POST-MATRIX LEGAL REASONING: HORIZONTALITY AND THE RULE OF VALUES IN SOUTH AFRICAN LAW

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ABSTRACT

The film The Matrix (1999) usefully illuminates why some members of the South African legal community would like to maintain that there are important differences between direct and indirect horizontal application. The legal matrix is a metaphor for a view of the law as reducible to a web of formal rules that either is or should be sealed off from 'external influences' like politics, morality and values in general. The post matrix challenge is to grasp the insight that constitutional values are the whole of the law in South Africa. What those values are and how they are to be invoked and weighed do not exist in a rule or set of rules. The matrix of rules no longer exists as a separate reality (if it ever did). The existence of any rule is contingent on the values that support it. The distinction between the two routes to horizontal application can only be seen to make a difference from within a matrix mindset. There is virtually no difference from within the post-matrix mindset embodied in the 1996 Constitution. The decisions in Holomisa v Khumalo 2002 (3) SA 38 (T) and Khumalo v Holomisa 2002 (5) SA 401 (CC) are evaluated from the perspective of 'post-matrix legal reasoning'. Both decisions erode the illusory distinction between direct and indirect horizontal application of the Bill of Rights.

I INTRODUCTION

'Every thinker puts some portion of an apparently stable world in peril ...'
– John Dewey (1859–1952)¹

There is no reason why gravity should be getting the legal community of South Africa so down, particularly in the debate over direct versus indirect horizontal application of the Bill of Rights. Those engaged in the debate often appear to be suffering under an illusion similar to that of Neo, the protagonist in the film, The Matrix (1999). Neo believes that

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gravity can get him down. He believes that the rules or laws of physics as well as the multitude of social rules which he perceives day in and day out are real and govern his options if not actions in the world. He is caught in the web of the matrix. He does not understand the true nature of the matrix. He does not know that the matrix is a fiction, a construct into which his mind is connected, but in which his body does not really exist. As Morpheus tells Neo, '[t]he matrix is everywhere. It is all around us. Even now, in this very room. You can see it when you look out your window or when you turn on your television. You can feel it when you go to work, when you go to church, when you pay your taxes. It is the world that has been pulled over your eyes, to blind you from the truth'.

With the help of Morpheus, Neo discovers that his body sits in a vat creating energy for the machines that feed the illusionary world of the matrix into his mind. After his body is disconnected from the vat and his brain from the matrix, he is slowly enlightened by those who disconnected him about the real world outside the matrix and about the workings of the matrix itself. 2 This re-birth is an enormous shock, for once outside the comfortable womb of the matrix there is no returning. The world outside is a constant struggle. There can be no reintegration because those outside the matrix are outlaws, both literlally and psychologically. Those who control the matrix wish to destroy these outlaws for they are a threat to the matrix. These outlaws, like Plato's prisoners who have escaped the dark illusionary world of the cave, have seen the light and cannot return to re-integrate themselves into that great lie. 3 They are a threat to that lie.

Once fully enlightened, as perhaps only Neo can be, he is able to interact within the matrix and at the same time transcend its rule-based boundaries. He no longer needs to speed up to dodge bullets but can stop them mid-air with no more than a thought. He no longer needs to run

2 After being separated from the matrix Neo asks 'Why do my eyes hurt? Morpheus, who is the leader of those who have managed to escape the matrix, answers 'You've never used them before'.

3 The Allegory of the Cave is found in Plato's Republic book VII. In the allegory, prisoners are chained in a dark cave illuminated by a fire high up and behind them; their position and gaze are fixed by shackles to the front where puppet images are paraded in front of them; their shadows are cast upon the wall. For them the shadow figures are reality. Thus, should a prisoner escape up into the unbearable light outside the cave and be confronted with the 'real' objects her or his eyes and dispensation would lead her or him to believe these present objects less real than what he or she perceived as reality before. Each step towards the sun would be painful and looking into the sun unbearable. But once he or she became adjusted could he or she in any way think her or his previous existence more genuine, more desirable? And what would happen if he or she were to return and try to convince the others in the cave of her or his superior knowledge? He or she would most likely fail on their terms to be able to pick out the shadows as they do and if he should wish to free them and lead up to the path to enlightenment they would probably rather kill him than follow him?
faster and jump harder to leap buildings, for now he can fly.\textsuperscript{4} Neo is unique for he alone, at this point, is able to fully transcend the laws of the matrix. Everyone else before him and contemporaneously with him, even those unplugged from the matrix, still struggle within its bounds. They are still bound to combating the matrix within its own system of rules. Although gravity does not get them down as much as it does those who are fully plugged in, it still gets them down.

Many people in the legal community of this country apparently still think of the law from within the matrix of rules woven over the last couple of thousand years. They are comfortable within that matrix of rules. They were raised and educated within that tradition and, though often acknowledging that that tradition was tainted by apartheid, it is that tradition and the elaborate matrix of rules that has sustained South African rule of law throughout. For them the law, genuine law, does not exist outside that matrix. For them law is epitomised in a clear set of rules or rule-like propositions. While there are principles that govern rules in the matrix, they take the form of meta-rules that guide the clear functioning of the set of rules found in any particular area of the law. They are principles like Dicey’s notion of the rule of law, or Lon Fuller’s inner principles of law.\textsuperscript{5} They tend to be rules of logic and procedure. So, for instance, legal rules should be general, clear, set out in advance and consistently applied and enforced. In other words, matrix-based principles function to keep the system of rules well ordered. Other values like justice, fairness, good faith, equity and so on are to be viewed suspiciously from within the matrix. No doubt there have always been elements of these values within certain doctrinal areas. The matrix-based attitude towards them is that they are not law-like, and if not confined, introduce uncertainty, or even bias into the law. Such values, if too pervasive, would undermine the law.

For some, the matrix has no doubt been invaded, disrupted and perhaps undermined by what must appear an unruly constitutional regime. For them, the Constitution has not provided a new matrix. The Constitution has not set out a new matrix of rules to supplant, amend or strengthen the fabric of the old. It does not even provide a stable rule of recognition for doing so.\textsuperscript{6} Rather, it – like its human counterpart in the matrix – acts more like a virus, with the potential to eat away at the fabric of rules so intricately woven over the centuries. Rather than setting out a framework of rules, it spins out a set of vague, and often competing values. What rules it does embody are fully exposed to the values they are

\textsuperscript{4} Neo asks Morpheus ‘What are you trying to tell me, that I can dodge bullets?’ to which Morpheus responds, ‘No, Neo. I’m trying to tell you that when you’re ready, you won’t have to’. In the final scene of the film Neo simply flies off into the sky.

\textsuperscript{5} AV Dicey Introduction to the Study of the Law of the Constitution (1885); LL Fuller Morality of Law (rev ed, 1969)

\textsuperscript{6} This assertion will be defended in due course.
said to serve in the Constitution. Thus, they are always susceptible to being changed or re-interpreted in light of those values.

