THE HORIZONTAL APPLICATION OF THE BILL OF RIGHTS AND THE DEVELOPMENT OF THE LAW TO GIVE EFFECT TO RIGHTS AND FUNDAMENTAL FREEDOMS

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Abstract

The scope of the Constitution of Kenya, 2010 goes far beyond the traditional understanding that a Constitution structures the relationship of government. It disabuses the Kenyan legal culture of a distinction between public and private law. The scope of the Bill of Rights is comprehensive, as article 20(1) of the Constitution makes plain, many of the rights envisaged in the Bill of Rights bind private individuals and corporations, as well as the state. Article 20(2) provides a textual pointer that depending on the nature of the right in question, private individuals may not be bound by the Bill of Rights in some circumstances. On the other hand, Article 20 (3) of the Constitution enjoins courts to develop the law to give effect to a right or fundamental freedom. While Article 10 of the Constitution introduces a normative value system upon which the Kenyan society must be ordered. This leads to the assertion that the Bill of Rights has a pervasive reach beyond the traditional vertical application.

1 Introduction

The Constitution of Kenya, 2010 (the Constitution) is different – it is a transformative constitution.¹ The Constitution is a document committed to social transformation.² It has the aspiration and intention to realise in Kenya a democratic, egalitarian society committed to social justice and self-realisation opportunities for all.³ In support of a post-liberal reading, one would

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¹ See K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 South African Journal of Human Rights 146, 150:

‘By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase ‘reform’, but something short of or different from ‘revolution’ in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the ‘private sphere’.”


³ Ibid para 51.
highlight that the Kenyan Constitution, in sharp contrast to classical liberal documents is social, redistributive, caring, positive, horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.\(^4\)

Traditionally, constitutional rights apply in the public sphere but not in the private sphere. In other words, private actors are not bound by human rights.\(^5\) Much has been made of the ‘public law’ character of rights, which were initially designed to curb excesses of public power, rather than to regulate ‘private’ commercial or interpersonal relationships.\(^6\) Over time, however, the distinction between the public and private spheres as respectively being appropriate and inappropriate venues for the application of human rights norms has been unmasked as artificial, counterproductive and oppressive, especially in a lived reality where much harm is suffered by vulnerable members of society at the hands of powerful private entities.\(^7\) A post-liberal constitution typically exhibits recognition that private individuals and entities have a strong impact on the realization of human rights. ‘In terms of potential impact, decisions and activities of many large multinational corporations are capable of doing more harm to persons and resources in ways that thwart human rights than decisions and activities of some nation-states’\(^8\).

The Constitution has set itself the mission to transform the Kenyan society in the public and private spheres. In other words, Kenya’s Bill of Rights represents a departure from many of the dichotomies and divisions of classic liberal constitutionalism. These include a blurring of the sharp distinction which the latter seeks to draw between negative and positive rights, public and private law, rights versus democracy, and individual versus communal redress for human rights violations. Thus, in terms of article 21(1) of the Constitution, the State is required not only ‘to observe’, ‘to respect’ and ‘protect’ the rights in the Bill of Rights, but ‘to promote’ and ‘fulfil’ them. This formulation derives from the works of Henry Shue who argued that the effective guarantee of all human rights – whether classified as civil and political, or economic, social or cultural – requires a combination of negative duties of restraint on the State, and positive duties to protect and ensure rights.\(^9\) It has also been incorporated in a number of international human rights

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\(^4\) Ibid para 51, the Preamble and Articles 10 and 19 of the Constitution support this reading.


Instruments, and jurisprudence. In this context, it becomes necessary for fundamental rights to address the responsibilities of private individuals and entities for the protection and promotion of human rights.

The application provision of the Bill of Rights addresses the question as to whom the burdens of the Bill of Rights fall upon. That is to what kind of persons or parties the Bill of Rights may be enforced against. The Kenyan Bill of Rights is among the most comprehensive to be found anywhere. As article 20(1) makes plain, many of the rights will bind private individuals and corporations, as well as state organs. The Constitution also envisages that the Bill of Rights applies to all law (statutes, common law and customary law) and requires courts to develop the law to the extent that such a law does not give effect to a right or fundamental freedom. Finally, and perhaps most importantly, the Constitution recognises the national values and principles of governance that bind all persons and state organs. In so doing, the Constitution makes clear that it is introducing a normative value system upon which the Kenyan society must be ordered.

