perform in the process of developing the common law and adjusting it to the ever-changing needs of society.[105] Corbett questioned whether judges should embark on policymaking decisions or whether these matters should be left to the legislature, acting on the recommendations of experts.[106] He wrote that since public policy reflects the mores and fundamental assumptions of the community, it is only natural that perceptions as to what is or is not contrary to public policy will vary from era to era and that "in appropriate circumstances the courts may consequently introduce new categories of public policy or abandon or restrict old ones."[107]

As to what would constitute such an appropriate circumstance, Corbett wrote that when a court is confronted with a legal problem in the common law for which there is no precedent or authority, then the court makes use of flexible standards such as public policy, *boni mores*, legal convictions

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interests of the community." *Id.* In common law adjudication, the concept of public policy had a stylized meaning of contracts that might contribute to public injury. *See also* J. D. SINCLAIR ET AL., THE LAW OF MARRIAGE 177 (1996) (detailing the numerous dire consequences of non-recognition).

104. M. M. Corbett, *Aspects of the Role of Policy in the Evolution of Our Common Law*, 104 S. AFR. L.J. 52 (1987). For example, see *Carmichele*, 2001 (10) BCLR 995, ¶ 43 (stating that the proportionality exercise described by Corbett now takes place within the context of the "spirit, purport and objects" of the Bill of Rights).

105. Corbett, *supra* note 104. Corbett discussed *Minister van Polisie v. Ewels*, 1975 (3) SA 590 (A) (S. Afr.):

> Even in 1975 there were probably still two choices open to the court in the *Ewels* case. The one was to confine liability for an omission to certain stereotypes, possibly adding to them from time to time; the other was to adopt a wider, more open-ended general principle, which, while comprehending existing grounds of liability, would lay the foundation for a more flexible and all-embracing approach to the question whether a person's omission to act should be held unlawful or not. The court made the latter choice; and, of course, in so doing cast the courts for a general policymaking role in this area of the law.

Id. at 56.

106. *Id.*

107. *Id.* at 64. As an example of this policymaking function, Corbett cites a case from 1907 where Chief Justice De Villiers held in the case of *King v. Gray*, 1907 24 S.C. 554 (S. Afr.), a marriage brokerage contract was contrary to public policy and unenforceable. *Id.* at 64. "Nearly 80 years later a two-judge court of the Transvaal Provincial Division, observing that 'the norms of conduct required by society do not remain static . . . , [but] may change from one generation to the next', upheld the validity of a marriage brokerage contract." *Id.* at 64–65 (citation omitted). It is quite telling that it took eighty years for the court to register a change in *boni mores*, and reflects a less malleable judicial stance than that represented by Corbett.

of the community, or reasonableness.[108] In explaining how courts give meaning to these concepts, he wrote:

> [T]he policy decisions of our courts which shape, and at times refashion the common law must also reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people. A community has certain common values and norms. . . . In the last resort the judge will often be required to perform a balancing act between two competing values, each in itself a worthy or desirable one. . . . And the balance which is eventually struck must accord with society's notions of what justice demands."[109]

On this account, the judicial function in common law cases, prior to the advent of constitutionalism and judicial review, is not political in the sense that it involved choice. Rather the judge is seen as reflecting, and therefore "discovering," society's sense of justice.[110] In this sense, judicial lawmaking or policymaking is legitimate, because judges would not invent the *boni mores*, but rather their decisions would reflect a slowly changing society's sense of justice back to itself.

Corbett's article was especially significant when viewed against the backdrop of the South African system of parliamentary sovereignty and the common understanding of the judicial role as limited to declaring rather than making the law.[111] It amounted to an important acknowledgement by the judiciary of its own policy-making or lawmaking function.[112] Yet, his article also revealed that he perceived policy-based decision-making to be an exceptional circumstance, occurring only where there is no precedent and judges adjudicate based on "society's notions of what justice demands."[113] There is doubtlessly a certain disconnect between the explicit Apartheid ideology incorporated into case law through the conception of *boni mores* and Corbett's conception that acknowledged only a very limited lawmaking role for the judge and

108. *Id.* at 67.
109. *Id.*
110. *See* HORWITZ, *supra* note 1, at 120.
111. *See* JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 366 (1978). The role of the South African common law judge was to declare, rather than make, law and was considered to be in marked contrast to the political or policy-driven role of judges of the United States Supreme Court. "[C]ourts appear to have adopted the distinction between the legislative function inherent in the common theory of law and regard it as their duty to analyze and interpret the will of parliament, but not to reason why." *Id.* at 373.
112. *Id.*
113. *Id.* at 68.

confined this role to the boundary of the common law's flexible standards.[114]

It seems likely that Corbett's conception is reflected in early constitutional cases, which determined that it was through flexible standards that the Constitution would primarily permeate the common law.[115] It is arguable that the reason for this distinction between rules and standards, is that standards inherently require a degree of discretion and lawmaking, and consequently are the natural preserve of the judiciary, whereas rules are considered entirely different and will be reluctantly changed only by the highest common law authority. This distinction is similar to distinctions between rules and values drawn in recent Supreme Court of Appeal cases, which declare that while values can animate rules, they are not self-standing, and a High Court judge has no discretion in applying the governing rule.[116] This distinction also reminds us that

114. HOSTEN ET AL., *supra* note 94, at 512 (citing *Universal City Studios Inc. v. Network Video (Pty) Ltd.* 1986 (2) SA 734 (A), ¶ 41 ("It is probably true that . . . the court does not have an inherent power to create substantive law . . . .") (Corbett, J.)).

115. This conception can be seen in many early proponents of indirect application, such as Justice Ackermann's view in *Du Plessis v. De Klerk*, 1996 (3) SA 850, ¶ 110 (CC) (S. Afr.):

> [T]he indirect radiating effect of the Chapter 3 rights on the post-constitutional development in the common law and statute law of concepts such as public policy, the *boni mores*, unlawfulness, reasonableness, fairness and the like, without any of the unsatisfactory consequences that direct application must inevitably cause.

See id. ¶ 53 (Kentridge, AJ.) ("The radical amelioration of the common law has hitherto been a function of Parliament; there is no reason to believe that Parliament will not continue to exercise that function."). This is not to say that common rules have not been interrogated and struck down by the Constitutional Court for falling short of the constitutional standard, but that it has been the rarer occurrence. *See, e.g.*, *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1998 (12) BCLR 1517 (CC) (S. Afr.); *Shabalala v. Attorney-General* 1995 (12) BCLR 1593 (CC) (S. Afr.).

116. *See Brisley v. Drotsky* 2002 (4) SA 1 (SCA) (S. Afr.); *Afrox Healthcare v. Strydom* 2002 (6) SA 21 (SCA) (S. Afr.). During Apartheid, the Appellate Division was the highest court of appeal and heard appeals from provincial divisions of the Supreme Court. Under the interim Constitution, the court hierarchical structure was preserved, save the creation of an additional Constitutional Court as the court of final instance over constitutional matters. In terms of the interim Constitution, the Appellate Division had no constitutional jurisdiction and was the highest common law court of appeal, whilst the Constitutional Court was confined to constitutional matters and had no jurisdiction to develop the common law. Under the 1996 Constitution, the Appellate Division has been renamed the Supreme Court of Appeal and still is the highest court of appeal with respect to the common law, although now it has constitutional jurisdiction. Similarly, the Constitutional Court has jurisdiction to develop the common law. The Constitutional Court can function as a court of first instance as well as a court of appeal, and must confirm certain orders of invalidity made by other courts. S. AFR. (Interim) CONST. 1993 ss. 86–98; S. AFR. CONST. 1996 ss. 165–174. *See* THE NEW CONSTITUTIONAL & ADMINISTRATIVE LAW 267–314 (Iain Currie & Johan de Waal eds., 2001). There have been recent, highly contentious legislative proposals to merge the Supreme Court of Appeal and the Constitutional Court into one apex court. *See* Carole Lewis, *Reaching the Pinnacle: Principle, Policies and People for a Single Apex Court in South Africa*, 21 S. AFR. J. ON HUMAN RTS. 509 (2005). For a related analysis of the doctrine of constitutional legality as both an enforceable rule and an interpretive value, see Michelman, *supra* note 2.

historically, the amelioration of the blunt force of rules was considered to be reserved for the legislature alone.[117]

IV. POST-APARTHEID INDIRECT APPLICATION AND *BONI MORES*: A LOOK AT SAME-SEX AND MUSLIM MARRIAGE

The question then is how post-Apartheid common law courts came to negotiate the interaction between rules, *boni mores*, and constitutional values. In doctrinal areas, such as contract law, the Supreme Court of Appeal—the highest court of appeal in non-constitutional matters—interpreted constitutional values to be fully consonant with the hegemony of common law liberty and freedom of contract.[118] Institutionally, the Supreme Court of Appeal was concerned with circumscribing the ability of lower courts to overrule precedent under the guise of giving effect to the "spirit, purports and objects" of the Constitution.[119]

However, in the area of family law,[120] specifically marital recognition, there is a proliferation of ways in which the Bill of Rights has influenced common law doctrine and discourse. This raises a different institutional question regarding the relationship between judicial and legislative lawmaking. Perhaps it was inevitable that the fractured terrain of South African family law would be the site of such proliferation given its glaring hierarchical nature.[121] Many common law provisions regulating family law

117. *See* H. R. HAHLO & ELLISON KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND 583 (1968) ("[T]he common law gives the judge no discretion . . . amelioration of the rule if considered desirable, must be produced by the legislature."). *See also Bank of Lisbon & S. Afr. Ltd. v. Ornelas* 1988 (2) All SA 393 (SCA) (S. Afr.) (finding that there is no general equitable jurisdiction that could override a clear rule of law). *See also* Carole Lewis, *The Demise of the Exceptio Doli: Is There Another Route to Contractual Equity?*, 107 S. AFR. L.J. 26 (1990); Jonathan Lewis, *Fairness in South African Contract Law*, 120 S. AFR. L.J. 330 (2003); *Crown City Restaurant CC v. Gold Reef City Theme Park (Pty) Ltd.* 2007 (5) BCLR 453 (CC) (S. Afr.).