The result: rather than inducing a sense of re-birth, of freedom, an invitation to fly, it induces a sense of vertigo, of boundlessness – of nothing to hold on to, of having no toe-hold on that slippery slope into the abyss of value judgments.\(^7\) The matrix of ‘settled’ and ‘solid’ rules are in flux. Many lawyers in South Africa at this point in time (much like Neo himself) still have the option of confining themselves to the comfort of the matrix of ‘existing’ rules; much of law practice and adjudication continues within the matrix. Nonetheless, at some point lawyers will have no choice but face the illusion they practice under because what keeps them in the matrix is not that set of settled rules but the critical mass of those who still choose to follow those rules while facing away from the sun – the Constitution. The rules only remain solid and settled as long as the practice of law sustains them. As more and more lawyers set upon that painful journey of looking into the sun, and as their vision becomes less and less hazy, the former reality captured within the framework of the matrix will no longer have any gravitational force. It will be those stuck within the dark cave of the matrix who will appear as fools engaging in discussions and arguments about things which only exist as shadows. The more legal discourse begins to take place outside the confines of the matrix the less there will remain of the matrix to be outside. All it takes to begin the process of disrupting the matrix of settled rules in any given case is for one advocate to introduce the constitutional argument.

Most of those who have accepted the invitation and who have awoken to find themselves jolted into the relatively boundless world of the 1996 Constitution\(^8\) operate at best as Neo’s compatriots. Most early attempts are very hazy, unclear, and lack the rigor of clear thinking.\(^9\) After adjusting to the light, a somewhat limited and select group of advocates and judges have learned how to engage the legal matrix strategically, finding its loopholes, weaknesses and places where the 1996 Constitution and its amorphous principles can be injected to propel one across gaps, or deficits in the existing matrix of legal rules of the old South Africa and into the new. This is done in much the same way that Neo’s comrades build their arsenal, notice the glitches in the matrix to avoid detection and neutralisation and make their getaways by leaping across buildings that those plugged into the matrix never could. The average matrix-based

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\(^7\) The worry that is generated by the Dewey epigraph is amplified by the remainder of Dewey’s sentence: ‘... and no one can wholly predict what will emerge in its place’. Dewey (note 1 above) 172.

\(^8\) Constitution of the Republic of South Africa Act 108 of 1996.

\(^9\) This may be captured by what Alfred Cockrell describes as ‘rainbow jurisprudence’ in his evaluation of the early jurisprudence of the Constitutional Court: A Cockrell ‘Rainbow Jurisprudence’ (1996) 12 SAJHR 1.
advocate and judge simply does not have the same tools that a skillful constitutional advocate has. Advocates who would otherwise appear elegant arguing a standard black-letter contract or delict law case suddenly look the fool attempting something like a limitation analysis in the post-matrix arena of the Constitutional Court.

Neo’s comrades have not transceded the matrix. They must fight within the matrix. They must touch down on the rooftop of the next building. Such is the case with the average post-matrix lawyer arguing in the standard matrix-based court. She knows that the ancient rules of the legal matrix are no longer necessarily binding law. They no longer can function simply as rules and their gravitational force is always up for re-evaluation. She has good evidence to this effect through her understanding of the history and processes that brought about the end of the apartheid regime and the beginning of the new constitutional dispensation. She can see that history and the values of the transition embodied in the Constitution and can access them through a relatively straight-forward reading of the text of the 1996 Constitution, and through the judgments of the Constitutional Court. Yet she is confronted with a difficult situation. How deeply should she think and re-think about the ‘existing’ rules of the matrix? How deeply should she challenge the court to think and rethink those rules? How much of the world as we know it is to be brought into jeopardy by this critical re-evaluation? Is there really so much to fear?

Through the elucidation and evaluation of the cases below it will be shown that there is much less to fear than one may suppose when our legal world is brought into jeopardy by its re-evaluation through the values, the spirit, purport and objects of the Constitution and the Bill of Rights. The result is not to undermine the foundations of the law, to unsettle every rule, and to leave every existing right or entitlement in jeopardy. No doubt the exercise will reveal those rules and structures that do not have solid foundations. Those which cannot be supported by the values of the new constitutional dispensation are in jeopardy of being condemned. They will need to be replaced with rules which are supported by those values. Those rules which can be, or are, supported by those values will find a foundation as secure as any set of rules can be. They will find a foundation that draws from a struggle to rid this country of apartheid and its legacy, a foundation built on comprehensive sets of human rights drawn from the best international and comparative practices. In other words, those rules will be founded on values that not only have one of the best democratic pedigrees as evidenced by the struggle and the processes that brought about the Constitution but also


11 This assertion will be defended below.
that sound in the best practices and thinking on human rights jurisprudence to this date.

What I am proposing is a process by which the matrix mindset and its practices are replaced with a post-matrix mindset and set of practices. The matrix mindset and its practices are composed of a comparatively unreflective set of settled rules and practices that have dubious foundations (i.e., foundations that are not supported by any reasonable conception of justice) but are in many ways simply supported by a herd mentality of continuing on, business as usual, for the sake of maintaining order, stability, and predictability. I am suggesting that, more and more, that view is being replaced and should be replaced with a reflective practice in which those rules and structures that ought to be condemned are leveled and new rules and practices are built on the rock of democratic values embodied in the Constitution. Many of the old rules will remain, but they will remain because they have a renewed foundation. They will remain because they are worthy of serving the values of the new regime.

II The Cases

In the pages that follow I will look into the decision of Van der Westhuizen J in *Holomisa v Khumalo* 12 and the decision of O'Regan J on appeal in *Khumalo v Holomisa*. 13 Both cases are important because they should take the matrix-based lawyer some distance up into the light of post-matrix legal reasoning. Van der Westhuizen J could have perhaps gone further in defence of his view that there is no significant difference between an s 39 approach to the development of the common law and an s 8 approach. O'Regan J, too, may have provided a deeper value-based justification for her decision that the s 8 approach in this case does not reveal that the common law of defamation is inconsistent with the 1996 Constitution. The judgment, however, is brilliant in its ability to cut to the core of the underlying issues and values involved. It is exceptionally clear and, at least to my eyes, convincing. It manages to enlighten without any undue staring into the sun – to illuminate without the painful blinding that is often associated with long and deep theoretical constitutional treatments. It should assure those who fear that, should one leave the gravitational force of the matrix, they and the law are likely to float off into the lofty clouds of theory.

My main concern in what follows will be to vindicate the decisions of Van der Westhuizen J and O'Regan J that there is little or no difference between what some may call the direct horizontal application of s 8(2) and (3) and the indirect horizontal application of s 39. O'Regan J in particular goes through the s 8(2) analysis arriving at the same place as

12 2002 (3) SA 38 (T).
13 2002 (5) SA 401 (CC).
the existing common law which had been developed under the equivalent of s 39. I will further vindicate these views from the perspective of post-matrix legal thinking. There is a distinction between the two if viewed from within the matrix but that distinction dissolves once viewed from outside the matrix.

(a) Van der Westhuizen J in Holomisa v Khumalo

Van der Westhuizen J’s judgment in Holomisa is important for primarily one reason, it addresses the issue of whether there is any significant difference between the development of the common law in the area of defamation under s 39 of the 1996 Constitution (and its counterpart s 35 of the interim Constitution15) and s 8 of the 1996 Constitution. It is a good decision because it cuts through what is often at best a superficial distinction and in most cases an illusory distinction. It is not the greatest decision because, in my view, Van der Westhuizen J did not fully support his view on the matter (but that may be understandable in a case heard on exception). What follows is an overview of the decision followed by a justification for why the distinction between the s 8(2)(3) process and the s 39(2) process involves a distinction with little or no difference.

