THICK CONSTITUTIONAL READINGS: WHEN CLASSIC DISTINCTIONS ARE IRRELEVANT

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The aim of this Article is to consider whether certain classic categories for the analysis of the nature and reach of constitutional rights would be better replaced by shifting our understanding of the nature of constitutions and the appropriate way to interpret them. In particular, I wish to suggest this is so for two pairs of contrasts: between positive and negative rights, and between the horizontal and vertical effect of rights. By positive rights, sometimes called socioeconomic rights, I mean an understanding of a right as entitling a citizen to government action, to the production of some good, while a negative right simply prohibits a government from doing something. For example, the right to receive pension benefits in Hungary is a positive right, while the right to publish without prior restraint in the United States is a negative right. Equating positive rights with socioeconomic rights is an oversimplification because the right to police protection against a known threat to life, or the right to intervention by a welfare agency when one's father is a dangerous drunk are positive rights, but not in any simple sense socioeconomic. The right to police protection lay behind a difficult case arising in the United Kingdom, which went to the European Court of Human Rights.\footnote{Osman v. United Kingdom, 29 Eur. Ct. H.R. 245 (1998).} The right to welfare intervention lay behind the complexities of the U.S. \textit{DeShaney} case.\footnote{DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).} Both of these cases involve the claim that a right requires the government actually do something, rather than to refrain from some action.

Vertical and horizontal effect refers to whom can be the bearer of rights against whom, and is partly, but not completely, covered by the American concept of state action. Vertical effect refers to the classic view that constitutional rights lie to the citizen against the state, and that they are necessarily only a matter for public law. The horizontal effect doctrine suggests that one private citizen may owe a duty derived from a bill of rights to another private citizen. In the American context, the ruling example is, of course, \textit{Shelley v. Kraemer}.\footnote{Shelley v. Kraemer, 334 U.S. 1 (1948).} The whole area of horizontal effect remains highly controversial, even in those jurisdictions like Germany and South Africa where it is arguably good constitutional law that bill of rights duties may at times apply between private citizens. I intend to argue that these conceptions are secondary to, and largely unimportant after, a prior decision about how a constitution should be understood and applied. To make this latter distinction,
I have borrowed an idea that first surfaced in a rather different context in American constitutional scholarship—a distinction between "thick" and "thin" readings. This distinction is developed at some length later in this Article. For convenience at this stage, it can be taken to mean a difference between seeing a constitution as a value-impregnated document representing a society's core values rather than a formal delineation of authority and power relationships. A thick reading of a constitutional right attempts to respond to a rights claim in a way fitting the overall ethical aspiration instantiated in the constitution, while a thin reading seeks to apply a minimalist textual interpretation. In the work from which I borrow the idea, discussed later, the distinction is drawn between the range of issues involving "political justice" and the range of issues orthodox or "thin" constitutional discourse sees as capable of treatment. In some ways, the analogy between a "literal" and a "purposive" interpretation of a statute may help us to understand the distinction. Negative and vertical rights orientations follow from, or are examples of, thin readings, whereas the distinctions are useless, and may be damaging if one is committed to thickly reading a constitution.

More generally, positive versus negative rights and horizontal versus vertical effect are just some of the procedural categories used to limit the range and efficacy of constitutional value commitments. If constitutions are to be seen as macro tables of organization combined with limited listings of discrete and freestanding prohibitions of certain government activities, they may be useful. Increasingly, there is an alternative understanding of what constitutions are; within this alternative perspective such distinctions are unnecessary and pointless restrictions serving only to limit the full functioning of the constitution as a value order. I do not claim that these distinctions cannot hold up philosophically. My point is rather that they do not get us very far in understanding, criticizing, or justifying much that goes on in some very important constitutional systems. Instead, I suggest we need to look at a different question: what model of the whole purpose of a constitution did its interpreters have in mind? I suggest, though the point cannot fully be argued here, that any constitution adopted or seriously modified in the last fifty years is one where such classic distinctions are largely otiose. How we are to label these constitutions is tricky because one is immediately in the realm of ideological labelling, a realm where cross-national translatability is notoriously

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5 See discussion infra Part III.
difficult. In one article, which shows how widespread the issue is, on positive
civil rights in Israel, the authors use the idea that these are constitutions arising
since the widespread penetration of socialist ideas. Such language will seem
overtly restrictive to those in countries manifestly not socialist. In a very
powerful argument from which I take much inspiration for my own, Frank
Michelman talks of “liberal justification” — but this is to use the word “liberal”
in American rather than British English. At this stage, I prefer to dodge the
question of to which constitutions my argument applies.

In addition to the positive/negative right distinction, the traditional
horizontal/vertical effect dichotomy and its American counterpart in the state
action doctrine are obvious candidates for this criticism. But the restrictions
on constitutional reach are broader and harder to characterize than simply these
famous distinctions. In the final section of this Article, for example, I take up
a well-known American example of constitutional theory that is not usually
seen in the light of my discussion — the welfare-as-property debate. In German
constitutional discourse, this is very much related to the idea of “positive
rights.” Then there is the question of denying state liability for protecting one
citizen from another where some might see the state as having a duty of
care — DeShaney in the United States, Osman perhaps in the United Kingdom.
The mere fact that these can be seen, and in the United Kingdom would
certainly be seen, as issues in tort law rather than normal constitutional law is
an indicator of the blindness to possible constitutional reach I wish to discuss.
As long as the law of torts is cast in terms of a form of insurance, with a heavy
emphasis on foreseeability, its very core concept, “the duty of care,” can never
be taken as deeply as a constitutionally imposed duty would be. It is inevitable
that any major extension of horizontal effect will trample on an even more
basic classification in legal thought, that between public and private law.
Some of the German critics of the country’s version of horizontal effect do
indeed regularly complain that constitutional law is invading the realm of
purely private legal relationships. Unfortunately, developing this line of

6 Yoram Rabin & Yuval Shany, The Israeli Unfinished Constitutional Revolution: Has the
7 Frank I. Michelman, The Constitution, Social Rights, and Liberal Political Justification,
8 DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989); Osman v.
9 Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 6, 2001, Neue
Juristische Wochenschrift 957 (F.R.G.), summarized in Constitutional Control of Martial
argument would take a whole book even to spell out.\textsuperscript{10} To make this point, I
discuss cases from two jurisdictional areas where a broad application of basic
values has been undertaken seemingly offending the classic distinctions, South
Africa and some of the Eastern European states. Frequently though, we come
across cases that are just very hard to force into the standard classifications at
all.

After introducing a recent Canadian case as an example of how hard it is
in practice to make some of these classic distinctions, Part II develops a critical
justification of positive rights and of giving horizontal effect to all rights. The
thesis is essentially that at least some modern constitutions were intended to
be transformative of social and political life, and must be seen as "purposive"
documents. The idea of transformative jurisprudence is borrowed from a
South African debate, which is carried out not only among scholars but every
bit as much by the judges themselves. Ultimately, I argue that even older
constitutions may have to be seen in this light if they are to continue
functioning.\textsuperscript{11}

In June 2005, the Canadian Supreme Court handed down a judgment which
might be thought to make much of our standard classification of constitutional
rights into positive versus negative rights potentially redundant. The case,
Chaoulli \textit{v. Québéc}, was decided on a 7–2 split with a coruscating joint
dissent, and has already been attacked as an extreme invasion of the legislative
domain by a court.\textsuperscript{12} The Supreme Court struck down a Québec statute that
made it illegal either to buy or to offer private health insurance.\textsuperscript{13} This is a
bulwark, also present in other Canadian provinces, to ensure the state health

\textit{at} \url{http://www.germanlawjournal.com/current_issue.php?id=86} (involving a woman who
managed to persuade the Constitutional Court to overturn the impact of a prenuptial agreement
she had made not to seek financial support in the case of a divorce, arguing that alimony was a
constitutional right she had not had the power to renounce. German family lawyers were
extremely angry about this breach of the public/private divide.).

\textsuperscript{10} Of course this is a staple of "critical legal thinking," as in Duncan Kennedy, \textit{Legal
Formality}, 2 J. LEGAL STUD. 2, 351 (1973), but I have a broader and more strictly constitutional
perspective in mind.

\textsuperscript{11} For an academic account of the idea of transformative jurisprudence, see Karl E. Klare,
For a judge's version, see Dikgang Moseneke, \textit{Transformative Adjudication}, 18 S. AFR. J. ON
HUM. RTS. 309 (2002).

\textsuperscript{12} Chaoulli \textit{v. Québéc} (Attorney General), [2005] 1 S.C.R. 791. For commentary, see Recent
Case, \textit{Due Process—Right to Medical Access—Supreme Court of Canada Holds That Ban on
Private Health Insurance Violates Québec Charter of Human Rights and Freedoms}, 119 HARV.

\textsuperscript{13} Chaoulli, 1 S.C.R. 791.
care system does not lose resources to the private sector. Both the court of first instance and the Court of Appeal of Québec had upheld the statute, the former after very lengthy and detailed empirical examination of expert witnesses. The argument of the claimants was very simple. The Québec health care system was overloaded and involved lengthy waiting lists for many medical procedures. Patients, some of whom could have had private medical treatment had they been allowed to buy private medical insurance, were therefore dying or suffering prolonged and excessive reduction of their quality of life. The statute therefore abridged the citizen’s right under the Charter of Rights and Freedoms. Article Seven of the Charter provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The majority opinion by Justice Deschamps describes how she saw the issue:

when my colleagues ask whether Québec has the power under the Constitution to discourage the establishment of a parallel health care system, I can only agree with them that it does. But that is not the issue in the appeal. The appellants do not contend that they have a constitutional right to private insurance. Rather, they contend that the waiting times violate their rights to life and security. It is the measure chosen by the government that is in issue, not Québecker's' need for a public health care system.

Does this case involve a positive or a negative right? The right to life can be a simple negative right against the state—when police get too trigger-happy in the street, perhaps. It can be held to forbid capital punishment, as the Hungarian Constitutional Court hurried to find in 1990 and the South African Court found in 1994. It can be used to ban abortion, given certain

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14 Id.
15 Id.
17 Chaoulli, 1 S.C.R. 791, para. 14 (emphasis added).
18 The Canadian Supreme Court has often discussed, and always struck down, the idea of positive rights being justiciable in this way. The most recent and clear-cut case before Chaoulli was Gosselin v. Québec (Attorney General), [2002] 4 S.C.R. 429, where there were fierce dissents by three of those in the majority in the later case.
assumptions about the legal status of the fetus. (Though here the right may transgress another boundary and become a horizontally applicable right, given that states themselves seldom seek to terminate life in utero.) In *Chaoulli*, it is hard to see the right quite in these simple negative terms. Québec is being forbidden to do something—restrict insurance—because this policy, in interaction with another policy—the funding level for the public health service—increases the risk to life beyond some nominal level. Justice Deschamps is clear about this: “the waiting times violate their rights to life and security.” This only makes sense against a measure, however vague, of a minimal health entitlement because clearly the right to life cannot be breached absolutely by any wait. As two of the concurring justices put it, “[b]y imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of [Section] 7 of the Charter.” The dissenters in a sense agree:

> What, then, are constitutionally required “reasonable health services”? What is treatment “within a reasonable time”? What are the benchmarks? How short a waiting list is short enough? How many MRIs does the Constitution require? The majority does not tell us. The majority lays down no manageable constitutional standard. The public cannot know, nor can judges or governments know, how much health care is “reasonable” enough to satisfy ... [Charter Rights]. It is to be hoped that we will know it when we see it.

