

**THE DESIRABILITY OF CONSISTENCY
IN CONSTITUTIONAL INTERPRETATION**

by

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DECLARATION

I declare that *The Desirability of Consistency in Constitutional Interpretation* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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ABSTRACT

Globally, the justice system has set up courts to respond to complaints of a criminal and civil nature. Courts also respond to complaints which require swift relief by way of shortened procedures, in the form of motion proceedings. In all these complaints, courts have to respond in a manner that leaves litigants with a feeling of satisfaction that justice has been done.

To the end of ensuring that there is legal certainty, justice systems in all jurisdictions have established a hierarchy of courts, with lower courts being bound by the decisions of higher courts in their jurisdiction. There has been no problem in the application of this principle called *stare decisis*, or judicial precedent, in disputes of law. However, in disputes of constitutional interpretation, courts have demonstrated a marked shift from observing the rule of judicial precedent. The disregard for this rule manifests itself particularly in the adjudication of cases surrounded by controversy. It is argued herein that constitutional interpretation is no different from legal interpretation, in that the rule of judicial precedent which characterises court decisions in legal disputes, should characterise court decisions in constitutional interpretation disputes. The Constitutional Court of South Africa itself, though it is the highest arbiter

in constitutional matters, is bound by its own previous decisions, unless its previous decisions have become manifestly wrong.

Three constitutional rights are analysed. The right to life in its three manifestations, namely, the right to life of the unborn child, the right to life of the convicted criminal not to be hanged, and the right of the terminally ill to continue living by receiving medical care at state expense. The other two rights are the right to privacy, and the right to culture.

The right to privacy is the right that has been claimed in political controversies. In isolated instances, specifically mentioned herein, the Constitutional Assembly and the drafters of the Constitution have also contributed to the resultant inconsistency in constitutional interpretation. This is especially so with regard to the right to practise one's culture.

KEY TERMS: desirability; consistency; Constitution; interpretation; judicial precedent; *stare decisis* ; rights; judges

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CHAPTER 1

General introduction

1.1 How the need for interpreting arises

For decades, courts have had to interpret legislation. The concept of interpreting is not used in connection with common law. The popular modern concept with regard to common law is to develop it. With the advent of the Constitution,¹ the concept of interpreting has been extended to the Constitution itself.

A question that seems not to have been answered satisfactorily is what gives rise to the need to interpret. It would appear that if drafters of legislation were to devote their drafting skills to closing all possible loopholes for ambiguity, misunderstanding, and lack of clarity, in drafting a legislative text, the need for courts to interpret would not arise.

The intriguing aspect of interpretation is that the help of those who authored the document called an Act of Parliament is never resorted to by courts to explain what they meant, or had in mind, when they drafted a piece of legislation which now baffles courts. One reason for this could

¹ The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as “the Constitution”).

be that the authors consist of several segments of the legislative community. More often than not, what becomes a piece of legislation in the end is not the product of Parliament alone. Most statutes have their genesis in national government departments. Their embryonic stage is what has been called the Green Paper.² The Green Paper is brought to the attention of the public for comment. Stakeholders also have their share of comment on the proposed policy.

Having taken the views of the public into account, a government department converts the policy document into a draft Bill. The draft Bill is drafted by either the department's internal drafters, or by external consultants, who do the work for a fee. At this stage, the policy document which has become a draft Bill is termed the White Paper.

Government departments work in clusters. Government departments whose functions are intertwined, form a cluster.³ A department that is the author of the Bill must discuss the Bill with the departments in its cluster. If the departments in the cluster approve the draft Bill, the draft Bill must be presented to the entire Cabinet for approval. Only after the draft Bill has been approved by the entire Cabinet does it become a Bill.

² The Green Paper is the policy document produced by a government department for public comment and discussion with stakeholders.

³ For example, the Department of Police, the Department of Justice and Constitutional Development, and the Department of Correctional Services may form a cluster, since their responsibilities, or functions, are interdependent.

The Bill is then sent to the central State Law Advisers, whose function is to scrutinise the Bill for constitutionality and possible clash with the existing body of laws. If the State Law Advisers are satisfied that the Bill is constitutional, they certify the Bill to this effect.

The Bill is then tabled in Parliament. Parliamentary committees critically analyse the Bill, and if Parliament finally adopts the Bill, it is assented to and signed by the President into law.

The above process illustrates the numerous entities who are involved in the eventual product of a statute. In view of the numerous stages and entities involved in the production of a statute, the inevitable consequence is that although a government department is the source of the statute, the ultimate product is far different from what the source department originally intended. When litigants are before a court, and the relief they seek is based on a statute, and there is a dispute as to the meaning of a section, or sections, in the statute, it would be impractical and impossible for the court to call all these entities to appear before the court to explain what their intention was when they worded the statute in the way that they did. Thus arises the need for courts to interpret statutes.

The Constitution is not different. Although it did not originate from a government department like a statute, some of its provisions were drafted in a manner that is open to interpretation. It is this imperfection in drafting that lawyers capitalise on in their attempt to secure the desired relief for their clients. Consequently, a court has to decide which interpretation, of the interpretations submitted, is acceptable to it. It may also be necessary for a court to come up with its own interpretation.

1.2 How statutes and the Constitution have been interpreted

Before the advent of the Constitution as the supreme law of the land, courts have, over the decades, invented different approaches of interpreting statutory provisions. Some of these approaches have been preferred over others when they proved to be in the interest of a litigant. When the Constitution emerged as the supreme law of the land which also needed to be interpreted, courts used the established methods of interpreting to interpret ambiguous provisions of the Constitution. But in interpreting the Constitution, these methods have been augmented to a certain extent, as it is felt that a Constitutional provision needs a more liberal approach than a statutory provision. These methods of statutory and constitutional interpretation, and the extent to which they have been augmented, are the subject matter of Chapter 2.

Chapter 3 deals with an essential element that should characterise court judgments. This essential element is consistency. Consistency is the positive result produced by the doctrine of *stare decisis*, or judicial precedent. The interpretation methods applied in interpreting constitutional provisions have little value if they are used inconsistently.

One of the factors which have resulted in inconsistency in constitutional interpretation is the influence of social controversies. It will be shown from what some judges themselves have admitted that it is indeed possible for judges to allow some inclinations to have a bearing on their judgments. The chapter will show that without consistency, methods of constitutional interpretation do not produce the desired legal certainty for future litigants.

1.3 Constitutional rights which have been interpreted inconsistently

The right to life⁴ stands out as one of the rights the interpretation of which has been inconsistent. The right to life is an indispensable right entrenched in the Constitution, as all other rights cannot be enjoyed unless one is alive. There have been three challenges surrounding the right to life. The first challenge revolves around which stage can accurately be said to be the beginning of life, and whether one can

⁴ Section 11 of the Constitution.

rightfully claim the protection extended by the Constitution at that stage. The position in the South African jurisprudence is explored. The position in foreign jurisdictions is compared to the position in South Africa. Finally, the influence that international instruments are supposed to have in the constitutional controversy surrounding the right to life is analysed.

The second challenge that has been raised in connection with the right to life revolves around the preciousness of the life of convicted criminals.⁵ Convicted violent criminals do not belong in society, but whether that justifies punishment which robs them of life is a bone of contention where society sees the matter differently from courts.

Finally, the life of a law-abiding, but terminally ill, person is weighed in the scales with the life of a convicted, but healthy, criminal. Besides protecting life itself, the Constitution protects the right of a patient to receive medical attention.⁶ In some cases, a patient may be terminally ill, yet his or her condition may not, in the eyes of the court, require “*emergency*” medical treatment in terms of section 27(3) of the Constitution.⁷ The adjudication of the right to life has been characterised by inconsistency of interpretation. These inconsistencies, and the various shades of the right to life, are dealt with in depth in Chapters 4 to 6.

⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁶ Section 27(1) of the Constitution.

⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

Another right that is entrenched in the Constitution is the right to privacy.⁸ This right, like the right to life, has been claimed in at least three areas of life. It has been claimed in the kind of entertainment one can rightfully enjoy in the privacy of one's home.⁹ It has also been claimed in the types of sexual intimacies one is entitled to in the deep recesses of one's bedroom.¹⁰ The respected profession of lawyers has claimed it in what is known as privilege in the legal profession.¹¹ There is also the question of whether the right to privacy can be extended to other aspects of privacy that are not listed in section 14, such as legal professional privilege. This constitutional right, and the controversial issues surrounding it, and the inconsistencies in its interpretation, are delved into in Chapter 7.

Finally, inconsistency in the interpretation of the right to practise one's culture, is considered. Although it is a right on its own, the right to practise one's culture has been associated with the right to speak one's own language.¹²

⁸ Section 14 of the Constitution.

⁹ *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC).

¹⁰ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

¹¹ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA (CC).

¹² Section 30 of the Constitution.

Customary law is unwritten law. It exists in the minds and hearts of traditional communities who choose to go about their lives in the cultural way. Because customary law, unlike statute law, is unwritten, it cannot be amended, or repealed. Nor can it be developed by courts, since it evolves on its own from generation to generation. It is, therefore, not so much the inconsistency of courts in interpreting customary law that has thrown the right to culture into confusion, but primarily the Constitutional Assembly and the drafters of the Constitution are to blame for the inconsistency. It will be shown how the Constitutional Assembly and the drafters of the Constitution are responsible for the resulting inconsistency in interpretation by the courts. Chapter 8 considers, therefore, some problems in the way the text of the Constitution was drafted, as one of the factors contributing to inconsistency.

CHAPTER 2

Theories of interpretation and their relevance to constitutional interpretation

2.1 Introduction

Over the years, courts have developed principles of interpreting statutes. Prior to the constitutional democracy in 1994, South Africa had various constitutions,¹³ but these were nothing more than an Act of Parliament, as they were not the supreme law of the land. Thus, theories of interpreting ordinary statutes were used to interpret these constitutions as well. The Constitution of the Republic of South Africa, 1996, containing an entrenched Bill of Rights, became the supreme law which has to be respected and interpreted in a manner more embracing than the methods used in interpreting ordinary statutes.

Accordingly, the interpretation of the Constitution follows the same interpretation approaches which are often used in the interpretation of statutes. However, since the Constitution is not a statute enacted by Parliament, its interpretation should not be limited to the interpretation approaches used for statutes. These different approaches are principles

¹³ South Africa Act of 1909; Republic of South Africa Constitution Act 32 of 1961; Republic of South Africa Constitution Act 110 of 1983.

which have guided courts over decades in the legal history of South Africa, and other jurisdictions. Considering these principles is appropriate as a stepping stone to the interpretation of the Constitution itself, because, although the Constitution is not an Act of Parliament,¹⁴ the principles employed in interpreting the Constitution are the same as those applied in interpreting legislation.

2.2 The literal or ordinary-meaning approach

The literal approach is usually the point of departure. Also known as the ordinary meaning approach, this method is often abandoned as soon as it becomes clear that the ordinary meaning of a word leads to a senseless interpretation.¹⁵ In terms of this approach in its crude and unqualified form, the meaning of a statutory provision must be gleaned from the actual words in which the statute is couched. According to this interpretation approach, the interpreter must unquestioningly defer to the authority of the legislature, and no one may dare tamper with the words that the legislature used to express its will. It is assumed that statutory language as it stands, on condition that it is clear and unambiguous, is a reliable expression of the legislative intent.¹⁶

¹⁴ Section 1 of the Citation of Constitutional Laws Act, Act 5 of 2005.

¹⁵ Du Plessis L *Re-Interpretation of Statutes* (2002) 93, 94.

¹⁶ Du Plessis L *Re-Interpretation of Statutes* (2002) 93.

It often happens, however, that the literal application of the words used by the legislature leads to difficulties. This has been the experience of courts as far back as the early part of the twentieth century. A case in point is the case of *Venter v R*¹⁷ where the Court, per Innes CJ, had to interpret the word “person” in terms of sections 3 and 5 of Ordinance No. 20 of 1905. The sections provided that any person entering into the Transvaal Colony after the passing of the Ordinance would be guilty of an offence if convicted elsewhere of certain offences. The Court came to the conclusion that the legislature could not have intended to include persons who were resident in the Transvaal.