The crisp issue in this case was whether or not the common law of defamation predating the 1996 Constitution is inconsistent with the Constitution insofar as it allows a plaintiff a defamation claim in the absence of pleading and proving that the defamatory statements were false.16 If so, then the claim in the instant case, which was not accompanied by a claim that the defamatory statement was false, would be dismissed on exception.

Van der Westhuizen J began by reviewing the various decisions on the question of onus under the interim Constitution.17 He spent considerable time on the opinion of Cameron J in Holomisa v Argus Newspaper Ltd.18 In that case Cameron J held that it was at odds with the interim Constitution to place the onus of establishing the truth of a defamatory statement on a defendant in the context of ‘free and fair political activity’.19 He further held that even if untrue, a media defendant could

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14 The common law was developed to its present point under s 35 of the interim Constitution in National Media Ltd v Bogoshi 1998 (4) SA 1196 (SCA). As is pointed out by J van der Walt ‘Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-operative Relation Between the Common-Law and Constitutional Jurisprudence’ (2001) 17 SAJHR 341, 357, although the court in Bogoshi went through the constitutional steps it claimed to not base its decision on the Constitution and its values.

15 Constitution of the Republic of South Africa Act 200 of 1993 (‘interim Constitution’).

16 Holomisa (note 12 above) 46f.

17 Gardener v Whitaker 1995 (2) SA 672 (E), De Klerk v Du Plessis 1995 (2) SA 40 (T), Mandela v Falati 1995 (1) SA 251 (W) and Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W).

18 1996 (2) SA 588 (W).

19 Ibid 608C–E, noted in Holomisa (note 12 above) 50B.
not be held liable unless the plaintiff could show that the statements made were unreasonable.\textsuperscript{20} In \textit{National Media Ltd v Bogoshi}\textsuperscript{21} the Supreme Court of Appeal overruled \textit{Holomisa} by holding that truth was still a defence and not an element of the delict, and thus that the plaintiff need not plead nor prove the falsity of the statement. Nonetheless, \textit{Bogoshi} did significantly alter the law of defamation by acknowledging that the right to freedom of expression had been undervalued in the previous dispensation. Further, the SCA in \textit{Bogoshi} held that a re-valuing of that right required that the strict liability rule for media defendants as established in \textit{Pakendorf v De Flamingh}\textsuperscript{22} should be overturned and replaced with a defence against unlawfulness. The SCA arrived at a defence against unlawfulness that was based on proving that the statements published were reasonable or non-negligent, given the circumstances of the case. The court arrived at its decision in \textit{Bogoshi} by balancing the right to freedom of expression in s 15 against the right to dignity in s 10.\textsuperscript{23} The SCA specifically applied its mind to Cameron J’s decision regarding the onus:

The ultimate question is whether what I hold to be the common law achieves a proper balance between the right to protect one’s reputation and the freedom of the press, viewing these interests as constitutional values. I believe it does. Cameron J’s decision in \textit{Holomisa} on the onus of proof in the negligence-based type of defence which he enunciated stemmed directly from the excessive importance which he attached to political activity and from the proposition at 61G–H of his judgment that ‘(r)eputation, though integral to “the essential dignity and worth of every human being” is not to be weighed equally with physical integrity’. I cannot find anything in the text or the spirit of the interim Constitution to support this….\textsuperscript{24}

Given that ss 10 and 15 of the interim Constitution are equivalent to ss 10 and 16 of the 1996 Constitution, is there any difference between a 1996 constitutional claim and an interim constitutional claim? The only real difference appears to be a change in the status of the rights in question.\textsuperscript{25} Although s 15 itself did not significantly change, the limitations analysis under the 1996 Constitution did. As Van der Westhuizen J points out, the limitations analysis under the interim Constitution required that limitations on political speech had to be necessary, whereas the limitation analysis under the 1996 Constitution does not place political speech in a heightened category requiring the necessity of a limitation to be demonstrated.\textsuperscript{26} Further, the limitation clause itself has been reworded to include dignity and to change the order of wording from requiring the infringement to be reasonable and justifiable in an open and

\textsuperscript{20} Ibid 618E–F, noted in \textit{Holomisa} (note 12 above) 49F.
\textsuperscript{21} 1998 (4) SA 1196 (SCA).
\textsuperscript{22} 1982 (3) SA 146 (A).
\textsuperscript{23} \textit{Bogoshi} (note 21 above) 1217F/G–218F noted in \textit{Holomisa} (note 12 above) 53G–I.
\textsuperscript{24} Ibid.
\textsuperscript{25} \textit{Holomisa} (note 12 above) 55.
\textsuperscript{26} Ibid 54H–55A.
democratic society based on freedom and equality\textsuperscript{27} (interim Constitution) to requiring the same in a society based on equality, dignity and freedom (1996 Constitution).\textsuperscript{28} The court also aptly pointed out the heightened salience of the equality and dignity jurisprudence of the Constitutional Court since the 1996 Constitution.\textsuperscript{29}

Van der Westhuizen J went into detailed analysis as to whether or not freedom of expression was the kind of right that could be directly applied to persons\textsuperscript{30} and concluded, unsurprisingly, that it was.\textsuperscript{31} Nonetheless, other rights, such as dignity and privacy also applied in the same way.\textsuperscript{32}

Bogoshi, being decided on the basis of the interim Constitution, was based on a s 35 analysis, which is the equivalent of a s 39 analysis under the 1996 Constitution. Putting aside the possible changes in the status of freedom outlined above and assuming no change in the rights between the two Constitutions then the question whether Bogoshi was binding on Van der Westhuizen J fundamentally depended on whether there is a substantial difference between an analysis based on s 35 of the interim Constitution and an analysis under s 8 of the 1996 Constitution. In exploring how the s 8 analysis would precede Van der Westhuizen J noted that:

If both s 10 and s 16 are horizontally applicable in terms of section 8, a process of weighing-up and balancing competing rights is necessarily required. One right therefore has to be limited in order to insure the protection of another. The vehicle for this is section 36.\textsuperscript{33}

Van der Westhuizen J went on to acknowledge that:

the rule that the defendant publisher bears the onus of proving a defence such as truth and public interest, could indeed be regarded as a common law limit on the right of free expression, which has to comply with the limitation clause. (Supposedly one would be able to argue that any onus on the party who has allegedly been defamed would also then constitute a limitation on such a party's right to dignity, or privacy, which would require a similar process.)\textsuperscript{34}

After rehearsing the copious arguments made on behalf of the defendant to the effect that the former limitation could not be justified,\textsuperscript{35} the court analysed the position on onus in other jurisdictions, starting with the US and moving through Canada, Australia and India, putting particular emphasis (as did Bogoshi) on the Australian position.\textsuperscript{36} The court then went into what it considered a constitutional and philosophical analysis.