118. *See Brisley v. Drotskey*, 2002 (4) SA 1; *Afrox Healthcare v. Strydom* 2002 (6) SA 21. *But see Barkhuizen v. Napier* 2007 (7) BCLR 691 (CC) (S. Afr.) (reworking that paradigm).

119. *See Afrox Healthcare*, 2002 (6) SA 21. *See also* Stuart Woolman & Danie Brand, *Is There a Constitution in This Courtroom? Constitutional Jurisdiction after* Afrox *and* Walters, 18 SA PUBLIEKREG/SA PUBLIC LAW 37, 43–44 (2003) (discussing the doctrine of stare decisis and the relationship between the High Courts and Supreme Court of Appeal).

120. *See, e.g.*, *Jooste v. Botha* 2000 (2) BCLR 187 (T) (S. Afr.) (cause of action compelling a famous father to provide loving care to an out of wedlock son on the basis of s. 28 in the 1996 Constitution); *Robinson v. Volks NO* 2004 (6) SA 288 (HC, Cape Provincial Div.) (S. Afr.) (application of Maintenance of Surviving Spouses Act to a heterosexual life-partnership); *Petersen v. Maintenance Officer* 2004 (1) All SA 117 (HC, Western Cape) (S. Afr.) (duty of grandparents to support child born out of marriage); *Bezuidenhout v. Bezuidenhout* 2003 (6) SA 691 (HC, Cape Provincial Div.) (S. Afr.) (asset redistribution upon divorce); *Van Rooyen v. Van Rooyen* 2001 (2) All SA 37 (T) (S. Afr.) (lesbian mother's right of access); *S v. Ferreira* 2004 (4) All SA 373 (SCA) (concerning abused married women who kill their spouses).

121. During Apartheid, only civil marriages were given full legal recognition, while African

were explicitly coercive and often innocuous, likely to be considered by most as an uncontroversial example of a doctrinal area that was illegitimately invaded by Apartheid policies.[122]

This Part will analyze the common law jurisprudence on Muslim marriage and same-sex marriage in order to understand how the application debate impacts traditional common law analysis. Underlying these judgments is an evolving conception of the relationship among judicial and legislative lawmakers. First I will look at those cases where traditional indirect application has been the norm and courts have used the common law vehicle of public policy to import the values of the Constitution into the common law. Here, I will argue that the impact of constitutional values on common law discourse is two-fold: first, it relaxes the institutional and cultural bias against explicit judicial lawmaking; second, it allows the judiciary to see, and therefore be able to respond to, an empirically changed and continually changing society. A variation of this theme is that constitutional values themselves are seen to be a reflection of changed social norms, and therefore—within the unaltered ambit of traditional common law—judicial function, which sees the common law judge as reflecting society back to itself. This approach views the post-Apartheid common law judicial role as continuous with the pre-constitutional task of responding incrementally to social change. In this role, the judge clearly does not see himself or herself as involved in political work requiring hard choices, but rather as confined to elucidating the evolving common law.[123]

In a second approach that emerges, constitutional values dominate the conflict between social norms and constitutional values. Constitutional values appear in this version as not deriving from the empirical community's *boni mores*, but as altering the *boni mores*.[124] This approach is increasingly politicized in that it acknowledges a clash of values, which

marriages were governed under a separate regulatory regime and granted mere limited recognition as "unions" rather than marriages. *See* T. W. BENNETT, CUSTOMARY LAW IN SOUTH AFRICA 190 (2004).

122. During Apartheid, there was a longstanding debate about the extent to which Apartheid policy and principle invaded and therefore tainted the common law. *See* John Dugard, *Should Judges Resign?—A Reply to Professor Wacks*, 101 S. AFR. L.J. 286 (1984); Cora Hoexter, *Judicial Policy in South Africa*, 103 S. AFR. L.J. 436 (1986); Edwin Cameron, *Legal Chauvinism, Executive-Mindedness and Justice—L C Steyn's Impact on South African Law*, 99 S. AFR. L.J. 38 (1982); Raymond Wacks, *Judges and Injustice*, 101 S. AFR. L.J. 266 (1984); Raymond Wacks, *Judging Judges: A Brief Rejoinder to Professor Dugard*, 101 S. AFR. L.J. 295 (1984). It is arguable that while contract law is the harder case, and theorists disagree about the extent to which Apartheid principles had permeated the common law of contract, the area of family law is an "easier case" for being more obviously invaded by Apartheid principles and in need of reconstruction.

123. *Amod v. Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA) (S. Afr.).

124. *Ryland v. Edros* 1997 (2) SA 690 (C) (S. Afr.).

involves choice.[125] However, the judge refuses this potential politicization of the judicial role by asserting a non-discretionary allegiance to uncontested constitutional values.[126]

In a third approach, found in the Supreme Court of Appeal decision in *Fourie*,[127] Judge Cameron, working outside the paradigm of flexible standards and in the terrain of legal rules, acknowledged that constitutional values conflict, and the judicial role involves choice.[128] On this approach, common law constitutional analysis is a form of politics necessitating choice, thus rendering the distinction between legislative and judicial lawmaking increasingly fragile.[129]

In each of these approaches, there is a progressive move away from the purist paradigm of indirect application, and legal analysis increasingly takes on characteristics of direct application. Given *Fourie*'s end result, it is difficult to tell precisely whether it was a case of direct application or indirect application. This leads to the conclusion that the distinction between direct and indirect application, about which people had once felt extremely passionate, has come to be less significant.[130]

A. Evolutionary Common Law Adjudication

The cases of *Amod v. Multilateral Motor Vehicle Accident Fund*[131] and *Du Plessis v. Road Accident Fund*[132] dealt with the recognition of Muslim marriages and same-sex unions, respectively. In *Amod*, the appellant was a widow who had been married to the deceased according to Islamic rites.[133] She instituted an action against the Multilateral Motor Vehicle Accident Fund claiming damages suffered as a result of the death of her husband in a motor vehicle accident prior to the enactment of either the interim or final Constitution.[134]

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125. *Id.* at 705, ¶ C ("[I]f the spirit, purport and objects of chap 3 of the Constitution and the basic values underlying it are in conflict with the view as to public policy . . . then the values underlying chap 3 of the Constitution must prevail.").

126. *Id.*

127. *Fourie v. Minister of Home Affairs* 2005 (3) SA 429 (SCA) (S. Afr.).

128. *Id.* ¶ 5.

129. *Id.* ¶ 22.

130. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

131. 1999 (4) SA 1319 (SCA) (S. Afr.).

132. 2004 (1) SA 359 (SCA) (S. Afr.).

133. *Id.* ¶ 1.

134. The Multilateral Motor Vehicle Accident fund was set up to pay compensation to people injured or killed in road accidents through the negligent driving of motor vehicles. It was succeeded by the Road Accident Fund ("RAF"). Road Accident Fund (formerly Multilateral Motor Vehicle

After some preliminary skirmishes, the case arrived before the late Chief Justice Ismail Mahomed. He considered the historical origins of dependants' action in common law and emphasized that equity requires that a dependant be able to recover from a party who has unlawfully and wrongfully caused the death of a breadwinner.[135] In order to succeed in her claim, the appellant would have to prove that her right to such support was worthy of protection by law, which would be assessed according to the prevailing *boni mores* of society.[136] Although the case concerned a statutory claim, the respondents argued that the appellant's claim should fail because while the relevant system of customary law by which she was married permitted polygamy, her marriage was invalid at common law, and her claim unenforceable.[137]

Chief Justice Mahomed approached the inquiry by focusing not on the question of whether the marriage was lawful at common law, but whether the deceased had the legal duty to support the appellant during the marriage.[138] If this was the case, then the deciding question was whether the widow deserved protection in these circumstances.[139]

In answering the question, an important consideration was the fact that the new ethos of religious freedom was well established at the time the cause of action arose, which was prior to the enactment of the interim Constitution.[140] The Court emphasized that as the present marriage was always a monogamous one, there was no meaningful distinction between this marriage and a Christian one.[141] Chief Justice Mahomed explained that this new ethos was substantially different from one that informed the *boni mores* of the community, which held that "potentially polygamous" marriages did not deserve the protection of the law for the purposes of the dependant's action.[142] He wrote:

> I have no doubt that the *boni mores* of the community at the time when the cause of action arose in the present proceedings would not

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Accidents Fund), http://www.capegateway.gov.za/eng/pubs/public_info/G/47578/5 (last visited June 21, 2010).

135. *Amod*, 1999 (4) SA 1319.

136. *Id.* The significant elements discussed are: (a) the deceased had a duty to support her, and (b) the duty was legally enforceable. *Id.* ¶ 12.

137. *Id.* The respondents argued that the dependant's action for loss of support was an anomalous remedy that should not accommodate claims for loss of support undertaken contractually, which do not flow from the common law consequences of a valid marriage. *Id.* ¶ 16.

138. *Id.* ¶ 19.

139. *Id.*

140. *Id.* ¶ 20.

141. *Id.* ¶ 23.

142. *Id.* ¶ 21.

> support a conclusion which denies to a duty of support arising from a *de facto* monogamous marriage solemnly entered into in accord with the Muslim faith any recognition in the common law for the purposes of the dependant's action; but which affords to the same duty of support arising from a similarly solemnized marriage in accord with the Christian faith full recognition in the same common law for the same purpose; and which even affords to polygamous marriages solemnized in accordance with the Christian faith full recognition in the same common law for the same purpose; and which even affords to polygamous marriages solemnized in accordance with African customary law exactly the same protection for the same purpose . . . .[143]

Chief Justice Mahomed's analysis made use of internal common law reasoning, which he characterized as essentially equitable and continually evolving to reflect the changing social norms.[144] He viewed the dependant's action as a particularly adaptable creature, and claimed that on proper analysis of existing relevant common law rules, "a claim of loss of support made on behalf of a Muslim widow in the position of the appellant is sound in law."[145] He based this departure from precedent on the evolving nature of the community's values and norms in existence prior to the enactment of the Constitution.[146]

In keeping with the jurisprudence of functional incrementalism, Chief Justice Mahomed stated that he only recognizes de facto monogamous Muslim marriages, and only for the purposes of the dependant's action.[147] However, given that the cause of action and change to the empirical *boni mores* that Chief Justice Mahomed based his decision upon took place prior to the enactment of the Constitution, *Amod* can be seen as a case of non-application of the Bill of Rights.[148]

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143. *Id.* ¶ 23.