When the approach of interpreting a statute *ipsissima verba* leads to absurd results, the golden rule as stated by Lord Wensleydale in *Grey v Pearson*¹⁸ applies, that “the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency, but no farther”.¹⁹

¹⁷ *Venter v R* 1907 TS 910 913.

¹⁸ *Grey v Pearson* [1857] 6 HL Cas 61 All ER.

¹⁹ at 36.

In the context of the South African Constitution, the difficulty presented by the literal or ordinary-meaning approach was experienced in *Christian Lawyers Association v Minister of Health*,²⁰ where the provisions of the Termination of Pregnancy Act,²¹ were impugned. Plaintiffs, in this case, contended that section 11 of the Constitution which provides that “everyone has the right to life” applied also to unborn children from the moment of conception. The High Court, finding that the ordinary-meaning approach leads to difficulties, held that:

If s 11 were to be interpreted as affording constitutional protection to the life of a foetus far-reaching and anomalous consequences would ensue. The life of the foetus would enjoy the same protection as that of the mother. Abortion would be constitutionally prohibited even though the pregnancy constitutes a serious threat to the life of the mother. The prohibition would apply even if the pregnancy resulted from rape or incest, or if there were a likelihood that the child to be born would suffer from severe physical or mental abnormality . . . In my view, the drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms.²²

The need to interpret statutes would probably not exist, or would be minimised if statutes were drafted in a clear, forthright manner. Most statutes were drafted in a convoluted style with long sentences, and with no full-stops. The sentences were characterised by numerous commas,

²⁰ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T).

²¹ Choice on Termination of Pregnancy Act 92 of 1996.

²² See footnote 20 above at 1442 – 1443.

with the predicate far removed from the subject because of numerous phrases and commas in-between.

It is noteworthy that, thanks to plain language advocacy of modern times, the drafting of legislation in legalese has in recent years shifted to a more modern, short-sentence style, with the predicate following soon after the subject.²³ The same can be said of the Constitution, which has avoided the use of the legal term, “jurisdiction” in section 167(4) of the Constitution. In the unsimplified style of drafting, this section would have read as follows: “Only the Constitutional Court has the jurisdiction — to *(a)* decide . . .” However, in the simplified drafting style, the meaning is better conveyed with the words: “Only the Constitutional Court may . . .”

Notwithstanding the improvement in the drafting style, seeking to find the correct interpretation by resorting to the ordinary-meaning approach is no lasting panacea to interpretation problems because what seems to be clear to one judge may not be to another. It is only what individual judges think is the clear meaning.²⁴

²³ Thornton G C *Legislative Drafting* (1996) 2nd ed at 16.

²⁴ Cockram G *The Interpretation of Statutes* (1983) at 49.

2.3 Determining the meaning of the legislature

Determining the intention of the legislature is another approach to legislative interpretation. Frankly, intention is elusive. This is because courts always endeavour to determine the intention of the legislature, yet the legislature is, more often, not the source of a piece of legislation.²⁵ Thus, intention is searched for from a wrong source. As shown in the previous Chapter, a piece of legislation undergoes numerous processes by various groups, so that by the time it is promulgated into law, it bears little resemblance to what it originally looked like. The result is that the intention is almost lost and untraceable by courts.

In South Africa, the intention approach to statutory interpretation has had to yield to the Constitution and its interpretation. In the years prior to the adoption of the Constitution, Parliament was sovereign, and courts had to defer to the will of Parliament, especially where the wording of legislation was clear and unambiguous.

With the advent of the Constitution, however, courts must defer to the will of the legislature, but subject to the Constitution. In other words, in interpreting statutes, courts must be satisfied that their interpretation harmonises with the spirit of the Constitution. If an interpretation which

²⁵ Du Plessis L *Re-Interpretation of Statutes* (2002) at 94–95.

harmonises with the Constitution is not achievable, the relevant piece of legislation must be struck down.²⁶

To illustrate, the traditional definition of “marriage”, for example, has always been that it is a legally recognised life-long voluntary union between one man and one woman, to the exclusion of all other persons.²⁷ The recognition of the right to equality, however, has resulted in the enactment of the Civil Union Act,²⁸ which provides for an alternative to the traditional concept of marriage. The Civil Union Act defines “civil union” as the voluntary union of two persons who are both eighteen years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedure prescribed in the Act, to the exclusion, while it lasts, of all others.

It is worthy of note that the definition of “civil union” differs from the traditional definition of marriage, which regarded marriage as a “life-long” union, whereas in reality marriages are often terminated by divorce. The Civil Union Act has taken into account the undeniable fact of divorce, and has omitted the element of “life-long” duration. Thus, the intention

²⁶ Du Plessis L *Re-Interpretation of Statutes* (2002) at 96.

²⁷ Cronje DSP and Heaton J *South African Family Law* 2nd ed (2004) at 17; See also *Seedat's Executors v The Master (Natal)* 1917 AD 302, 309.

²⁸ Civil Union Act 17 of 2006.

approach to interpretation has had to yield to the supreme influence of the Constitution.

2.4 The purposive approach

The purposive approach is yet another approach to legislative interpretation. The line of distinction between intention and purpose is very faint. Purpose, however, is not elusive, as it is invariably stated in the long title of a piece of legislation. Also, some statutes²⁹ of national importance, or statutes the enactment of which is directly authorised by the Constitution, invariably begin with a preamble. The preamble of a statute throws light on the purpose of the statute.

In the Constitution, however, there is no long title setting out the purpose of the Constitution, but the preamble to the Constitution may be of assistance in this regard, as it lays the background giving rise to the drafting of the Constitution. The preamble may therefore serve as the historical approach to interpretation. It was for this reason that Sachs J,³⁰ in reference to the interim Constitution,³¹ said that the preamble should not be dismissed as a mere aspirational and throat-clearing exercise of

²⁹ Promotion of Administrative Justice Act 3 of 2000; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³⁰ In *S v Mhlungu* 1995 (3) SA 867 (CC).

³¹ The Constitution of the Republic of South Africa, 1993 (Act 200 of 1993).

little interpretive value. He emphasised that the preamble connects up, reinforces, and underlies all of the text that follows.³²

The interim Constitution also had a postamble which was relied upon for interpretation purposes in *Shabalala v Attorney-General of the Transvaal*.³³ Its relevance was emphasised. It was said to be similar to a historic bridge which the Constitution provides between a past based on conflict, untold suffering, injustice, and a future founded on the recognition of human rights.³⁴

The spirit of the postamble to the interim Constitution manifested itself in the final Constitution as part of its preamble. The phrases of the preamble to the final Constitution, such as, ‘the injustices of the past, and the honouring of those who suffered for justice and freedom in our land, and the need for healing the divisions of the past’, are all an indication that the spirit and tenor of the postamble to the interim Constitution survived to the final Constitution.³⁵

³² See footnote 30 at par. 112.

³³ *Shabalala v Attorney General of the Transvaal and Another* 1996 (1) 725 (CC).

³⁴ at par. 25.

³⁵ Du Plessis L “Interpretation” in Woolman S and Roux T (eds) *et al Constitutional Law of South Africa* Vol 2 (2009) at 32–119.

Miers and Page³⁶ mention the occasional possibility of a statute providing that certain concepts in it are to be understood as having the same meaning as in an earlier statute, but in the South African context, this seldom happens. Interpreters of legislation have to fumble their way through, determining the purpose and intention of legislation at hand.

Perhaps the best way to illustrate the benefit of the purposive approach in action is to consider the line of reasoning of the Constitutional Court of South Africa in construing the provisions of section 14 of the Local Government: Municipal Electoral Act.³⁷ *In casu*,³⁸ the applicant, a political party contesting municipal elections, paid a deposit in the form of a bank guaranteed cheque as required by the Municipal Electoral Act. Section 14(1) of the Act requires that a party intending to contest municipal elections should pay a prescribed deposit, before a stipulated date, to the local office of the Electoral Commission.³⁹ In error, the applicant made its payment to the head office of the Commission. The

³⁶ Miers D R and Page A C *Legislation* (1990) at 169.

³⁷ Act 27 of 2000 (hereinafter referred to as the Municipal Electoral Act).

³⁸ *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) 305 (CC).

³⁹ The full provisions of section 14(1) of the Local Government: Municipal Electoral Act 27 of 2000 are as follows:

“A party may contest an election in terms of s 13(1)(a) or (c) only if the party by not later than a Date stated in the timetable for the election has submitted to the office of the Commission’s local representative—

(a) in the prescribed format—

- (i) a notice of its intention to contest the election; and
- (ii) a party list; and

(b) a deposit equal to a prescribed amount, if any, payable by means of a bank guaranteed cheque in favour of the Commission”.

applicant intended to contest elections in several municipalities, including Cape Town. However, by oversight, the applicant did not include Cape Town as one of the municipalities in which it intended to contest elections. This resulted in the Electoral Commission holding surplus funds paid by the applicant. Upon becoming aware of its omissions, the applicant requested the Electoral Commission to use the surplus funds as a deposit to contest the Cape Town municipality elections. The Electoral Commission declined the request, reasoning that the provisions of the section are peremptory and cannot be adhered to in some other way. Thereupon the applicant approached the Electoral Court.

For purposes of illustrating the application of the purposive approach in construing a statutory provision in the spirit of the Constitution, it must be noted at this stage that the Electoral Court dismissed the applicant's application, whereupon the respondent contended that no further remedy could the applicant hope for. The reason advanced by the respondent for this submission was that the Constitutional Court did not have jurisdiction to hear the matter since, firstly, the decision of the Electoral Court was final and could not be appealed against⁴⁰ and, secondly, the matter did not raise a constitutional issue.

⁴⁰ Section 96(1) of the Electoral Act 73 of 1998 provides:

"The Electoral Court has final jurisdiction in respect of all electoral disputes and complaints about infringements of the Code, and no decision or order of the Electoral Court is subject to appeal or review".

In considering whether the applicant could be granted relief, the Constitutional Court dwelt on the reasons of the Commission for not certifying the applicant and its candidates. One reason was that the applicant, although it paid its deposit, had not done so in the manner required by the Act. The Commission's view was that the Act required compliance to the letter.

It is enlightening to note that the Constitutional Court, in being purposive in its approach, did not limit itself to the interpretation of section 96 of the Electoral Act, but widened its scope by invoking the provisions of a closely related provision in *another* Act, section 17 of the Municipal Electoral Act. While the Electoral Act contains a provision ruling out an appeal or review by another court, the Municipal Electoral Act does not contain an equivalent express provision. The Court held that this leads to the reasonable conclusion that section 96 of the Electoral Act is not applicable to disputes arising from municipal elections. Also, there is no provision in the Municipal Electoral Act that the decision of the Electoral Court is final. Based on this broadened view which takes into consideration a related provision in a related Act, the Constitutional Court could come to a balanced conclusion on the question whether the jurisdiction of the Constitutional Court was ousted by the narrow construction of section 96.

Adopting a purposive approach on the question whether the matter raised a constitutional issue or not, the Court broadened its scope of application to a relevant section in the text of the Constitution, section 19.⁴¹ The point of departure is that this section entrenches the right of citizens to vote. It is clear, therefore, that any statutory provision which deals with, or regulates, voting, must be interpreted in the spirit of realising the entrenched nature of this right in the Constitution.

Consequently, any dispute arising from the exercise of the right to vote will give rise to a constitutional issue, and the matter will fall within the jurisdiction of the Constitutional Court, was the Court's approach. The fact, therefore, that section 19 of the Electoral Act renders the decision of the Electoral Court unappealable or unreviewable, must be understood in the light of this principle. Moreover, the Municipal Electoral Act was enacted by Parliament specifically to give effect to the constitutional political rights of section 19 of the Constitution.

⁴¹ Section 19 of the Constitution provides:

- "(1) Every citizen is free to make political choices, which includes the right—
- (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right—
- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office".

A further factor which makes it evident that the matter is a constitutional one is the fact that the Electoral Commission itself is an institution established by the Constitution,⁴² to perform a vitally important constitutional function. Consequently, the question whether it performs its functions must raise a constitutional issue.