If the right to life in Canada is a negative right, the state would be prevented only from intentional deprivation of life, not from bringing about a state of affairs in which some may die when they could have avoided it but for the state’s action. At the very least, if negative, the right is negative in some unusual way. It is a right to some condition, not to state inaction. The problem really is not so much that this is not a negative right, but that the negative-

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20 *Chaoulli*, 1 S.C.R. 791.
21 *Id*.
22 *Id.* para. 14.
23 *Id.* para. 105 (Mclachlin, C.J. & Major, J., concurring).
24 *Id.* para. 163 (Binnie & LeBel JJ., dissenting).
versus-positive distinction quite fails to capture what is extraordinary about Chaoulli and can lead us not to notice how the substance of rights claims accepted by constitutional courts is widening and changing rapidly.25

There has long been a muted hostility on the part of constitutional experts to the idea that a bill of rights might contain a special sort of right, usually referred to as either a "positive right," a "socioeconomic right," or a "third generation right."26 I refer to a muted hostility because it is hard to find any extensive discussion. The idea that such rights are not real, or certainly not justiciable, seems to have been more an article of faith than the result of serious inquiry. Yet in the last fifteen years, such rights have, on several occasions and in several countries, been successfully pleaded before constitutional courts without dire political consequences.27 But positive rights are only one of the ways constitutional jurisdictions are widening their scope. At least as controversial is the idea of "horizontal effect," by which constitutional rights are brought to bear on the behavior of private actors to each other, rather than only on the state/individual relationship. Typically in the literature this is translated, for purposes of American comparison, as a version of the state action doctrine. While it is not clear that this translation always helps, I am happy to adopt it here.28 Other situations where courts may impose values drawn from a constitution outside the classic vertical negative rights exist and are never easy to categorize. Perhaps the most important is where the state is held liable, possibly for what may be explicitly described as "constitutional damages," when it has failed to protect one individual against


26 A very powerful critical analysis of the arguments against positive rights, though where the main thrust is tangential to my concerns here, is given by Michelman, supra note 7.


actions of another, actions which would be unconstitutional (or simply criminal) if carried out by the state itself. These later cases raise many of the same concerns as both positive and horizontal rights jurisprudence without quite being either. If we are to get some grasp, for either normative or sociological analyses, on this expanding reach of constitutional values, we need to find a way of treating all these forms of action, and perhaps others, as part of a general thrust.

There has been considerable theoretical work on human rights in the last twenty years, much of which has opposed the simple positive-versus-negative distinction. However, this seems largely not to have touched the more practical discussions in courts and by constitutional lawyers who concentrate on what courts actually do, as opposed to philosophers and writers on jurisprudence. Consider, for example, the useful literature on positive rights before the European Court of Human Rights (ECHR), where the distinction is still retained even when opposition to the justiciability of such rights is removed. As far as my practical concerns with using constitutions thickly, or "richly," the ECHR would be better seen as a court that no longer maintains a positive-versus-negative distinction. It may well be, as has often happened in legal development, that a vocabulary will last longer than the ideas it grew from. My aim here, therefore, might be seen as much a matter of pruning vocabulary as actually pressing for new ideas. Either way, my goal here is to sketch such a general categorization and to relate it to the overall nature of constitutions. For now I retain the traditional categorizations to introduce the core idea of a new approach. The next Part discusses some of the leading cases across the range to develop further the main themes—that of a new broader categorization and its link to rival conceptions of what a constitution is.

II. POSITIVE RIGHTS AND HORIZONTAL EFFECT

In some jurisdictions, constitutional adjudication is taking on a role quite unlike the traditional Western conception of it, a role within which positive rights are not only permissible, but necessary. As suggested earlier, I find it

29 A good start to this literature and approach is Ida Elisabeth Koch, Dichotomies, Trichotomies or Waves of Duties?, 5 HUM. RTS. L. REV. 81 (2005).
30 See, for example, the careful analysis in ALASTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS (2004).
31 See D.M. Davis, Adjudicating the Socio-Economic Rights in the South African
best to use a very simple definition of a positive right. The normal, "negative" form of a constitutional right consists of a prohibition against the government from doing something, for example, censoring speech or arresting an individual without probable cause. A positive right involves an instruction to the government to provide citizens with some benefit, for example, a pension, medical treatment, or basic housing. Part of the reason the case against positive rights has not often been made very fully may be that the concept covers so much, and, for much of what it contains, the argument against it hardly needs to be made. Where a constitution commits the state to full employment policies, for example, it takes little argument to support the idea that this does not give a justiciable claim to anything whatsoever. But not all putative positive rights are anything like this. Nor, crucially, have all the successful claims for judicial enforcement of socioeconomic benefits actually been based on individually-oriented rights at all, but on more general commitments to maintain certain constitutional values like "the rule of law." There are really two logically separable arguments usually deployed against positive rights: one derived from the idea of the separation of powers, and one derived from a restrictive notion of the competence and capacity of courts to undertake certain types of analysis or to make certain types of decisions.

The basic arguments against positive rights focus on the nature of the decision a court has to make if it enforces such a right. At times the argument is dressed up in the language of the separation of powers. To grant a positive right is to make a substantive, and often distributive, policy decision and such matters, it is said, are simply not the province of the judiciary. The trouble is that the separation of powers doctrine is itself under-theorized, as most of it concentrates on why the executive and legislative powers should not invade each other's territory or that of the judges, and revolves around avoidance of tyranny. There is remarkably little account given of why, in principle, judges should not trespass on the territory of the other two branches, except for a generalized claim based on relative democratic legitimacy. Yet, though some

32 See, e.g., David Robertson, A Problem of Their Own, Solutions of Their Own: CEE Jurisdictions and the Problems of Lustration and Retroactivity, in SPREADING DEMOCRACY AND THE RULE OF LAW?: THE IMPACT OF EU ENLARGEMENT FOR THE RULE OF LAW, DEMOCRACY AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS (Wojciech Sadurski et al. eds., 2005).
33 See Sunstein, supra note 27.
34 Cross, supra note 27.
35 A good example of this approach is an interesting recent study of what the author calls "the new constitutionalism," RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND
people do become incensed about the lack of electoral legitimacy of an appointed judiciary, it is unclear why the positive/negative distinction should be relevant. Either it is part of liberal democracy that judges can override the elected lawmakers where the constitution grants them this power or not; the nature of the intervention is hardly germane. The separation of powers is arguably an asymmetric doctrine: the ban on the executive or legislative invading the court’s province follows from the most entrenched of due process ideas, the old common law rule of natural justice, \textit{nemo in sua causa}, and implies absolutely nothing about positive rights.

The less grandiose version of the argument focuses on competence—courts do not have the wherewithal to make substantive decisions on who should get what benefits from the state budget, and judges do not have the training to make such choices. In fact, much the same argument can be made against several major Western legislatures, which would leave the executive in sole control. Nonetheless, there is clearly some merit in this argument, though probably not enough to get very far in the real world. The argument from competence can be divided into two parts. One part claims incompetence in working out the technical details of a policy—how exactly a specified medical benefit or housing entitlement should be delivered. It is probably true that courts cannot do this as well as the executive, but it is not true that they necessarily have to do this anyway as positive rights must be result-oriented. One may have a justiciable right to a particular medical treatment or educational benefit, but one cannot be seen as having a right to any specific mechanism for the delivery of these rights. \textit{Chaoulli} may well be on point: the dissenters made much of the court’s inability to assess the merits of the Québec health system, but in fact the majority never pretended to do any such thing. The other part of the argument concentrates on the core question of the entitlement to a costly benefit. This part, because it implies judicial connotations...

\textbf{CONSEQUENCES OF THE NEW CONSTITUTIONALISM} (2004). He is part of a developing American school of constitutional lawyers who are critical of and disappointed in courts, but not for traditional reasons.

36 Furthermore, as some American writers note, critics of positive rights apply the argument to such rights under American state constitutions, where the bulk of the judiciary is in some way or other elected. See Helen Hershkoff, \textit{Positive Rights and State Constitutions: The Limits of Federal Rationality Review}, 112 HARV. L. REV. 1131 (1999).

37 Cross, \textit{supra} note 27.

38 \textit{See Minister of Health & Others v Treatment Action Campaign & Others} 2002 (5) SA 721 (CC) (S. Afr.).


40 Cross, \textit{supra} note 27.
control over the state budget, is seen as necessarily unacceptable. The obvious criticism of this part of the argument was made by the South African Constitutional Court when it ruled on the compatibility of the final Constitution with the fundamental principles set out in the Interim Constitution it was due to replace. As the court said:

> even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.

In particular, the court noted that “[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion,” which is one way of looking at what the Canadian Supreme Court did in Chaoulli. Similar arguments have been made by some academic constitutional lawyers, and the problem is not restricted to constitutional review.

There is also the question of a state’s constitutional “duty of care” obligations. The most noted cases also involve the right to life, a right that has been in constitutions for a very long time, but has always been a “negative” right, denying the state’s authority to take life except in special circumstances. As soon as one conceives of the state having a duty to protect, one turns a negative into a positive right. Can it possibly be the case that such a distinction, tantamount to Clough’s “thou shalt not kill; but need not strive

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41 In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) (S. Afr.).
42 Id. para. 77 (emphasis added).
43 Id. para. 78.
44 Chaoulli, 1 S.C.R. 791.
officiously to keep alive," can really produce non-justiciability? Yet, of course, major cases in the common law world involved in this complex of horizontal effect/duty of care/positive rights have indeed turned on that, to note only two—the classic American case, *DeShaney v. Winnebago County Department of Social Services* and, before the ECHR, *Osman v. United Kingdom*.47

### III. THIN AND THICK CONSTITUTIONALITY

I borrow the idea of a "thin" constitution from United States constitutional argument. European academics do not always realize that the United States of America, home of restrictive welfare conceptions and of judicial-constitutional hostility toward anything resembling a positive right, has itself been engulfed in a fierce debate on such rights, at least in academic circles, for several decades.48 Though seldom with success, positive rights claims have certainly been litigated, and have met with at least some judicial interest in state courts.49 At the beginning of the article, whose title provides the heading to this Part, Lawrence Sager comments:

Constitutional case law is thin in this important sense: the range of those matters that are plausible candidates for judicial engagement and enforcement in the name of the Constitution is considerably smaller than the range of those matters that are plausibly understood to implicate serious questions of political justice. This moral short-fall is one of the most durable and salient features of our constitutional life, one that begs for explanation.50


50 Sager, *supra* note 4, at 410.
Sager’s argument, along with insights provided by Tushnet and Michelman, is the core inspiration for this discussion. Sager suggests that one has to choose between seeing the constitution itself as impoverished, as failing to have relevance for most matters of political justice, or seeing the history of U.S. constitutional law as one of systematic under enforcement of rights which are actually there. A similar approach is quite common in U.S. law journals. Several scholars in particular stress the fact that state, though not the federal, constitutions very frequently contain positive or socioeconomic rights, but that state courts have been over influenced by the U.S. Supreme Court’s negative attitude toward them. I return to this issue.

A “thicker” constitution might be one where constitutionally enshrined values permeate most legal decisions about when a duty is owed, largely irrespective of who owes the duty or the precise nature of the duty according to traditional categorizations. This thicker sense of the constitution’s role is hard to deal with within the orthodox language of positive/negative, horizontal/vertical, tort liability of state agencies, and so forth, because these categorizations impose artificial boundaries on a broader concern. Thus, there is a move to seeing the constitution as embodying social values rather than being predominantly a road map or table of organization. This seems a plausible, if unusual, approach to some constitutions. It seems appropriate to say that a modern, literate, politically sophisticated population, in adopting a constitution, is making a choice that its society should be characterized by a set of values and entitlements, and that governments, as well as other public actors, have a duty to help deliver these. It makes much less sense that the public intends such value instantiation to pass through a net of legal procedural assumptions about which it knows nothing. Surely that was part of what the South African and Eastern European electorates were doing when they voted for replacements to their authoritarian systems. It is at least arguable that something similar was the intention of the Canadians in supporting their Charter. One would be on much weaker grounds assuming the same support for thick constitutionality with, for example, the United Kingdom’s Human Rights Act or the New Zealand act, given that these were imposed on a

51 Sager, supra note 4.
53 Moseneke, supra note 11.
55 HIRSCHL, supra note 35.
largely ignorant population by elites. The extent to which one can attribute this deeper sense of what a constitution represents when it comes about with no widespread public involvement is very difficult to work out. Can a governing elite commit a people to a value set without something like a referendum or a general election that focuses the question? One reason it is difficult is that there is everywhere considerable latitude given to governments to make international commitments, which may bring with them value commitments to a way of doing things inside the country. In the case of the U.K.'s Human Rights Act, a large part of the government's motivation for passing it was that the country was already committed to the European Convention on Human Rights as a matter of international treaty obligation. The fact that the United Kingdom regularly lost when one of its citizens took it before the Human Rights Court in Strasbourg was a matter of considerable embarrassment. The United Kingdom hoped that making the Convention justiciable in British courts would reduce the number of such embarrassing defeats.