This article is divided into five sections for orderly interrogation of the reach of the Bill of Rights. The first part is the introduction that lays the basis for the ensuing analysis. The second part, interrogates the philosophy of the horizontal application of the Bill of Rights as envisaged in the Constitution of Kenya, 2010. The third part, delves into the question of the constitutional norm range of application versus the prescriptive content of a constitutional right to address the conundrum as to whether all rights and fundamental freedoms are amenable to horizontal application. The fourth part, address the question of the development of law to give effect to rights and fundamental freedoms. Lastly, the fifth part rehashes the findings of this study.

2 Philosophy of horizontal application in the Constitution

In liberal philosophy, constitutions focus on creating political structures that simultaneously empower and limit governments. Such constitutions pay primary attention to the threats to human rights posed by the government. However, in post-liberal philosophy, it is recognised that non-state actors actually exercise private power which can infringe on the rights of individuals.

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10 See, for example, the decision of the African Commission on Human and Peoples' Rights in *The Social and Economic Rights Action Centre (SERAC) and the Centre for Economic, Social and Cultural Rights v Nigeria* Communication no. 155/96 (2001) AHRLR 51 (ACHPR 2001) paras 44-48.

11 Article 20(1) provides that “the Bill of Rights applies to all law and binds all state organs and all persons”. The definition of a State Organ is found at Article 260 which states that, a State Organ is; ‘a commission, office, agency or other body established under this Constitution’ and ‘person’ includes ‘a company, association or other body of persons whether incorporated or unincorporated’.

12 Article 20(2) of the Constitution recognises a constriction to such enjoyment of a right to the effect that a right or fundamental freedom shall only be enjoyed to the greatest extent consistent with its nature.

13 Article 20(1) of the Constitution.

14 Article 20(3) of the Constitution.

15 Article 10 of the Constitution.

In post-liberal philosophy the emphasis is on social democratic institutions. The Kenyan constitution is clearly committed to social welfare principles. At the core of the ideal of liberal autonomy is the proposition that private actors operate in a domain where their reasons for acting are free from public scrutiny. Liberal autonomy consists in decision making pursuant to an individual’s own criteria of the right and the good, not the public’s. Social democracy in contrast is the political theory of the active state. The political theory of the liberal state sees the powerful state as the only real threat to liberty. Social democrats in contrast, believe that liberty can be threatened at least as much by the deployment of private actors.

Proponents of vertical approach to application of constitutional rights invoke the truism that the traditional function of most constitutions is to protect individuals from abuses of state power. But in the Kenyan case, the text of the Constitution indicates clearly that another model of a constitution was envisaged. The courts that have taken a contrarian approach have failed to undertake a principled engagement with the text of the application provision and instead sought to ground their decisions on comparative jurisprudence.

2.1 The duty to protect

Article 21(1) of the Constitution provides that; ‘[i]t is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.’ The very raison d'etre of the State is the welfare of the people and the protection of the people’s rights and it is its obligation, under international and national laws, to ensure that human rights are observed, respected, and fulfilled, not only by itself but also by other actors in the country. For this purpose, it should regulate the conduct of non-state actors to ensure that they fulfill their obligations.

The obligation to ‘protect’ the rights in the Bill of Rights is typically understood to mean that the state must safeguard individual members of society from infringements of their rights by third parties and must ensure the adequacy of legal remedies that prevent or compensate for such infringements. The State is therefore obliged to protect right-holders against other subjects by

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17 The preamble and article 19 of the Constitution are clear on this.
20 Peter Hogg Constitutional Law of Canada (3rd edn, Carswell 1992) 34.2. In deciding that the Charter does not extend to private action, the Supreme Court of Canada has affirmed the normal role of a Constitution. A constitution establishes and regulates the institutions of government, and it leaves to those institutions the task of ordering the private affairs of the people.
21 Articles 20(1) and 21 (1) of the Constitution. Satrose Ayuma and 11 Others v Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme Nairobi Petition No. 65 of 2010 [2013]eKLR; Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort Limited and Others Nairobi Petition No. 156 of 2011 [2013] eKLR at para. 30; Amy Kagendo Mate v Prime Bank Limited Credit Reference Bureau & another, Petition No. 17 of 2013 [2013] eKLR.
23 Satrose Ayuma (n 21 above) para 56.
24 See, for example, Chirwa (n 5 above) 559-60; Pierre De Vos ‘Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa’s 1996 Constitution’ (1997) 13 South African Journal of
legislation and provision of effective remedies. Thus the state has a duty to provide for judicial remedies for violations of rights by private actors.25