An aspect on which the Electoral Commission had refused to grant the applicant's request was that the provisions of section 14 of the Municipal Electoral Act are peremptory, and accordingly, the Commission required compliance to the letter. In this regard, the Constitutional Court quoted with approval the words of the then Appellate Division, per Van Winsen AJA, in *Maharaj and Others v Rampersad*,⁴³:

The enquiry, I suggest, is not so much whether there has been "exact", "adequate" or "substantial" compliance with this injunction but rather whether there has been compliance therewith".⁴⁴

The Court adopted a strong view that a narrow approach should be avoided. Adopting the purposive approach, the Court stated that the purpose of section 14 was to ensure that a deposit was paid by a political party to establish beyond doubt that the party had a serious intention of contesting the election. Looking at the requirement of the section that

⁴² Section 181(1)(f) of the Constitution.

⁴³ *Maharaj and Others v Rampersad* 1964 (4) SA 638 (A).

⁴⁴ at 646C.

the deposit be paid at the local office of the Commission, and not anywhere else, the Court found that the legislature had no specific purpose in thus requiring. What is more, no other party would be harmed by this generous and purposive interpretation. Thus, the purposive approach of the statutory provision was to the benefit of the litigant.

2.5 Contextualism

Sometimes judges resort to contextualism,⁴⁵ as an alternative approach. A judge employing this approach looks at the context by having regard to similar words or phrases in other sections, or in the entire piece of legislation, or even at the surrounding circumstances. This approach presents problems in the interpretation of the Constitution because the Constitution, unlike a piece of legislation, does not deal with one subject, one intention, and one purpose, but covers various facets of life in society. Nevertheless, the contextual approach has been found to be an indispensable tool in arriving at an appropriate construction of a piece of legislation.⁴⁶ By the same token, it has been a useful guide in constitutional interpretation.⁴⁷

⁴⁵ Contextualism is an interpretive approach which seeks to interpret a statutory provision, or a constitutional provision, by having regard to the Act, or the Constitution, as a whole, and not focus attention on a single provision, to the exclusion of all others. See Du Plessis L *Re-Interpretation of Statutes* (2002) at 112.

⁴⁶ Naylor N "Removing the prescription blindfold in cases of childhood sexual abuse" 2005 227 *ACTA JURIDICA* 233.

⁴⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par 40.

2.6 The mischief rule

The mischief rule requires a court to determine the mischief which the piece of legislation at hand seeks to remedy. In *Hleka v Johannesburg City Council*,⁴⁸ the then Appellate Division, per Van Den Heever JA, considered how the intention of the words of the empowering legislation were to be understood. Van Den Heever JA held that to arrive at the real meaning, the Court had to “consider, (1) what was the law before the measure was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy the Legislator had appointed; and (4) the reason for the remedy”.⁴⁹

This makes the mischief rule akin to historical approach which is backward-looking and forward-looking, seeking to remedy the results brought about by the past, such as apartheid.⁵⁰ In *Qozeleni v Minister of Law and Order*,⁵¹ the Court adopted the view that the interim Constitution must be interpreted in the light of the mischief it sought to cure. In this case, the mischief was the previous apartheid dispensation.

⁴⁸ *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A).

⁴⁹ *Ibid* at 852, 853.

⁵⁰ Goldblatt B “Litigating Equality — the example of child care” 2001 8 *ACTA JURIDICA* 25.

⁵¹ *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75 (E).

2.7 The generous approach

The generous approach is a cornerstone in legal interpretation.⁵² This approach is in harmony with a vital principle in the interpretation of statutory provisions, namely, that if a provision is open to more than one interpretation, one being favourable to the accused, and the other being adverse, the interpretation favourable to the accused must be preferred. This approach was used extensively in the case of *Makwanyane*,⁵³ to the benefit of the accused.

Recently, in *National Director of Public Prosecutions v Zuma*,⁵⁴ the interpretation of section 179(5)(d) of the Constitution was open to more than one interpretation. The question was whether an accused facing prosecution is entitled as a matter of constitutional right to be invited for representations before he or she could be recharged. Rather than interpret the section in a manner that would answer the constitutional question once and for all, the Supreme Court of Appeal (SCA) avoided the crux issue, nor was its view one of a generous approach. The question which the appellant wanted the Court to settle for future cases was whether all accused persons whose cases had been withdrawn or struck off the roll would have, as a matter of law and right, to be invited for

⁵² *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 9.

⁵³ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁵⁴ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

representations before they could be recharged. As indicated, the Supreme Court of Appeal handled the matter in a manner that does not settle the crux for future cases as desired.

With the advent of the Constitution, Constitutional Court judges have, according to Currie and de Waal,⁵⁵ laid down guidelines as to how the Constitution in general, and the Bill of Rights in particular, should be interpreted. These two authors make it appear as though the Constitutional Court judges are the inventors of these theories of constitutional interpretation, whereas these have been employed by courts decades before the judges of the South African Constitutional Court used them.⁵⁶ These interpretation theories have served as a useful tool in unravelling the hidden intention of drafters. However, these theories contribute little to consistency and certainty in interpretation.

No single interpretation theory is adequate on its own, but a combination of two or more has to be employed, basing the combination on the ordinary-meaning approach, as a point of departure.

⁵⁵ Currie I and de Waal J *Bill of Rights Handbook* (2005) 5th ed at 147.

⁵⁶ *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) 852, 853; *Harris v Minister of the Interior* 1952 (2) 428 SA (A) 459 F-H.

In the *Corporal Punishment* case,⁵⁷ the Namibia Supreme Court emphasised the wisdom of a value judgment which “requires objectivity to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the . . . people”.⁵⁸ Against this background, it was felt in *Makwanyane*⁵⁹ that a court may not allow itself to be guided by public opinion in interpreting the Constitution. With these two thoughts in mind, it is difficult to draw a line between a “value judgment” which is based on values of society as endorsed by the Court in the *Corporal Punishment* case, and public opinion, because public opinion can be said to reflect values of society.

Admittedly, a number of interpretation approaches should be explored, and those that would be favourable to the litigant should be favoured. This means that if the literal approach would be prejudicial to the litigant, a purposive approach would be preferable. However, that alone should not be the end. There should be a common thread permeating all those cases in which a generous approach was chosen as an aid to interpretation.

⁵⁷ *Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSc).

⁵⁸ at 86 H-I.

⁵⁹ *S v Makwanyane and Another* 1995 (3) (SA) 391 (CC) at 9.

Illustrating this point is the *Mhlungu* case.⁶⁰ Item 17 of Schedule 6 of the Constitution⁶¹ needs no interpretation, as it expressly states that cases which were pending when the Constitution came into effect were not to be decided on the basis of the Constitution, unless it was in the interests of justice to do so. Notwithstanding such a clear provision, a generous interpretation was adopted, thus allowing constitutionally disqualified persons to benefit from a Constitution which was not in force when their cases were finalised. However, the same generous approach was not adopted to the benefit of the litigant in the *Soobramoney* case.⁶² Instead, a literal, ordinary-meaning interpretation was sufficient. No doubt, the situation in *Soobramoney* was more compelling to adopt the generous approach, as life was at risk. By contrast, the situation of a litigant facing imprisonment in the *Mhlungu* case was less compelling, since life was not at risk.

2.8 The historical approach

The historical approach without the element of consistency has also proved not to be a panacea in constitutional interpretation. While by and large the generous approach, combined with the purposive approach, was resorted to by the Court in *Makwanyane*, the Court also relied on the

⁶⁰ *S v Mhlungu* 1995 (3) SA 391 (CC).

⁶¹ The interim Constitution was used at that time.

⁶² *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

historical approach. “It is against this historical background and ethos that the constitutionality of capital punishment must be determined,” was Chaskalson JP’s view.⁶³

Reasoning along the same lines, the same Court in the *Grootboom* case⁶⁴ expressed the view that:

the cause of the acute housing shortage lies in apartheid. . . . The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, . . . The legacy of influx control in the Western Cape is the acute housing shortage that exists there now.⁶⁵

However, this historical approach, though used in both these instances did not yield the same result. In *Makwanyane*, this approach yielded a positive result in the form of a positive order, saving the lives of the two convicts, and of many others who would suffer the fate of the gallows ending their life. The same approach in *Grootboom* yielded a result falling short of a positive result, a mere declaratory order.

It cannot be said that *Grootboom* provides a useful framework for an analysis of women’s housing rights. This order proved to be ineffective. This can be seen in the fact that Mrs Irene Grootboom, the leading figure

⁶³ See footnote 59 at 264.

⁶⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA (CC).

⁶⁵ at 6.

in the case bearing her name, died in September 2008 at Kraaifontein, Western Cape, seven years after the landmark judgment, still without a state-provided roof over her head. She was still living in a corrugated-iron-makeshift shelter against which she had continually fought so vehemently.

This analysis of statutory interpretation theories demonstrates that courts are not striving towards consistency in their interpretation.

2.9 Constitutional interpretation

The Constitution contains no provision prescribing how it should be interpreted. It is silent on the theories of interpretation. However, in section 39 it throws some light on how its Bill of Rights should be interpreted. It prescribes that in interpreting the Bill of Rights a court, tribunal or forum, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.⁶⁶ This signifies that in interpreting the Bill of Rights, the interpreter must interpret the right in question in a manner that takes into account the values which our modern society lives by. It has been suggested⁶⁷ that such values should include the African concept of *ubuntu*.⁶⁸ Indeed, the

⁶⁶ Subsection (1)(a).

⁶⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 31.

⁶⁸ *Ubuntu* means humanity, or the spirit of being human.

concept of *ubuntu* makes the interpretation of the South African Bill of Rights unique, since the values to be taken into account in the process of interpretation are not merely those of international law and Western civilisation. The concept of *ubuntu* gives these values a unique character of being rooted in the native soil of South Africa, and are not merely imposed by a previous colonial, imperialist, political and social order.⁶⁹

The spirit of *ubuntu* as an element of the values promoted by the Constitution of South Africa has already displayed itself in the interpretation of legislation dealing with the eviction of unlawful squatters. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,⁷⁰ has been invoked to evict unlawful occupiers of land in the case of *Cape Killarney Property Investments v Mahamba*.⁷¹ The property company sought to evict unlawful residents on its property, doing so without notice to the unlawful residents, notwithstanding the peremptory provisions of section 4 of the Act.⁷²

⁶⁹ Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 587.

⁷⁰ Act 19 of 1998.

⁷¹ *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) 1222 (SCA).

⁷² Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 provides:

“(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction”.

It is obvious from the peremptory nature of the provision that the relief of eviction sought cannot be sought *ex parte*. There is a respondent who must, as a matter of legislative injunction, be served with notice. Doing so in the context of eviction does not only satisfy the *audi alteram partem* rule,⁷³ but is in line with the spirit, purport, and objects of the Bill of Rights. In particular, this spirit and the element of *ubuntu* are contained in section 26(3) of the Constitution, which regulates evictions. The section provides in a clear language that one may only be evicted from one's home, or have one's home demolished, with an order of court, made after considering all relevant circumstances. In this manner, the eviction of an unlawful occupier is made cumbersome, requiring motion proceedings, which are brought at cost to a litigant seeking relief. It is also worthy of note that the "home" referred to by section 26(3) of the Constitution is not defined. It therefore matters not whether the "home" was unlawfully obtained. The fact of its being unlawfully obtained does not justify an *ex parte* application, nor does it justify self-help, by demolishing the "home" arbitrarily on the grounds that the demolisher is a lawful owner of the land. Thus, the interpretation of a provision, having regard to section 39, calls for a "rights-friendly reading of a statutory provision".⁷⁴

⁷³ *Audi alteram partem* means "hear also the other side". See Paterson T J M *Eckard's Principles of Civil Procedure in the Magistrates' Courts* (2005) 5th ed at 48. It is the principle that, before any court makes a finding, or an order, it must first give the other party in the matter before it an opportunity to be heard.