> This important shift in the identifiable *boni mores* of the community must also manifest itself in a corresponding evolution in the relevant parameters of application in this area. "The common law is not to be trapped within the limitations of its past." If it does not do this it would risk losing the virility, relevance and creativity which it needs to retain its legitimacy and effectiveness in the resolution of conflict between and in the pursuit of justice among the citizens of a democratic society. For this reason the common law constantly evolves to accommodate changing values and new needs.

Id.

144. *Id.*

145. *See id.* ¶¶ 5, 23–24.

146. *See id.* ¶¶ 23–24.

147. *See id.* ¶ 24.

148. Another example of this approach, where the constitution serves as the impetus to "see"

Du Plessis v. Road Accident Fund mirrors the facts in *Amod*, except that the relationship in question was a same-sex partnership.[149] As the cause of action took place after the enactment of the Constitution, the court used section 39(2) of the Constitution to extend the action for loss of support to partners in same-sex permanent life relationships similar to marriage in other respects, and who had a contractual duty to support each other.[150] Doing this, it was said, took "an incremental step to ensuring that the common law accorded with the dynamic and evolving fabric of society as reflected in the Constitution."[151]

In this judgment, constitutional values did the work, but did so through the common law doctrine of *boni mores*, which facilitated the expansion of common law to recognize a greater variety of dependent relationships. The judge expressly stated that "the incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes,"[152] and that the constitutional values themselves represent *boni mores*, community norms and attitudes.[153] Hence, this judicial development was in keeping with the time honored role of the judiciary in responding to changes in society since the source of constitutional values is in society. It was essential to this judgment that the

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changes that have occurred "out there" in real life and the adjudicator sees him or herself as reflecting such changes, is *Langemaat v. Minister of Safety and Security*, 1998 (3) SA 312 (T) (S. Afr.), where the applicant, a member of the South African Police Services and a lesbian in a relationship for twelve years, sought to have her partner listed as a dependant on her medical aid scheme. Deciding in her favor, Judge Pierre Roux stated:

> I would ignore my experience and knowledge of several same-sex couples who have lived together for years. The stability and permanence of their relationships is no different from the many married couples I know. Both types of union are deserving of respect and protection. If our law does not accord protection to the type of union I am dealing with then I suggest it is time it does so. This is how I understand what section 39(2) of the Constitution has in mind.

Id. at 316, ¶ G.

149. 2003 (1) SA 359 (SCA) (S. Afr.). In the court below, Judge De Klerk rejected the argument that the common law duty of support be extended to include same sex partners. 2002 (4) SA 596 (T) (S. Afr.) He commented that should the duty of support be recognized, it would open a can of worms since it would not only lead to many tenuous claims, but it would also establish a duty of support in all similar homosexual relationships where both parties are still alive. *Id.* at 498, ¶ E. It would, for instance, mean that on the dissolution of a homosexual relationship, a partner to such relationship would have a right to claim maintenance from the other. The court also stated that the monogamous heterosexual common-law marriage is the only form of marriage recognized in our law. *Id.* at 599, ¶ C.

150. *Du Plessis*, 2003 (1) SA 359, ¶¶ 36–37.

151. *Id.* ¶ 37. The court stressed:

> It is important to emphasize that the submissions made on behalf of the plaintiff fell short of requesting this court to extend the common law definition of marriage, which requires that the union be between man and woman, to persons of the same sex.

Id. ¶ 7.

152. *Id.* ¶ 17.

153. *Id.* ¶ 18.

evolution be seen as incremental; the judge stressed that he had not been asked to grant a more generalized recognition to same-sex relationships.[154] The implication is that a more generalized recognition of same-sex relationships would overstep the institutional limits of incremental development and legitimate judicial role.

B. Transformative Common Law Adjudication

A second approach to the relationship between *boni mores* and constitutional values can be seen in *Ryland v. Edros*,[155] where the judge characterized the relationship between *boni mores* and constitutional values as one of conflict.[156] *Ryland* was an earlier case that emerged from the post-Apartheid High Court and concerned the question of whether the *Ismail* precedent precluded enforcement of the proprietary terms of an Islamic marriage contract because the marriage was potentially polygamous and contrary to public policy.[157]

Justice Ian Farlam wrote that, while it was true that public policy is essentially a question of fact, it would be difficult to find that there was such a change in the community's general sense of justice as to justify a refusal to follow the *Ismail* precedent had it not been for the new Constitution.[158] Accordingly, he preferred to base the decision on the fundamental alteration in the basic values of the legal order brought about by the new Constitution.[159] If the spirit, purport, and objects of chapter three of the Constitution and the basic values underlying it were in conflict with the public policy expressed and applied in precedent, then the values underlying the Constitution must dominate.[160] He framed the question as whether constitutional values are in conflict with public policy expressed in *Ismail* and stated,

> [I]t is inimical to all the values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive

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154. *See id.* ¶ 37. *See also id.* ¶ 43.

155. 1997 (2) SA 690 (C) (S. Afr.).

156. *Id.* at 705, ¶ C.

157. *See Ismail v. Ismail* 1983 (1) SA 1006 (A) (S. Afr.).

158. *Ryland*, 1997 (2) SA 690, at 704, ¶ D. ("What is immoral is a factual not a legal problem.") (citing Mr. Justice F. P. van den Heever, *Immorality and Illegality in Contracts*, 58 S. AFR. L.J. 337, 346 (1941)). In terms of the *Ismail* precedent, the marriage contracts in question were both contrary to public policy (defined as contacts which might redound to public injury) and *contra bonos mores*. *Id.* at 709, ¶ C.

159. *Id.* at 704, ¶ D.

160. *Ryland*, 1997 (2) SA 690(C) at 705, ¶ C.

to those values which are shared by the community at large, . . . not only by one section of it.[161]

However, the *Ismail* precedent accounted for the views of only one group in a plural society.[162]

Justice Farlam went on to find that principles of equality underlie the Constitution and "irradiate" concepts of public policy and *boni mores*.[163] The effect of these values is that both the *contra bonos mores* and the grounds for refusing to enforce the consequences of an Islamic marriage could no longer stand. Farlam stressed that this was a case of potential, not actual, polygamy, and that the court was not being asked to recognize a polygamous marriage, but to enforce certain terms of a contract made between parties that are collateral to the marriage.[164]

In Farlam's opinion, he contrasted public policy and the community's sense of justice with constitutional values and found that a conflict existed between the constitutional values and the *boni mores* present in society as previously articulated in judicial precedent.[165] Where there is such conflict, constitutional values trump.[166]

Technically, whilst employing the traditional entry point of a flexible standard, Justice Farlam's approach differs from that stipulated in *The Bill of Rights Handbook*[167] to indirect application. Instead of interpreting the *boni mores* to be congruous with constitutional values, as prescribed by *The Handbook*, Farlam treated the *boni mores* as empirical facts that can conflict with constitutional requirements and put forward the notion that judges are required to enforce constitutional values.[168] At the same time, he stated that the conception of the empirical norms of the community upheld in *Ismail* were unconstitutional because the *boni mores* were those of a small group rather then society as a whole.[169] However, he did not go on to find that the more representative *boni mores* would favor enforcement, but "prefer[red] to base [his] decision on the fundamental alteration in regard to the basic values on which our civil polity is based."[170] In effect, he was "striking down" or invalidating the conception

161. *Id.* at 707, ¶ G.
162. *Id.* at 707, ¶ H.
163. *Id.* at 709, ¶ A (using the expression of the German Federal Constitutional Court).
164. *Id.* at 709, ¶ D.
165. *Id.* at 704, ¶ C.
166. *Id.* at 705, ¶ C.
167. *See* THE BILL OF RIGHTS HANDBOOK, *supra* note 47, at 64–67.
168. *See id.* at 64–67.
169. *Ryland*, 1997 (2) SA 690 (C), at 707, ¶ H.
170. *Id.* at 704, ¶ D.

of community norms announced in *Ismail*, and positing constitutional values in its stead.[171] In this respect, his analysis, although indirect, resembles direct application. Accordingly, the distinction between direct and indirect application loses some of its all-or-nothing quality.[172]

In both approaches described above, judges operate incrementally within the flexible standards of the common law. Whilst the first set of cases is in keeping with the traditional judicial mandate of keeping the *boni mores* contemporaneous, *Ryland* views the Constitution as representing values that legally outrank the community's norms or sense of justice.[173] This is a distinct shift in judicial function, since the role of the common law judge is to give voice to constitutional values as opposed to community norms. Institutionally, this shift allowed Farlam, a High Court judge, to overrule precedent from the Supreme Court of Appeal in *Ismail*.[174] But he was cautious not to push the boundary between legislative and judicial lawmaking, and did not grant outright recognition to Muslim marriages. He expressly stipulated that he was not dealing with a situation involving actual polygamous spouses.[175]

C. *Constitutionalized Common Law and* Fourie

Fourie[176] broke ground as it dealt with the constitutionality of the common law rule defining marriage as exclusively between a man and a woman. From the outset, this case was concerned with a rule or omission, rather than the open-ended policy thought to be the preferred channel for indirect analysis.[177]

In the Supreme Court of Appeal judgment, Justice Cameron found that the common law definition of marriage denied a host of benefits, protections, and duties to gays and lesbians wishing to solemnize their union.[178] He also emphasized the "deeper" harm of exclusion, which signified to gay and lesbian people that their relationships were inferior and they could never "be fully part of the community of moral equals that

171. *Id.* at 705, ¶ C.

172. *See* Kennedy, *supra* note 130, at 1351 ("The development of intermediate terms means formal recognition that some situations are neither one thing nor another . . . but rather share some characteristics of each pole . . . .").

173. *Ryland*, 1997 (2) SA 690 (C), at 705, ¶ C.

174. *Id.* at 711, ¶ C.

175. *Id.* at 709, ¶ D.

176. *Fourie*, 2005 (3) SA 429 (SCA) (S. Afr.).

177. *See id.* ¶ 5.