2.2 The illusion of public/private distinction

The private power exercised by private actors is conferred on them by laws creating and regulating market behaviour. The state constructs and enforces all law.26 Both legislation and common law in turn significantly shape all public and private relationships. Since the state constructs and enforces all law; all law and all private relationships should be measured against constitutional standards. This requires that all enquiries as to the constitutionality of a particular law or relationship be tested against the constitution’s dictates and not be artificially suppressed as a result of a misguided belief that the guarantees in the Bill of Rights apply only to those actions and relationships which can be traced directly back to the state.27

Every social transaction is governed by law, or at a minimum, is underwritten by the power of the state. If a state’s laws and conduct determine public and private lives, then it is untenable to subject only those acts immediately traceable to the organs of the government to constitutional scrutiny and immunize from constitutional attack those acts backed by the power of the state but traditionally described as private.28 Moreover all law depend on enforcement by the state for its efficacy thus its untenable suggest that the state is not involved in governing relations between individuals inter se.29

All rights including those founded on private relations are ultimately sourced in some law. Whatever the foundations of such rights, their efficacy in the modern state depends, on the power of the State to enforce its sanction and its duty to do so when its protection is invoked by the

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25 Velázquez Rodríguez v. Honduras, 1988, Series C. No. 4 The decision of the Inter-American Court that ‘when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens.’

26 See Harold M Horowitz and Kenneth L Karst, The Proposition Fourteen Cases: Justice in Search of a Justification’ (1966) 14 University of California Law Review 37, 41, 45: ‘[T]here always exists some state law (statutory, decisional or declarable in a court of first instance) determining the legal characteristics of any private discriminatory conduct .... State action, in the form of state law, is present in all legal relationships among private persons.’

27 Such a misguided distinction is made in KAPI Ltd. & another v Pyrethrum Board of Kenya, Petition 54 of 2012 [2013] eKLR. See contrarian opinion in Erwin Chemerinsky, ‘Rethinking State Action’ (1985) 80 Northwestern Law Review 503 at 536: ‘[W]e must remember ... [i]n each case when a question of state action [or any legal action] arises, both the freedom of the violator and the freedom of the victim are at stake. No matter how a court decides, someone’s liberty will be expanded and someone’s liberty restricted. To assert that the state action doctrine is desirable because it preserves autonomy and liberty is to look at only one side of the equation.’


citizen seeking to rely on it. It is therefore erroneous to conclude that private rights are to the exclusion of the public domain. Inherently, there can be no private right governing relations between individuals inter se or between individuals and the State the protection of which is not legally enforceable, and if it is legally enforceable it must be part of law that is subject to constitutional conformity.  

If a provision of legislation would be deemed to be unconstitutional when invoked by an individual against the state, then it must likewise be unconstitutional when invoked by an individual in a dispute between individuals inter se. The remedial purposes of the constitution must be borne in mind as its efforts to create a new order must have been intended to reach even individual/individual relations. This takes into account the modern day realities that abuse of power is perpetuated in many instances by private individuals against other private individuals. The distinction between private and public realm is therefore an illegitimate attempt to immunize a section of conduct or law from constitutional scrutiny.

3 Article 20(2) of the Constitution: Constitutional norms range of application versus prescriptive content

The horizontal application of rights must be cognisant of the caveat envisaged in article 20(2) of the Constitution. Although article 20(1) of the Constitution provides that fundamental rights are applicable to all types of law and binds all organs of the state and all persons, article 20(2) makes it clear that not all fundamental rights operate in the same manner.  

Article 20(2) establishes a ‘restricted application’ with the qualification that a right can only be enjoyed in a manner consistent with its nature. This means that wholesome horizontal application without a determination as to whether the fundamental right in question is amenable to horizontal application would invade article 20(2) of the Constitution and render it meaningless.  

This approach is buttressed by the distinction between a constitutional norm’s range of application and that same norm’s prescriptive content. Article 20(1) speaks to each specific constitutional norm’s range of application while Article 20(2) speaks to the prescriptive content of each specific constitutional norm and directs the court to consider whether that prescriptive

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30 Article 2(2) of the Constitution provides for supremacy of the Constitution and all law is only valid as it comports with the letter and spirit of the Constitution.