⁷⁴ Du Plessis L "Interpretation" in Woolman S and Roux T (eds) *et al Constitutional Law of South*

The interpreter of the Bill of Rights is also bound, in terms of section 39, to consider international law, whereas there is a discretion in considering foreign law.⁷⁵ In this regard, the South African Constitution is akin to the Canadian Charter⁷⁶, the interpretation of which is guided by international treaties.⁷⁷ The most important of these is the International Covenant on Civil and Political Rights,⁷⁸ to which Canada became a party in 1976.⁷⁹ The terms of the Covenant are relevant to the interpretation of the Canadian Charter on the basis that a statute and a constitution should be interpreted, to the extent that this is possible, in the spirit of international law.⁸⁰

Africa Vol 2 (2009) at 32–108.

⁷⁵ Subsection (1)(b) and (c).

⁷⁶ Canadian Charter of Rights and Freedoms, 2007. For example, section 11 (*g*) of the Charter provides that:
 “Any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or *international law* or was criminal according to the *general principles of law recognised by the community of nations*” [emphasis added]. See also Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 84, where the authors mention that at first Canadian courts were cautious in their approach to the Canadian Charter, which is the Canadian Bill of Rights, since it was only a statute, and judges adhered to the traditional concept of parliamentary supremacy.

⁷⁷ Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 36–39 to 36–40.

⁷⁸ Hereinafter referred to as “the Covenant”.

⁷⁹ The International Covenant on Civil and Political Rights is an international agreement which contains 27 articles defining and circumscribing a variety of rights and freedoms, and imposing an absolute and immediate obligation on each of the State parties to respect and ensure these rights to all individuals within their territories. See Sieghart P *The International Law of Human Rights* (1983) at 25.

⁸⁰ *Re Powers to Levy Rates on Foreign Legations* [1943] S.C.R. 208.

In cases where the Covenant entrenches a right which is also entrenched in the Canadian Charter, but in an unclear manner because of the wording used in the Charter, the Covenant is relied upon to indicate the appropriate interpretation of the right. A case in point is section 10(b) of the Charter, which confers upon an arrested person the right to legal representation.⁸¹ The subsection is silent on whether an accused person may obtain legal representation at state expense if he or she is indigent. In the absence of a clear stipulation in this regard, the Covenant is considered. The Covenant provides direction in its article 14(3)(d) by conferring upon an accused person the right to be legally represented at state expense “if he does not have sufficient means to pay for it”.⁸² Thus, the state of Canada feels obliged to provide legal representation at state expense to an accused of little or no means. As to the relationship between the Charter and the Covenant, the authors⁸³ of *Human Rights from a Comparative and International Law Perspective* explain that the

⁸¹ Section 10 of the Canadian Charter of Rights and Freedoms provides:

“Everyone has the right on arrest and detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful”.

⁸² Article 14(3) of the International Covenant on Civil and Political Rights provides:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance, assigned to him, in any case where interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”.

⁸³ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 215.

Covenant and other similar instruments are tools of interpretation and, as such, must be considered alongside other tools. Moreover, they argue that the ability of these tools to guide the courts will depend on the comparability of the instrument concerned. Referring to the Canadian courts being bound by the provisions of the Covenant, the Supreme Court of Canada held:

This brief overview of Legal Aid and duty counsel systems reveals the extent of Canada's recognition of the importance of the right to counsel for all persons detained in connection with criminal offences. This recognition extends beyond our own affirmation of the right in the *Canadian Bill of Rights*, R. S. C, 1985, App III, and the *Charter* to our international commitments. For example, Canada is a signatory to the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171.⁸⁴

The constitutions of most countries bear some resemblance to some degree. The Constitution of Canada and its Charter is not an exception to this. The drafters of the Canadian Charter drew from the American Bill of Rights in drafting their own Bill of Rights, called the Charter of Rights and Freedoms.⁸⁵

Since there is similarity in the text of the constitutions of different jurisdictions, each jurisdiction should therefore be free to consider

⁸⁴ *R. v. Brydges* [1990] 1 S.C.R. 190, at 214.

⁸⁵ Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 36–38.

interpretations of another, in constitutional provisions that bear resemblance. Indeed, Kriegler J subscribed to this view in his words:

Comparative study is always useful, particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us. Likewise, where a provision in our Constitution is manifestly modelled on a particular provision in another country's constitution, it would be folly not to ascertain how the jurists of that country have interpreted *their* precedential provision.⁸⁶

Kriegler J held this view notwithstanding the opposite view by his colleagues on the Constitutional Court Bench, who adopted a cautious approach, per Chaskalson J, in *Makwanyane*,⁸⁷ that “in dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution”.⁸⁸

It is submitted that Chaskalson J lost sight of the fact that, although he referred to the South African Constitution as “our own Constitution”, our Constitution is not original, or unique, but its provisions bear some resemblance with the constitutions of other jurisdictions, such as

⁸⁶ In *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) at 811 I–J to 812A.

⁸⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁸⁸ at par. 39.

Botswana, Kenya, Lesotho, Malawi and Zambia⁸⁹ in Africa, and Germany, Austria and Switzerland in Europe.⁹⁰

There is a word of caution, though. A court would have to sift, and not transplant blindly everything that there is to transplant. The special circumstances of the country from whose constitution a court is borrowing would have to be painstakingly compared with the circumstances prevailing in its own country. This word of caution was pointedly phrased in the words of the Supreme Court of India in *Babulal Parate v State of Bombay*,⁹¹ where the Court cautioned that “it will be improper to import into the question of the construction doctrines of democratic theory and practice obtaining in other countries, unrelated to the tenor, scheme and words of provisions which we construe”.⁹²

There is another similarity between Canada and South Africa regarding the method used when legislation is impugned for its unconstitutionality. This method is called severance. It is used in the interpretation of statutes, where only a part of the statute is bad for constitutionality, whereas the rest is constitutionally sound.⁹³ When this is the case, the

⁸⁹ Heyns C and Kaguongo W “Constitutional Human Rights Law in Africa” 2006 *SAJHR* at 683, footnote 68.

⁹⁰ Van der Walt A J “Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause” 2000 *SAJHR* at 11, footnote 44.

⁹¹ *Babulal Parate v State of Bombay* AIR 1960 SC 51.

⁹² at 53.

⁹³ Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 605.

court usually excises the bad part, and preserves the part that is constitutional.

Care is exercised, however, that the severance does not alter the meaning of the remaining part of the piece of legislation under scrutiny. This is because the unchallenged part can stand on its own merit because it was enacted within constitutional bounds.⁹⁴

For example, in the case of *R v Hess*,⁹⁵ section 146(1) of the Criminal Code of Canada dealing with rape served before the Supreme Court. The provision criminalised the conduct of a male person who had sexual intercourse with a girl under the age of fourteen years. The Criminal Code made such conduct an offence whether the male person believed that the girl was older than the age of fourteen years. The wording of the provision failed to take into account the essential requirement for a criminal offence, namely, *mens rea*. The unconstitutionality of the provision could be remedied by severing the words: “whether or not he believes that she is fourteen years of age or more”. The words of the provision which would remain would be sound in law without replacing the severed words with new ones. Accordingly, the Court invoked its power of severance to strike out the unconstitutional words.

⁹⁴ Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 36–25.

⁹⁵ *R v Hess* [1990] 2 S. C. R. 906.

Severance also became a tool to remedy the unconstitutionality in *Tétreault-Gadoury v Canada*,⁹⁶ where the Unemployment Insurance Act⁹⁷ of Canada restricted the unemployment insurance benefits to persons under the age of sixty-five. If the age restriction of sixty-five years were to be removed, the statute would not be in conflict with section 15 of the Canadian Charter of Rights and Freedoms which prohibited discrimination on grounds of age.⁹⁸ The Supreme Court simply invoked the power of severance to remove the age bar of sixty-five years from the Act.

The interpretation of the Canadian Charter of Rights also necessitated the severance power of the Supreme Court in *Benner v Canada*,⁹⁹ where the Citizenship Act of Canada¹⁰⁰ was impugned for discriminating between children born abroad to Canadian fathers and Canadian mothers before 1977. A child born to a Canadian mother had to apply for citizenship and pass a security test, whereas the child of a Canadian father was

⁹⁶ *Tétreault-Gadoury v Canada* [1991] 2 S.C.R. 22.

⁹⁷ Unemployment Insurance Act 1970-71-72 c.48, s.1

⁹⁸ Section 15 of the Canadian Charter provides:

“(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex age or mental or physical disability”.

⁹⁹ *Benner v Canada* [1997] 1 S.C.R. 358.

¹⁰⁰ Citizenship Act, Act of 1977.

automatically entitled to citizenship upon the father registering the child's birth in Canada. Mothers of children born abroad before 1977 felt that the statute was unconstitutional on the grounds of discrimination based on age.¹⁰¹ The remedy was to excise the discriminating part of the statute, which the Court ordered.

It seldom happens that the interpretation of a constitutional provision results in the entirety of a statute being struck down because of unconstitutionality. What usually happens is that only a section thereof is unconstitutional and needs to be severed from the rest of the constitutionally sound part. However, the case of *R v Big M Drug Mart*¹⁰² was a landmark decision by the Supreme Court of Canada where the Court struck down the Lord's Day Act¹⁰³ for violating section 2 of the Canadian Charter.¹⁰⁴ On a Sunday of 30 May 1982 the Big M Drug Mart store was charged with unlawfully selling goods on a Sunday in violation

¹⁰¹ Section 15(1) of the Canadian Charter expressly prohibited discrimination on grounds of age.

¹⁰² *R v Big M Drug Mart* [1985] 1 S. C. R. 295. Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 92, mention the case of *R v Big M Drug Mart* as the only case in which the Supreme Court of Canada has unequivocally rejected the legislative objective.

¹⁰³ Lord's Day Act of 1906.

¹⁰⁴ Section 2 of the Canadian Charter provides:

"Everyone has the following fundamental rights:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

of the Lord's Day Act. The store was acquitted, but the State appealed the Court's judgment. The appeal was dismissed.

The constitutional question was whether the Lord's Day Act infringed the right to freedom of conscience and religion and, if so, whether the infringement was saved by section 1 of the Charter.¹⁰⁵

The Court interpreted section 2 of the Charter and the Lord's Day Act in a way that rendered the statute unconstitutional, as violating section 2 of the Charter. The Court held that there was no justifiable basis for the legislation, and its only purpose was to satisfy a state's religious based requirement, and was therefore invalid.

In South Africa, the reconciling of a statute with the Constitution has also necessitated that severance be resorted to as a remedy. Section 172(1)(a) of the Constitution is the authority for such a constitutional remedy.¹⁰⁶ Since the section qualifies the declaration of inconsistency with the words: "to the extent of its inconsistency", it becomes clear that the Court may not simply declare the entire statute constitutionally invalid,

¹⁰⁵ Section 1 of the Canadian Charter provides:

"The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject to such reasonable limits presented by law as can be demonstrably justified in a free and democratic society".

¹⁰⁶ Section 172(1) of the Constitution provides:

"When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency".

but only the part that is constitutionally invalid. That gives the Court the power to sever the constitutionally invalid part.

The Constitutional Court of South Africa had to invoke this rare remedy in *Coetzee v Government of the Republic of South Africa*.¹⁰⁷ The question to be decided was the constitutionality of sections 65A to 65M of the Magistrates' Courts Act,¹⁰⁸ which authorised the judgment creditor to cause the arrest and detention of the judgment debtor. It was felt by the judgment debtor that this kind of detention amounted to detention without a fair trial, and as such, vitiated the provisions of sections 11 and 25(3) of the interim Constitution.¹⁰⁹

The Court, per Kriegler J, in considering severance as a remedy, held that:

Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?

¹⁰⁷ *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC). Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 217 refer to this case in the context of showing that South African courts have shown a willingness to make use of binding and non-binding convention law and of non-binding instruments.

¹⁰⁸ Act 32 of 1944.

¹⁰⁹ Sections 11 and 25(3) of the interim Constitution dealt with the freedom and security of the person, and the right to a fair trial, respectively.

Severance saves the legislature a lot of time and effort, since they would have to enact an entirely new piece of legislation if the impugned piece of legislation were to be struck down in its entirety as constitutionally invalid.