178. *Id.* ¶ 16.

the Constitution promises to create for all."[179] In his view, this exclusion "undermines the values which underlie an open and democratic society," and in the absence of justification, it constitutes unfair discrimination in terms of section 9(3) of the Constitution.[180]

In his analysis, Justice Cameron looked at possible justifications for the exclusion, including that the majority of South Africans still think of marriage as a heterosexual institution and view an extension to gays and lesbians unfavorably.[181] He wrote:

> Our task is to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. In this our sole duty lies to the Constitution: but those we engage with most deeply in explaining what that duty entails is the nation, whose understanding of and commitment to constitutional values is essential if the larger project of securing justice and equality under law for all is to succeed.
>
> In interpreting and applying the Constitution we therefore move with care and respect, and with appreciation that a diverse and plural society is diverse and plural precisely because not everyone agrees on what the Constitution entails. Respect for difference requires respect also for divergent views about constitutional values and outcomes.[182]

Justice Cameron concluded that the appellants were "entitled . . . to a declaration that their intended marriage is capable of recognition as lawfully valid subject to compliance with statutory formalities."[183] He stressed that once the court decides that the Bill of Rights requires the common law to be developed, it does not intrude upon the legislative process because "[i]t is precisely this role that the Bill of Rights envisages must be fulfilled, and which it entrusts to the judiciary."[184]

Justice Farlam authored the dissenting judgment, where he approached the question institutionally and asked whether such a development constituted an incremental change mandated by indirect application, or

179. *Id.* ¶ 15.

180. *Id.* ¶ 16. Section 9(3) of the Constitution provides: "The state may not unfairly discriminate directly or indirectly against anyone 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."

181. *Fourie*, 2005 (3) SA 429, ¶ 20.

182. *Id.* ¶¶ 20–21.

183. *Id.* ¶ 48.

184. *Id.* ¶ 40.

whether it involved a fundamental change, which would preferably be undertaken by Parliament.[185] Farlam was concerned that such an extension would not be an incremental step, but "a quantum leap across a chasm," the consequences of which would be a "crisis of the reality of law" where what the population practiced was the opposite of that contained in the law books.[186] After traversing the long secular history of marriage, Farlam found that the common law definition of marriage violated equality and dignity and could not be justified.[187] In other words, he utilized indirect application. He concluded that the extension of the common law definition of marriage to same-sex couples could not involve a fundamental change in the traditional concept of marriage and decided to develop the common law, but then suspend development so that Parliament had the opportunity to intervene.

From the start, the case is distinguishable from the previous cases discussed in that it is not a policy or flexible rule that is being adjudicated, but rather a categorical omission created by the exclusive definition of marriage.[188] Cameron's judgment appears to take the *Ryland* version of incrementalism a step further and arguably represents an instance of the Constitutional Court injunction to "one law."[189] From the start, the discourse follows a more constitutional than common law analysis in its refusal to embark on tedious review of case law to "prove" incrementalism.[190]

Justice Farlam's approach is more traditionally common law-like as it focuses on the internal development of doctrine, such that incrementalism appears to require recognition. He clearly stated at the outset that his analysis is a section 39(2) indirect application analysis, while Cameron's approach is difficult to pin down and appears to combine a section 8(3) mandate for direct application with a section 39(2) indirect application injunction.[191] Farlam wrote of the sections "taken together" as constituting an "imperative normative setting that obliges courts develop the common

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185. *Id.* ¶ 67.

186. *Id.* ¶ 107.

187. *Id.* ¶ 100. *See also id.* ¶ 101 (Farlam, J.) (citing *Carmichele* as authority for indirect application); *id.* ¶ 111 (Farlam, J.) (again expressing concern with incrementalism).

188. *See, e.g.*, *id.* ¶ 15.

189. *See Pharma. Mfrs. Assoc. of S. Afr.*, *In re* The *Ex Parte* Application President of the Republic of S. Afr. 2000 (3) BCLR 241, ¶ 37 (CC) (S. Afr.).

190. *Fourie*, 2005 (3) SA 429, ¶ 5.

191. *Id.* ¶ 15. For example, Justice Farlam refers to *Carmichele*, the authority for indirect application, while there is no analogous reference to *Khumalo*, the authority for direct horizontal application judgment. *Id.* ¶¶ 22–25.

law."[192] In terms of substance and remedy, both clearly operate in the new arena of constitutionalized common law. While Farlam goes to great lengths to demonstrate that his judgment is a natural and therefore reasonable extension of previous common law judgments that is comfortably positioned within the legitimate jurisdiction of the judiciary,[193] Cameron seems to address the broader questions of constitutional values, social norms, and political choice. He argues that the nature or extent of the changes to be brought about is not less significant than common law development within the competency of the judiciary.[194] While Farlam's rhetoric pulled towards indirect application and affirmation of the common law, Cameron's judgment spoke in the language of direct horizontal application and constitutional hegemony.

Justice Cameron addressed the question of community norms when dealing with possible justifications for the rule. In contrast to previous approaches, he refused to sidestep this question and found that constitutional values represent the new *boni mores*—arguably he could not find otherwise, given the assertions that a majority of South Africans viewed the extension of marriage to gays and lesbians unfavorably—[195] but acknowledged that the values embodied in the Constitution are there by the dint of the founders' choices.[196] While asserting the supremacy of the Constitution, he refused to end the debate by simply determining that constitutional values are absolutely conclusive. Rather, he determined that if the constitutional project is to succeed, it is imperative that the nation understand and be committed to constitutional values.[197] This view is a world away from Corbett's conception that the judge reflects and "discovers" the community's sense of justice.[198] In Cameron's view, the judge must exercise choice and must then explain or justify that choice to the community or the nation.[199] Even when the nation is committed to the constitutional project, there is an acknowledgement that values may conflict and contradict each other, and not everyone agrees on outcomes.[200]

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192. *Id.* ¶ 5 (moving the application discussion away from discrete sections composed of direct and indirect, and preferring discussion of the normative obligation flowing from all of the sections read together).
193. *See id.* ¶¶ 102–131.
194. *Id.* ¶ 39.
195. *Id.* ¶ 108.
196. *Id.* ¶¶ 8–11.
197. *Id.* ¶ 20.
198. Corbett, *supra* note 104, at 68.
199. *Id.* at 67.
200. *Fourie*, 2005 (3) SA 429, ¶ 21.

According to Justice Cameron's analysis, it is the Constitution, rather than the *boni mores*, that requires incremental development to take place.[201] Ultimately when the *boni mores* conflict with constitutional values, the values trump—but this does not negate the need to engage with those *boni mores*.[202] It is easy to see how indirect application has come of age in the majority judgment. It seems clear that had it been a case of direct application, it would have looked no different.[203]

D. Constitutional Court: Fourie

When *Fourie* finally came before the Constitutional Court, both common law and legislative issues were on the table: the exclusion of same-sex marriages from the common law definition of marriage and the provisions of the Marriage Act, which explicitly exclude same-sex couples from marrying.[204] The Court easily found that the absence of a provision for same-sex couples to marry amounted to a denial of equal protection of the law and unfair discrimination by the state, and turned to the question of remedy.[205]

Counsel for the state contended that the Court could not indirectly apply the Constitution to the common law and develop the common law definition because only the legislature had the power to cure any substantial and non-incremental defect in the common law.[206] Similarly, they maintained that the Court was not competent to restructure the institution of marriage in such a radical way because the issue was exclusively within parliament's competence and required the public's input due to its great importance.[207]

Justice Albie Sachs, writing for the majority of the Constitutional Court, found it unnecessary to decide whether the Court had power to

201. *Id.* ¶ 23. *See also id.* ¶¶ 40–41.

202. *Id.* ¶ 108.

203. Since the issue of statutory provisions stipulating the heterosexual formula for marriage had not been brought before the court, the practical result of the judgment was that same-sex couples could not marry until legislation was passed to facilitate this.

204. *Fourie*, 2006 (3) BCLR 355, ¶ 15 (CC) (S. Afr.).

205. *Id.* ¶¶ 60–117. According to Justice Sachs, writing on behalf of the majority of the court, equality does not eliminate or suppress difference, rather it means "equal concern and respect across difference"; it does not imply a homogenization of behavior, but the acknowledgment and acceptance of difference. *Id.* ¶ 60. "The issue goes well beyond assumptions of heterosexual exclusivity," but is rather concerned with the "character of . . . society as one based on tolerance and mutual respect. . . . [where] [t]he test of tolerance is of . . . how one accommodates the expression of what is discomfiting." *Id.*

206. *Id.* ¶ 143.

207. *Id.* ¶ 123.

develop the common law only in an incremental fashion, but in the same paragraph cited to an early instance of direct application to support the invalidation and striking down of appropriately challenged, inconsistent common law provisions.[208] He also found that the public had already been extensively consulted by the Law Commission, which had drafted legislation that could be placed in front of parliament within a relatively short period.[209] Hence, on both points the Constitutional Court is competent to act—the question is whether it should grant immediate relief to the applicants, or whether it should suspend the order of invalidity to give Parliament a chance to remedy the defect.

Deciding in favor of the suspension order, Justice Sachs stressed that the issue involved a matter of status that required a secure remedy, which would be found in legislation.[210] Also, in his view, the equality claims in question were best served by respecting the separation of powers and giving Parliament an opportunity to deal with the matter because not only are the courts responsible for vindicating constitutional rights, but the "legislature is in the frontline in this respect."[211] The remedy he ultimately provided declared the common law definition of marriage invalid to the extent that it did not permit same-sex couples the status and benefits accorded to heterosexual couples, but he suspended the declaration of invalidity for twelve months from the date of judgment to allow Parliament to correct the defect.[212]

208. *Id.* The Court emphasized that in striking down the common law offence of sodomy it was not developing the common law but exercising a power under s. 172(1)(a) of the Constitution, which was an example of direct application of the Bill of Rights. But this case was heard under the interim Constitution, and also prior to *Carmichele*, which was the decisive case "giving teeth" to indirect application, and hence, deliberately or inadvertently, charting the path of future jurisprudence. The instances where the Court had explicitly used direct application to strike out a common law rule are limited and occurred during the early years of the Court. In *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) (S. Afr.), the Constitutional Court expounds on the section 8, direct horizontal application clause, but it is difficult to see how that analysis furthers the rubric of indirect application in *Carmichele*. For discussion of the *Khumalo* judgment, see Woolman, *supra* note 47.