Had Britain traditionally been a monist country in terms of international law theory, as are most European countries, this would not have mattered. A current example of the problem is that the South African parliament is considering a constitutional amendment to get around its Constitutional Court ruling against the death penalty. But the government's legal advisors are stressing the incompatibility of the death penalty with international obligations the Republic of South Africa has accepted. While I present the issue here as one of legal theory, it may well better be seen as one of political sociology. What really matters is whether a country's citizens see

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56 Part of Hirschl's argument is that not only are the people not engaged in this type of situation, but that the elites' motives are suspect. See id. I doubt his argument, but it is nonetheless quite powerful.

57 An obvious example is the accession to the European Union. When the United Kingdom's Parliament passed the European Communities Act 1972, Section 2 provided that "[a]ll such rights ... from time to time created or arising by or under the Treaties ... are without further enactment to be given legal effect ... [and] shall be recognised and available in law ...." European Communities Act 1972, 1972, c. 68, § 2(1). Thus, values were incorporated which, at the time, neither the government nor the public can be said to have chosen.


61 Id.
their constitution in a particular light, though this will in turn be influenced by
the way the political elite talk about it. At least one reason the United
Kingdom’s citizenry is lukewarm about the Human Rights Act is that the
government, which introduced it, now castigates the judges every time they
thwart government policy by applying it.

One can think of a spectrum, one end of which represents a fully conscious,
intentional public acceptance of a constitution as embracing a value compact,
and the other as public indifference to, or possibly ignorance of, any value
aspect to the constitution. On such a spectrum, other countries might be seen
as in a middling position. Exactly what the French thought they were doing in
1958 when they gave the Fifth Republic Constitution resounding support
cannot be known, but it was certainly not a vote just to continue the past. The
Conseil constitutionnel has argued powerfully and creatively that this vote, by
ratifying values in the preamble to the Fourth Republic Constitution and the
1789 Declaration of the Rights of Man, justifies it in applying its own
construction, the Bloc de constitutionnalité.\(^6\) If one considers cases
concerning equality and nondiscrimination in France, it is clear that what I call
a “thick” reading of a constitution certainly takes place, and that judicial
creativity has made this possible despite the actual text of the French
constitution being an open invitation to thin readings. One set of cases in
particular is of interest because it shows that there is no necessary connection
between the “thickness” of a reading and the “liberalness” of that reading in
the usual sense that “liberal” is used. These are the cases on gender equality
in the electoral system where the Conseil constitutionnel held for as long as
possible to a strong sense of Republican equality, which forbade taking notice
of a politician’s gender in writing electoral laws that would have mandated a
quota of female candidates.\(^6\) In the end, the Conseil had to bow to a
constitutional amendment, which in itself makes a useful point: thick readings
are not dangerous to democracy but may well force a very clear public
statement of what the constitutional values are if equally thick judicial and
political readings conflict.\(^6\)

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\(^6\) FERDINAND MÉLIN-SOURCRAMANIEN, LE PRINCIPE D’ÉGALITÉ DANS LA JURISPRUDENCE DU
CONSEIL CONSTITUTIONNEL 219–21 (1997).

\(^6\) The cases come from a period stretching from 1982 to 2000. CC decision no. 82-146DC,
Nov. 18, 1982, J.O. 3475; CC decision no. 98-407DC, Jan. 14, 1999, J.O. 1028; CC decision
no. 2000-429DC, May 30, 2000, J.O. 8564. For a good analysis, see LOUIS FAVOREU & Loïc

\(^6\) See FAVOREU & PHILIP, supra note 63.
Similarly, one might not be able to claim that the Polish or Czech populations had anything very clear in mind in embracing their new constitutions; no one could deny that the judicial stress on reintroducing the rule of law (and interpreting that phrase very thickly) in these countries is something the people cannot be held to have wanted.\textsuperscript{65}

I propose therefore to claim that a "thick" reading of a constitution, one which ignores traditional legal restrictions in order to ensure the delivery of entitlements and the saturation of public life with constitutional values, is appropriate for at least some societies. The societies in which a thick reading is appropriate are especially those where the constitutions, in their bills of rights, and frequently, in their preambles and limitations clauses, spell out the core values.\textsuperscript{66} At this stage, progress can only be made by exploring the cases, which the rest of this Article does. This way I hope to give some substance to Sager's idea of delivering political justice—by looking at cases where it would be just to activate these rights and unjust to refrain from doing so because they fail to fit a negative or vertical test. In the alternative, I discuss cases where a court has applied thick readings and has refused to let classic legal doctrines and categories get in the way of delivering constitutionally derived justice.

In fact, some courts, including above all the South African Constitutional Court, are actually charged by their constitution with the duty of developing their common law in the light of constitutional values.\textsuperscript{68} A very good example of how to read existing legal doctrine through constitutional eyes is a recent South African case where three policemen, while on duty, gave a lift to a woman stranded in a city and then raped her.\textsuperscript{69} A standard common law problem of vicarious liability was transformed into a constitutional issue when the Constitutional Court overturned the courts below.\textsuperscript{70} The lower courts had

\textsuperscript{65} Robertson, supra note 32.
\textsuperscript{66} Although he would probably be as surprised as anyone at the Chaoulli decision, David Beatty describes this process of deducing a social value compact from constitutional language very well in his account of Canadian constitutional jurisprudence in David Beatty, The Canadian Charter of Rights: Lessons and Laments, 60 MOD. L. REV. 481 (1997).
\textsuperscript{67} See Sager, supra note 4.
\textsuperscript{68} See, e.g., S. AFR. CONST. 1996, § 8(3)(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 . . . ."
\textsuperscript{69} K v Minister of Safety & Sec. 2005 (9) BCLR 835 (CC) (S. Afr.).
insisted on applying a test by which the huge deviation between what the policemen did and what their employer intended them to do precluded vicarious liability of the latter. This decision is a very clear indication that at least some modern constitutions are value-imposing public decisions, not road maps. Here, O'Regan, for the court, early equates the South African Constitution to the German Constitution. She cites approvingly a German statement that the Basic Law embodies "an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the Legislature, Executive and Judiciary." O'Regan insists that: "Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system." The full extent of this radiation of constitutional values is considerable. It extends to a duty to "be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue." In the present case, the constitutional right to safety, combined with the police force's duty to ensure this right, operates to make the police authority liable vicariously. Not only did the policemen rely on their positions to trick the woman into trusting them, but they committed a further sin of "constitutional omission" because their duty was precisely to protect her. The South African Constitution may be clearer on this point than many, but others certainly imply a duty like that set out specifically in South Africa's section 39(2)—the Canadian Charter does, and some readings of the U.K.'s Human Rights Act would impose a like duty on the courts. What differs is more the willingness of the courts to develop

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71 Minister of Safety & Sec. 2005 (9) BCLR 835 paras. 8–9.
72 Id. para. 15.
73 Id.
74 Id. para. 17. Section 39(2) of the South African Constitution reads: "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." S. AFR. CONST. 1996, § 39(2).
75 The duty of a court to act where legislation is inadequate leading to a constitutional omission is also found explicitly in the Hungarian Constitution, though there it does not apply to acts of individuals. See CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT (László Sólyom & Georg Brunner eds., 2000) [hereinafter CONSTITUTIONAL JUDICIARY].
the constitutional law thickly than the material available with which to do so. How much of the South African willingness to give a thick reading follows from the influence of the German court is hard to know. Certainly it does regularly cite German case law, but this is common among post-1990 courts everywhere. The influence of German constitutional law is hard to overemphasize, but as yet not fully treated in the scholarly literature. There are clear examples in Central and Eastern Europe, especially in Hungary, though in this case, the sources of the influence are clearer: many of the Hungarian academic experts, as well as some of the country’s judges, studied in Germany before their anti-communist revolutions. The South African court has less training in continental European legal thought, obviously. Indeed, references to German cases in South African judgments are sometimes directly made to the standard English language treatments of the court, like those of David Currie and Donald Kommers, rather than to actual German court reports. At times, the South African judges themselves seem unsure as to how some German concepts got into their constitutional law. This was particularly clear, for example, in early discussions of the limitations clauses in the first version of the South African Constitution, which appears to have been modelled on the German Basic Law. The concept, that no law shall abridge the “essential content” of a right, raised considerable difficulty for the court:

Section 33(1)(b) provides that a limitation shall not negate the essential content of the right. There is uncertainty in the literature concerning the meaning of this provision. It seems to have entered constitutional law through the provisions of the German Constitution, and in addition to the South African Constitution,

79 Including the first president of the Hungarian Constitutional Court, László Sólyom. There is an excellent treatment of the German influence on that court in CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY (2003). Sólyom’s own account suggests a less automatic influence than does Dupré’s account. See CONSTITUTIONAL JUDICIARY, supra note 75.
appears, though not precisely in the same form, in the constitutions of Namibia, Hungary, and possibly other countries as well.\footnote{S v Makwanyane & Another 1995 (6) BCLR 665 (CC) para. 132 (S. Afr.).}

This was a crucial case early abolishing the death penalty, and the German constitutional case law on sentencing was extensively quoted, but all citations were from Kommers and Currie.\footnote{KOMMERS, supra note 80.} It is interesting to note that this troublesome concept was omitted, probably partly because of the difficulty judges had with it, in the final version of the constitution in 1996. The South African court does indeed make extensive use of other nations’ jurisprudence, as it is encouraged to in the constitution, but it is in no sense a slavish following. It often uses U.S. cases too, but as Albie Sachs, one of its leading members, has pointed out, much more frequently in the dissenting opinions.\footnote{Albie Sachs, Justice, Const. Ct. S. Afr., Private Lecture at Middle Temple, London (July 23, 2006).} It seems more to be a case of Germany being the first country to embark on a thickly read constitution acting as a beacon to others, rather than a careful transmission of dogma. In the South African case, of course, the dominant Dutch-Roman model of legal thinking makes a continental European grafting onto a case law country more natural than it might be elsewhere.

It might be objected that to see all such issues as examples of the normal legal process of applying a duty of care is inappropriate, and I certainly use it only as a heuristic device here. Nonetheless, a focus on the “duty” aspect rather than the “rights” aspect may help. As far as seeing a constitution as a value statement goes, the emphasis certainly helps. An interesting parallel argument for seeing constitutional adjudication less as a matter of rights claims and more as concerning acceptable arguments for the state doing or failing to do something is made by Richard Pildes and touches on the whole idea of thick or thin reading.\footnote{Richard H. Pildes, Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. LEGAL STUD. 725 (1998).} Constitutional adjudication is indisputably about vetting arguments, and as such has little actual use for categorizations of claims. In more concrete terms, the huge literature, and even greater mass of case law, on both limitations clauses and the jurisprudence of legitimate discrimination are much more about how to instantiate constitutional preambles with their value declarations than about granting some, but not other forms of rights.\footnote{DAVID ROBERTSON, CONSTITUTIONAL REVIEW IN A COMPARATIVE PERSPECTIVE: THE
extreme version of my argument might indeed be that the way we see constitutional arguments currently makes it look rather like the old common law concentration on forms of action than it can really be. For simplicity of exposition, one can see the process of thick reading as contained within two dimensions. One dimension covers the range of the constitutional values over actors, the other the range of values to be instantiated. The first dimension is in large part about the horizontal effect distinction. The second contains, though is not limited to, the positive rights/negative rights distinction. The next section of this discussion is about dimension one, the range of constitutional values across actors.

IV. THE FIRST DIMENSION: CONSTITUTIONAL THICKNESS AND HORIZONTAL EFFECT

This "thicker" orientation to constitutionalism is of course seen preeminently in the work of the German Federal Constitutional Court, which, as I note above, has had a marked and openly avowed influence on the Hungarian and other Central and Eastern European courts in addition to the South African courts. Arguably the horizontal/vertical dispute most closely and directly involves the idea of thick constitutionalism. Certainly a methodology rather like the German version of proportionality makes constitutions more easily thickly interpreted because of the inevitable balancing of values that a wide-ranging judicialization of political justice involves. Admittedly, though having its admirers, the German version of horizontal effect, usually described as giving constitutional rights a radiating effect into other legal contexts, has not been much applied. Until very recently, the South African Constitutional Court (SACC) has been unwilling to use the horizontal effect powers the politicians gave it, at first weakly in the Interim, then more defiantly in the final Constitution. In a recent case I will

NATURE AND FUNCTIONS OF JUDICIAL REVIEW (forthcoming 2008).