2.10 Progressive interpretation

The Appeal Court of Canada¹¹⁰ has invented a doctrine of constitutional interpretation which the Court has called the progressive interpretation.¹¹¹ In terms of the progressive doctrine, a constitution cannot be compared with an ordinary statute because a constitution is couched in a language sufficiently broad to accommodate a wide and unpredictable range of facts. The doctrine also takes into account that a constitution is difficult to amend, and it is likely to remain in force for a long time.

In terms of the doctrine, these considerations require that a constitution be given a versatile interpretation, so that the constitution can be adapted over a period of many years to accommodate changing conditions. Illustrating the elasticity that a constitution should have in

¹¹⁰ *Edwards v A.-G. Canada* [1930] A. C. 124 at 136.

¹¹¹ Hogg P W *Constitutional Law of Canada* (Vol 2) (2007) at 36-25.

the way it is interpreted, Lord Sankey in *Edwards v A.-G. Canada*,¹¹² compared a constitution to “a living tree capable of growth and expansion within its natural limits”.¹¹³

The constitutional issue in *Edwards v A.-G. Canada* was whether, in terms of section 24 of the British North America Act,¹¹⁴ the words “qualified persons” in section 24 include a woman, and consequently whether women were eligible to be summoned to be and become members of the Senate of Canada.¹¹⁵

In arriving at the correct interpretation, the majority of the Court took into account external evidence derived from extraneous circumstances such as previous legislation and decided cases, and internal evidence derived from the Act itself. The Court found that the exclusion of women from all public offices was a relic of days that were more barbarous than the days during which the Court had to settle this constitutional question, and that the necessity of the times often forced on men customs which in later years were not necessary. This, together with the fact that the deliberative assemblies of the early tribes were attended by men under

¹¹² *Edwards v A.-G. of Canada* [1930] A. C. 124.

¹¹³ at 136.

¹¹⁴ British North America Act of 1867.

¹¹⁵ Section 24 of the British North America Act of 1867 provides:

“The governor general shall from time to time, in the Queen’s name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of the Act, every person so summoned shall become and be a member of the Senate and a senator”.

arms, and women did not bear arms, led to the exclusion of women from the Senate.¹¹⁶ The consideration of these factors led the Court to the conclusion that the words “qualified persons” included both genders.

The doctrine of progressive interpretation acknowledges that there might be conditions which did not exist, and could not have been foreseen, at the time that a constitution was drafted. The advent of technology and its endless advancement, for example, makes it necessary for constitutional interpretation to be elastic in nature. Also, the advancement made in the methodology of complex crimes necessitates that the interpretation of the text of a constitution be flexible in nature.

Although the doctrine of progressive interpretation has its origin in the Appeal Court of Canada, its underlying principle seems to be used in the United States of America as well, although the United States Supreme Court¹¹⁷ has not specifically referred to the doctrine by name. A case in point is the Fourth Amendment to the Constitution of the United States. The Fourth Amendment was adopted in the eighteenth century. In those years it can hardly be said that electronic technology was foreseeable. But in 1967, the Supreme Court of the United States was confronted with a situation where it had to apply the right against unreasonable search and seizure in the Fourth Amendment to electronic

¹¹⁶ at 2.

¹¹⁷ *Katz v United States* (1967) 389 U. U. 347.

eavesdropping,¹¹⁸ a practice that could not have been anticipated in the eighteenth century when the Fourth Amendment was adopted.

The doctrine of progressive interpretation, however, has its negative side. It may tend to give judges an unintended latitude to rewrite a constitution. Their interpretation may be so radical that it amounts to rewriting the constitution, a right which can only be exercised by politicians.

The view expressed by the Appeal Court of Canada in *Edwards v A.-G. of Canada* is shared by South African courts.¹¹⁹ The view is that the interpretation of a constitution differs to some extent from the interpretation of legislation. The common view shared by both the Canadian Court and the South African Court is that the interpretation of a constitution should have an element of elasticity in order to accommodate unpredictable occurrences that can arise in the future.¹²⁰ The elasticity of its interpretation also takes into account that a constitution is not easy to amend, and is seldom amended.¹²¹ However,

¹¹⁸ *Katz v United States* (1967) 389 U. U. 347.

¹¹⁹ *Ntentseni v Chairman, Ciskei Council of State* (1994) 1 BCLR 168 (CK); *S v Zuma* (1995) 4 BCLR 401 (CC).

¹²⁰ Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 585.

¹²¹ Section 74(1) of the Constitution provides that sections 1 and 74(1) of the Constitution may be amended by a Bill passed by the National Assembly with a supporting vote of at least 75 percent of its members, and the National Council of Provinces with a supporting vote of at least six provinces. Section 74(2) provides that Chapter 2 of the Constitution, which contains the Bill of Rights, may be amended by a Bill passed by the National Assembly with a

notwithstanding the stringent measures for rendering the South African Constitution difficult to amend, it has been amended a number of times.¹²²

One reason a constitution needs a broader interpretation is that, in terms of the decision in *Ntentsi v Chairman, Ciskei Council of State*,¹²³ a constitution is a foundational law on which other laws are enacted. It is not just another statute. In *Ntentsi*, the applicant had instituted action against the Ciskei Council of State for damages arising from an unlawful arrest and detention by members of the police force, acting in the course and scope of their employment by the state. In defending the action, the state relied on the provisions of section 2(2) of the Definition of State Liability Decree 34 of 1990.¹²⁴ In this regard, the Supreme Court of

supporting vote of at least two thirds of its members, and the National Council of Provinces with a supporting vote of at least six provinces. Subsection (3) provides that any other provision of the Constitution may be amended by a Bill passed by the National Assembly with a supporting vote of at least two thirds of its members, and also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendment relates to a matter that affects the Council, that alters provincial boundaries, powers, functions or institutions, or that amends a provision that deals specifically with a provincial matter.

¹²² For example, in 1997, section 90(4) of the Constitution was amended by section 1 of the Constitution First Amendment Act of 1997; in 2001, section 111(2) was amended by substituted by section 9 of the Constitution Sixth Amendment Act of 2001; in 2001, section 120(3) was substituted by section 3 of the Constitution Seventh Amendment Act of 2001, and in 2003, section 139(8) was substituted by section 4 of the Constitution Eleventh Amendment Act of 2003.

¹²³ *Ntentsi v Chairman, Ciskei Council of State* (1994) 1 BCLR 168 (CK).

¹²⁴ Section 2(2) of the Definition of State Liability Decree 34 of 1990 provided as follows: "No legal proceedings may be brought against the State in respect of any claim arising from any . . . abuse of power . . . on the part of any member or servant of the Government of the Republic of Ciskei which was overthrown on 4 March 1990"

Ciskei¹²⁵ found that the provisions of the Decree were unconstitutional,¹²⁶ as they limited the right of access to courts.¹²⁷ The Court held that the Constitution should be interpreted “from a broad perspective and it is the source of the fundamental rights and reflects the norms against which other legislation is to be evaluated and tested”.¹²⁸ The Court further held¹²⁹ that, on a proper interpretation, the provisions of section 26(1) of the Republic of Ciskei Constitution Decree¹³⁰ applied to all decrees without limiting the section to post-constitution decrees.¹³¹ Thus, the Court demonstrated that a constitution needs a broader interpretation.

2.11 The presumption of constitutionality

Another principle of constitutional interpretation is that constitutionality must be presumed. This means that when deciding the constitutionality of a statute, or the conduct of a member of the executive, the court should be inclined towards accepting its constitutionality. This principle

¹²⁵ The existence of this Court was terminated by political developments in South Africa.

¹²⁶ When tested against the fundamental rights that were contained in Schedule 6 of the Republic of Ciskei Constitution Decree 45 of 1990.

¹²⁷ *Ntentseni v Chairman, Ciskei Council of State and Another* 1994 (1) BCLR 168 (Ck) at 179.

¹²⁸ *Ntentseni v Chairman, Ciskei Council of State and Another* 1994 (1) BCLR 168 (Ck) at 177G.

¹²⁹ *Ntentseni v Chairman, Ciskei Council of State and Another* 1994 (1) BCLR 168 (Ck) at 178G–H.

¹³⁰ The Republic of Ciskei Constitution Decree 45 of 1990.

¹³¹ Section 26(1) of the Republic of Ciskei Constitution Decree provided as follows:

“(1) The Supreme Court shall be competent to enquire into and pronounce upon the validity of a Decree in pursuance of the question:

- (a) whether the provisions of this Decree were complied with in connection with any law which is expressed to be decreed by the Council of State; and
- (b) subject to the provisions of this Decree, whether the provisions of any such Decree abolish, diminish or derogate from any fundamental right as set out in Schedule 6”.

of constitutional interpretation is invoked where a statute or the conduct of a member of the executive is capable of being interpreted in more than one way, one resulting in constitutional validity, and the other in constitutional invalidity. The court should presume that the legislature or the executive intended to act in a way that is compatible with the Constitution. This approach is also called the “reading down” approach.¹³²

Admittedly, the Constitution of South Africa does not contain in its text an express provision which authorises constitutional presumption. But the interim Constitution¹³³ provided for the presumption of constitutionality in section 232(3).¹³⁴

Even though the text of the final Constitution does not prescribe to courts that they must presume legislation to be within the spirit of the Constitution, the South African Constitutional Court has adopted the approach that “all statutes must be interpreted through the prism of the

¹³² Currie J and de Waal J *The Bill of Rights Handbook* (2005) 5th ed at 64; Chaskalson M *et al/ Constitutional Law of South Africa* (1999) Vol 1 at 9.3(a); *S v Bhulwana* 1996 (1) SA 388 (CC); *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC).

¹³³ Interim Constitution of 1993.

¹³⁴ Section 232(3) of the interim Constitution of the Republic of South Africa, 1993 provided as follows:

“No law shall be constitutionally invalid solely by reason of the fact that the wording used is prima facie capable of an interpretation which is inconsistent with a provision of this Constitution, provided such a law is reasonably capable of a more restricted interpretation which is not inconsistent with any such provision, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation”.

Bill of Rights”.¹³⁵ This is in harmony with the provisions of section 1 of the Constitution, which lays the groundwork for every step likely to be taken by the executive, the legislature and the judiciary. These three separate arms of state have to bear in mind the values of human dignity, equality and the advancement of human rights and freedoms.

The values with which the Constitution is imbued have been manifest in the manner in which the South African Constitutional Court itself has dealt with constitutional challenges which it had to resolve. For example, in *Daniels v Campbell and Others*,¹³⁶ the applicant sought a declaration of constitutional invalidity of certain provisions of the Intestate Succession Act,¹³⁷ and the Maintenance of Surviving Spouses Act,¹³⁸ for failing to include persons married according to Muslim rites as spouses.¹³⁹

¹³⁵ *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) at par. 44; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at par. 21.

¹³⁶ *Daniels v Campbell and Others* 2004 (5) SA 331 (CC).

¹³⁷ Act 81 of 1987.

¹³⁸ Act 27 of 1990.

¹³⁹ Section 1(1) of the Intestate Succession Act provided:

“If after the commencement of this Act a person (hereinafter referred to as the ‘deceased’ dies intestate, either wholly or in part, and—

(a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;

(b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;

(c) is survived by a spouse as well as a descendant—

In terms of section 1 of the Maintenance of Surviving Spouses Act, “survivor” is defined as “the surviving spouse in a marriage dissolved by death”. Although both statutes confer rights on spouses who are predeceased by their husbands or wives, neither of them defined the word “spouse”.

The applicant was married to her deceased husband by Muslim rites. The marriage, which was at all times monogamous, was not solemnised by a marriage officer appointed in terms of the Marriage Act.¹⁴⁰ No children were born of the marriage, though the applicant and her deceased husband had children from previous marriages. The deceased died intestate.

It would have been easy for the Court to take the line of least resistance by simply declaring the statutes unconstitutional in their entirety, but that would be the easy route to take only for the Court making such a declaration. For the legislature, however, time and effort would be

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- (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
 - (ii) such descendant shall inherit the residue (if any) of the intestate estate”.

Section 2(1) of the Maintenance of Surviving Spouse Act provided:

“If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings”.

¹⁴⁰ Act 25 of 1961.

required to remedy the defect, within the time that would have been stipulated by the Court.