209. *Fourie*, 2006 (3) BCLR 355, ¶¶ 125–131.

210. *Id.* ¶ 136.

211. *Id.* ¶ 138. Although there are different legislative options, "this is an area where symbolism and intangible factors play a particularly important role. What might appear to be options of a purely technical character could have quite different resonances for life in public and in private." *Lesbian & Gay Equal. Project v. Minister of Home Affairs* 2006 (1) SA 524, ¶ 139 (CC) (S. Afr.). *See also Fourie*, 2006 (3) BCLR 355, ¶¶ 150–153.

212. *Id.* ¶ 161. Similarly, the omission of the words "or spouse" from the Marriage Act was declared invalid to the extent of the inconsistency with the Constitution, and Parliament was given twelve months to cure the defect. Sachs further provided that should Parliament fail to correct the defects within the period, section 30(1) of the Marriage Act will be read as including the words "or spouse" in the marriage formula. *Id.* Ultimately the Civil Union Act 17 was passed in 2006. For further

In a dissenting opinion on the question of remedy, Justice Kate O'Regan disagreed with the suspension order, adding that the absence of suspension "would not preclude Parliament from addressing the law of marriage in the future, and would simultaneously and immediately protect the rights of [same-sex] couples pending [such legislation]."[213] Her reasoning was that the question before the Court involved a rule of common law developed by the courts, so the responsibility for its remedy lay "in the first place, with the courts."[214] She stressed that in terms of *Carmichele*, the authority for accelerated, indirect application, it was the duty of the courts to ensure that the common law conformed to the Constitution.[215] In her view, while the doctrine of separation of powers was important, it could not be used to avoid the obligation of a court to provide appropriate relief to successful litigants.[216] Although it would have been desirable if the unconstitutional situation identified had been resolved by Parliament without litigation, this does not mean that the Court should not come to the relief of successful litigants simply because an act of parliament might be thought to carry greater democratic legitimacy. Justice O'Regan wrote, "The legitimacy of an order made by the Court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution."[217]

Technically, the O'Regan dissent engaged in indirect application, while the Sachs opinion suggested that direct application is competent, although

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analysis, see the entire issue, 23 S. AFR. J. ON HUMAN RTS. 407 (2007) (dedicated to discussion of sexuality and the law).

213. *Fourie*, 2006 (3) BCLR 355, ¶ 173. The Court has stated this on previous occasions as well. *See, e.g.*, *Zondi v. MEC for Traditional & Local Gov't Affairs* 2005 (4) BCLR 347, ¶ 123 (CC) (S. Afr.) ("Finally it must be borne in mind that whatever remedy a court chooses, it is always open to the legislature, within constitutional limits, to amend the remedy granted by the court.").

214. *Fourie*, 2006 (3) BCLR 355, ¶ 167.

215. In rejecting Sachs's argument for legislative choice and status, Justice O'Regan stated that her proposed order would mean that there would be gay and lesbian married couples at common law whose marriages would be regulated by any new marital regime the legislature chooses to adopt:

> I cannot see that there would be any greater uncertainty or instability relating to the status of gay and lesbian couples than in relation to heterosexual couples. The fact that Parliament faces choices does not, in this case, seem to me to be sufficient for this Court to refuse to develop the common law and, in an ancillary order, to remedy a statutory provision, reliant on the common law definition, which is also unconstitutional.

Id. ¶ 169.

216. *Id.* ¶ 170. O'Regan writes that as necessary as it is that unconstitutional laws be removed from the statute books, it is equally necessary that provisions of the common law that are in conflict with the Constitution are developed in conformity with it. *Id.*

217. *Id.* ¶ 171. "Time and again, there will be those in our broader community who do not wish to see constitutional rights protected, but that can never be a reason for a court not to protect those rights." *Id.*

he declined to employ it.[218] While by virtue of a basic agreement between both judgments in the formulation of the court order, both direct and indirect applications reach the same remedy, the reasons for the difference of opinion on the question of suspension are vital and go to the heart of institutional choice.

The Sachs majority favored suspension of the order since it viewed the legislature as the frontline of law reform in a constitutional democracy.[219] The majority judgment gave particular weight to the fact that the case concerned an issue of status that required a stable remedy, which in Justice Sachs's opinion was a legislative remedy.[220] In contrast, according to Justice O'Regan's judgment, indirect application carried with it the positive injunction to transform common law found constitutionally wanting, making it imperative that courts grant a remedy.[221] She asserted that the legislative process was not more legitimate than the judicial process, particularly in matters involving the common law and stressed, like Justice Cameron, that the common law and its reform are fully within the domain of the judiciary.[222]

The case squarely presented the issue of separation of power and institutional choice. Whilst previous constitutional cases stressed that the positive obligation on the judiciary to transform the common law found constitutionally wanting must be counterbalanced against legislative primacy, O'Regan's judgment took this a step further; it represents the first attempt to chisel out a clear jurisdictional boundary between the legislature and the judiciary.[223] Using indirect application, she found a duty of the judiciary to vindicate the Constitution and grant a constitutional remedy.[224] Hence, she refused the separation of powers argument, and with this, refused to delay relief for a year.[225] She also confronted the institutional legitimacy argument, maintaining that legitimacy comes from the vindication of the constitution, not from the mere institution of the judiciary.[226] However, she stressed in answer to the Osborne-Sprigman democratic critique, that this did not prevent Parliament from passing legislation that complies with the Constitution.[227]

218. *Fourie*, 2006 (3) BCLR 355, ¶ 121.
219. *Id.* ¶ 138.
220. *Id.*
221. *Id.* ¶¶ 152–153.
222. *Id.* ¶¶ 165–173.
223. *Id.* ¶¶ 170–171.
224. *Id.* ¶ 171.
225. *Id.* ¶ 170.
226. *Id.* ¶ 171.
227. *Id.* ¶ 167.

Here, there is a distinct change in the rhetoric associated with indirect application; indirect application, because of *Carmichele*, has urgency and bite and furthers the goals of direct and fundamental, not merely incremental, law reform.

The disconnect between social norms and constitutional values is referred to in the earlier Cameron opinion and then again in the O'Regan opinion. Justice O'Regan wrote that the judicial duty to vindicate constitutional rights operates despite opposition.[228] According to this analysis, judicial function is not to reflect *boni mores* or to change them, for even if social norms run contrary to the decision, the judiciary must not shirk responsibility or allegiance to the Constitution.[229] The underlying notion is that even if this is an unpopular, controversial, and possibly combustive social issue, the judiciary cannot abstain.

Philosophically, neither judgment seeks to insulate the private sphere as feared by first generation academics,[230] nor does either use the language of common law incremental good. The case is a clear example of how far the distinction between direct and indirect application has come. Indirect application bears none of its original imprints on O'Regan's version, but in fact carries a far more urgent obligation on the judiciary to transform the common law.[231] It is easy to see how indirect application fulfills many of the functions of direct application such that the distinction, which had initially been so controversial and divisive, appears to have lost many of its original meanings and associations.

V. CUSTOMARY LAW UNION

In this Part, I will look at jurisprudence regarding judicial recognition of African customary law marriages and the function of the application debate. When applying the Constitution to African customary law, one is immediately confronted with historically subordinate relationship of African customary law to the common law which can be traced to the 1927 Black Administration Act.[232] The purpose of the Act was to re-

228. *Id.* ¶ 171.

229. *Id.*

230. *Supra* note 1.

231. Although Sachs explicitly stated he did not have to decide whether adjudication is limited to the incremental, rather than fundamental, development of common law because of his suspension order, I take his citing of the sodomy case, *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) (S. Afr.), to all but say that direct application and fundamental law reform are within the province of the judiciary.

232. T. W. Bennett explains that the act was introduced to re-establish traditional authority so that the chiefs would be better able to control the young. BENNETT, *supra* note 121, at 41. While the courts

establish traditional authority.[233] It allowed customary law to be applied nationwide, but only in a separate system of courts constituted by traditional leaders and native commissioners.[234]

By the 1980s, when it was clear that Apartheid was failing, the Law of Evidence Amendment Act of 1988[235] was passed and allowed both customary law and foreign law to apply in any court in the country without reference to race.[236] Yet the Law of Evidence Amendment Act also excluded the application of customary law where it conflicted with public policy and natural justice.[237] Chuma Himonga and Craig Bosch contend that the fact that customary law was grouped together with foreign law is indicative of it being something outside the dominant common law system.[238] They comment, "The 'public policy' to which the courts would refer was an embodiment of the sentiments of the small, dominant, white population in South Africa."[239]

Yet the new constitutional era demanded that the relationship between African customary law, common law, and the Constitution be radically restructured.[240] At the very least, African customary law now seems to

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of traditional leaders could apply only customary law, the courts of native commissioners had the discretion to apply either customary or common law. Post-Apartheid legislation in the form of The Recognition of Customary Marriages Act of 1998 recognizes marriages contracted before November 15, 2000, which are valid at customary law and existing at the commencement of the Act. Recognition of Customary Marriages Act 120 of 1998 s. 2(1). Customary marriages conducted after November 15, 2000 must comply with the following prerequisites: both prospective spouses must be above the age of eighteen years old, both must consent to be married to each other under customary law, and the marriage must be negotiated and entered into or celebrated in accordance with customary law. *Id.* ss. 2(2), (3). *See also* S. AFRICAN LAW COMM'N, HARMONISATION OF THE COMMON LAW AND INDIGENOUS LAW (DRAFT ISSUE PAPER ON SUCCESSION) (1998), http://www.justice.gov.za/salrc/ipapers/ip12_prj108_1998.pdf.

233. BENNETT, *supra* note 121, at 42. Bennett writes that the regime was given its decidedly racist stamp by a rule that the jurisdiction of the courts of traditional rulers and native commissioners was only over blacks, and that only blacks could be subject to customary law. *Id.*

234. *Id.*

235. Law of Evidence Amendment Act 45 of 1988.

236.

> Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

Id. s. 1(1).