\textsuperscript{27} Ibid 55G–H.
\textsuperscript{28} Ibid.
\textsuperscript{29} Ibid 55J.
\textsuperscript{30} Ibid 58–9.
\textsuperscript{31} Ibid 59J–60B.
\textsuperscript{32} Ibid 60D.
\textsuperscript{33} Ibid 60H–I.
\textsuperscript{34} Ibid 60I–61A.
\textsuperscript{35} Ibid 61B–62G.
\textsuperscript{36} Ibid 63H–64H.
of the soundness of the current rule regarding onus. The court re-iterated the view in Bogoshi that truth and public benefit are defences and that a prima facie defamatory statement is unlawful unless these defences are made. Van der Westhuizen J acknowledged that the view that a shift in onus with regard to public officials and perhaps even public figures only (ie not with regard to average citizens) carried some weight. However, he noted that this possible exception would most likely be the rule as it would be rare that prima facie defamatory material regarding average citizens would be in the public interest. Nonetheless the court concluded or conceded that a rule that required the defendant publisher to carry the burden in every case might not pass a limitations analysis.

The defence attempted to argue that Bogoshi was not binding as that case was not one in which truth was in issue. Rather, the argument went, in Bogoshi it was established that the statement was not true and the question in point was whether the defence of reasonableness should be available. The defence thus argued that statements regarding onus of establishing truth were merely obiter dicta. Further, even on the facts of the two cases, it was argued that in the Bogoshi case the facts were within the personal knowledge of the defendant while in the present case it was the plaintiff who was best placed to establish truth.

Without going into much explanation as to why, the court concluded that it was not persuaded that Bogoshi was distinguishable on these bases. But was it distinguishable on the basis that an s 8 analysis would be substantially different? Again, without a great deal of justification, Van der Westhuizen J found that the results of the analysis would be the same. In the end it relied on the fact that the s 36 analysis coupled to s 8(3) would require recourse to such values as dignity, equality and freedom presumably in a similar fashion to the analysis under s 39. The Court further relied on textbook authority to the effect that ‘indirect and direct application of the Bill of Rights to the common law amounts, for all practical purposes, to the same thing’.

The result is that the concessions made above are merely dicta. This is because Van der Westhuizen J found that the court in Bogoshi had weighed all the relevant factors in much the same way as one would under s 8 and therefore that he was bound by the decision of the SCA.

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37 Ibid 65D–F.
38 Ibid 65G–I; 65J–C.
39 Ibid 66C–D.
40 Ibid 66E.
41 Ibid 66H.
42 Ibid 66I.
43 Ibid 66J–67C.
44 Ibid 67A.
45 Ibid 67D.
46 Ibid 68E.
47 Ibid 68C.
(b) O'Regan J in Khumalo

The decision was appealed directly to the Constitutional Court. Before moving to the merits of the issue, O'Regan J, for a unanimous Constitutional Court, first needed to address the jurisdictional question whether the case was a ‘decision on a constitutional matter’ as contemplated by rule 18 of the Constitutional Court rules and, whether it was ‘in the interests of justice’ to have the Constitutional Court hear the matter as stipulated by s 167(6) of the Constitution. Although a number of considerations were addressed, O'Regan J appears to have based her main justification for hearing the case on three grounds: one, the need to develop the common law of defamation is an issue that has frequently been raised in litigation since the interim Constitution; two, the SCA is unlikely to have reconsidered its judgment in Bogoshi; three, Van der Westhuizen J issued a rule 18 certificate signifying that there was a reasonable prospect that the Constitutional Court might reverse or alter his order.

O'Regan J provided a succinct statement of the current law of defamation after Bogoshi and then proceeded to an analysis of the s 16 right to freedom of expression. Although not completely clear, O'Regan J appears to have placed the central value of freedom of expression in two somewhat related notions, one the dignity and autonomy of human beings and two, its role in enabling citizens to participate in public life and make responsible political decisions.

In the next paragraph, O'Regan J noted the media’s special role both as a bearer of the right to freedom of expression and as a bearer of duties. As O'Regan J stated, ‘[t]he ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate’. If the media fails in its mandate, the public at large is deprived of its rights to information and to make responsible political decisions. She continued by pointing out the important watchdog role that the media plays in ensuring that government is ‘open, responsive and accountable to the people as the founding values of our Constitution require’.

Yet, in spite of what appears to be a lofty exaltation of the role of the media and the right to freedom of expression, Justice O'Regan went on to hold that the right to freedom of expression is not paramount. It must, she held, ‘be construed in the context of the other values enshrined in our Constitution. In particular, the values of human dignity, freedom and

49 Ibid para 16.
51 Ibid para 15.
52 Ibid paras 18–21.
53 Ibid.
54 Ibid para 22.
55 Ibid para 23.
56 Ibid para 25.
equality’. Unsurprisingly, the next stop was an analysis of the often competing right to dignity. If not paramount, dignity is foundational. By way of amplification, O’Regan J quoted the decision of the Constitutional Court in *Dawood v Minister of Home Affairs* to the effect that:

The value of dignity in our Constitutional framework cannot ... be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels.

Having said this, O’Regan J went on to note that dignity underlies and weaves together the protection of reputation, dignitas and privacy in the law of delict. Thus, the question of the constitutionality of the existing law of defamation which places the onus of establishing truth on the media defendant in such cases, requires answering the question as to ‘whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other’.

This is where things get a little strange, because according to O’Regan J, the applicants were trying to argue for direct application of the s 16 right through s 8(1) which now binds the judiciary as well as other organs of state. If this was the argument, then O’Regan J was quite correct to hold that such a contention could not be sustained in light of the express distinction between s 8(1) and 8(2) which would imply that when the primary focus is persons rather than the state, one cannot circumvent s 8(2) by alluding to the fact that a judicial decision is state action. No doubt it is state action, however, it is only derivatively so and the primary

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57 Ibid para 25. O’Regan J refers to the discussion in *S v Mamabolo* 2001 (3) SA 409 (CC) paras 40–1.

58 Ibid para 25, citing s 1 of the 1996 Constitution.

59 2000 (3) SA 936 (CC) para 35.

60 *Khumalo* (note 13 above) para 27.

61 Ibid para 28.

62 Ibid para 30. Perhaps counsel for the applicants was arguing that since s 8(1) applies to all law and since the judiciary was included as being bound by the Bill of Rights in the 1996 Constitution, s 8(2) and s 8(3) are meant to apply to types of conduct that are not law. In other words, s 8(1) covers private ‘law’, while ss 8(2) and (3) cover private ‘conduct’ that is not regulated by law (this view is put forward by S Woolman & D Davis ‘The Last Laugh: Du Plessis v De Klerk, Classical Liberalism and the Application of Fundamental Rights under the Interim and Final Constitutions’ (1996) 12 SAJHR 36). But it is difficult to see how such an argument could help their case. If this was the submission it could only make sense within the thinking of the matrix, by thinking that one could derive something more solid and law-like from an s 8(1) direct application than one gets by going through s 8(2) – s 8(3) or s 39. The Court would have to accept the myth that there was a distinction between conduct governed by law and conduct that is outside the law’s bounds. Unfortunately for the argument the law also sets and therefore regulates the boundary of not only that which is prohibited but also that which is allowed. Perhaps these post-matrix advocates saw that they could not win this on
issue in dispute concerns the balancing of rights and duties between persons and not the state. Once it is accepted that the case must be a s 8(2) case rather than a s 8(1) case then s 8(3) follows by necessity should any remedy be contemplated. It is nearly impossible to stretch the language so as to avoid this conclusion. Further, as will be argued below, the values of the Constitution support this approach. As O'Regan J concluded:

Were the applicants' argument to be correct, it would be hard to give a purpose to section 8(3) of the Constitution. For if the effect of sections 8(1) and (2) read together were to be that the common law in all circumstances would fall within the direct application of the Constitution, section 8(3) would have no apparent purpose. We cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose.63

Thus O'Regan J categorises this case as a direct horizontal application case under s 8(2), which one should read as direct mediated application.64

Turning to the question whether the common law is inconsistent with the Constitution, O'Regan J noted that the constitutional interest in cases of untrue statements is at best attenuated as is the constitutional interest in maintaining reputations based on false foundations.65 In fact, in cases of falsehoods (either untrue statements or reputations based on false foundations) neither the interest in the constitutional right to freedom of expression nor the interest in protecting the right to dignity are of central concern.66 The truth of the given reputation or statement is thus crucial for bringing either the expression or the reputation under the interest of the right in question. O'Regan J does acknowledge that, given that it is often difficult to prove the truth or falsehood of statements, it does matter which party has the burden of establishing either truth or falsehood.67 O'Regan J indicates that it is equitable that the risk of

the balance of the substantive values at play and attempted the lawyerly tactic of reverting back to matrix-like arguments. From discussions with Gilbert Marcus which I may have gotten wrong, the main contention was not to avoid s 39 or s 8(3) but rather that the Court in Bogoshi avoided any finding on the constitutional merits. Rather, the court in Bogoshi simply found that the rule in Pakendorf had been wrong all along (see Bogoshi (note 21 above) 1210). This point is also made and strongly criticised by Van der Walt (note 14 above) 356-58. Nonetheless, even Van der Walt concedes that the court did go through the motions of testing its decision against the requirements of the Bill of Rights in perfectly sound fashion, one that can in fact be recommended as formally exemplary for the way horizontal application of the Bill of Rights should be accounted for in future decisions' (ibid 358). In fact, Van der Walt's objection is not on the merits of the analysis but the fact that the court was being disingenuous by acting as if the common law did reflect these values generally and that it was simply the case that Pakendorf had been out of step with the common law and these values all along (ibid).

What is important in any case is that on the substantive considerations the court comes to the correct solution. One can go no further with s 8(1) than this.

63 Kismalo (note 13 above) para 32.
64 Ibid para 33.
65 Ibid para 35.
66 Ibid para 36.
67 Ibid para 38.
proving truth lies on the media defendant because, after all, it was it who chose to publish the material in question. Nonetheless, O'Regan J does recognise the possible chilling effect on legitimate speech of such a rule. This may have tipped the scale for O'Regan J, were it not for the fact that the common law also places the defence of reasonableness on the scales in cases where a defendant is not able to prove the truth of the statement.

As O'Regan J noted: 'Were the Supreme Court of Appeal not to have developed the defence of reasonable publication in Bogoshi's case, a proper application of constitutional principle would have indeed required the development of our common law to avoid this result'.

Thus, in the end, all that is required of the media defendant is that it acts reasonably. Here the defence of reasonableness is to be infused with constitutional values, as O'Regan states:

In determining whether publication was reasonable, a court will have regard to the individual's interest in protecting his or her reputation in the context of the constitutional commitment to human dignity. It will also have regard to the individual's interest in privacy. In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists. It will also have regard to the crucial role played by the press in fostering a transparent and open democracy.

For O'Regan J this strikes the proper balance, US authority to the contrary. The applicants were not able to establish that the common law in its present state is inconsistent with the Constitution.

III A POST-MATRIX ANALYSIS OF WHY THE DISTINCTION MAKES NO DIFFERENCE

There is no question that s 39 and s 8 are distinguishable. The former is often referred to as indirect horizontal application while the latter is direct or direct mediated application. I suspect there is often much ado about this distinction because of its historical origin in the debates over whether s 35 of the interim Constitution allowed for direct horizontal application of the Bill of Rights to private persons, a debate that was settled (wrongly in the opinion of a number of academics) by *Du Plessis v De Klerk*. This was then resettled when the drafters of the 1996 Constitution significantly wounded *Du Plessis* through the addition of s 8(2) and (3) to the 1996 Constitution. Section 8(2) combined with subsection (3) to form something of a compromise between direct and

68 Ibid paras 38; 44.
69 Ibid para 39.
70 Ibid.
71 Ibid para 45.
72 Ibid para 43.
73 US authority in this area should not be countenanced since in the US, freedom of expression is paramount and there is no countervailing right to dignity.
74 1996 (3) SA 850 (CC).
indirect application. The application is directly binding on private persons under s 8(2) 'where applicable' (and this is why Du Plessis is not completely dead) but the remedy for that direct application is substantially similar to s 39, that is, through the 'indirect' route of the common law. But here again, 'indirect' is in inverted commas because if the s 8 remedy took place in any other way (ie by a separate set of constitutional actions as if they were statutory actions carved out from the rest of the common law) it would lead to a very strange anomaly. It would lead to a situation in which s 39 cases integrated the common law with the Constitution and its values, while s 8 somehow provided a hotline to special isolated constitutional remedies that left the common law intact. This, according to O'Regan J is what the applicants were attempting to argue, and this is what she soundly rejected. As will be argued below, this bifurcated approach could only make sense if one is trapped in pre-constitutional thinking or at best interim Constitution thinking. It only makes sense from within the matrix, from a perspective which conceives the Constitution as being outside the proper matrix of the common law, as alien.

(a) The matrix-based view

Contrary to the interpretation of Van der Westhuizen J, De Waal et al in the most recent edition of The Bill of Rights Handbook hold a view that strongly distinguishes direct versus indirect application. They argue that the distinction does make a difference and that direct application founds a constitutional cause of action which overrides normal law and that it has its own rules of standing and its own remedies. They contrast this to indirect application which does not override normal law, does not have its own rules for standing and does not have its own remedies. They further argue that one should consider indirect application before direct application because the former is somehow less constitutional and thus gives more scope for the legislature to do its democratic job. They base this on the idea stated by Kentridge AJ in S v Mhlungu to the effect that it is always better to decide a case without recourse to the Constitution if possible. As the authors note, this position was further accepted by the Court in Zantsi v Council of State, Ciskei. These, of course were interim

75 Arguably s 8(3) is superior from the point of view of guidance to the courts as it calls attention to the potential of limiting other rights in the process and directs the courts to ensure that any such limitation passes the s 36 requirements. This should also be done in any evaluation of the appropriateness of the development of the common law under s 39 if that development limits other rights. The difference under s 39 is that this limitation analysis is done through the more fluid process of balancing the rights in order to come to the overall spirit, purport and objects of the Bill of Rights.