86 See discussion supra Part III.
87 The whole area of German constitutional interpretation is rich and complex. Useful ideas for my point here are found in Susanne Baer, Equality: The Jurisprudence of the German Constitutional Court, 5 COLUM. J. EUR. L. 249 (1999). The classic text used by the South African Constitution Court (SACC) itself is KOMMERS, supra note 80.
88 President of RSA & Another v Modderklip Boerdery Ltd. & Others 2005 (8) BCLR 786 (CC) (S. Afr.). A fascinating account of the difficulties that drafters of the Interim Constitution had with the legal profession over horizontal effect is given in RICHARD SPITZ & MATTHEW CHASKALOSN, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S
consider later, the SACC handed down an order virtually identical to that of the court below, but refused to use the horizontal effect doctrine deployed there and instead fell back on a version of a general rule of law argument. This argument itself, however, looked more like the distinctly “thick” readings of the “rule of law” found in Eastern Europe than a classic common law world reading. On the other side, the Canadian Supreme Court famously stamped down hard the first time it was invited to make the Charter horizontally effective. The opportunity occurred in a case where a trade union claimed that an injunction against secondary picketing breached the Charter rights of freedom of association. What was at stake was whether the Charter’s provision that it applied to the “Parliament and government of Canada” could make courts, as part of the state, unable to apply any law in breach of a Charter right. The Canadian court was clear that it was not to be seen as part of the state in that sense and left only the narrowest of openings for some form of indirect horizontal effect, ruling that courts should develop common law “in a manner consistent with the fundamental values enshrined in the Constitution.” The Canadian court accepted that the Charter must govern common laws as well as statute, but only when the government was directly implicated in the litigation. No principled reason was given for this restriction—the arguments were pragmatic:

[T]he better view is that the Charter applies only to government action. To hold otherwise would be to increase the scope of the Charter immeasurably. In cases involving arrests, detentions, searches and the like, to apply the Charter to purely private action would be tantamount to setting up an alternative tort system.

It was vital that the Canadian Supreme Court establish firmly that it is not part of the government for Charter purposes, lest it be caught by the “state action” argument the Americans have used to justify horizontal effect in the


89 See discussion supra Part II.
91 Id. For commentary, see W.A. Bogart, Courts and Country: The Limits of Litigation and the Social and Political Life of Canada (1994).
92 Retail, Wholesale & Dep’t Store Union, [1986] 2 S.C.R. at 603.
93 Id. at 597 (quoting A. Anne McLellan & Bruce P. Elman, To Whom Does the Charter Apply? Some Recent Cases on Section 32, 24 Ala. L. Rev. 361, 367 (1986)).
rare case they have allowed it. The court achieved it by fiat in a virtually tautological argument:

The courts are, of course, bound by the Charter as they are bound by all law. *It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute.* To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter.*

The italicized words are important—to the Canadian judges it appeared that the court could in some sense be neutral as to whether the values of the Charter should pervade Canadian society or not. This interpretation is a perfect definition of a “thin” view of a constitutional court’s business. It is interesting to note in passing that the Human Rights Act in the United Kingdom, perhaps intentionally, removed this escape route. The Act refers not to government but to “public authorities,” and the only example it provides is that a court is a public authority. The main argument of the Canadian court in this case is not an argument at all, but a firm statement that bills of rights exist only to protect individuals from the state, and thus it is simply “inappropriate” to broaden them. There is no recognition of the idea that rights need protecting against all powerful abusers. Even *Shelley v. Kraemer,* restrictive though it is, gives more chance of a thickness to constitutional reasoning than is possible in

94 *Id.* at 600–01 (emphasis added).
95 *Id.*
   (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
   . . .
   (3) In this section “public authority” includes—
      (a) a court or tribunal, and
      (b) any person certain of whose functions are functions of a public nature. . . .
Canada, at least in this respect. However, it is always difficult to know quite how to characterize American state action doctrine in a comparative context. Is it best seen as the gateway through which a thick reading may be given or the limits to such a reading? As one commentator pointed out on “state action” during the Burger era, the language of the Constitution:

defines, on the one hand, a governmental duty, such as a duty to provide all citizens the equal protection of the law. Any private conduct which is deemed state action is subject to this duty. On the other hand, the concept of state action is a dividing line that bars the use of these constitutional restrictions on government to regulate purely private life and private decision-making.

Some of the best arguments against thick, value-enshrining constitutional arguments exist within the American literature that supports the restrictiveness of Shelley, especially the arguments stressing the meaningfulness of value pluralism.

Very probably horizontal effect in the sense of a freestanding right whereby one individual would sue another for deprivation of a constitutional right, absent any other legal basis, has never been intended by any constitution drafter, mainly because it would not have occurred to anyone. To the extent that there are any English answers as yet, the firm statement, perhaps obiter, by Dame Butler-Sloss in one of the few English cases where any such claim has been made that “the claimants in private law proceedings cannot rely upon a free-standing application under the convention,” very probably represents what will become the law. But strict direct horizontal effect—one private actor suing another for breach of a constitutional right where no common or statutory law applies—is a difficult scenario to imagine. The classic cases are not like this. Dolphin in Canada, Du Plessis in South Africa, Shelley in the

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102 Geddis gives an interesting analysis of the way some New Zealand judges are toying with strict direct horizontal effect, and the New Zealand Bill of Rights was, after all, the model for the U.K.’s Human Rights Act 1998. Andrew Geddis, The Horizontal Effects of the New Zealand...
THICK CONSTITUTIONAL READINGS

United States, and even the paradigmatic Lüth in Germany all involve people seeking to escape from having a well established law applied to them because it breached a constitution. Even if Du Plessis and Dolphin were not necessarily wrongly decided, it is fairly clear that there is something odd—let us call it "thin"—about these situations. Essentially, it means ruling that the constitution allows an existing common law rule to be applied in a way that would be unconstitutional in a newly drafted statute. These cases are about balancing rights, usually one right well entrenched in either the common law or its equivalent, against another derived from the constitution. These cases involved, variously, the right not to be defamed (Lüth), the duties of those under restrictive covenants (Shelley), and protection against the inducing of a breach of contract (Dolphin). These entrenched rights come up against a new moral order that invites a balancing against other less familiar rights, which almost serve as new defenses to be argued, and which fit quite well with Pildes' claim that balancing rights is seldom a good description of what goes on in these cases. Any court in this position has to weigh principles. The German court, with its proportionality doctrine, finds such weighing a natural thing to do because it has already committed to the idea of the constitution as a new and prevailing moral order. The arguments of courts which refuse to do this, as with the Canadians, the South Africans at times, and usually the Americans (for Shelley is, after all, very restrictive), are eclectic. While there is no standard reason produced for not giving the thicker understanding of a constitution, the attitude cited earlier from Dolphin is typical, that "to apply the Charter to purely private action would be tantamount to setting up an alternative tort system." However, this argument is invalid if one starts from


103 In Shelley, 334 U.S. 1, the Court upheld a decision that refused to enforce restrictive covenants to not sell houses to black families on the grounds that a court's involvement would implicate racial discrimination contrary to the Fourteenth Amendment. Du Plessis & Others v De Klerk & Another 1996 (5) BCLR 658 (CC) (S. Afr.), was the first horizontal effect case under the Interim Constitution, and it involved an attempted defense against a defamation suit using that constitution's freedom of speech guarantee. See also Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Lüth, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (F.R.G.).

104 See supra note 103.

105 See Pildes, supra note 84.


107 See supra note 93 and accompanying text.
the premise that constitutions, when drafted, are intended to produce a radically pervasive spread of new values throughout a system. Perhaps the designers of the Canadian Charter had no such intentions, though nothing in it precludes such an interpretation. Equally, there can be no doubt that the German and the Central and Eastern European constitutions were specifically so aimed. In part, the question for us is whether it is possible any longer to refuse to hold this newer view of constitutions. The rest of this discussion proceeds by discussing cases in two contrasting modern constitutional settings: post-apartheid South Africa and post-communist Eastern Europe.

V. SOUTH AFRICA’S DU PLESSIS CASE IN DETAIL

It might seem odd to analyze Du Plessis, given that the court in this case decided not to apply a horizontal-effect rationale.\(^\text{108}\) It is precisely because in it one can see the tension between this decision and the general thrust of modern South African jurisprudence that it helps us consider why constitutions should be interpreted thickly. From the earliest days of South Africa’s post-apartheid constitutional discourse, one finds, repeatedly and proudly, claims that the constitution is indeed meant to be a value-pervading instrument.\(^\text{109}\) In this early case, this approach seemed to be rejected through a fear of horizontal effect.\(^\text{110}\) The majority’s argument in Du Plessis, like the Canadian argument in Dolphin, is purely pragmatic, focused largely around the idea that imposing constitutional values on the common law is too big a task, even an inappropriate one, for the Constitutional Court.\(^\text{111}\) At the same time, the dissent by Justice Kriegler is the most powerful of all cries that under a new constitution this is a task that absolutely must be carried out.\(^\text{112}\) For the majority, the problems of direct effect were just too great. The main opinion by Justice Kentridge contains many of such anxieties, amounting almost to a confession of inadequacy on the part of the Constitutional Court.\(^\text{113}\) The

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\(^{108}\) Du Plessis 1996 (5) BCLR 658.


\(^{110}\) The SACC has moved on from this early position in *K v Minister of Safety & Security* 2005 (9) BCLR 835 (CC) (S. Afr.). The argument was a development of ideas found four years earlier in *Carmichele v Minister of Safety & Security & Another* 2001 (10) BCLR 995 (CC) (S. Afr.), so the restrictive approach discussed in this section was not long lasting.

\(^{111}\) Du Plessis 1996 (5) BCLR 658.

\(^{112}\) *Id.* para. 113.

\(^{113}\) *Id.* para. 53.
argument is essentially that constitutional review is difficult and the judges should defer to parliament even where, because it was common law, there was no parliamentary intent to defer to!

The majority's preference is that constitutional values should permeate via the routine common law interpretative work of the ordinary courts. However, this position, perhaps the most common one internationally, is subject to a fatal logical flaw. What if the ordinary courts do not perform this function? What happens where a litigant pleads that the existing law be modified in the light of the constitution and the court refuses? Either the constitution gives a litigant a right of appeal to the constitutional court, or the constitutional values do not operate within the system. There is no way out for the court. If it truly believes in a thick interpretation, it cannot logically deny a form of direct horizontal effect and cannot permanently evade taking cases. In fact, even those who support the decision in Du Plessis have had to read a long-stop protection by the Constitutional Court into the majority opinion, somewhat unconvincingly. Whatever they may say, only a judge committed to thin constitutionalism can take the position the majority took on this case. The question is whether the South African Constitution actually permits a thin reading. But it was not only those whose commitment to the all-pervasive idea of a constitution in any case being weak who rejected horizontality here. The oddity of the decision is perhaps best shown by the fact that the court's most radical member, Justice Sachs, stated thus:

I have no doubt that given the circumstances in which our Constitution came into being, the principles of freedom and equality which it proclaims are intended to be all-pervasive and transformatory in character. We are not dealing with a constitution whose only or main function is to consolidate and entrench existing common law principles against future legislative invasion. Whatever function constitutions may serve

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114 Id. para. 62.
in other countries, in ours it cannot properly be understood as acting simply as a limitation on governmental powers and action. Given the divisions and injustices referred to in the postscript, it would be strange indeed if the massive inequalities in our society were somehow relegated to the realm of private law, in respect of which government could only intrude if it did not interfere with the vested individual property and privacy rights of the presently privileged classes. That, to my mind, is not the issue. I accept that there is no sector where law dwells, that is not reached by the principles and values of the Constitution.\textsuperscript{116}

It is remarkable to find that his opinion, which could be the paradigm of thick interpretation, continues as though simply an addendum to the defense from technical inadequacy: "[t]he judicial function simply does not lend itself to the kinds of factual enquiries . . . which appropriate decision-making on social, economic, and political questions requires."\textsuperscript{117} This argument, for what it is worth, is at least as applicable to the enforcement of positive or socioeconomic rights, about which Justice Sachs is deeply enthusiastic. Given such reluctance, even from a judge like Sachs, it is hardly surprising that the one dissenter, Justice Kriegler, starts his opinion by castigating the majority:

The second point concerns a pervading misconception held by some and, I suspect, an egregious caricature propagated by others. That is that so-called direct horizontality will result in an Orwellian society in which the all-powerful State will control all private relationships. . . . That is nonsense. What is more, it is malicious nonsense preying on the fears of privileged whites, cosseted in the past by laissez faire capitalism thriving in an environment where the black underclass had limited opportunity to share in the bounty. I use strong language designedly. The caricature is pernicious, it is calculated to inflame public sentiments and to cloud people's perceptions of our fledgling constitutional democracy. "Direct horizontality" is a bogeyman.\textsuperscript{118}

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\textsuperscript{116} \textit{Du Plessis} 1996 (5) BCLR 658 para. 177. \\
\textsuperscript{117} \textit{Id.} para. 180. \\
\textsuperscript{118} \textit{Id.} para. 120. \\
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\end{flushright}
Justice Kriegler makes a strong case for not just the desirability of direct horizontal effect, but its necessity:

The way I read the Preamble and the Postscript, the framers unequivocally proclaimed much more sweeping aims than those . . . apparently accepted by some of my colleagues. Our past is not merely one of repressive use of State power. It is one of persistent, institutionalized subjugation and exploitation of a voiceless and largely defenceless majority by a determined and privileged minority.119

His conclusion is very simple, and in many ways more strict constructionist than the otherwise more conservative majority:

My reading of Chapter 3 gives to the Constitution a simple integrity. It says what it means and means what it says. There is no room for the subtleties and nice distinctions so dear to the hearts of mediaeval theologians and modern constitutional lawyers. The Constitution promises an “open and democratic society based on freedom and equality,” a radical break with the “untold suffering and injustice” of the past. It then lists and judicially safeguards the fundamental rights and freedoms necessary to render those benefits attainable by all. No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the State can possibly bring those benefits. The fine line drawn by the Canadian Supreme Court in the Dolphin Delivery case and by the U.S. Supreme Court in Shelley v. Kraemer between private relationships involving organs of State and those which do not, have no place in our constitutional jurisprudence.

. . . . We do not operate under a constitution in which the avowed purpose of the drafters was to place limitations on governmental control. Our Constitution aims at establishing freedom and equality in a grossly disparate society. And I am grateful to the drafters of our Constitution for having spared us the

119 Id. para. 125.
jurisprudential gymnastics forced on some courts abroad. They were good enough to say what they mean. The Constitution applies to all three of the pillars of State and Chapter 3 applies to everything they do.\textsuperscript{120}

The question for us is whether we wish to continue to see western constitutions as designed solely as though "the avowed purpose of the drafters was to place limitations on governmental control,"\textsuperscript{121} or even whether that option still exists. It is worth remarking that between the interim and final constitutions, the South African constituent power seems to have had a view: the language in Section 8(2) of the final Constitution all but strikes out the arguments used by Kentridge in \textit{Du Plessis}.\textsuperscript{122} It must of course be noted that the South African Constitution is, to use a more American phrase, more aspirational than any other, or at least more clearly so. After all, as I now go on to discuss, the Constitution itself (in both the initial interim and the subsequent final version) in some places quite specifically lists positive rights.

\section*{VI. Constitutionally Thick Decisions in the Second Dimension}

I have given such prominence to \textit{Du Plessis} in order to underline my general thesis—what one feels about the legitimacy of any particular constitutional/legal technique depends overwhelmingly, as it should, on what one thinks the purpose of a constitution is. Both Justices Sachs and Kriegler are very clearly on the "thick" end of constitutional interpretation.\textsuperscript{123} In fact, the whole of the court is. In the end, the SACC's fall from grace in this particular case has had no real effect on the court's general thrust to widen the reach of the South African Constitution. I shall, relatively briefly, turn now to the more famous cases dealing with socioeconomic rights, and then to other cases, harder to categorize, in which this same drive has shown itself. Here though I want to ask a very simple question: given the politics of most modern liberal democracies, are the tenets of thin constitutionalism still viable? Even where there is no recently approved constitutional document, these liberal democracies can hardly be thought not to embrace the values spelled out more

\begin{itemize}
\item[\textsuperscript{120}] Id. paras. 145, 147.
\item[\textsuperscript{121}] Id. para. 147.
\item[\textsuperscript{122}] Woolman & Davis, \textit{supra} note 115.
\item[\textsuperscript{123}] See \textit{Du Plessis} 1996 (5) BCLR 658.
\end{itemize}
directly in the more recent, manifestly "thick" constitutions. I attempt to provide an answer to this question in the last section.

VII. POSITIVE RIGHTS IN SOUTH AFRICA

The South African cases most often discussed in the literature are the first two in which plaintiffs succeeded in getting the SACC to order the state to provide an actual, tangible good as required by the Constitution. *Grootboom* and *Treatment Action Campaign*, 124 decided in 2000 and 2002, respectively, remain the clearest examples of the SACC granting socioeconomic rights, although there have been many other cases with similar results. 125 Some time before either of these famous cases, however, and in its own way just as important, was one in which relief was denied, *Soobramoney v Minister of Health (KwaZulu-Natal)*, decided in 1997. 126 In the light of likely reactions to *Chaoulli* and of the dissent in that case, *Soobramoney* is especially important. In this case, a chronic renal failure patient was refused dialysis in a hospital because scarce resources were targeted on patients who could be cured or who were fit enough to be transplant possibilities. 127 Mr. Soobramoney fell into neither category and had run out of the funds necessary to continue dialysis in private clinics. 128 He argued that the right-to-life clause in the South African Constitution required the health service to admit him, and that the state should make more funds available so that others better placed to benefit would not be

124 *Gov't of the Republic of S. Afr. & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) (S. Afr.). *Grootboom* involved a claim for emergency housing brought by a group of homeless South Africans who had been forced off land on which they had erected a shantytown. Though the case is procedurally complex, the court effectively held that there was a positive right to housing and ordered the local government in question to provide such for the plaintiffs. *Treatment Action Campaign* arose because the government restricted access to a drug that could prevent an HIV-positive mother from infecting her child during birth. The court did not hesitate in ordering the government to provide the drug. *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) (S. Afr.).


126 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1997 (12) BCLR 1696 (CC) (S. Afr.). This case, as well as others of interest to us here, is discussed in *Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials* (Bertrand G. Ramcharan ed., 2005).

127 *Soobramoney* 1997 (12) BCLR 1696.

128 *Id.*
denied treatment. The claim was based not just on a general extension of the basic right-to-life clause, but on the very specific language which the South African Constitution uses to provide “positive” rights, in particular Section 27:

27. Health care, food, water and social security
   (1) Everyone has the right to have access to—
       (a) health care services, including reproductive health care;
       (b) sufficient food and water; and
       (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
   (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
   (3) No one may be refused emergency medical treatment.

The court had no difficulty in refusing Soobramoney’s claim, largely because of its reading of subsection (2). At this stage in its history, the court decided the state lacked the resources necessary for the state to be required to provide the treatment.

If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment – and many of them, as the appellant does, would require treatment three times a week – the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the State has to meet.

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129 Id.
131 Soobramoney 1997 (12) BCLR 1696.
132 Id.
133 Id. para. 28.
In combination with this conclusion, the court provides traditional self-warnings about judicial restraint and shows a useful awareness that the problems would not be absent even in a richer country. As Justice Sachs states, "[h]owever the right to life may come to be defined in South Africa, there is in reality no meaningful way in which it can constitutionally be extended to encompass the right indefinitely to evade death." What is important though is that the judgment contains no words that could possibly be taken to preclude the general idea that the court might order government action where conditions made it possible. From a comparative perspective, we ought to view *Soobramoney* as an example that no one need fear courts being economically illiterate and spendthrift with national resources. Much of the argument regarding separation of powers is shown to be irrelevant, as in other SACC cases in which positive rights are granted. *Soobramoney* also shows that it is possible to deny specific positive rights demands without denying their overall legitimacy. The contrast with *Chaoulli* marks the latter's extreme nature.

While one could hardly have predicted from *Soobramoney* that within a few years the SACC would become famous for positive rights decisions, let alone that the first important one would be in the field of health provision, there is in fact no reason to see this as a change in court policy. The best known case is the *Treatment Action Campaign* case, in which the Constitutional Court upheld a claim that the Constitution requires the government to extend its very limited scheme for supplying an antiretroviral drug called Nevirapine to all

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134 Id. para. 57.
pregnant mothers who were HIV positive. The court was very clear about its right to hear the case in its arguments about separation of powers, which:

may be relevant in two respects: (i) in the deference that courts should show to decisions taken by the executive concerning the formulation of its policies; and (ii) in the order to be made where a court finds that the executive has failed to comply with its constitutional obligations. These considerations are relevant to the manner in which a court should exercise the powers vested in it under the Constitution. It was not contended, nor could it have been, that they are relevant to the question of justiciability.

In some ways the case was a very easy one, largely because it could be cast in terms of an equality argument. The government was already giving Nevirapine to patients at some research and training hospitals, and the cost implications were fairly modest as the drug itself was being provided free. Consequently, the court was able to accept all the limitations of budgetary constraints and deference to policy choices as long as they were rational: "[a]ll that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis." The more powerful logic in this case, a development from the argument in Grootboom, but developed through further cases, is the idea that such rights depend for their ultimate justification on the protection of human dignity: "[n]o one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court."

VIII. THE ROLE OF HUMAN DIGNITY

Human dignity is the prime value of the constitution and serves as the touchstone to assess the presence of a justiciable right rather than any technical

137 Minister of Health & Others v Treatment Action Campaign & Others 2002 (10) BCLR 1033 (CC) (S. Afr.).
138 Id. para. 22 (emphasis added).
139 Friedman & Mottiar, supra note 136.
140 Treatment Action Campaign 2002 (10) BCLR 1033 para. 35.
141 Id. para. 28.
distinction between positive and negative. Rather than seeing rights as isolated claims, the court has stressed that rights are interrelated, and all follow from "the founding values of human dignity, equality and freedom." This is not a mere philosophical reflection; "the proposition that rights are interrelated and are all equally important, has immense human and practical significance in a society founded on these values." In Khosa, the case from which the preceding quotation is taken, the court invalidated a policy of denying non-citizen permanent residents full welfare rights. Though the case in part depended on a discrimination argument, much of the court's ruling was openly one of enforcing a positive right to minimum welfare. Justice Mokgoro, quoted here, also relies on a completely different human rights case, relating to the right of spouses to settle in South Africa, to make the point about the fundamental basis in human dignity:

In this case we are concerned with these intersecting rights which reinforce one another at the point of intersection. The rights to life and dignity, which are intertwined in our Constitution, are implicated in the claims made by the applicants. This Court in Dawood said: "Human dignity . . . informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights . . . Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution it is a justiciable and enforceable right that must be respected and protected.


Khosa & Others v Minister of Social Dev. & Others 2004 (6) BCLR 569 (CC) para. 40 (S. Afr.) (relying partially on Gov't of the Republic of S. Afr. & Others v Grootboom & Others 2000 (11) BCLR 1169 (CC) (S. Afr.).)

Id.

Khosa 2004 (6) BCLR 569.

Id. para. 41 (emphasis added) (quoting Dawood & Another v Minister of Home Affairs & Others 2000 (8) BCLR 837 (CC) para. 35 (S. Afr.).)
A right to dignity is not a right in any normal way that a thinly read constitution could embrace, but perhaps the whole point of thick readings is that the very distinction between a right and a value disappears. Dignity is not, of course, the only fundamental value which underlies these interlinked rights, and indeed Khosa, because of its element of discrimination, also focuses sharply on equality, giving equal status to dignity in the judgment. But dignity is crucial because were there not a basic positive right to welfare, the state might have succeeded in its pragmatic argument for giving welfare resources only to citizens as an economic necessity. As such, it might have satisfied the court that the discrimination claim was acceptable under the limitation clause in the Constitution.