237. BENNETT, *supra* note 121, at 43.

238. Chuma Himonga & Craig Bosch, *The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?*, 117 S. AFR. L.J. 306, 308 (2000).

239. *Id.*

240. S. AFR. CONST. 1996. s. 39(2) ("[W]hen developing . . . customary law, every court . . . must promote the spirit, purport and objects of the Bill of Rights."); *id.* s. 39(3) ("The Bill of Rights does not deny the existence of any other rights . . . conferred by . . . customary law."); *id.* s. 211(3) ("The

occupy equal status to common law and is not subservient to common law values.[241] But section 211(3) of the Constitution arguably elevates customary law above common law because courts are constitutionally obliged to apply "customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."[242] It is further perplexing to note that section 8(3) of the Constitution, which expressly provides for horizontal application, does not make explicit reference to the development of customary law, whilst the section 39(3) injunction to indirect application does refer to the development of both common and customary law.[243] From this, some commentators conclude that indirect application, or development of customary law, is not an option envisaged by the Constitution.[244] They further assert that it would undermine the status of customary law to hold that only it should be directly tested against the Bill of Rights in all cases.[245]

This part traces two distinct stages in the approach of common law courts to the question of the interaction between customary law, common law, and constitutional law. The first is characterized by the refusal of judges to grant recognition to African customary marriages.[246] Only now, in post-Apartheid courts, the justification for non-recognition is no longer that African customary marriages are contrary to public policy, but that this type of complex law reform lies within the exclusive competence of

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courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.").

241. *See Alexkor Ltd. v. Richtersveld Cmty.* 2003 (12) BCLR 1301 (CC) (S. Afr.). *See also Crossley v. Nat'l Comm'r of SAP Servs.* 2004 (3) All SA 436 (T) (S. Afr.).

242. S. AFR. CONST. 1996 s. 211(3). This obligation is subject to three important qualifications: that customary law is applicable, that it is compatible with the Constitution, and that it has not been superseded by any legislation that specifically deals with customary law. With respect to the latter, customary law was treated as distinct from common law, where statutes automatically override all precedent, custom, and juristic writing. BENNETT, *supra* note 121, at 43.

243. "According to the South African Law Commission, the indirect horizontal application of the Bill of Rights contained in the 1996 Constitution would give the courts grounds for applying the so-called 'living law' instead of the official version to disputes before the courts." Christa Rautenbach, *Some Comments on the Status of Customary Law in Relation to the Bill of Rights*, 14 STELLENBOSCH L. REV. 107, 110 (2003).

244. Himonga & Bosch, *supra* note 238, at 317. Himonga and Bosch ask,

> [W]hat will occur where the court finds that it is required to strike down or refer an offending customary law rule is not clear. If a rule of living customary law is struck down will the court apply a rule from official customary law (if there is such a rule) in its stead? If the court suspends the invalidity of a rule that it has elected to strike down to refer the matter to a competent authority to correct the defect, who would that authority comprise?

Id. (citations omitted).

245. *Id.* at 316.

246. *See id.* at 309.

the legislature.[247] This first stage can be characterized as deploying "non-application" of the Constitution to customary law in the sense that it is neither directly applying nor indirectly developing the common law. Yet the justification proffered is similar to that advocated by the original indirect application proponents.

This discourse of non-recognition, in conjunction with non-application, changes in *Mabuza v. Mbatha*,[248] after which non-application is no longer a viable judicial option, and subsequent judgments must negotiate the terrain between direct and indirect application.[249] In contrast to the common law debate on application, where indirect application emerges as the dominant form, in African customary law jurisprudence, direct application dominates the discourse. In yet another twist, the implications of the Ngcobo dissent in the *Bhe* opinion are that indirect application, thought to be the more democratically deferent approach, signifies greater judicial willingness to intervene in the domain of culture[250] (in the first generation, a case of no cause of action), whilst the consequences of direct application represent the more institutionally deferential argument that the Court lacks democratic legitimacy, empirical understanding, or institutional capacity and must leave the legislature to decide.[251] However, in contrast to *Fourie*, the Constitutional Court did not grant a suspension order, but rather was determined to provide an immediate remedy.[252]

A. Stage One: Non-application of the Constitution

In *Mthembu v. Letsela*,[253] the decedent died intestate leaving behind the appellant—with whom he had cohabited—and a daughter born of that relationship.[254] The appellant brought an application for an order declaring the customary law of primogeniture, which generally excluded African women from intestate succession, to be declared invalid on grounds of inconsistency with the Constitution.[255] She argued that the rule of customary law of succession discriminates against all black women and

247. *Mthembu*, 2000 (3) All SA 219, at 40.
248. 2003 (4) SA 218 (HC, Western Cape) (S. Afr.).
249. *Id*. at 32.
250. This is similar to O'Regan's use of indirect application in her *Fourie* dissent in order to assert the institutional legitimacy of the courts over common law reform. *See Fourie*, 2006 (3) BCLR 355, ¶ 169 (CC) (S. Afr.).
251. *Bhe v. Magistrate Khayelitsha* 2005 (1) SA 580, ¶ 139 (CC) (S. Afr.).
252. *Id.* ¶¶ 107–108.
253. 2000 (3) All SA 219 (A) (S. Afr.).
254. *Id.* ¶ 2.
255. *Id.* ¶ 4.

girls, along with all black children who are not the eldest, by excluding them from participation in intestate succession.[256] She further argued that the rule of primogeniture be developed indirectly in terms of section 35(3) of the interim Constitution with due regard to the fundamental value of equality in order to avoid discrimination between legitimate and "illegitimate" children of the deceased.[257]

On the facts, the Supreme Court of Appeal held that although there had been an agreement between the appellant and the deceased to marry, and bridewealth had been paid in part, the complete requirements for a customary union had not been completed.[258] Consequently, the court found that the daughter was illegitimate.[259] The court rejected arguments in favor of either direct or indirect application on three grounds: (1) the interim Constitution did not apply to the matter since it came into operation after the death of the deceased and the Constitution does not operate retroactively;[260] (2) the interests of justice require the Constitution be applied retrospectively because an illegitimate child in customary law forms part of the family of the maternal grandfather who is obliged to provide for her and there can be no question of the child being thrown out of her home on the basis of her "illegitimacy";[261] and (3) this is not an appropriate case to develop the rule, given that it does not have the relevant information before it.[262] The judge preferred that the development of the rule be left to the legislature after a process of full investigation and consultation.[263] He concluded that "to strike down the rule would be

256. *Id.* ¶ 10.

257. *Id.* Appellant argued that regulation 2(e) was *ultra vires* at common law, as "it constitute[d] delegated legislation which may not be partial and unequal in its operation unless specifically authorized by the enabling Act." *Id.* ¶ 13. In a statement that would later assume great importance, the court stressed that "the regulation in issue did not introduce something foreign to Black persons . . . . [but] merely gave legislative recognition to a principle or system which had been in existence and followed . . . for decades." *Id.* ¶ 23. The judge declared that because the deceased could still have taken steps to alter the devolution of his estate if he so wished and that the wishes of the deceased are still paramount in South African law, "a regulation which respects that right [could not] be said to the [sic] unreasonable and *ultra vires* at common law." *Id.* ¶¶ 23–24.

258. *Id.* ¶ 18.

259. *Id.* Appellant argued that Tembi was still the victim of gender discrimination because the law recognizes the rights of an illegitimate son, but not an illegitimate daughter. *Id.* ¶ 19. The court held that this proposition was incorrect as only a son born during the subsistence of a customary union between his mother and the deceased could succeed to the head of the household if there were no other male descendants. *Id.* ¶ 20.

260. Compare this to the approach taken by Judge Mahomed in *Amod*, where the cause of action also preceded the enactment of the Constitution. *See Amod*, 1999 (4) SA 1319.

261. *Mthembu*, 2000 (3) All SA 219, ¶ 37.

262. *Id.* ¶ 40.

263. *Id.*

summarily to dismiss an African institution without examining its essential purpose and content"[264] and cited a quote from the trial court:

> If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture . . . , I find it difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in s 8 of the Constitution. . . . It follows that even if this rule is *prima facie* discriminatory on grounds of sex or gender and the presumption contained in s 8(4) comes into operation, this presumption has been refuted by the concomitant duty of support.[265]

Consequently, the judge rejected all forms of application of the Constitution to both the common law and customary law, which he argued was within legislative domain.[266] At the same time he put forward his construction of African customary law in a post-Apartheid age of constitutional pluralism.[267] The judge's refusal to look at the actual consequences of his decision on the appellant is particularly striking. Instead, he was satisfied with the theoretical checks and balances contained in customary law.

Mthembu can be seen as ideologically conservative—in the sense feared by the original proponents of direct application—because of its reluctance to intervene in a culture that is perceived by the court to have its own internal safety nets. For corroboration, the court uses the institutional competence argument to find that the judiciary does not have the requisite qualification to develop customary law and therefore should defer to the legislature.[268] The result is that the applicant is left without a remedy.[269]

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264. *Id.* ¶ 47.
265. *Mthembu*, 2000 (3) All SA 219, ¶ 11 (citing *Mthembu v. Letsela* 1997 (2) SA 936 (T) (S. Afr.) (Le Roux, J.)).
266. *Id.* ¶ 40.
267. *Id.* ¶ 47.
268. *Id.* ¶ 40.
269. This argument resembles that found in *Ismail v. Ismail*, where the judge refused to recognize the consequences of a Muslim marriage, and Acting Judge Trengove's comments in his concurrence that recognition would be a retrograde step for the equality rights of women. *Ismail v. Ismail* 1983 (1) SA 1006 (A) (S. Afr.); *id.* at 1024, ¶ G.

B. Stage Two: Common Law and African Customary Law: Separate and Equal under the Constitution

In *Mabuza*,[270] an action for divorce, the plaintiff sought custody of the minor child and an order directing the defendant to pay maintenance.[271] The respondent argued that there had been no valid customary marriage between the parties.[272] On the facts, the plaintiff argued that *lobolo* had been paid, and she regarded herself as married to the defendant.[273] The only requirement that was not complied with was the formal integration of the bride into the groom's family.[274] The plaintiff and defendant disagreed as to whether this was necessary for the marriage to be valid.[275] The judge found that siSwati customary law has evolved over the centuries such that formal integration can be waived by agreement between parties.[276] The case is important for how it defines the relationships between African customary law, common law, and the Constitution.