77 Ibid.
78 Ibid 66-7.
constitutional cases and the various procedural reasons for their salience have since diminished with the 1996 Constitution (and the authors concede as much). Nonetheless, the substantive reason arguably remains, and that according to De Waal et al, is to leave the legislature the space to reform the law in accordance with its own interpretation of the Constitution.\footnote{81} The authors argue that because the Constitutional Court has the final say on what the Constitution means it should not put a straitjacket on the legislature (at least not in most cases).\footnote{82}

A similar sentiment is expressed by Chris Sprigman and Michael Osborne in ‘Du Plessis is not Dead: South Africa’s 1996 Constitution and the Application of the Bill of Rights to Private Disputes’\footnote{83} and in their ‘Behold Angry Native Becomes Postmodernist Prophet of Judicial Messiah’.\footnote{84} Sprigman and Osborne see direct application as settling constitutional issues and thus pre-empting the legislature while indirect application is perceived as being non-constitutional, or simply common law and thus amendable by Parliament.\footnote{85} They state that the crucial difference between direct and indirect application is that ‘where a court applies the Bill of Rights indirectly, its judgment is a non-constitutional ruling, which the legislature may overturn, modify, develop or elaborate by ordinary legislation’.\footnote{86} In the direct case, these authors argue that the legislature would need to make a constitutional amendment (citing the dissenting judgments of Ackermann J and Sachs J in Du Plessis).\footnote{87} The authors believe that while in the indirect case there can be a give and take relationship between the courts and the legislature in the direct case it is only the courts that speak.\footnote{88}

(b) Critique of the matrix-based view

Both sets of authors are mistaken in their views. Their views only make sense if we think of the Constitution as some kind of alien import into the domestic common law of this country. It makes sense from within the matrix as a strategy for keeping the Constitution and its infecting values outside the matrix. This may make some sense if viewed either from a US styled constitutional perspective or if viewed from the perspective of the interim constitution, but it makes little sense from the view of the 1996 Constitution. If the Constitution is viewed from a US perspective as a tool for keeping government in its place and limiting its reach into the private lives and activities of individuals, then it makes sense. If the South

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\begin{itemize}
  \item De Waal et al (note 76 above) 67.
  \item Ibid 68–9.
  \item (1999) 15 \textit{SAJHR} 25–51.
  \item (2002) 118 \textit{SALJ} 69–78.
  \item Sprigman & Osborne (note 83 above) 28; Sprigman & Osborne (note 84 above) 696.
  \item Sprigman & Osborne (note 83 above) 28; Sprigman & Osborne (note 84 above) 703–04.
  \item Sprigman & Osborne (note 83 above) 29; Sprigman & Osborne (note 84 above) 704.
  \item Sprigman & Osborne (note 83 above) 30.
\end{itemize}
African Constitution was a constitution of limited national governmental powers, limiting it to those powers enumerated, or one conceived in terms of protecting citizens against the powers of the state, then perhaps viewing it as completely separate from the common law would make sense. It would make sense because the Constitution would be designed to govern a different sphere (the public sphere) and overspill into the area of private law and the private sphere would be exceptional. This was partly what was at stake in the debates over the meaning of application under the interim Constitution and before the certification of the 1996 Constitution. These authors' views also arguably make some sense under the interim constitutional scheme where it was determined that horizontal application was purely indirect and the Supreme Court of Appeal was the crown of a court system that dealt largely with non-constitutional issues while the Constitutional Court was separate from that system and was to deal with Constitutional issues. However, the 1996 scheme does not bifurcate constitutional law from private law or from the common law in general. It neither does so in substance nor, to a large extent, in procedure.

The views of both De Waal et al and Sprigman and Osborne rely at best on the now outdated thinking of the meaning of these categories from the perspective of the interim constitutional debate and *Du Plessis*. Both sets of authors quote the dissenting opinions of Ackermann J and Sachs J in *Du Plessis* to the effect that direct application pre-empts the legislature from doing its democratic job.\(^{89}\) However, both are off point because that decision was based on a different notion of direct application which did not see application taking place through the development of the common law as is the case under s 8(3). There can be little question that the decision was affected by the bifurcated court system that existed then in South Africa and a view of constitutionalism based on something akin to the US model.

De Waal et al still hold on to this view despite the opinion expressed by Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* to the effect that:

> It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, ‘fine-tuning’ them or abolishing them.\(^{90}\)

Ackermann J may have overstated the case, or have even been wrong, but if so he was not wrong in the sense that De Waal et al may suspect. It is not that one approach is more final than the other. Rather, if Ackermann J was wrong it is because both approaches are equally final. If it is final it

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89 De Waal et al (note 77 above) 65, Sprigman & Osborne (note 83 above) 28–9.
90 2000 (2) SA 1 (CC) paras 76; 84 quoted in De Waal et al (note 77 above) 66.
is final in the same way that *Bogoshi* is final. It is final if it arrived at the right balance, not because it falls under s 8(2) or s 39. Neither approach is any more or less inherently ‘constitutional’ and neither inherently pre-empts the legislature to any greater degree.\(^91\)

\(\text{(i) Is there a distinction based on the text?}\)

The distinction between the two approaches to horizontal application may somehow be thought to anchor itself in the differences in the wording of the texts of s 8(2)\(^92\) and (3)\(^93\) and s 39(2).\(^94\) The two provisions sound very different. The wording is different and they conjure up different images. However, upon a close reading, the difference in the meaning of these two provisions reduces to a distinction between giving effect to a right through the development of the common law and developing the common law in light of the spirit, purport and objects of the Bill of Rights.\(^95\)

The former, ‘direct’ route appears more law-like with a relatively clear rule entailing:

1. identifying a right in a provision;
2. applying it if applicable;
3. looking to see if there is legislation that does the job; and
4. if not, developing the common law to give effect to that right; and finally

\(^91\) In the case of De Waal et al I suspect that what has occurred is that Iain Currie has imported his views on judicial avoidance, or minimalism into this debate without fully realising that a court can be minimal or maximum under both s 8(2)-(3) and s 39 (see I Currie *Judicial Avoidance* (1999) 15 *SAHR* 138–65). Section 8(2)-(3) in no way dictates a more maximal approach, nor a more constitutionally binding approach than s 39.

\(^92\) Section 8(2): ‘A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.’

\(^93\) Section 8(3): ‘When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2) a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1).’

\(^94\) Section 39(2): ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

\(^95\) It is true that ss 8(2) and 8(3) deals only with private relationships while s 39(2) applies also to legislation, customary law and common law, including common-law crimes. Thus s 39(2) is capable of infusing the Constitution and its values into the entire matrix of existing law. Johan Van der Walt sees the difference between s 8(2) and s 39 coming to the fore only in those cases in which there is no common law to be developed. Van der Walt (note 14 above) 352. I still do not see the distinction even here for the ‘development’ of the common law does not require that there be a specific action that is slightly changed or developed. A new development can mean a new cause of action. No doubt it will have a clearer anchor if there is a specific provision or right that is determined to be applicable in terms of s 8(2) than if it is based on the spirit, purport and objects of the Bill of Rights under s 39. Nonetheless, as Van der Walt himself argues, the difference between s 39 and s 8(2) should not be seen as dividing line with the former insulating private action (ibid 355). Rather, indirect horizontal application should be ‘understood as a sound and courageous methodological procedure’ (ibid).
(5) making sure that the infringement of any other right is justifiable in the process.

If there is such a thing as constitutional ‘law’ this looks pretty close.