31 Charles M Fombad ‘African Bill of Rights in a Comparative Perspective’ (2011) 17(1) Fundamina 49. Fombad has endorsed the approach that only some of the rights in the Constitution have horizontal application. He cites article 27(5) which states that “[a] person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated by clause (4)”. Another example is art 29(c), which provides that “[e]very person has the right to freedom and security of the person, which includes the right not to be—subjected to any form of violence from either public or private sources.” However, Fombad’s critique is minimalist as it fails to discuss the ramifications of article 20 of the Constitution to horizontal application.

32 One of the canons of constitutional interpretation that courts cannot adopt an interpretation which would render a provision of the Constitution to be without any apparent purpose. See Khumalo v Holomisa, 2002 (5) SA 401 (CC) at para 32.

content ought to be understood to govern the private conduct of the private parties that constitutes the gravamen of the complaint. Article 20(2) acknowledges that not every right, and not all obligations imposed by a particular right, are capable of horizontal application.\textsuperscript{34} The idea is that the constitutional norms bind everyone, public and private, but that some additional norms weigh against the full-scale application of the constitutional norm to private actors. For example in a hypothetical situation, for the proposition that a patriarchal male could be held liable for failing to invite a female neighbour to a party held in the patriarchal male’s house, in this situation a right to intimate association must be balanced against the antidiscrimination norm. But constitutional provisions will be given effect to where no such counter-norms exist.

The court in \textit{Isaac Ngugi v Nairobi Hospital & 3 others} observed thus:\textsuperscript{35}

> The issue whether the Bill of Rights applies horizontally or vertically is beyond peradventure. ….The real issue is whether and to what extent the Bill of Rights is to apply to private relationships. The question as to whether it is to be applied horizontally or just vertically against the State depends on the nature of the right and fundamental freedom and the circumstances of the case.

Similarly in the case of \textit{Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi},\textsuperscript{36} Gacheche J., observed that:

> …the rigid position that human rights apply vertically is being overtaken by the emerging trends in the development of human rights litigation…We can no longer afford to bury our heads in the sand for we must appreciate the realities which is that private individuals and bodies such as clubs and companies wield great power over individual citizenry who should as of necessity, be protected from such non-state bodies who may for instance discriminate unfairly or cause other constitutional breaches…The major challenge to horizontal application of human rights is the fact that it (is) a novel area and courts bear great responsibility of examining individual cases so as to decide each case on its own merits as a horizontal application does not and should not cut across the board…I find that fundamental rights are applicable both vertically and horizontally save that horizontal application would not apply as a rule but it would only be an exception which would obviously demand that the court do treat (it) on a case by case basis by examining the circumstances of each case before it is legitimized.

This approach is in tandem with scholarly views expressed regarding Section 8(2) of the South African constitution. Cockrell has argued that it ‘proceeds on the assumption that constitutional rights might be agent-relative and context-sensitive, inasmuch as their direct application against private agencies will depend on the circumstances of the case and the characteristics of the


\textsuperscript{35} \textit{Isaac Ngugi ibid} Para 22.

\textsuperscript{36} \textit{Mwangi Stephen Mureithi} (n 34 above).
particular person’, Stephen Ellman argues that the extent to which a private entity may be held accountable for infringements of rights must depend on the nature and extent of the power exercised by the entity, the degree to which the power emulates state powers and the impact of the power on the enjoyment of rights. Ellmann accordingly suggests that entities which exercise powers or perform functions that emulate those of the state, or that impact on the exercise of rights by citizens in a similar manner, should be held bound by relevant provisions in the Bill of Rights.

Article 20(2) envisages three sets of circumstances: on the one hand a right may be of no application to private persons; a right may apply fully to private persons; and a right may only be applicable to a certain extent. Thus, the mere existence of the right in the Bill of Rights does not determine its application to private persons. The implication of article 20(2) of the Bill of Rights for horizontal application is that a court should first decide whether given the nature of the right, the right will apply to the dispute before the court. Where the prescriptive content of the substantive right does not engage the law or conduct at issue, then the spirit, purport and objects of the Bill of Rights will inform an effort to bring all law into line with the Constitution as envisaged in article 20(3)(a) of the Constitution.

4 Article 20(3) of the Constitution: Development of statute, common and customary law

The terrain of the law in Kenya has profoundly changed. All courts must now, as a first duty, take into account the provisions of the Constitution particularly the Bill of Rights. Article 20 (3) of the Constitution envisages that courts are to actively scrutinize the law (statute, common and customary) as to their conformity with constitutional imperatives and transform it in a manner that promotes the Bill of Rights in general and gives full effect to the various rights at issues in particular. This can be understood, together with section 7 of the Sixth Schedule of the Constitution as mandating courts to actively scrutinize private law as to their conformity with constitutional imperatives and transform it in a manner that promotes the Bill of Rights in general and gives full effect to the various rights at issue in particular.