Judge Hlophe set out his approach to the new legal hierarchy:

> The approach whereby African Law is recognised only when it does not conflict with the principles of public policy or natural justice leads to an absurd situation whereby it is continuously being undermined and not properly developed by courts which rely largely on "experts".[277]

He found this situation to be untenable given that the courts have a constitutional obligation to develop African customary law, both with reference to section 39(2) provisions and given the historical background.[278] In his view, the starting point was to accept the supremacy of the Constitution and reason a priori that all law, including customary law, which is inconsistent with the Constitution is invalid.[279] As a result, he concluded that the "approach which only recognises African law to the extent that it is not repugnant to the principles of public policy or natural justice is flawed" and unconstitutional.[280]

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270. *Mabuza v. Mbatha* 2003 (4) SA 218 (HC, Western Cape) (S. Afr.).
271. *Id.* ¶ 1.
272. *Id.* ¶ 2.
273. *Id.* ¶¶ 7–8.
274. *Id.* ¶¶ 7–9.
275. *Id.* ¶¶ 11, 17.
276. *Id.* ¶¶ 25–27.
277. *Id.* ¶ 31.
278. *Id.*
279. *Id.* ¶ 32.
280. *Id.*

Mabuza ushers in a new discourse, which refuses to subordinate African customary law to common law and public policy repugnance or, in fact, to common law at all. His reasoning seems to be influenced by two separate and related issues: first, the symbolic matter of the inferior status of African customary law to common law, and second, the contention that common law attitudes towards African customary law have resulted in the ossification of that law's development. Judge Hlophe declared that the approach, which only recognizes African customary law if it is not repugnant to public policy or natural justice, is flawed.[281] He rejected the subjection of African customary law to the common law because African customary law does not work through old common law doctrines, but is answerable only to the Constitution, and the current structure of discourse had changed.[282] Judge Hlophe defined a new starting point—the Constitution; any law inconsistent with it is invalid.[283] He would intervene in the arena of custom if it "cannot withstand constitutional scrutiny" since he views it to be parallel to common law and thus clearly within the judicial domain.[284]

It is helpful to look more closely at the way in which the application discourse functions here. Judge Hlophe associates the flexible standards of public policy and natural justice with the subservience to the common law apparatus, and ideologically refuses to subject African customary law to common law—a hierarchy associated with Apartheid.[285] Consequently, he uses the application doctrine as a way to claim equal authority and space for African customary law. He asserts the equality of customary law to the common law by his willingness to invalidate it if necessary.[286] On the particular facts of the case, he develops a customary rule based on empirical evidence of a changed practice.[287]

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281. *Id.*
282. *See id.* ¶ 29–32.
283. *Id.* ¶ 32.
284. *Id.* ¶¶ 31–32.

> The starting point it [sic] to accept the supremacy of the Constitution, and that law and/or conduct inconsistent therewith is invalid. Should the Court in any given case come to the conclusion that the customary practice or conduct in question cannot withstand constitutional scrutiny, an appropriate order in that regard would be made.

Id. ¶ 32.

285. *Id.* ¶¶ 28–31.
286. *Id.* ¶ 32.
287. *Id.* ¶¶ 25–27 (finding that the custom of *ukumekeza* has evolved).

C. Stage Three: Constitutional Court Response and Bhe

In the *Bhe*[288] case, the question before the Court was whether an African woman, whose parents were married according to African custom, was entitled to inherit intestate property upon the death of her father.[289] The Constitutional Court examined two related issues: first, the constitutionality of the Intestate Succession Act and certain provisions in the Black Administration Act, which deal exclusively with intestate deceased estates of Africans,[290] and second, and more significant to this part of the Article, "the constitutional validity of the [unregulated customary law] principle of primogeniture in the context of the customary law of succession."[291] The majority opinion written by Chief Justice Pius Langa endorsed the direct application of the Constitution to the customary law, while Justice Sandile Ngcobo's dissent favored indirect application.[292]

Justice Langa, writing for the majority, distinguished between the concept of customary law contained in the acts and that which was intrinsic to the customary law system.[293] He focused on the new place of African customary law in the constitutional system.[294] That is, African customary law should be accommodated and interpreted in its own setting, not through the "prism of the common law," but with the proviso that customary law rules do not conflict with the Constitution.[295] It follows that customary law must be interpreted by the courts as to whether they first and foremost answer to the contents of the Constitution since "[i]t is protected by and subject to the Constitution in its own right."[296] He explained that the approach taken by Apartheid legislators and judiciaries

288. *Bhe v. Magistrate Khayelitsha* 2005 (1) SA 580 (CC) (S. Afr.). Primogeniture is challenged on basis that precludes widows from inheriting as intestate heirs of husbands, daughters from inheriting from parents, younger sons from parents, and extra-marital children from fathers. The Court concludes that exclusion of women violates section 9(3) of the Constitution the right to human dignity, and other protected rights, as they are a particularly vulnerable group. *Id.* ¶¶ 91–93.

289. *Id.* ¶¶ 10–13.

290. *Id.* ¶ 3.

291. *Id.*

292. *Id.* ¶¶ 218–219.

293. *Id.* ¶ 41.

294. *Id.* Sections 30 and 31 of the Constitution entrench respect for cultural diversity. S. AFR. CONST. 1996. ss. 30–31. Further, section 39(2) specifically requires a court interpreting customary law to "promote the spirit, purport and objects of the Bill of Rights." *Id.* In a similar vein, section 39(3) states that "the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred byz . . . customary law" as long as they are consistent with the Bill of Rights. *Id.* Finally, section 211 protects those institutions that are unique to customary law. *Id.*

295. *Bhe*, 2005 (1) SA 580, ¶ 43.

296. *Id.* ¶ 41.

led to the "fossilisation and codification of [African] customary law which in turn led to its marginalisation. . . . den[ying] it of its opportunity to grow in its own right and to adapt itself to changing circumstances."[297] Yet Justice Langa stressed that customary law can change, and "[a]djustments and development to bring its provisions in line with the Constitution . . . are *mandated*."[298] Ultimately, the judge found that the legislative provisions were unconstitutional and "cannot escape the context in which [they were] conceived."[299]

Regarding the constitutionality of the customary law rule of primogeniture, Justice Langa focused on the society in which it operated as part of a "system [that] had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities."[300] However, the effect of changing circumstances—such as the fact that "[m]odern urban communities and families are [no longer] structured . . . purely along traditional lines"—means that customary law rules of succession are now void of the social implications which they historically had.[301] Since "[n]uclear families have largely replaced traditional extended families[,] [t]he heir does not necessarily live together with the whole extended family," but the rules of succession in customary law have not been given the space to adapt.[302] Justice Langa found that the rule of primogeniture violated dignity and that the theoretical justification that the heir has a principled duty of support was not adequate justification.[303]

In considering an appropriate remedy, Langa touched on the issue of the relationship between judicial and legislative roles in his consideration of three methods to deal with this unconstitutionality: (a) strike it down and leave it to the legislature (direct), (b) strike it down and suspend the declaration of invalidity (direct), or (c) develop the rules of succession (indirect).[304] In rejecting the third method, he wrote that in order to develop customary law, the current content of the law must be determined

297. *Id.* ¶ 43.

298. *Id.* ¶ 44 (emphasis added; internal citation omitted).

299. *Id.* ¶ 61.

300. *Id.* ¶ 75.

301. *Id.* ¶ 80.

302. *Id.* ¶ 92. The Court made extensive reference to the *Richterveld* decision, where the Court noted that indigenous law is not a settled body of formally classified and easily ascertainable rules, but rather by its very nature it evolves as the people who live by its norms change their patterns of life. *Id.* ¶ 153. "Throughout its history it has evolved and developed to meet the changing needs of the community." *Alexkor Ltd. v. Richtersveld Cmty.* 2003 (12) BCLR 1301, ¶ 53 (CC) (S. Afr.). However, the rules of succession in customary law have not been given space to adapt. *Bhe*, 2005 (1) SA 580, ¶ 157.

303. *Bhe*, 2005 (1) SA 580.

304. *Id.* ¶ 105.

prior to giving effect to the order.[305] He emphasized, "The difficulty lies not so much in the acceptance of the notion of 'living' customary law, as distinct from official customary law, but in determining its content . . . against the provisions of the Bill of Rights."[306] Yet another factor to be considered in granting a remedy was the perceived unreasonable lengthy period of time the legislature took to pass legislation.[307]

Because of the material's complex nature, Justice Langa preferred to strike it out rather than develop it so that people in the position of the applicant were able to inherit pending the passage of legislation.[308] However, in order to avoid a lacuna in the law as a result of the invalidation, his order provided that estates that had previously devolved according to the rules in the Black Administration Act and the customary rule of primogeniture will now devolve according to the rules provided in the Intestate Succession Act.[309]

The Ngcobo dissent is largely concerned with the nature of the remedy to be employed. Justice Ngcobo supported the development of the rule of primogeniture to bring it in line with constitutional rights.[310] In many respects, his opinion begins where the majority ended—dealing with the problem of ascertaining the real customary rules, bearing in mind its evolving nature. To avoid looking at customary law through the lens of common law, he advocated looking at the social context in which African customary law originated.[311] He stressed how different this context is compared to that of the Succession Act.[312] In the traditional subsistence-agricultural society, the conception of the successor as holder of property was distinct from that of individual ownership.[313] Instead, the successor

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305. *Id.* ¶ 104.
306. *Id.* ¶ 131 (citation omitted).
307. *Id.* ¶ 114.

> The Court was urged not to defer to the legislature to make the necessary reforms because of the delays experienced so far in producing appropriate legislation. This was an invitation to the Court to make a definitive order that would solve the problem once and for all. That there have been delays is true and that is a concern this Court cannot ignore. The first proposal by the Law Reform Commission for legislation in this field was made more than six years ago. According to the Minister, the need for broad consultation before any Bill was finalised has been the cause of the delays. Moreover, he was unable to give any guarantee as to when the Bill would become law.

Id. ¶ 114.