The ‘indirect’ route appears un-law-like, fuzzy with no clear rule. It may be interpreted as requiring, to paraphrase something Dennis Davis might have said, ‘business as usual with a twist’ – in other words, the message is to keep doing what you are doing but have in view these fuzzy amorphous constitutional values in the back of your minds when doing so (the very kind of fuzzy thinking that lawyers and judges like to avoid). 96 This appears to not really be ‘law’ but just new policy integration (ie supplementing boni mores, legal convictions of the community, or general policy). It may appear to the matrix based lawyer and judge to be a fairly innocuous consideration that can be taken or left. At the most, it would compete with the traditional values that already exist within the matrix. 97

After all, it may be argued that the Constitution also embodies the value of the rule of law in s 1. These fuzzy constitutional values tend to undermine the stability and predictability of the rule of law. Even O’Regan J’s decision may be criticised for leaving the law of defamation in a fuzzy state. Rather than providing a clear rule, each rule-like provision is interpreted in terms of the other values of the Constitution. Even the rule of reasonableness articulated in Khumalo 98 is infected with these values. Why is it that when O’Regan J did the s 8(2) analysis it did not look anything like the rule-like process outlined above. Why is it that the analysis looked so much like s 39? Did O’Regan J not violate the rule of law and the Constitution itself in her failure to go through the s 8 procedure line by line? She did not because those matrix-based rules do not exist. With eyes wide open let us look closer.

(ii) The distinction is an illusion

The perceived distinction is an illusion. For the most part, the provisions in the Bill of Rights of the 1996 Constitution and the rights included therein are not rule-like self interpreting provisions. They do not appear

96 This is the kind of thinking that the Constitutional Court has decided that every superior court in the country must engage in when interpreting statutes and developing the common law (see Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)). According to the Constitutional Court: ‘It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately’ (ibid para 39). Courts have a duty to get clear on what may be perceived as fuzzy or unclear values.

97 However, after Carmichele it is clear that this is not how s 39 works.

98 Note 13 above para 43.
in the form of statutory entitlements or administrative regulations. Rather they are worded in language such as this:

Section 10: 'Everyone has inherent dignity and the right to have their dignity respected and protected';
Section 11: 'Everyone has the right to life';
Section 18: 'Everyone has the right to freedom of association'.

Without question, some provisions are more exactly worded and may be argued to give a more exact entitlement, like the right not to have one's 'person or home searched' as part of the right to privacy in s 14.99 However, in this case as well as in most cases in which a right has enumerated subsections, the list is not closed or exhaustive of the right, but illustrative. What happens when other rights are potentially in issue? For example, can someone search your house after seeing you forcibly abduct their child and bring her into your home, or someone else's child, or another adult, their pet, their motorbike? Is a cardboard box under a bridge, or a plastic bag in a doorway a home? If they weren't considered so under apartheid should they be now?

In light of the fact that the boundaries of these rights are open ended, how are the boundaries of the rights to be settled in any given case? As noted by Van der Westhuizen J, any argument by a plaintiff for an interpretation of a right that results in its applicability to private persons will be met with the counterclaim or defence that the right will infringe or limit another horizontally applicable provision and right (if not a number of them). As O'Regan J's analysis demonstrates, the right to freedom of expression is neither paramount nor to be read on its own, but must be read in light of the other values of the Constitution. Any rule-like provision is subject to the interpretive exercise enunciated in s 39. The broader the interpretation, the more likely there will be conflict with or limitations on other rights. The more tailored and limited the application the less likely that it will heavily impact on other horizontally applicable rights. In the end, a balancing must take place between the various rights in issue. The balancing cannot be done, or rather, should not be done by a myopic technical evaluation of competing provisions. It can only be done properly by stepping back and looking at the entire scheme of the Bill of Rights and what it is meant to achieve. This is what O'Regan J did both in interpreting s 16 and in balancing it off against other provisions of the Constitution and their values.

It is only by looking at the spirit, object and purport of the Bill of Rights that the balancing (mutually limiting) process can make

99 It may be thought that provisions like s 36 are more rule-like. Again, if read carefully, one will notice that the limitation analysis provided and often slavishly followed is simply one example of how to determine if the limitation is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom. This is the core of the limitation provision, not the example that follows; although admittedly the example is more 'law-like' it is not 'the law'.

constitutional sense. Not only is this dictated by the logic of viewing the Constitution as a coherent scheme of value, but is dictated by the Constitutional text itself. The s 36 analysis required of s 8(3) limitations asks whether the limitation is 'reasonable and justifiable in an open democratic society based on equality, dignity and freedom'. These values are integral to the spirit, objects and purport of the Bill of Rights. Further, s 39(2) doubles back on any s 8 analysis of 'constitutional provisions' by requiring that they, as pieces of legislation, be interpreted in light of the overall spirit, purport and objects of the Bill of Rights.

Note that it really does not matter how clear and rule-like a provision in the Constitution appears to be; do not be lured back into the comfort of the matrix. No Constitutional provision or statutory provision stands alone under South African law. Each provision of constitutional law, statutory law, common law and custom must be interpreted in light of and/or developed in light of the spirit, purport and objects of the Bill of Rights. Thus, attempting to seek refuge in provisions that appear more rule-like should give the matrix lawyer and judge cold comfort. There are no such enclaves in the Constitution (or so the Constitution, its history and its interpretation by the Constitutional Court says) and even if the community is somehow persuaded that such values are irrelevant to understanding, say, s 5 relating to the colours of the flag to claim that such values are irrelevant to the application of the Bill of Rights cannot be maintained.

Even an appeal to the value of the rule of law cannot assist those lamenting the oncoming of the post-matrix era. Section 1(c) of the founding provisions both declares the foundational value of the rule of law and the supremacy of the Constitution. It both elevates the value of the rule of law and unmoors it from the matrix that had previously given it its life blood. The rule of law is not valued in the sense of merely requiring order under law. Rather the value of the rule of law under the 1996 Constitution is subject to the other values in s 1 and throughout Chapter 2. The rule of law as a value is listed after human dignity, the achievement of equality and the advancement of human rights and freedom as well as non-racialism and non-sexism. When s 1 is read with s 39(2), we see that the value of the rule of law must be read in light of spirit, purport and objects of the Bill of Rights. To interpret the spirit,

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100 See the decision of Ackermann J and Goldstone J in Carnicelle (note 96 above) para 56: 'Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system'.

101 Should there ever arise a genuine dispute regarding those colours, the values of the Constitution would doubtlessly need to be invoked to resolve it. Does it matter that s 5 describes one of the colours as red while the schedule describes it as chilli red? Would any type of green or blue do? How do we know when this rule has been broken? Do they have significance in terms of the values of the Constitution?
purport and objects of the Bill of Rights one must be able to interpret the Bill of Rights and this in turn takes one into the various considerations enumerated in s 39(1).\footnote{Section 39(1): ‘When interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law’.}

The post-matrix reading of every provision, every ‘existing’ rule, must be viewed and may be measured in this way. If it is found wanting then that so called ‘rule’ must be developed in light of the principles and values that animate the Bill of Rights. Rather than a rule of law based on ‘rules’ of law, it is the underlying spirit of the law that is acknowledged as ruling. This finalises the transformation of the quasi rule-like nature of s 8 into the value based s 39. If a given rule lacks that spirit, a principle or set of principles capable of justifying the rule in light that spirit, the rule ceases to be a binding rule of law.