The wisdom of the Constitutional Court in its interpretive approach becomes especially evident in the light of the judgment of the High Court which heard the matter as a court of first instance.¹⁴¹ The High Court had honoured the doctrine of judicial precedent in that it was guided, in its interpretation of the term “spouse”, by the judgment of the Constitutional Court in *National Coalition v Minister of Home Affairs*,¹⁴² and in *Satchwell v President of the Republic of South Africa* respectively.¹⁴³ The High Court held the view that the term “spouse” only applied to parties to a marriage recognised as valid in terms of South African law.

The second consideration of the High Court in interpreting the term “spouse” was the Estate Duty Act as amended,¹⁴⁴ which, under definitions, makes provision for the inclusion of Muslim parties. Since this Act created an exception to the general rule that the only marriages to which South African law attaches legal consequences are those solemnised in terms of the Marriages Act, the High Court was of the view

¹⁴¹ The Cape of Good Hope Division of the High Court, now renamed the Western Cape High Court, in terms of the Renaming of High Courts Act 30 of 2008.

¹⁴² *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC).

¹⁴³ *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1(CC).

¹⁴⁴ Estate Duty Act 45 of 1955.

that this Act leads to the conclusion that, in the absence of any deeming provision or an express definition, the term “spouse” must be given its traditional, limited meaning. The High Court thus came to the conclusion that since the impugned statutes, the Intestate Succession Act and the Maintenance of Surviving Spouses Act, did not contain a definition that covered Muslim marriages, they could not be interpreted to include parties to Muslim marriages. Amendments of these Acts to provide a broader meaning lay in the hands of the legislature.¹⁴⁵

The High Court proceeded to consider what the consequences of this interpretation would be. Having given the impugned statutes a contextual interpretation, the Court found that the interplay between the applicant’s religious beliefs and the cultural practices in her community, and the failure of South African law to properly accommodate such beliefs and practices, resulted in the applicant being denied relief.¹⁴⁶ For this reason, the High Court held that the omission of people who hold certain religious beliefs and practices in the impugned statutes violated their rights, and thus rendered the statutes unconstitutional and invalid.

It is in the light of this background that the wisdom of the Constitutional Court becomes evident. It is true that the Court of the first instance had commendably abided by the principle of judicial precedent and followed

¹⁴⁵ at 1000A.

¹⁴⁶ *Daniels v Campbell and Others* 2004 (5) SA 331 (CC) at 993H-I.

the decision of the Constitutional Court in a previous similar matter. However, the Constitutional Court, in its endeavours to interpret, begins from the premise that a statute is constitutional. Thus, constitutionality is presumed. *In casu*, the Court partly resorted to the ordinary meaning approach, holding that the word “spouse” in its ordinary meaning includes parties to a Muslim marriage. The Court was of the view that “such a reading is not linguistically strained. On the contrary, it corresponds to the way the word is generally understood and used. It is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word ‘spouse’ than to include them”.¹⁴⁷ This resulted in the Constitutional Court making the order that the word “spouse” as used in the Intestate Succession Act, included the surviving partner to a monogamous Muslim marriage, and that the word “spouse” as used in the Maintenance of Surviving Spouses Act, included the surviving partner to a monogamous Muslim marriage, and that the applicant, for the purposes of the two impugned statutes, was in fact a spouse.

The reasoning of the Constitutional Court in this regard is consistent with the reasoning voiced by one of its members¹⁴⁸ in a dissenting judgment in the early years of its functioning, when Kentridge AJ laid it down as a general principle that, where it is possible to decide any case, civil or

¹⁴⁷ at par. 19.

¹⁴⁸ *S v Mhlungu* 1995 (3) SA 867 (CC).

criminal, without reaching a constitutional issue, that is the course which should be followed.¹⁴⁹ This view was eventually adopted by all members of the Court later in *Zantsi v Council of State, Ciskei*,¹⁵⁰ where the Court emphasised the importance of not formulating a rule of constitutional law broader than is required by the precise facts to which it is applied.¹⁵¹

The principle of presuming the constitutionality of an impugned statute before holding that it is unconstitutional, also prevails in the United States of America. The Supreme Court of the United States has, as early as 1938,¹⁵² shown itself to be disinclined to pronounce statutes unconstitutional and invalid if it is possible to cure the defect without resorting to a declaration of unconstitutionality. In dealing with *Zantsi v Council of State*, the South African Constitutional Court, per Chaskalson J, echoed the words of the United States Supreme Court in *United States v Lovett*,¹⁵³ that “the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible”.¹⁵⁴

¹⁴⁹ *S v Mhlungu* 1995 (3) SA 867 at 895 par. 59D.

¹⁵⁰ *Zantsi v Council of State, Ciskei* 1995 (3) 10 BCLR 1424 (CC).

¹⁵¹ at 1428B.

¹⁵² *United States v Carolene Products Co* 304 US 144 n 4 (1938).

¹⁵³ *United States v Lovett* 328 US 186 (1962).

¹⁵⁴ at 320.

The United States Supreme Court has not only been reluctant to invoke the direct application¹⁵⁵ of the Constitution when interpreting statutes, but has taken a step further. It has refused to make any pronouncements when it considers the matter before it to be purely political.¹⁵⁶ This may be due to the Supreme Court's recognition of the principle of separation of powers. In dealing with political issues in *Baker v Carr*,¹⁵⁷ the Court acknowledged that there were questions beyond judicial competence, and that where the performance of a duty was left to the discretion and good judgment of an executive officer, the judiciary would not compel, one way or the other, the exercise of a discretion by the officer.¹⁵⁸

Further insight into how the principle of constitutional presumption operates is to be found in the view expressed by Georges CJ in *Zimbabwe Township Developers v Lou Shoes*,¹⁵⁹ that whenever a constitutional challenge is raised by a litigating party, it rests on the shoulders of the court to interpret a constitutional provision that is applicable, and establish its meaning. The court must then proceed to consider whether

¹⁵⁵ The direct application of the Constitution, or of its Bill of rights, when interpreting a statute, means interpreting the statute as being unconstitutional. Indirect application means interpreting a statute in a way that avoids declaring the statute as being unconstitutional, for example, by using the "reading down" technique. See Currie I and de Waal J *The Bill of Rights Handbook* (2005) 5th ed at 64.

¹⁵⁶ *Baker v Carr* 369 US 186 (1962); Devenish GE *A Commentary on the South African Bill of Rights* (1999) at 603.

¹⁵⁷ *Baker v Carr* 369 US 186 (1962).

¹⁵⁸ at par. 9.

¹⁵⁹ *Zimbabwe Township Developers (Pvt) Ltd v Lou Shoes (Pvt) Ltd* 1984 2 SA 778 (ZS). See also Devenish GE *A Commentary on the South African Bill of Rights* (1999) at 601.

the impugned piece of legislation falls within the meaning the court has given to the constitutional provision in question. It may be that the challenged piece of legislation is open to two possible meanings. If one meaning falls within the interpretation given to the constitutional provision, the court must presume that the lawmakers intended to act constitutionally, and the court must then uphold the piece of legislation.¹⁶⁰

It is submitted that it would be improper to twist a constitutional provision by giving it a far-fetched interpretation so as to accommodate a meaning the court would like to give to a piece of legislation. That would result in that constitutional provision having to be twisted again in future to accommodate a statute that would also have to be accommodated. The doctrine of precedent would not allow that. Rather, the impugned statute needs to be studied and given its proper meaning. The related constitutional provision must also be studied and interpreted liberally.¹⁶¹ Then it should be considered whether the meaning given to the impugned statute can fit into the interpretation given to the applicable constitutional provision.¹⁶²

¹⁶⁰ at 783C-D.

¹⁶¹ Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 599.

¹⁶² *Minister of Home Affairs v Bickle* 1984 2 SA 439 (Z).

Magid J¹⁶³ introduced a new angle to constitutional interpretation which serves as a warning to courts with the jurisdiction to interpret a constitution. He recognises that section 39(1)(a) of the Constitution requires a liberal interpretation. However, he warns that this provision, peremptory though it is, does not permit or encourage courts to ignore the actual language used in the Constitution. Referring to the rights of detained persons, Magid J opined that if their rights should be extended, that should be achieved by means of legislative action, and not by means of judicial activism, nor by reading words into a statutory provision which were not there, or by excising words which were.¹⁶⁴

Closely related to the principle of constitutional presumption, is the principle not to anticipate a question of constitutional law in advance of the necessity to decide it, and never to formulate a rule of constitutional law broader than is required.¹⁶⁵ This means that while a court is dealing with a matter before it, the matter before it may lend itself to the interpretation of another constitutional issue which is not before court at that particular time. The court may then unwisely succumb to the temptation to also deal with the interpretation of that constitutional issue which is only hypothetical at that stage.

¹⁶³ *S v Gumede and Others* 1998 (5) BCLR 530 (D).

¹⁶⁴ at 542A–C.

¹⁶⁵ *Liverpool, New York and Philadelphia Steamship Co v Commissioners of Emigration* 113 US 33, 39 (1885); *Zantsi v Council of State, Ciskei and Others* 1995 (10) BCLR 1424 (CC) 1428.

In South Africa, this principle of constitutional interpretation became necessary to apply when the Constitutional Court¹⁶⁶ was considering whether the interpretation of the right to life as applied to the death penalty conflicted with the common law right of self-defence. In terms of section 49(2) of the Criminal Procedure Act,¹⁶⁷ a police officer had a legal right to shoot at an escaping suspect who was under lawful arrest. The act of a police officer shooting at an escaping suspect raised the constitutional question of the right to life of the escaping suspect. However, that was not the constitutional issue the Court was asked to settle. If the Court decided the question, it would be anticipating a question of constitutional law in advance of the necessity to decide it. It would also be formulating a rule of constitutional law broader than was required by the precise facts before it.

Recognising this principle of not anticipating a constitutional issue before it is raised, the Court stated: “We are not concerned here with the validity of section 49(2) of the Criminal Procedure Act, and I specifically refrain from expressing any view thereon”.¹⁶⁸ Interestingly, however, having refrained from expressing its view on the constitutionality of the section, the Court nearly succumbed to the temptation of doing so. This becomes evident in the subsequent words of the Court: “But, if one of the

¹⁶⁶ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

¹⁶⁷ Act 51 of 1977.

¹⁶⁸ *S v Makwanyane and Another* 1995 (3) 391 (CC) at 450A.

consequences of this judgment might be to render the provisions of section 49(2) unconstitutional, the legislature will have to modify the provisions of the section in order to bring it into line with the Constitution".¹⁶⁹ With these words, the Court indirectly pronounced on the constitutionality of a statutory provision that was not before it, in violation of its own rule.

The principle of avoiding to adjudicate on the constitutionality of questions that are moot, or not ripe for decision, is said¹⁷⁰ to be beneficial in that it allows for the orderly development of law. Law is developed in instalments.

This principle is a salutary rule also in Canada.¹⁷¹ In the 1980s, a litigant attacked the validity of section 251(4), (5) and (6) of the Criminal Code¹⁷² in relation to abortion on the ground that these sections contravened the right to life, security and equality, of the foetus as a person. These rights, according to the litigant, were protected by sections 7 and 15 of Canadian Charter of Rights and Freedoms. The litigant's *locus standi* was based on the fact that he was seeking a declaration that the legislation was invalid; that there was a serious issue as to its invalidity;

¹⁶⁹ *S v Makwanyane and Another* 1995 (3) 391 (CC) at 450B-C.

¹⁷⁰ Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 604; De Waal J and Currie I *The Bill of Rights Handbook* (2005) 5th ed at 94, 95; Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 59-17.

¹⁷¹ *Borowski v The Attorney-General of Canada* [1989] 1 S.C.R. 342

¹⁷² These sections have since been struck down.

that, as a citizen, he had a substantial and legally protectable interest in the validity of the legislation, and that there was no other reasonable and effective manner in which the issue could be brought before court.

It had to be determined *in limine* before court whether the matter was moot. The question also arose as to whether the litigant had lost his *locus standi*, and indeed whether the matter was justiciable.