308. *Id.* ¶¶ 114–116.
309. *Id.* ¶ 117.
310. *Id.* ¶ 139.
311. *Id.* ¶ 162.
312. *Id.*
313. *Id.* ¶ 159.

was understood to hold property in trust on behalf of the clan.[314] On the question before the Court, he found that indigenous law discriminated on the basis of gender, and given the changed social and economic context, could not be justified.[315]

In determining whether the rule should be developed, he stated that section 39(2) of the Constitution imposed an obligation on courts to develop indigenous law to bring it in line with the Constitution.[316] To understand this injunction in the context of customary law, he insisted that *Carmichele* applies equally to the development of indigenous law, and further, the *Carmichele* obligation to develop is even more important in the indigenous law context because the Constitutional clauses together represent a commitment to the survival and development of customary law.[317] This is because using the remedy of striking down ends a rule that many people still observe.[318]

Justice Ngcobo's choice of indirect application was motivated by a concern both for the survival of indigenous law as well as the legitimacy of the Constitution.[319] He argued that, where possible, a court should choose to develop, rather than strike out.[320] He elaborated by providing two specific instances where the need to develop arises: (1) where there are changed circumstances, and (2) to bring the rule in line with the Constitution.[321] It is this latter concept that is articulated in *Carmichele*.[322] Because it is not primarily concerned with changing social context, the latter notion therefore, by ascertaining what living law is, should not be an impediment to development.[323] On the facts, he postulated that a judge does not need to know what the actual, lived rules governing primogeniture are to know that the rule, as applied in *Bhe*, needs to be developed.[324] He thought the majority's substitution of the laws of the Intestate Succession Act would lead to the disintegration of indigenous law.[325] He put forward his own remedy, which holds that, pending the passing of legislation by parliament, both the indigenous law of succession

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314. *Id.*
315. *Id.* ¶ 209.
316. *Id.* ¶ 212.
317. *Id.* ¶ 215.
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* ¶ 216.
322. *Id.* ¶ 218.
323. *Id.* ¶ 216.
324. *Id.* ¶ 220.
325. *Id.* ¶ 229.

and the Succession Act should be applied subject to the requirements of fairness, justice, and equitableness.[326] In the interim, the question of which system of law should apply must be determined by agreement among family members.[327] However, he added a proviso: where there is a dispute, it should be resolved by the Magistrate's Court.[328]

What is striking about both the majority and dissenting judgments is the lack of deference with which they appear to approach the institution of customary law. They argue that customary law has been constructed, tainted, and ossified, instead of adapting to a changing social context.[329] The majority judgment declares that it cannot develop customary law because it cannot ascertain what actual, lived customary law truly is.[330] Underlying this difficulty is the concern that this task is too complex for judicial deliberation, and by implication it is the wrong institution to do so. However, the majority's response to institutional inadequacy is not to defer judgment to the legislature, which it perceives as being unacceptably slow in passing legislation.[331] Rather, the majority refuses to engage in the developmental task associated with indirect application, preferring to simply strike out the innocuous rule.[332] The construction of legislative and judicial roles are somewhat altered in this scheme. Returning to the first generation of the debate, advocates of indirect application argued that common law rules should be developed, not stricken, given that large scale law reform was not in the domain of the judiciary.[333] In that same debate, proponents of direct obligation argued that only direct application could ensure there were no law-free spaces.[334] Yet here the majority judgment strikes down the customary rule as unconstitutional, refusing to develop it on grounds that it is "the development" of the rule that is not within judicial competence.[335]

326. *Id.* ¶ 233.
327. *Id.* ¶ 239.
328. *Id.* ¶¶ 236–241.
329. *Id.* ¶¶ 86, 221.
330. *Id.* ¶ 112.
331. *Id.* ¶ 116.
332. *Id.* ¶¶ 110–113.
333. *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC) (S. Afr.).
334. It will be recalled that Justice Sachs in *Du Plessis*, particularly referred to customary law as an example of where indirect rather than direct application, was appropriate. *Id.* ¶ 189 (using the example of lobola to illustrate that direct horizontal application could require the Court to engage in wholesale striking down because of the violation of equality guarantees). In *Du Plessis*, Sachs favored the indirect approach, which "would permit courts closer to the ground to develop customary law in an incremental, sophisticated and case-by-case way so as to progressively, rapidly and coherently to bring it into line with the principles of Chapter 3." *Id.*
335. *Bhe*, 2005 (1) SA 580, ¶¶ 110–113.

Justice Ngcobo insisted that it is not necessary to know customary law in order to declare the customary rule, as framed in case law, unconstitutional.[336] His understanding of the ideological-institutional axes is different because even if the Court lacks the requisite ability to ascertain actual, lived customary law, the Court can still develop the customary law rule as contained in case law. He was unconcerned with the counter-majoritarian nature of judicial choice, or even the lack of institutional competence of the judiciary.[337] Rather, his allegiance was to the survival of African customary law, which in his view meant that it must not be struck down.[338]

In another twist, the case illustrates or opens up the distinction between direct and indirect application to different usages: while "private" power is not immunized from scrutiny by either the majority or dissent, and hence the concerns of the first generation advocates of direct horizontal application are not met, the labels or methodologies of "direct" and "indirect" now come to signify "how" the Constitution or constitutional values will permeate customary law.[339] Certainly, in Justice Ngcobo's opinion, indirect application displays a commitment to the evolution and survival of customary law; in this multicultural sense indirect goes even further than direct application. Direct application, on the other hand, can be said to reveal the limitation of liberal tolerance or judicial institutional competence. If engaging with the private is a question of degree, indirect application engages it in a way that direct will not. Correspondingly, indirect application signifies an increased judicial role, while direct application, with its remedial tool of striking out, often becomes the more institutionally deferent remedy.[340]

VI. CONCLUSION

The question that asserts itself in this analysis is: why is indirect application the dominant form in common law adjudication, whilst direct application prevails under African customary law? Ultimately both common law jurisprudence under the rubric of indirect application and African customary law under the authority of direct application substantively take on social norms and refuse the privatization of

336. *Id.* ¶ 155.
337. *Id.*
338. *Id.* ¶ 215.
339. *Bhe*, 2005 (1) SA 580.
340. It will be recalled, that in the early debate, Sprigman and Osborne viewed direct application as an instance of gratuitous counter-majoritarianism. Sprigman & Osborne, *supra* note 77.

Apartheid's cloistered attitudes in the widest sense. Similarly, both judgments largely resist the institutional competence argument and refuse to wait for the legislature to perform, arguing that justice must be achieved in the cases before them.[341] Perhaps, sixteen years into democracy, there is awareness that the legislative response to the project of actualizing rights is at best slow and convoluted.[342]

When looking at *Fourie* and *Bhe* together, it appears that there is little difference between the two, other than the former's contention that it is engaging in indirect application, and the latter direct. It is arguable that the distinction makes no difference, and

> a distinction without a difference is a failure even if it's possible for everyone to agree every time on how to make it. Making a difference means that it seems plain that situations should be treated differently depending on which category of the distinction they fall into.[343]

Nonetheless, the question of direct versus indirect application is necessarily tied into conceptions of the equitability of the common law. As argued earlier, one of the original conceptions of direct horizontal application was sourced from a distrust of the common law's equitable unfolding. Proponents of indirect application were more concerned with common law stability and counter-majoritarianism in a post-Apartheid society.[344] Both in form and substance, direct application was intended to disrupt common law incrementalism, whilst indirect application was thought to graft constitutional values onto an already largely equitable system. With this in mind, it is easy to see how the common law cases discussed in this Article are concerned with the continuity and legitimacy of that discourse, hence the move to indirect application and its concern with constraining legitimate avenues for constitutional values to alter the common law form.[345] The starting point of the judgment in *Bhe* is the construal of the nature of African customary law as constructed and

341. Sachs's judgment in *Fourie* reveals limited deference to the legislature by allowing it twelve months to pass legislation, failing which the court order of invalidation automatically comes into effect. *Fourie*, 2006 (3) BCLR 355, ¶ 161.

342. Or as Cameron suggests in *Fourie*, perhaps the legislature does not want to be the decision-maker of such socially contentious issues, and omits to pass legislation in order to force the judiciary into deciding the matter, such as in *State v. Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.), which declared the death penalty unconstitutional. *Fourie*, 2006 (3) BCLR 355, ¶ 161 (CC) (S. Afr.).

343. Kennedy, *supra* note 130, at 1349.

344. Sprigman & Osborne, *supra* note 77, at 50.

345. O'Regan's dissenting judgment in *Fourie*, and Ngcobo's dissenting judgment in *Bhe* disrupt this paradigm, using indirect application to claim judicial non-deference and institutional legitimacy.

ossified by and under colonial law.[346] From there it is an easy step to directly apply and declare the rule of primogeniture unconstitutional. Ultimately, even as the results in the cases of direct and indirect application might be the same, the discourse is different: common law and its processes are legitimated, whilst African customary law is deconstructed. One way to concretize this is to consider the two majority judgments in the Constitutional Court in both *Bhe* and *Fourie*: in *Bhe*, Justice Langa goes out of his way to state that the Constitutional Court does not have at its disposal sufficient knowledge and information regarding living customary law.[347] In other words, the judiciary is institutionally incompetent. But according to the *Fourie* majority, it is not the competence of the Court that is at issue, but rather its legitimacy, given the status of the legislature as the forerunner in law reform.[348]

Nevertheless, it would be remiss to overlook the wider significance of these groundbreaking cases—that a new common law and a new customary law are being created to meet the needs of a democratic post-Apartheid state. Whilst *Bhe* and *Fourie* are concerned with creating the apparatus for this new project, both judgments are acutely aware of the dangers of backlash where constitutional values are so out of sync with those of the populace (or "the nation," as Justice Cameron puts it) that it is not the *boni mores* that are reconstituted by the constitutional values, but rather the constitutional project's loss of some of its legitimacy—or relevance.[349]

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346. *Bhe*, 2005 (1) SA 580, ¶ 86 (CC) (S. Afr.).
347. *Id.* ¶¶ 110–113.
348. *Fourie*, 2005 (3) SA 429 (SCA) (S. Afr.).
349. *Id.* ¶ 20.