The South African Constitutional Court takes further the idea of an interlinkage between rights by seeing positive rights as having negative rights aspects, and in particular the court does so when dealing with issues connected to the traditional horizontal/vertical discussion. In fact, the idea that a positive right would be justiciable at the very least in this way goes back to the initial statement in the certification hearing: “At the very minimum, socio-economic rights can be negatively protected from improper invasion.” An example of this combination of approaches is the Rail Commuters case, where the plaintiffs sought a declaration that a commuter railway company operating services with a heavy rate of violent crime was in breach of a constitutional duty to protect life. The claim was that the ordinary statutes that applied must be interpreted in the light of this constitutional value. Their argument, rejected in the ordinary courts, was that the statutory requirement that the rail services be operated “in the public interest” be read alongside the constitutional injunction that “[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights,” in particular Sections 11 and 12 of the Constitution, which promise that “[e]veryone has the right to life” and “[e]veryone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private

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147 Khosa 2004 (6) BCLR 569.
149 In re Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253 (CC) para. 78 (S. Afr.).
150 Rail Commuters Action Group & Others v Transnet Ltd. t/a Metrorail & Others 2005 (4) BCLR 301 (CC) (S. Afr.).
Justice O'Regan, in the majority opinion, had no difficulty in holding that the statute in question must be interpreted to "promote the spirit, purport and objects of the Bill of Rights." She comments that:

The rights contained in the Bill of Rights ordinarily impose, in the first instance, an obligation that requires those bound not to act in a manner which would infringe or restrict the right. . . . The obligation is in a sense a negative one, as it requires that nothing be done to infringe the rights. However, in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights.

The inevitable argument about budgetary implications was raised; however, as O'Regan states: "an organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints." The basic argument in *Rail Commuters* had been made earlier; for example in *S v Baloyi*, the court found that the that the Prevention of Family Violence Act 1993 "has to be understood as obliging the State directly to protect the right of everyone to be free from private or domestic violence." Much followed from the first important case where the obligation of the courts to develop the common law in the light of the Constitution was firmly established. Part of the reason that this case, *Carmichele*, was needed was to bring the jurisprudence on the development of the common law into line with the much firmer stand taken by the final Constitution after the weakness of the court’s decision in *Du Plessis*. From *Carmichele* in 2001 onwards, a stream of cases has pushed further this basic approach—that nothing should stand in the way of the instantiation of constitutional values in the working of the law. *Carmichele* itself concerned the liability of the police to have

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151 S. AFR. CONST. 1996, §§ 7(2), 11, 12(1).
152 *Rail Commuters Action Group & Others* 2005 (4) BCLR 301 para. 72 (quoting S. AFR. CONST. 1996, § 39(2)).
153 Id. para. 69.
154 Id. para. 88 (emphasis added).
155 *S v Baloyi & Others* 2000 (1) BCLR 86 (CC) para. 11 (S. Afr.).
156 *Carmichele v Minister of Safety & Sec. & Another* 2001 (10) BCLR 995 (CC) (S. Afr.).
157 See, e.g., *Minister of Home Affairs & Another v Fourie & Others* 2006 (3) BCLR 355 (CC) (S. Afr.); *Rail Commuters Action Group & Others* 2005 (4) BCLR 301; *Khosa & Others v Minister of Social Dev. & Others* 2004 (6) BCLR 569 (CC) (S. Afr.); *Port Elizabeth*
prevented a rape when they were well advised of its possibility. The court talked of the need to engage in a proportionality exercise balancing community and individual interests, but stressed that “that exercise must now be carried out in accordance with the ‘spirit, purport and objects of the Bill of Rights’ and the relevant factors must be weighed in the context of a constitutional State founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.” In the case, the court deliberately contrasts its perception of this duty to develop the common law with the Canadian situation, and it distances itself from American doctrines while expressly supporting the ECHR position in Osman. The extent to which the new, constitutionally enshrined values are to trump other considerations is given in an extremely interesting suggestion that has much relevance to my main theme here: “[u]nder section 39(2) of the Constitution concepts such as... ‘the wishes... and the perceptions... of the people’ and ‘society’s notions of what justice demands’ might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.”

The results of other cases include giving extra protection for debtors having their house taken by lenders in the procedure of the magistrates’ courts, the development of Grootboom in an ever extending list of housing protection cases for those who have been forced to occupy land for shantytowns, and even a case where an old law allowing trespassing cattle to be impounded was found constitutionally wanting because of its threat to the livelihood of the very poor. Modderklip, mentioned earlier, saw the Constitutional Court dodge the direct issue of horizontal application, though that claim had been accepted by the court below. The case is particularly interesting because it shows the court’s continual effort to craft new techniques to deal with the implications of reading the Constitution thickly. The Constitutional Court

Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) (S. Afr.).
158 Carmichele 2001 (10) BCLR 995.
159 Id. para. 43.
161 Carmichele 2001 (10) BCLR 995 para. 56.
162 Jaftha v Schoeman & Others 2005 (1) BCLR 78 (CC) (S. Afr.).
163 See, e.g., President of RSA & Another v Modderklip Boerdery (Pty) Ltd. & Others 2005 (8) BCLR 786 (CC) (S. Afr.).
164 Zondi v MEC for Traditional and Local Gov’t Affairs & Others 2006 (3) BCLR 423 (CC) (S. Afr.).
165 See Modderklip Boerdery 2005 (8) BCLR 786 para. 1 n.1.
provided what it described as “constitutional damages” by a route alternative to horizontal applicability, suggesting again that the characterization of rights in such a way is simply not helpful.\textsuperscript{166} Land had been occupied by squatters which Modderklip had offered to sell to the local authority. It refused, but both the squatters and the police also refused to do anything at all to enforce the eviction order Modderklip had gained from a court.\textsuperscript{167} The Constitutional Court took the interesting line that the rule of law itself was a value the plaintiff was entitled to have enforced. However, the court argued, eviction was now impossible because the huge number of squatters who had taken advantage of the state’s inaction.\textsuperscript{168} Consequently, the award of damages, which could be replaced by the authority simply buying the land, would satisfy both the land need of the squatters and Modderklip’s constitutional entitlement. Whether there is a horizontal effect did not need to be decided because:

Section 1(c) of the Constitution refers to the “[s]upremacy of the Constitution and the rule of law” as some of the values that are foundational to our constitutional order. The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them.\textsuperscript{169}

Though it might in some sense be more satisfactory to have had an outright ruling that Modderklip had an enforceable horizontal constitutional right against the squatters, finding instead a positive right to have the rule of law enforced is yet another example of the drive the SACC has to find any way which will work to “thickly” interpret the Constitution to ensure the sway of its core values over society. This right is a true positive right because:

The obligation on the State goes further than the mere provision of the mechanisms and institutions referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} para. 20.
\item \textit{Id.} para. 9.
\item \textit{Id.} para. 39.
\item \textit{Modderklip Boerdery} 2005 (8) BCLR 786.
\end{enumerate}
\end{footnotesize}
wake of the execution of court orders, thus undermining the rule of law.\(^{170}\)

One might sum up South African jurisprudence as amounting to a determination to combine all aspects and all the machinery of law to establish the core values through an understanding that precise differences between types of rights, which are themselves all intermixed, are irrelevant. The values both are themselves rights and underpin any specified rights. Though they still use the terminology of socioeconomic or positive rights, little or nothing seems to depend on it.

**IX. POSITIVE RIGHTS IN POLAND AND HUNGARY**

The reliance in *Modderklip* on the rule of law is reminiscent of much of the most imaginative constitutional interpretations of another set of courts, those in newly democratic Central and Eastern Europe (CEE).\(^{171}\) There exist clearly stated socioeconomic rights in several of the constitutions of this region.\(^{172}\) The Hungarian Constitution, for example, provides in Article 70/E that: "[c]itizens of the Republic of Hungary have the right to social security; in the case of old age, sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own."\(^{173}\) It goes on to require that "[t]he Republic of Hungary shall implement the right to social support through the social security system and the system of social institutions."\(^{174}\)

Similar double requirements, that a right be recognized and that the government set up the necessary machinery, exist for health and education. Poland has a whole chapter on economic, social, and cultural freedoms and rights, with provisions such as Article 67:

1. A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as

\(^{170}\) *Id.* para. 43.


\(^{172}\) Similar ideas to those of Poland and Hungary exist throughout the former communist states, but the legal arguments are best exemplified by the cases from Poland and Hungary.

\(^{173}\) See *CONSTITUTIONAL JUDICIARY*, *supra* note 75, at 404.

\(^{174}\) *Id.*
well as having attained retirement age. The scope and forms of social security shall be specified by statute.

2. A citizen who is involuntarily without work and has no other means of support, shall have the right to social security, the scope of which shall be specified by statute.\(^{175}\)

All the usual socioeconomic rights are covered in the same manner and similar patterns are found throughout the CEE constitutions.\(^{176}\) Not surprisingly, many of the early decisions of these courts were on socioeconomic rights, at least in part because the pro-capitalist revolutions produced inevitable uncertainty on the one area of strength in the socialist economies, the provision of relatively generous social expenditure.\(^{177}\) There is a sense in which the Polish and Hungarian constitutions are less overtly aspirational than, for example, South Africa’s constitution. One has to remember that because the respective histories are different, the salience of constitutional value commitments will be as well. No one in CEE had to stress the priority of welfare rights; rather, the need was to find a way of maintaining them when other problems were in the forefront.\(^{178}\) For the Eastern Europeans, the “rule of law” is what transformation is all about, while in South Africa, it has been the drive for equality that is all important.\(^{179}\) The social aspirations were already present for the Eastern Europeans, though they did indeed fear losing the historic priority of welfare.\(^{180}\) In both cases, and especially in Hungary, the jurisprudence of those constitutional guarantees has not usually presented anything to disturb those dubious of the propriety of positive rights.\(^{181}\) The Hungarian court has regularly held that Article 70/E is satisfied


\(^{176}\) Arato, supra note 54.

\(^{177}\) Schwartz, supra note 78 (suggesting that the courts were heavily involved in such issues). There are counterclaims, notably András Sajó who, at the time of writing, does not think the Hungarian court is as involved in such issues as might have been expected. András Sajó, *Reading the Invisible Constitution: Judicial Review in Hungary*, 15 Oxford J. Legal Stud. 253 (1995).

\(^{178}\) Schwartz, supra note 78.


as long as some form of welfare system is in place.\textsuperscript{182} Similarly, there have been few challenges accepted in Poland that the statutes called for by articles like Article 67, as created by the Sejm, are inadequate.\textsuperscript{183} Decisions otherwise would indeed have raised, fatally or not, the problem of separation of powers, a value the CEE countries, not least their courts, strongly favored during this period because it was one of the conditions for entry into the European Union.\textsuperscript{184} Where welfare statutes were found at fault, it was more likely because they offended a different sort of value, especially unjustified or irrational discrimination, which is a far more “normal,” perhaps a purely “negative,” right entitlement.

A good example is a 1993 case concerning problems in interpreting unemployment and social assistance legislation.\textsuperscript{185} The Polish Constitutional Tribunal was clearly concerned that where the relevant act deals with the provision of social assistance after the period when an unemployed person was entitled to unemployment benefit, it “lacks a suitable normative content” because it appears to leave the actual duties of social assistance institutions under defined.\textsuperscript{186} Nonetheless, the Tribunal’s decision was to petition its own president to launch a Tribunal investigation of the 1990 Social Assistance Act, rather than to strike down any part of the act under consideration, the 1991 Employment and Unemployment Act.\textsuperscript{187} The constitution, according to the Tribunal, does contain a guarantee of social justice, and social justice requires that people not be left helpless after unemployment pay runs out.\textsuperscript{188} However,

\textsuperscript{182} Decision 43/1995 AB of June 30, 1995 on Social Security Benefits, Alkotmánybíróság [Hungarian Constitutional Law Court], \textit{translated in CONSTITUTIONAL JUDICIARY, supra} note 75, at 332 [hereinafter Decision on Social Security Benefits].
\textsuperscript{183} See SCHWARTZ, \textit{supra} note 78, at 63.
\textsuperscript{184} BUILDING DEMOCRACY? THE INTERNATIONAL DIMENSION OF DEMOCRATISATION IN EASTERN EUROPE (Geoffrey Pridham et al. eds., 1997).
\textsuperscript{186} Decision on Unemployment Benefits, P. 7/92, \textit{translated in SELECTION OF DECISIONS, supra} note 185, at 103.
\textsuperscript{187} \textit{Id.}; see also Employment and Unemployment Act of Oct. 16, 1991; Social Assistance Act of Nov. 29, 1990.
\textsuperscript{188} Decision on Unemployment Benefits, P. 7/92, \textit{translated in SELECTION OF DECISIONS, supra} note 185, at 104.
as the court says itself, "[g]iven its general and legally virtually undefined nature, the principle of justice does not, however, determine the legal form for the implementation of the justice formula with respect to the unemployed." No negative rights theorist could object to such a description of the Tribunal’s approach. The court’s concern was not that social justice requires any particular level of social assistance, or even any particular set of qualifications. Rather it argues "[t]he guarantee function of the law requires that the right to such an allowance follow from a statute and the eligible person be entitled to make a claim, the satisfaction of which could be prosecuted in court." Where it did act decisively was to strike down a part of the 1991 Act, which differentiated between unemployed people depending on whether they had previously been involved in agricultural or non-agricultural sectors. This distinction is simply irrational and unjustified discrimination:

[N]o rational justification can be identified for the differentiation of citizens based on the form of their earlier professional activity. . . . [m]atching the State’s financial means to its obligations toward the citizens cannot be achieved through differentiation that discriminates against legally defined groups of citizens.