The court held that the matter was moot, and therefore the court did not have to hear it.¹⁷³ Furthermore, the litigant had lost his *locus standi* as the circumstances upon which his *locus standi* were premised had ceased to exist. It was the court's view that the doctrine of mootness is part of a general policy that a court may decline to decide cases which merely raise a hypothetical or abstract question. The court held¹⁷⁴ that a matter is moot when a decision will not have the effect of resolving some controversy directly affecting the rights of parties before it. Parties must be actually affected not only at the time when the proceedings are commenced, but also up to the time when a court is called upon to reach a decision.

¹⁷³ The matter had been rendered moot by the fact that the question of the constitutionality of section 251(4), (5) and (6) had disappeared when section 251 was struck down in *R v Morgentaler* (1988) 44 DLR (4th) 385.

¹⁷⁴ at par. 2.

The court succinctly crystallised a two–step analysis to be used in determining mootness. The first step is to determine whether the requisite concrete dispute still exists or has disappeared, thus rendering the issue academic. If the dispute has disappeared, the court must decide whether to exercise its discretion and hear it nevertheless. The second step in the analysis requires that a court considers whether it should exercise its discretion to decide the merits of the case, despite the absence of a live controversy, that is, despite the fact that no parties are actually affected by the issue.

It is clear that courts should be disinclined to decide matters that are of general public interest, controversial, but are not before court as directly affecting litigants.

2.12 Multilingualism

Du Plessis¹⁷⁵ is probably the only one, among constitutional interpretation writers, who adds a new feature as an aid to constitutional interpretation — multilingualism.¹⁷⁶ This approach to constitutional interpretation is seldom, if ever, used. It is true that prior to the commencement of the new constitutional dispensation, South Africa had

¹⁷⁵ Du Plessis L “Interpretation” in Woolman S and Roux T (eds) *et al Constitutional Law of South Africa* Vol 2 (2008).

¹⁷⁶ at 32–115.

only two official languages. However, with the commencement of the interim Constitution, the forerunner of the Constitution of 1996, nine more languages were added as official languages. For this reason, the text of the Constitution has been translated into all these languages.

The question then arises whether the availability of eleven languages can be used as an aid in the interpretation process. The reality is that, although some of the judges speak the other nine languages, other than English and Afrikaans, as their mother tongue, they have never resorted to the text of the Constitution as printed in their mother tongue, to interpret conflicting provisions of the Constitution. Invariably, judges of the High Courts, the Supreme Court of Appeal, and the Constitutional Court, limit themselves to the English text of the Constitution.

Admittedly, during the transitional period of the interim Constitution of 1993, the Constitutional Court did make use, in its interpretation, of the advantage of having two official languages as languages of the Constitution, English and Afrikaans. The issue to be decided¹⁷⁷ was whether Chapter 3 of the interim Constitution applied to both statute law and common law, or to statute law only. The Court decided that the answer was to be found in section 7(2) of the interim Constitution which provided that the Chapter would apply to “all law in force”. However, the

¹⁷⁷ In *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

Court felt that the phrase “all law in force” may have some ambiguity, in that it was capable of being read as limited to statute law.

This being the case, the Court had regard to the Afrikaans version, and found that the Afrikaans version removed all ambiguity by its use of the equivalent phrase: *alle reg wat van krag is*. The word *reg*, as distinct from *wet*, unambiguously embraces both common law and statute law.

The Constitutional Court bolstered its view by referring to a well-established rule of interpretation, that, if one text is ambiguous, and if the ambiguity can be resolved by reference to unambiguous words in the other text, the latter unambiguous meaning should be adopted.¹⁷⁸ The Court, per Kentridge AJ, reasoned that there was no reason why that interpretation rule could not apply to the interpretation of the Constitution. The Court added that, in any event, Afrikaans remained an official language with undiminished status.

In this way, multilingualism,¹⁷⁹ as suggested by Du Plessis, was used as an aid to interpretation. However, since then, there has not been any more use of bilingualism or multilingualism, involving the use of the ten languages other than English, as an aid to interpretation.

¹⁷⁸ *S v Moroney* 1978 (4) SA 389 (A) at 409.

¹⁷⁹ In the court case under consideration here, it is, in fact, bilingualism, and not multilingualism.

As far as the interpretation of statutes is concerned, the South African Constitutions between 1909 and 1994,¹⁸⁰ contained a conflict provision which resolved the problem of conflicting renditions between the English and Afrikaans texts. It was provided¹⁸¹ that in the case of conflict, the version signed by the head of state would prevail.

In our constitutional democracy, however, it would appear that the fact that a particular version is the signed version does not necessarily determine that it will be the prevailing version in the case of a conflict. It would appear that the English text prevails, regardless of the version signed. This becomes apparent when one considers the provisions of section 15 of the Constitution of the Republic of South Africa Amendment Act,¹⁸² which expressly provides that: “Notwithstanding the fact that the Afrikaans text of the Principal text is the signed text, the English text of that text shall, for the purposes of its interpretation prevail as if it were the signed text”. The quoted provision was referring to the interpretation of an Act of Parliament. But the interpretation of the text of the Constitution itself is expressly governed by the same principle. Section 240 of the Constitution deals with inconsistencies between different texts of the Constitution, and it solves any possible differences by providing that: “In the event of an inconsistency between different texts of the Constitution, the English text prevails”. It would seem, therefore, that

¹⁸⁰ South Africa Act of 1909; the Republic of South Africa Constitution Act 32 of 1961.

¹⁸¹ Section 67 of the South Africa Act of 1909; section 65 of Republic of South Africa Act 32 of 1961; section 35 of the Republic of South Africa Constitution Act 110 of 1983.

¹⁸² Act 2 of 1994.

multilingualism in the South African constitutional jurisprudence does not contribute much as an aid to constitutional interpretation, as Du Plessis suggests.

Du Plessis¹⁸³ enumerates certain features, which he calls conspicuous waymarks, which assist in constitutional interpretation. Among these are definitions. It is well known that an Act of Parliament will have a set of definitions. In the South African style of drafting, definitions are arranged to be the first section of a Bill or an Act. Definitions serve as guidelines to the reader or interpreter of an Act as to how certain concepts are to be understood in that particular Act.

There are pre-determined definitions contained in the Interpretation Act.¹⁸⁴ They are pre-determined in that the definitions in this Act were provided to make it unnecessary for future statutes to define certain concepts because these concepts have already been defined in the Interpretation Act. Examples of these are “day”, the “reckoning of number of days”, “month”, and “the Republic”.

Since these concepts, which are of common use, are already defined in the Interpretation Act, it is unnecessary for a legislative drafter to define

¹⁸³ Du Plessis L “Interpretation” in Woolman S and Roux T (eds) *et al Constitutional Law of South Africa* Vol 2 (2009) at 32–132.

¹⁸⁴ Act 33 of 1957.

them when drafting any Bill, unless a meaning contrary to the meaning given in the Interpretation Act is intended.

As far as the Constitution is concerned, it contains only three definitions. These are the definitions of “national legislation”, “provincial legislation”, and “organ of state”.¹⁸⁵

Definitions in the Interpretation Act have been used in constitutional interpretation, as they have been used in statutory interpretation.¹⁸⁶ However, if the meaning given to a concept in the Interpretation Act would be narrow and unduly prejudicial to a constitutional litigant, the interpretation given in the Interpretation Act would be rejected in favour of the interpretation given to the concept by the Constitutional Court. This is because being bound by the interpretation in the Interpretation Act when interpreting the Constitution would imply that the Constitution is subordinate to the Interpretation Act. That would be incorrect. The Constitution is supreme law. Du Plessis¹⁸⁷ shares this view. In analysing the definitions of the Interpretation Act, he points out that the Constitution, as was the case with the interim Constitution, is a law for purposes of the Interpretation Act, and definitions in the Interpretation Act have been used for constitutional interpretation in much the same

¹⁸⁵ Section 239 of the Constitution.

¹⁸⁶ *Zantsi v Council of State, Ciskei and Others* 1995 (4) SA 615 (CC) par. 36–37; *Ynuico Ltd v Minister of Trade and Industry* 1996 (3) SA 989 (CC) par. 7.

¹⁸⁷ Du Plessis L *Re-Interpretation of Statutes* (2002) at 205–206.

way they would have been used for statutory interpretation. He then emphasises, however, that the use of the Act's definitions to interpret the Constitution is precluded "if this would have the effect of subordinating the supreme Constitution to the Act".¹⁸⁸

Hofman¹⁸⁹ supports this view only in passing. In analysing the proposed Interpretation of Legislation Bill,¹⁹⁰ he mentions that "the law on interpreting legislation, as with all other law, depends on the Constitution".¹⁹¹ It is submitted that this statement emphasises that the Interpretation Act is subject to the Constitution.

The South African Law Reform Commission itself acknowledges¹⁹² the fact that the Interpretation Act has to be governed by the Constitution. The Commission seeks to bring the Interpretation Act into harmony with the Constitution and to rename the Act the Interpretation of Legislation Act. In stating its reasons for seeking to bring about changes in the Act, the Commission emphasises that the Interpretation Act "was drafted during an era of parliamentary sovereignty, is in line neither with the

¹⁸⁸ Du Plessis L *Re-Interpretation of Statutes* (2002) at 206.

¹⁸⁹ Hofman J "Comments on the South African Law Reform Commission's draft Interpretation of Legislation Bill" 2007 *SALJ* 479.

¹⁹⁰ The draft Interpretation of Legislation Bill of 2006. The draft Bill is the product of the South African Law Reform Commission by which it seeks to bring changes to the Interpretation Act 33 of 1957 to bring it in line with the Constitution.

¹⁹¹ Hofman J "Comments on the South African Law Reform Commission's draft Interpretation of Legislation Bill" 2007 *SALJ* at 483.

¹⁹² In its Discussion Paper 112 (Project 25) "Review of the Interpretation Act 33 of 1957".

current constitutional dispensation nor with the principles and practices of drafting and interpretation which the legislature and the courts have adopted since 1994”.¹⁹³ Further emphasising the supremacy of the Constitution over the Interpretation Act, the Commission has proposed that “both section 39(2) of the Constitution and the reading down principle should therefore be reflected in an interpretation clause in the Interpretation Act to ensure compliance with the requirements of the new constitutional order”.¹⁹⁴

Prior to 2005, the Constitution was referred to as the “Constitution of the Republic of South Africa, Act 108 of 1996”. By referring to it as an Act of 1996, its supreme status was reduced to that of an Act of Parliament. To emphasise the supremacy of the Constitution above other laws enacted by Parliament, the Citation of Constitutional Laws Act,¹⁹⁵ was passed. This Act proscribed the reference to the Constitution as an Act. It provided that it must be referred to as the “Constitution of the Republic of South Africa, 1996”.

¹⁹³ Discussion Paper 112 (Project 25) “Review of the Interpretation Act 33 of 1957” at (vii).

¹⁹⁴ Discussion Paper 112 (Project 25) “Review of the Interpretation Act 33 of 1957” at 39. The Commission has proposed to emphasise the supremacy of the Constitution by having section 4 of the proposed Interpretation of Legislation Bill read as follows:

4. When interpreting legislation —

- (a) the supremacy of the Constitution is paramount;
- (b) the spirit, purport and objects of the Bill of Rights in Chapter 2 of the Constitution must be promoted; and
- (c) any reasonable interpretation that is consistent with the Constitution must be preferred over any alternative interpretation that is inconsistent with the Constitution.

¹⁹⁵ Act 5 of 2005.

Although “definitions” are mentioned by Du Plessis as one of the conspicuous waymarks in constitutional interpretation, the definitions contained in the Constitution itself have a limited role to play, compared to the role played by the definitions in the Interpretation Act in interpreting statutes.

2.13 When the constitutional text itself is seemingly self-contradictory

It happens that the text of the Constitution itself gives rise to interpretation problems, in that the text is actually, or at least seemingly, self-contradictory. For example, section 8(3) of the Constitution¹⁹⁶ uses the article “a” in relation to the word “court”. The ordinary meaning conveyed by the indefinite article “a” in any context is that, that which is being referred to can be any of the available kinds. In this particular case, since the article “a” is used in relation to the word “court”, the proper understanding would be that *any court* — whether higher court or lower court — has the jurisdiction to develop the common law. A similar provision is section 39(2), which provides that: “When interpreting any

¹⁹⁶ The full provisions of section 8(3) of the Constitution are as follows:

“When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)”.