The aim of article 20(3) of the Constitution is to ensure the seepage of fundamental rights into statutory, customary and common law disputes between private parties. This would also apply

40 In Luka Kitumbi & 9 Others v Commissioner of Mines & Geology & Another, Civil Case Number 190 of 2010 [2010] eKLR Ojwang J. (as he then was) has stated as follows: ‘So, a new obligation is placed upon the Judge who, though beginning from the established judicial practice and the known principles of interpretation, must assess any cause coming up before him or her in relation to the imperative terms of the new Constitution.’
where no specific constitutional right has been asserted. A court should infuse its interpretation of the law with the general values of the constitution, which include human rights.\textsuperscript{41} As Kelsen notes the basic norm of the legal system must be effective in the sense of being applied consistently by and large by the citizenry in order for the legal system based on such basic norm to operate. Thus ‘as soon as the old constitution loses its effectiveness, and the new one has become effective, the acts that appear with the subjective meaning of creating or applying legal norms are no longer interpreted by the presupposition of the old basic norm, but by presupposing the new one.’\textsuperscript{42} The obligation that the Bill of Rights in general and article 20(3) in particular imposes on courts is of a peremptory character. When it comes to giving effect to the rights in the Bill of Rights, it is not a matter of discretion for courts to effect the development of law. Thus, where the development of common law is necessary to give full effect to the Bill of Rights, it is imperative upon courts to effect such development accordingly.

That private law rules governing private relationships –relationships created by property, contract or tort- are subject to direct constitutional review under the Constitution does not mean that they will necessarily violate the Constitution. What it means is that rather than the court artificially suppressing questions regarding private-law rules governing private relationships by saying the constitution does not apply, a court will have to answer on the merits whether the property, privacy or associational interests protected by the rules of private law should trump the right in question.\textsuperscript{43} Where the private law can meet the requirements of constitutional justification, the private choices and relations in questions will be protected. Where the private law is not consistent with the rights in the Constitution, new private law norms will be crafted. This is to involve the formulation of a new rule and crafting of new remedies.

The implication of the provisions is that when a private person attempts to enforce a claim, the court is called upon to investigate the constitutionality of the rule of private law upon which such person relies to enforce the claim. The law guarantees the consequences of the exercise of certain forms of private power. Where the law operates in this manner, private behaviour falls within the scope of the constitution, owing to the ability of the court to investigate the constitutionality of the law.

The trigger for the development of the common law is, in the first instance, that it should be found to be inconsistent with the Bill of Rights. Judicial intervention is required either when a rule of private law is in conflict with a constitutional provision, or where a court is obliged to adopt a new stance on a matter of public policy because the former position has been rendered untenable by the impact of the Bill of Rights. The obligation to develop private law also arises where the private law as it stands is deficient in promoting the article 10 values. The test in

\textsuperscript{41} Article 20(4) of the Constitution.
respective of the article 10 requirement is therefore a facilitative one, turning not merely on the existence of a conflict between private law and the Bill of Rights but also on whether the existing instrumentarium of private law is optimally suited for the realization of the constitutional imperatives. The jurisdiction in respect of article 10 values is matter of duty rather than discretion.44

In this regard, giving effect to the Bill of Rights will often involve the striking down of private law rules or doctrines that are in conflict with constitutional rights, irrespective of whether what is objectionable is enshrined in legislation or doctrines of common or customary law. This will often mean the re-conceptualization of traditional rules, concepts and doctrines in order to give effect to constitutional rights in the domain of private law. Such an exercise requires that courts evaluate established legal doctrine purposively through the teleological lenses of the fundamental values contained in the constitution. This implies a shift from the authority-based reasoning to the purposive and value-based decision-making implicitly demanded by the constitutional injunction to develop private law. In this approach the Constitution makes provision for gradual or interstitial development of the common law. This could involve the creation of new common law actions and remedies for private disputes under fundamental rights.