The thrust of both parts of this decision is the same—expressing the overriding need for legal values, the proper justifications for unequal treatment, and the proper concern for legally enforceable rights, as opposed to concern with the level of rights provision. Very much the same attitudes colored Hungarian jurisprudence through its great period of activism in the 1990s. Over and again, the court stressed that "[t]he State has a wide margin of appreciation with respect to changes, regroupings and transformations within welfare benefits depending on economic conditions." All that is absolutely required is the provision of some welfare system:

189 Id. at 105.
190 Id. at 107.
191 Id. at 109.
193 CONSTITUTIONAL JUDICIARY, supra note 75, at 326.
In [an earlier] decision, the Constitutional Court established as a general constitutional requirement that the right to social security contained in Article 70/E of the Constitution entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation of the right to human dignity.\(^{194}\)

The state will be "deemed to have met its obligation specified in Article 70/E by organising and operating a system of social institutions including welfare benefits. Within this, the legislature can itself determine the means whereby it wishes to achieve its social policy objectives."\(^{195}\)

It seems that part of the court had struggled in early cases for a more intrusive role, but relatively early a compromise was struck whereby the margin of appreciation would be satisfied as long as total welfare provision did not fall below some notion of a minimum subsistence level.\(^{196}\) So in the 1998 decision from which the quotations are taken, proceedings were suspended to await a report on whether the challenged legislation would still "secure the minimum livelihood necessary for the realisation of the right to human dignity in line with the constitutional requirement specified in the holdings."\(^{197}\) How one reacts to this position depends largely on one's substantive political views. The President of the Hungarian Court at the time, who was on the losing side in the conflict, sees this as reducing socioeconomic rights to mere "state goals":

This means that the ordinary test for (subjective) fundamental rights—necessity and proportionality does not apply. This, in turn, amounts to a silent acceptance by the whole Court of the understanding of social rights as being similar to "state goals," for which . . . only excessive infringements reach the level of constitutional significance.\(^{198}\)


\(^{195}\) Id.


\(^{197}\) Decision on Unemployment Benefits, P. 7/92, translated in Selection of Decisions, supra note 185, at 103.

\(^{198}\) CONSTITUTIONAL JUDICIARY, supra note 75, at 37.
Others might more plausibly note that the strict negative liberty theory would not regard even excessive infringement of Article 70/E as entitling a court to strike down welfare legislation. They might also note that the minimum level is to be set by the court, and that it is tied, by the court itself, to the powerful but elastic conception of human dignity, a phrase which does not occur in the constitutional provisions for socioeconomic rights. More important perhaps, is Sólyom’s arguably unwarranted equation of a “real” right as one to which a specific limitation test applies. It may well be that a useful distinction between rights could be based on whether the proportionality/necessity limitation test or some other test applies. There are several alternative candidates, including the German conception of retaining the core meaning of a right, which would here implicate a minimum subsistence test. But it by no means follows that the distribution of rights into such categories would map closely onto the positive/negative rights or rights/state goals distinctions.

Despite this caution, these courts are nonetheless famous for major intrusions into policy to the point that any orthodox sense of the separation of powers becomes extremely weak. Both have struck down state retrenchment of social benefits, especially in the areas of pensions. In both cases, the government’s policy was thought crucial to major economic reform, and in both cases, the decisions cost the state treasury massive amounts of money.

The crucial point is that both courts relied primarily not on specific socioeconomic rights, but on fundamental assumptions about the relationship between society and law. In Poland in 1992, the Tribunal decided a complex set of issues involving several interrelated statutes that were intended to cut pension benefits in multiple ways, especially the Act of October 1991 on the Revaluation of Retirement and Disability Pensions. The court found parts of these acts offended Article 67 (nondiscrimination), Article 7 (protection of personal property), and parts of Article 70. The last was a more typical

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199 More than any other court in the CEE area, more even than in South Africa, the Hungarian court has relied on German jurisprudence on human dignity. See Dupré, supra note 79, though she unfortunately has little to say directly about positive rights.

200 CONSTITUTIONAL JUDICIARY, supra note 75, at 37–38.

201 In fact, the core minimum concept appears in the Hungarian constitution, as it did in the Interim South African Constitution, in both cases based on the German model, but has been little used. András Sajó, How the Rule of Law Killed Hungarian Welfare Reform, 5 E. EUR. CONST. REV. 31 (1996).

202 Schwartz, supra note 78.


204 Pol. Const. 1952 arts. 7, 67, 70.
socioeconomic rights article, guaranteeing the right to health protection and to “assistance in the event of sickness or inability to work.” Article 70(2) stated “[t]his right shall be implemented to an increasing degree by the development of social insurance to cover sickness, old age and inability to work, and by enlargement of various forms of social assistance.” These articles were used almost as additional arguments, however. The real work was done in the judgment by reliance on the very simple language of Article 1: “[t]he Republic of Poland is a democratic state ruled by law and implementing the principles of social justice.” Furthermore, Article 1 was applied twice, with the Tribunal finding most of the legislation in breach of both the conception of “a state ruled by law” and, separately in breach of the idea that the state should implement “the principles of social justice.” Several of the many clauses struck down were found to be in breach of both limbs of this clause; the Tribunal found it useful to make these separate attacks because it seemed to have wished to mark the two lines of criticism as equally valid. The social justice arguments largely revolved around the expectation that pension and similar schemes would promote social solidarity by being redistributive, an aspect which the new legislation minimized. The Tribunal does remind itself that “the velocity of change within the realm of economic and social relations, especially over a period of basic transformations . . . demands that the lawmaker be given a relatively broad range of freedom in moulding the law.” It even cites German cases to support its admission that “[a]s is the case in the constitutional legislation of other democratic States, the Constitutional Tribunal cannot test if, in detail, the lawmaker chooses the most expedient and appropriate solution.” Nonetheless, in this area, the Tribunal gave quite detailed objections, citing expert opinion on, inter alia, the need for and failure to provide a “flattening” of the benefit to contribution ratios.

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205 POL. CONST. 1952 art. 70(1).
206 Id. art. 70(2).
207 Id. art. 1.
208 The constitutional articles come from the 1952, i.e., communist constitution, relevant parts of which were kept in force by Article 77 of the 1992 constitutional act, usually called “The Small Constitution.” POL. CONST. 1992 art. 77. Not until 1997 did Poland adopt an entirely new post-communist constitution. The Polish Constitutional Tribunal is the only one of the CEE courts to predate the collapse of communism. SCHWARTZ, supra note 78.
210 Id. at 63.
211 Id.
212 Id. at 66.
Despite these words of caution, the Polish Tribunal derived a very strong social justice restriction on the government’s plans to deal with the economic problems of the state:

[R]etirement and disability rights cannot be restricted without agreeing that the criteria for selecting the types of resources financed by the State be socially justified and without an objective conviction that the State is undertaking sufficient actions to combat economic crisis. Furthermore, the concepts of social equality and justice signify that “the weight of economic crisis should encumber all social strata and not specifically affect only certain strata or groups,” especially if these were to have been pensioners.  

X. THE CENTRALITY OF THE RULE OF LAW

For my purposes, probably the more important argument was the more purely legal one. It very much represents a “thick” reading of a standard legal term, the “rule of law.” It is common throughout CEE to load the idea of the rule of law with rather more content than it routinely carries in Western common law countries, even more than might be expected given that Rechtsstaat and “rule of law” are synonyms rather than translations. The Polish Tribunal, which nearly always uses the compound phrase “a democratic state ruled by law,” from Article 1, has been even more insistent on giving a rich substantive meaning to the idea than others. The court starts this aspect of the ruling in the Pensions case by disposing of the government’s claim that an ongoing economic crisis forced the reduction in pensions. Characteristically, it actually makes two points—that the argument was never actually featured in the parliamentary debates on the statute, and that it could

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213 Decision on Unemployment Benefits, P. 7/92, translated in Selection on Decisions, supra note 185, at 105.
215 POL. CONST. 1997 art. 1.
not avail anyway: “If one were to agree that a state of superior economic need existed, then the Constitutional Tribunal would be unable to derive legal consequences from that fact for lack of any legal basis in the Constitution.”

Very broadly, and vitally for its overall approach, the Tribunal goes on to say:

Under the rule of law, the law is a phenomenon that is, to a great extent, autonomous of the State as an organization implementing defined political tasks and it should not serve to bring to life political or economic objectives in a manner that may depreciate the role of the law and its acceptance by society.

This acute awareness of the fragility of law as a social instrument is also common, for very understandable reasons, throughout the CEE countries. For example, a concurring opinion in the parallel Hungarian case on welfare and pension reform was given precisely to stress this relationship. Judge Zlinszky spells this out firmly:

[T]he Court must call the attention of the legislature to the fact that it can expect the agreement and co-operation of society, which is the necessary precondition of the success of the reforms, only if it chooses and requires restrictive measures which meet the sense of moral and social justice of society.

The core idea in both the Hungarian and Polish cases is the same: the rule of law implies predictability, certainty, and the protection of legitimate expectations. At its strongest, in the language of the Polish Tribunal, “the social security system takes on the form of a unique type of social contract governed by the principle of pacta sunt servanda.” This idea is itself tied to the confidence in the law idea: “The rule of law embodies maintaining the confidence of citizens in the State; the protection of acquired rights (also the

217 Id.
218 Id. at 59.
219 There is some evidence from social psychology that Eastern European mass publics, not only the judges, attach an unusually high value to procedural propriety. Ellen S. Cohn et al., Distributive and Procedural Justice in Seven Nations, 24 LAW & HUM. BEHAV. 553 (2000).
220 Decision on Social Security Benefits, translated in CONSTITUTIONAL JUDICIARY, supra note 75, at 332.
221 Id.
222 Decision on Pensions Laws, translated in SECTION OF DECISIONS, supra note 185, at 61.
(non-retroactive effect of law) is tied to the foregoing. . . “ It is very much a practical judgment, rooted in the Tribunal’s idea that the rule of law itself has clear substantive implications. One problem it sees, for example, is the suddenness of the government’s policy impact. “[T]he citizens of a land ruled by legality should not be suddenly surprised by regulations that are to their disadvantage,” and therefore the government ought to use transition periods, and these periods must be long enough to allow citizens to adapt. This principle is taken far enough indeed to find another part of the act unconstitutional simply because of an unduly short period before the act’s sunset clause sets in—a mere two years is not long enough, given a very tough constitutional restriction derived, again, simply from the Article 1 rule of law clause. “In the realm of social security, only legislative regulations that allow future pensioners and disability pensioners to engage in long term planning may constitute effective legal guaranties.”

It should not be thought that decisions like these are accepted easily by all political positions in the CEE countries. Not only governments, but independent social critics can be heard lamenting the breach they see in the separation of powers. János Kis, a distinguished and usually liberal Hungarian social philosopher, has roundly attacked the Hungarian court’s 1995 decision, while approving of much of its direct human rights work, with much the same effect, though without using the language, of the standard negative-rights-only position. Critics, however, tend to ignore the general thesis that underlies this highly “substantive” idea of the rule of law, perhaps because it is only rarely well spelled out. The Hungarian court has been less sporadic or ad hoc in its use. There is a constant theme throughout its jurisprudence of the way in which “legal certainty . . . in the view of the Constitutional Court, is the most substantial conceptual element of a state under the rule of law and the theoretical basis of the protection of acquired rights.”