The late Justice Mohamed in \textit{S v Makwanyane} captured the idea nicely:

\begin{quote}
In some countries the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.\footnote{\textit{S v Makwanyane} 1995 (3) SA 391 (CC) para 262.}
\end{quote}

The bulk of the rules of the private common law, no less than those in public law, are part of that past. The question of their survivability cannot rely solely on having secured some firm place in the matrix of precedent over the last two hundred years or more under the notions of stare decisis and the rule of law. The matrix of legal rules is no longer the seat of the law in South Africa. One can disagree with Mohamed J’s standard for determining what parts of the past are incongruent with the spirit of the present and what parts are defensible. There is, again, no simple rule establishing that threshold.

Nonetheless, one may still argue that there are different remedies and special standing procedures that go along with an s 8 claim that do not exist in s 39 claims. The idea that there may be different or special remedies under s 8 as opposed to s 39 is also shortsighted, for should the common law remedies not give full effect to the constitutional values, there is nothing stopping a court from developing the common law to include new or expanded remedies. Nothing is added by calling them constitutional, for there is nothing that is not constitutional from the post-matrix view. The only clear difference in remedy appears to be the notion in De Waal et al that direct application is about conflict between
existing law and the Bill of Rights which, if it exists, would result in a declaration of invalidity.\textsuperscript{104} They claim that indirect application is not about conflict but about avoidance of the conflict through interpretation and/or development of the common law.\textsuperscript{105} Is there really any case outside of criminal common law in which a declaration of invalidity would be required under the common law?\textsuperscript{106} In most if not all cases the conflict is not avoided any more or less by s 8(3) or s 39. Because s 39 is a part of s 8(3) the conflict can often be transformed through the interpretive act. Should a conflict remain, it is overcome by a development of the common law.\textsuperscript{107} To some extent every development of the common leaves the previous common law invalid. That is how the common law and the doctrine of stare decisis or precedent works.

The same would be true of standing to bring a claim which is significantly broader in constitutional cases than in the average civil case (under s 38). Again, there is nothing stopping a court from broadening standing requirements when the spirit, objects and purport of the Bill of Rights require or recommend it.\textsuperscript{108}

Further, given that the Constitutional Court in \textit{Carmichele} has determined that s 39 cases are constitutional matters that can come to it on appeal (and in fact should come to it on appeal after other courts have attempted such developments of the common law)\textsuperscript{109} then it is very difficult to see what the fuss about s 8 versus s 39 can possibly be about. It may be conceded that the addition of s 8(2) and (3) to the 1996 Constitution was inelegant and it would have been nice if it could have been more clearly integrated with s 39. However, finding a common place to integrate the two provisions would have required considerable work given that the s 8 application provision was so far away in terms of the physical text from the interpretation section and since it extends s 8(1). Section 8(3) links s 8(2) to s 39 and s 39 links itself to the whole of the law. For the most part, the debate has gone on as if ss 8(2) and (3) is an alien provision that has been cut and pasted into the Constitution; one that opens a secret door to the Constitution, a hotline of sorts, putting one on the Constitutional fast track, completely bypassing the gradual, amorphous s 39 development of the common law. It’s like the ringing phone in \textit{The Matrix} that once picked up takes you completely out of the matrix and into the world outside. People seem afraid of this fast track, as if it is too Constitutional, too serious, too final, too exclusive. At the

\textsuperscript{104} De Waal et al (note 77 above) 64-5.
\textsuperscript{105} Ibid 65.
\textsuperscript{106} See \textit{National Coalition for Gay and Lesbian Equality v Minister of Justice} 1999 (1) SA 6 (CC).
\textsuperscript{107} Like Neo, post matrix law no longer needs to dodge the bullets of the agents of the matrix. It need not outrun them. Rather, it penetrates them and changes them. Should they not yield to the change, they shall cease to exist.
\textsuperscript{108} There is precedent in constitution based legislation like the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 for expanded standing provisions.
\textsuperscript{109} \textit{Carmichele} (note 98 above) paras 50-5.
same time they devalue s 39 to something of little moment as if those like Neo can really do little damage to the matrix itself from within it. But this is to take something that is inelegant and to make it incoherent. Section 8(2) coheres with subsec (3), which in turn coheres with s 39. Both are equally inside and outside of the matrix in that both are constitutional as was determined by Carmichele.

A decision formed under either s 8 or s 39 is legally binding. It is hard to see how, for instance, a decision that some formulation of the common law is inconsistent with the spirit, purport or objects of the Bill of Rights is going to limit the scope for legislation any less than a decision that the existing common law unjustifiably allows for the infringement of a provision and right (for example, by not proscribing the activity) and that the common law must be developed to vindicate the right. In either case, the legislature can pass subsequent legislation to give effect to the given right or to the spirit of the constitution in general. That legislation will be good law if it can be interpreted under s 39 to be in line with the spirit, objects, and or purport of the Bill of Rights. If interpretive creativity fails and there remains a conflict with a right in the Bill of Rights it can be struck down under s 8(1). If Parliament wants to go back and pass laws to re-instate the common law position, that existed before either the s 8(3) development or the s 39 development, it can, but that effort is likely to fail in the long run.

It will be especially likely to fail if the case worked its way up to the Constitutional Court (as is possible for either s 39 or s 8(3) cases). In such cases, the common law was determined to be in need of development because it failed to pass constitutional muster and that is true whether it failed to live up to the spirit, purport and objects of the Bill of Rights or if it failed to vindicate a specific provision or right in the Bill of Rights. In either case, alternative routes to developing the common law may still be acceptable under either s 8(3) or s 39. Neither contains language that dictates that either is more or less pre-emptive or constitutionally final. The degree to which legislation is pre-empted depends on the breadth of the decision not on the category of s 8(3) or s 39.

The post-matrix challenge is to grasp the fact that constitutional values are the whole of the law in South Africa. What those values are and how they are to be invoked and weighed do not exist in a rule or set of rules. The matrix of rules no longer exists as a separate reality (if it ever did). The existence of any rule is contingent on the values that support it. Post matrix law is not a set of rules that function as rails upon which the engine and cars of law and society travel. They are not made of steel anchored on unshakable ground. Rather, post-matrix law is secured in a web of values which emanate from the Constitution. The Constitution is not a piece of text, a book of rules or even a definitive set of values written down for all time. Rather, it is the legal embodiment of the values of post apartheid South Africa. The Constitution is nothing less than
South Africa in legal form. With its inception, no law in South Africa lives outside it.110

We cannot bend the steel rails of the matrix. We must come to understand that they do not exist. Those rules are not separate from the values and practices that support them. If you do not know what it means to say 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’ then you do not know the law – you do not know South Africa – you do not know what constitutes this nation. Tomorrow has come; today is another country.

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110 As the boy with the spoon said to Neo, ‘Do not try to bend the spoon. That’s impossible. Instead... only try to realize the truth’. And Neo responded, ‘What truth?’ To which the boy answered, ‘There is no spoon’. ‘No spoon?’ Neo retorted. To which the boy answered, ‘Then you will see that it is not the spoon that bends, it is only yourself’.