One question that arises is the extent to which courts can develop the law. In the light of article 20(4), it seems that such development must be taken to a level that gives the rights whose protection is at issue their full effect. To put it differently, courts must develop the law to a level at which it becomes consistent not only with the rights whose protection is at issue in the case at hand but also with the spirit, purport and objects of the Bill of Rights in general. Given the nature of judicial review envisaged by the Constitution, this is a proper exercise of judicial power, and does not in any way amount to interfering in the law making power of the legislature. It should be emphasised that judicial assertions of a law making power, albeit a limited and circumscribed one, is nothing new. The considerable flexibility and capacity for change of the common law is a constant theme in common law legal systems.45 What is novel is the explicit requirement that this jurisdiction is to be exercised under the guidance of the catalogue of fundamental rights enshrined in the constitution.

44 In Luka Kitumbi (n 40 above) the court observed thus:
I take judicial notice that the Constitution of Kenya, 2010 is a unique governance charter, quite a departure from the two [1963 and 1969] earlier Constitutions of the post-Independence period. Whereas the earlier Constitutions were essentially programme documents for regulating governance arrangements, in a manner encapsulating the dominant political theme of centralized (Presidential) authority, the new Constitution not only departs from that scheme, but also lays a foundation for values and principles that must imbue public decision-making, and especially the adjudication of disputes by the Judiciary. It will not be possible, I think, for the Judiciary to determine causes such as the instant one, without beginning from the pillars erected by the Constitution of Kenya, 2010.

45 Continental jurists often claim that judicial law-making occurs only in common law regimes. Recent research shows that the asserted contrast between civil and common law jurisdictions is over-stated. See, for example, Mitchel Lasser, ‘Judicial (Self-)Portraits: Judicial Discourse in the French Legal System’ (1995)104 Yale Law Journal 1325.
Where the development of the law is required in order to give full effect to the Bill of Rights, the separation of powers doctrine should not unduly hinder the courts as that are an intervention explicitly mandated by the Constitution. However, such development can be legitimate and coheres with the doctrine of separation of powers only if it is limited to giving full effect to the Bill of Rights of the Constitution. Thus, where the development of the law goes beyond what is required to give full effect to the Bill of Rights, it may unreasonably usurp the constitutionally mandated powers of the legislature and thus may amount to a breach of the doctrine of separation of powers.

Outside of this, however, the development of the law by courts to give effect to the Bill of Rights does not constitute a breach of the doctrine of separation of powers as it does not preclude the legislature from enacting laws in accordance with its legislative objectives. The same should be seen as part of institutional dialogue within a democratic system.

5 Conclusion

The question as to whether a constitution will apply to private law matters depends on the normative commitments of a particular constitution. Where the Constitution adopts a narrow restriction of constitutional-legal norms that set formal rules and protocols for electing the government and the legislature that provide for the enactment of statutes and leave everything else to the free and unrestricted choice of parliament, or the other variant, where the constitution is broadly coached substantive protections of fundamental rights which are then made applicable to the conduct and transactions that occur in civil society, private as well as state, horizontal as well as vertical.

The Kenyan constitution does structure the arrangements of government. However this is not the full ambit of constitutional law in Kenya. The Kenyan constitution compels social

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46 The High Court in *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others*, Petition Number 1174 of 2007 [2013] eKLR para 37 endorsed the holding in the case of *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 LRC 216, 248 at para 99, where the South African Constitutional Court defined the constitutional duty of the Court in the following terms:

The primary duty of Courts is to the Constitution and the Law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.

47 Judicial restraint is called for since courts are obliged to refrain from usurping the law-making powers constitutionally vested in the legislature by actively engaging in judicial law-making. See Alexander M Bickel, *The Least Dangerous Branch* (2nd eds Yale University Press1986) 16-17.


transformation. The scope for the Constitution therefore goes far beyond a minimalist definition as that identifying its core goal as structuring the government.\textsuperscript{50} Not only does the Constitution structure the relationship of government but it requires a fundamental law reform project in terms of which all existing laws’ validity must be determined through the prism of the Constitution.\textsuperscript{51}

Kenya’s constitution is concerned with abuse of power simpliciter – whether it is privately or publicly sourced. Kenya has one of the most skewed patterns of wealth distribution in the world.\textsuperscript{52} Wealth is concentrated in a few powerful private organisations which possess the power to render nugatory the benefits of a constitutional state. The state has an essential role to play in determining the contours of those private relationships which so fundamentally shape individual identity and in making possible a variety of life choices through support for those associations and organisations which make up society writ large.

\textsuperscript{50} Luka Kitumbi (n 40 above).
\textsuperscript{51} Section 7, Sixth Schedule of the Constitution.