The idea of the rule of law as guaranteeing legal certainty has been used in a variety of contexts, most notably perhaps in controlling the excesses of lustration policy by striking down legislative attempts to restart the clock under

223 Id.
224 Id. at 63.
225 Id. at 70.
227 Decision on Social Security Benefits, translated in CONSTITUTIONAL JUDICIARY, supra note 75, at 327.
the statute of limitations for crimes committed during the Communist era. The huge theoretical importance of this method of interpreting the doctrine of "a state under the rule of law" is highlighted rather than negated by the fact that national constitutional courts in the CEE area have sometimes come to directly opposed conclusions about what the phrase means in any specific situation.228 In common with the welfare decisions, these lustration decisions, clearly in the negative rights domain, are deeply empirical in the sense that they take note of the realities of life in the area.229 So, for example, the Czech court refuses to ignore the sheer improbability that the previous regime would ever have punished the people breaking the law on behalf of the security services, and refuses to lose track of this fact by an overly formal approach.230 The Polish court made detailed analyses of who worked for what agency in what capacity before issuing a lustration decision.231 Thus, in their welfare decisions, both of these courts emphasize that no one in a former communist country has had the chance to make private arrangements for their old age or other welfare, and most are still unable to afford such measures.232 The vital importance of these decisions, which I can only lightly sketch here, is that the CEE courts have effectively held that constitutionalism itself, because of the paramount importance of the rule of law, makes it impossible to do some things, or to do them in certain ways. The defense against arguments by critics like Kis is rather simple—the one thing constitutional courts are specifically about is ensuring legality. Preventing a government from doing something which cannot be done legally can never be regarded as stepping outside the limitations imposed by the separation of powers. And, of course, there is no surprise about the CEE courts' addiction to legality.233

228 See Robertson, supra note 32, at 227–37.
229 Id.
230 See nálež Ústavního soudu čj. 9/ 01/ Sbírka nálezu a usnesení Ústavního soudu [Czech Republic Constitutional Court] [hereinafter Lustration II]; Decision of Apr. 20, 2004, K 45/02, 2004 ORZECZNICTWO TRYBUNAL KONSTYTUCYJNY [OTK] [Polish Constitutional Tribunal].
231 Id.
232 Decision on Social Security Benefits, translated in CONSTITUTIONAL JUDICIARY, supra note 75, at 332.
XI. FINAL CONSIDERATIONS

Inevitably the CEE courts differ often in the details of their judgments. As an example, the Polish Tribunal makes little play with an idea that attracts the Hungarian Court, the protection of property. Here, we might have a link not only to other European constitutional doctrines, but even to that of the United States. According to the Hungarian court: "In the case of social security benefits where the insurance element has a role to play, the constitutionality of the reduction or termination of the benefits should be evaluated according to the criteria of the protection of property." There are echoes here of a strand of thought in German constitutional and administrative law, where the emphasis is sometimes, but not invariably, on the need for some element of contribution to transform a welfare right into a form of property right. The European "welfare as property" concept is a weaker form of this transformation of a positive rights claim into a property claim to be found in some American ideas about "the New Property." The "New Property" argument is more than forty years old now, and has made little progress in the courts after a flurry of success in the last years of the Warren court, but it continues to be an important strand in U.S. legal thinking. Originally introduced by Charles Reich in 1964, it was developed further in a later article into a full-blown thesis of the need to protect individuals against all assaults on their autonomy. The narrower thesis has travelled widely in the common law world, though more frequently in administrative law literature than among writers on constitutional law. The essence of Reich's argument is that traditional property rights are valued as protecting the independence and basis for flourishing of the individual. But in a modern, highly regulated society, many of the conditions for such autonomy and human development have come to be in the discretionary hands of the state. By seeing welfare entitlements,

234 CONSTITUTIONAL JUDICIARY, supra note 75, at 329.
235 As early as the mid-1950s, however, German courts had started handing down rulings which tended towards a "positive-rights" interpretation of welfare and similar rights under the Basic Law, often predicated on dignity rights and similar arguments. See Robert Dugan, Standing, The "New Property," and the Costs of Welfare: Dilemmas in American and West German Provider-Administration, 45 WASH. L. REV. 497 (1970).
237 The original article is Charles A. Reich, The New Property, 73 YALE L.J. 733 (1964); further developed in Charles A. Reich, The Individual Sector, 100 YALE L.J. 1409 (1991).
238 For example, even to Australia. See Ian Holloway, Natural Justice and the New Property, 25 MONASH U. L. REV. 85 (1999).
and anything the state controls which has this effect (for example licenses to practice a profession), as property, these human needs can be put on a much surer basis. "The aim of these benefits is to preserve the self-sufficiency of the individual, . . . [to] provid[e] a secure minimum basis for individual well-being and dignity. . . ."\textsuperscript{239} Reich had a host of reasons, the strongest being an appeal to social justice, when he described welfare rights as "part of the individual's rightful share in the commonwealth," and "in no sense a form of charity."\textsuperscript{240} From my point of view, the key to this reading of the Constitution, which brings it into the same focus as all the rights discussed above in the various courts' readings of various constitutions, is Reich's claim that "the time has come for us to remember what the framers of the Constitution knew so well—that 'a power over a man's subsistence amounts to a power over his will.' "\textsuperscript{241} Of course Reich's argument is not directly about positive rights—it is an attempt to turn discretionary government largess into rights so that welfare claims would come to have the same sort of substantive due process protection that ordinary property entitlements have had. But it is an example of the same argumentative strategy—to take values which no one doubts are inherent in a constitutional settlement and bring other human needs under their umbrella. In a sense, it is an argument of the form "whatever works, works." Property is an indisputable good deserving of constitutional protection in the United States, so the rather weak analogy between welfare entitlements and property "works." Property rights have been vital in the new CEE democracies, in Hungary more than anywhere else, so it "works" to find a property element in pension entitlements. The Hungarian argument could not be made solely on a property basis, and the human dignity argument, a mainstay of Hungarian jurisprudence, comes in. But Reich also uses a dignity argument.\textsuperscript{242} The German administrative court, which found a "new property" element in a welfare claim in 1954, also made use of the \textit{Sozialstaat} description of the state in the German Basic Law, and of its Article 1 commitment to human dignity.\textsuperscript{243} In Poland and Hungary, but also in the German cases, the value most useful was simply that of the rule of law—as it was in some of the South African cases.\textsuperscript{244} The rule of law works in large part

\textsuperscript{239} Reich, \textit{The New Property}, supra note 237, at 785–86.


\textsuperscript{241} Reich, \textit{The New Property}, supra note 237, at 787.

\textsuperscript{242} \textit{Id.} at 733–87.

\textsuperscript{243} Dugan, \textit{supra} note 235, at 499.

\textsuperscript{244} \textit{President of RSA & Another v Modderklip Boerdery (Pty) Ltd. & Others} 2005 (8) BCLR
because it is a black box into which one can assert very nearly any substantive value one wants.

In the end, the transformation of a discretionary benefit into a litigable right is much the same process as the finding of a concrete duty from a "state aim" or the deriving of a positive right to life strong enough to overturn a health insurance statute. Nor does there seem to be much difference between any of these operations on the vertical individual-to-state dimension and the imposition of constitutional duties between legal individuals on the horizontal plane, at least through the process of irradiating the law with constitutional values. All of these are examples of a judicial process which takes constitutions primarily as value codes that the court must apply though a thick reading of constitutional texts and laws. The aim in all these cases is to regulate relations by constitutional values. One might object that such a process is defensible for some but not all constitutions. That would be to admit that some constitutions are indeed value documents, but retain the claim that others states, particularly the United Kingdom and United States, have entirely procedural and value-free constitutions.

It is unclear that this is a viable option. To start with, the common law must be at least as dedicated as any code law system, maybe more, to the Polish argument that "the law is a phenomenon that is, to a great extent, autonomous of the State as an organization implementing defined political tasks." It is of note that the "legitimate expectations" argument found so powerful in Poland and Hungary caused the Law Lords much anxiety, though they ultimately sidestepped it, in a major U.K. constitutional law case, Council of Civil Service Unions v. Minister for the Civil Service in 1985. But beyond the problem of what the rule of law may in itself proscribe against governments is the whole question of whether any rights claims can be handled entirely without reference to more basic constitutional values. At its simplest, the problem is this: can a court know whether a particular interest is protected by a right, such as one in the U.K.'s Human Rights Act, without knowing or deciding just why the right in question is valued or what its more fundamental purpose is? If it is not possible to go on for much longer pretending that constitutional interpretation is an exercise in the application of abstract and freestanding rights, rather than one of instantiating constitutionally mandated

786 (CC) (S. Afr.).

245 Decision on Unemployment Benefits, translated in SELECTION OF DECISIONS, supra note 185, at 57.

values, then no procedural distinctions like those between positive and negative or vertical and horizontal rights can be of any utility at all.

XII. CONCLUSION

I have attempted in this Article to come to terms with the fact that much of the standard conceptual framework for discussing rights produces what one scholar has aptly called "moral short-fall," which requires explanation.²⁴⁷ Using that scholar's terminology of thick versus thin constitutional law, though in a rather different sense, I have tried to tease out why this may be so and what may be done about it.²⁴⁸ For the purposes of this Article, I have selected two dichotomies basic to much constitutional discussion, those between positive and negative rights, and between horizontal and vertical application of constitutional rights. I have characterized these as defining two dimensions, one of reach and the other of depth of rights. Obviously, there are many other candidates for conceptual blocks to a constitution delivering full political justice. Obvious candidates, for example, could be found within the rules and categories governing standing, but the list of ways in which constitutions may fail to deliver all that might be desired is likely to be extensive. My first step was to show that the distinctions themselves are hard to operate and do not clearly denote different judicial actions, even if they formally describe "causes of action." In a recent Canadian case involving the Charter right to life, I demonstrate how easy it is to move from a negative to a positive conception of rights if the judges actually wish to do so.²⁴⁹ In general, I maintain that the actual results of constitutional litigation depend more on this willingness to use whatever material the constitution contains to deliver its purposes than on any real block to certain results. Thus, a "thick" reading of a constitution is, in a sense, analogous to the "purposive" or "teleological" rules of statutory interpretation to be found in basic texts on the construction of statutes.²⁵⁰

I have taken a thickly read constitution to be one where judicial argument is heavily influenced by a sense of a fundamental purpose lying behind the constitution. By taking examples from two jurisdictions that have recently replaced highly undemocratic systems, South Africa and Central and Eastern

²⁴⁷ Sager, supra note 4, at 410.
²⁴⁸ Id.
Europe, which can both be seen as "transformatory" in the language increasingly used in South Africa, I have attempted to show how useless the distinctions referred to are, given an overwhelming drive to deliver justice in the terms of the perceived constitutional purpose. Instead of focusing on such rules about rights, I show that what motivates these courts is the need to deliver a form of justice wherever it is needed. The South Africans rely very heavily on ideas about human dignity, which is seen as both a pervasive value and a specific right. The Central and Eastern Europeans rely on the crucial importance of reestablishing the rule of law in a way that gives to this most orthodox of all legal concepts its own rich or thick reading. Although I have no space to analyze German cases directly, it is clear that in both of these jurisdictions, German constitutional thinking is highly influential. This is even more likely to be the case because the post-war Federal German Constitution was the first of the new type of overtly transformatory constitutions, and in Germany and those countries influenced by it, it is unthinkable that a constitution should be the "value free" road map, or "large scale organization chart" that traditional liberal theory seems to require.  

To some extent, the role of a constitution necessarily depends on the way it was introduced, if only because the more clearly the constitution is legitimated by an informed citizenry, the safer it is for judges to assert the values they wish to see pervading all law, regardless of prior categorizations. Thus, while it is easy to make the case for South Africa or Poland and Hungary, it may be a less plausible argument elsewhere. However, not only have I demonstrated in the Canadian case that such a thick reading is possible, but I suggest there are plenty of other signs of such readings legitimately becoming more common. The United Kingdom, under the Human Rights Act 1998, is now required to follow the jurisprudence of the ECHR, and this has long given up in practice, if not entirely in doctrine, any real interest in either of the categorizations I discuss in this Article. I also suggest that there are and have in the past been some signs of U.S. constitutional law being, in some circles at least, a good deal less hostile to positive rights and horizontal application than usually thought. In the end, I suspect that all jurisdictions will have to move in this direction in order to retain and build constitutional legitimacy.

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251 See Winfried Brugger, Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View, 42 AM. J. COMP. L. 395 (1994). For an account of how Germany has influenced Eastern European courts, see DUPRÉ, supra note 79.