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”.¹⁹⁷ The use of the two words, “every court”, wipes off any distinction between lower and higher courts. The meaning, therefore, would be that higher courts and lower courts are all competent to develop the common law.

On the other hand, section 173 expressly assigns the jurisdiction of developing the common law to higher courts, by stating that: “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice”. Further uncertainty is caused by the use of the word “inherent” in relation to power. Higher courts have the inherent power to develop the common law. This would imply that the competence of these courts to develop the common law is something to be accepted without questioning, by virtue of their status, whereas lower courts do not have this competence automatically, but would have it if bestowed upon them, by legislation, for instance. These are self-contradictory, or at least seemingly self-contradictory provisions of the Constitution, which require a wise interpretation approach.

¹⁹⁷ emphasis added.

In a situation of this nature, it is prudent to proceed from the departure point that the drafters of the Constitution did not intend to contradict themselves. Once this departure point has been accepted, efforts will be aimed at finding an interpretation which will reconcile the conflicting, or seemingly conflicting, provisions. Also, the approach recommended by the Constitutional Court, per Ngcobo J,¹⁹⁸ contributes to harmonising seemingly self-contradictory provisions of the Constitution. Ngcobo J recommended:

The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed.¹⁹⁹

Since section 173 stipulates that only higher courts have the jurisdiction to develop the common law, and since other provisions do not have this stipulation, it follows that the provisions which do not make this stipulation should be understood in the light of the provision which makes the stipulation. This would mean, therefore, that when section 8(3) uses the words: “a court”, it refers to *any court* of the rank of a higher court. Once the rank has been identified, the indefinite article “a” would refer to *any court* in that rank.

¹⁹⁸ In *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC).

¹⁹⁹ *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC) at pars. 36-37.

The same applies to section 39(2). With this understanding, “every court” would refer to every court in the rank of higher courts. Indeed, section 170 throws some light on how sections 8(3) and 39(2) are to be understood. Although section 170 does not specifically mention the development of the common law, it draws a line of distinction between higher and lower courts. The section empowers magistrates’ courts and all other courts to decide any matter determined by an Act of Parliament, but to any court of a status lower than a High Court, the section denies the right to enquire into, or rule on the constitutionality of, any legislation, or any conduct of the President.

The Constitutional Court reasoned along these lines when it dealt with *Masiya v Director of Public Prosecutions*.²⁰⁰ However, the Constitutional Court went beyond the text of the Constitution itself in its endeavour to reconcile the seemingly conflicting provisions. It considered the Magistrates’ Courts Act²⁰¹ itself. Section 110 of that Act, in the spirit of section 170 of the Constitution, prohibits a Magistrate’s Court from pronouncing on the validity of any law or conduct of the President. It must be emphasised, however, that it is the pronouncing of invalidity that is prohibited by both section 110 of the Magistrate’s Court Act and section 170 of the Constitution, and not the developing of the common

²⁰⁰ *Masiya v Director of Public Prosecutions and Others* 2007 (2) SACR 435 (CC).

²⁰¹ Section 110 of the Magistrate’s Courts Act 32 of 1944.

law. Whereas the text of the Constitution itself leaves the matter unclear, the Constitutional Court has, by way of interpretation, brought clarity on the issue in *Masiya v Director of Public Prosecutions*.²⁰² The developments leading to this case were that, in a criminal case before a regional court magistrate, the accused was charged with the rape of a nine-year old girl. The evidence was that the accused had penetrated the complainant *per anum*.²⁰³ At that stage, the facts before the learned magistrate, if accepted, justified a conviction of indecent assault as a competent verdict to the charge of rape. In fact, the State sought a conviction for indecent assault. Likewise, the defence contended for such a conviction if the accused were to be found guilty. However, the regional court magistrate, despite being a judicial officer of a lower court, took it upon himself to develop the common law of rape to include non-consensual sexual intercourse with a female *per anum*. In giving reasons for his unusual decision, the learned magistrate stated, *inter alia*, the following:

1. The archaic common law definition of rape (and the concomitant penal provisions upon a conviction of the offence of rape provided for in Act 105 of 1997) discriminates arbitrarily against all (males and females, children and adults) with reference to which kind of sexual penetration is to be regarded as most serious — such discrimination is illogical, unjust, irrational and unconstitutional and

²⁰² *Masiya v Director of Public Prosecutions and Others* 2007 (2) SACR 435 (CC).

²⁰³ *Masiya v Director of Public Prosecutions and Others* 2006 (2) SACR 357 (T) at 363.

negates the rights to values of human dignity, equality and freedom (s 7(2) of the Constitution of the Republic of South Africa, 1996).

2. Where necessary the Court, *even a lower court*, is mandated to develop the common law in terms of s 8(3) of the Bill of Rights to give effect to victims' and society's rights and interests and to limit the rights of accused.²⁰⁴

In terms of section 52(1) and (3) of the Criminal Law Amendment Act,²⁰⁵ the proceedings were thereupon stopped, and the accused was committed to the High Court for the purpose of determining whether the conviction was in order, and if so, the appropriate sentence.

When the matter came before the High Court, the Court rejected²⁰⁶ the State's submission that section 173 of the Constitution does not permit a lower court, which is a creature of statute, to develop the common law, by reasoning that the matter was in any event before the High Court at that stage, and therefore the question whether the lower courts were permitted to develop the common law was somewhat irrelevant.

²⁰⁴ *Masiya v Director of Public Prosecutions and Others* 2006 (2) SACR 357 (T) at 363H–364A [emphasis added].

²⁰⁵ Act 105 of 1997.

²⁰⁶ *Masiya v Director of Public Prosecutions and Others* 2006 (2) SACR 357 (T) at 373G–H.

The High Court extended the definition of rape and declared²⁰⁷ the common law definition of rape unconstitutional, and the matter was referred to the Constitutional Court for confirmation of the order.

Of relevance here for purposes of this discussion is the Constitutional Court's finding on the question whether lower courts may develop the common law. The Constitutional Court held²⁰⁸ that the suggestion by the High Court that magistrates are empowered to develop the common law was incorrect. As reasons for this finding, the Constitutional Court referred to a principle of law, namely, the doctrine of *stare decisis*. The Constitutional Court reasoned²⁰⁹ that if magistrates' courts were allowed to develop the common law, their pronouncements would create a fragmented and possibly incoherent legal order. An effective operation of the development of the common law principles depends, reasoned the Court, on the maintenance of a unified and coherent legal system, a system maintained through the recognised doctrine of *stare decisis*. It is submitted that this view is correct. The

²⁰⁷ *Masiya v Director of Public Prosecutions and Others* 2006 (2) SACR 357 (T) at 380J.

²⁰⁸ *Masiya v Director of Public Prosecutions and Others* 2007 (2) SACR 435 (CC) at 464C.

²⁰⁹ *Masiya v Director of Public Prosecutions and Others* 2007 (2) SACR 435 (CC) at 463G–464C.

Court's resorting to some consideration outside the text of the Constitution, was a plausible approach in the circumstances.

There is a dearth of academic writing on the propriety of the development of common law by lower courts. Dersso,²¹⁰ however, aligns himself with the view that lower courts are, by inference, barred from developing the common law.

Indeed, the interpretation of seemingly conflicting provisions of the Constitution may require a consideration of law, or considerations outside the text of the Constitution itself.

This approach of taking into consideration factors outside the text of the Constitution leads to the question of giving effect to competing rights. The question arises whether, where rights compete, it is in the spirit of the Constitution with its Bill of Rights, to decide a constitutional issue in a manner repugnant to common sense, public policy, or *boni mores* of society. It is submitted that the answer is no.

²¹⁰ Dersso S A "The role of courts in the development of the common law under s 39(2): *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* CCT Case 54/06 (10 May 2007) 2007 SAJHR 373 at 381.

This issue arose in *Afrox Health Care Bpk v Strydom*.²¹¹ The parties, a hospital and a patient, had signed a contract at the time of the admission of the patient to the hospital. The contract contained a clause indemnifying the hospital from liability for negligence on the part of its medical staff or its agencies.

The patient was operated on and, after the operation, complications developed which were alleged to have been caused when a nurse acted negligently by bandaging the patient too tight so that blood circulation was restricted to an area that was sensitive after the operation. This negligent conduct by the nurse, contended the patient, was a breach of the contract that resulted in him suffering damage amounting to R2 million. The patient conceded that he had personally signed the contract on admission, but contended that he signed the document without having read it. He had merely signed on the part of the document indicated to him by means of a cross. He contended that he was not aware of the content of the clause in question when he signed the admission document, and that the onus was on the hospital clerk to draw to his attention the content of the clause in question. He contended that the reason he believed there was a legal duty on the clerk to draw the content of the clause to his attention was that he was not expecting a provision such as was contained in the clause to be in a contract with a

²¹¹ *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA).

hospital. For these reasons, the patient based his claim for damages on the legal point that the clause was against public interest, that it was contrary to the principles of good faith, and that the admission clerk had a legal duty to draw his attention to the unusual content of the clause in question.

In deciding the question, the Supreme Court of Appeal should have had regard to one of the principles of the law of contract, namely, that contracts that are against the *boni mores* of society, or are against public policy, are unenforceable by law.²¹² Indeed, it is against public policy for a health institution to hold itself not liable for negligence. Negligence cannot be condoned in any social system, and no law, statute or common law, may condone negligence. For this reason, negligence is a form of fault that is prosecutable in criminal law. If a criminal charge which rests on intention as a form of fault, fails, prosecution may fall back on negligence.²¹³ Negligence also sustains an action for civil damages.²¹⁴

A court can also take into consideration that some contracts are often presented in fine print on the reverse side of the document, and that it is

²¹² Kerr A J *The Principles of the Law of Contract* (2002) 6th ed at 187; Christie R H *The Law of Contract in South Africa* (2006) 5th ed at 382; Guest A G (ed) *et al Chitty on Contracts — General Principles* (1977) 24th ed at 414.

²¹³ For example, should a charge of murder fail, which requires intention as a form of fault, it may fall back on *culpable homicide*, in which negligence as a form of fault is sufficient for one to be convicted. In terms of criminal law, *culpable homicide* is a competent verdict for the crime of murder. See Burchell J *Principles of Criminal Law* (2006) at 159–160.

²¹⁴ Neethling J *et al Law of Delict* (2006) 5th ed at 116.

a common human failure not to read the fine print on the reverse side of a document. This common human failure is something that manifests itself in situations which do not involve illness. If this is so, then a court should be even more prepared to take judicial notice of it in the case of a patient who is being admitted to a hospital for a serious procedure like surgery.

According to Du Plessis,²¹⁵ this is a matter in which the Court, with prudent reliance on existing law, could resolve in a manner quite consistent with, and indeed conducive to, constitutional values, the spirit, purport and objects of the Bill of Rights, without deducing the answer directly from the provisions of the Constitution. But the Court failed to do so. Instead, the Court raised a constitutional right that was irrelevant in the circumstances of the case — freedom. It is submitted that the Court inappropriately invoked the parties' right to freedom to enter into contract. The Court thus refused to interfere in a contract which, according to the Court, the parties had entered into voluntarily in the exercise of their freedom of choice.

It is submitted that it could only be said that the parties had exercised their freedom to choose if the one party had drawn special attention of the other party to those clauses of the contract which would work

²¹⁵ at 32–154.

prejudicially to the other party, so that the other party entered into contract with informed choice. Freedom to choose without informed choice is no freedom.

In any event, the constitutional right to freedom envisaged by section 12 of the Constitution, is not freedom in the context of entering into contracts. The freedom envisaged and expressed by section 12 is freedom from arbitrary detention, physical assault, or cruel treatment. Invoking section 12 of the Constitution to justify the freedom of majors to enter into contract is to invoke that right out of its intended context.

The patient also relied on section 27(1)(a) of the Constitution, which entrenches the right to health care. According to Du Plessis,²¹⁶ there was an even more important right which both parties and the Court failed to discern that it was at the central stage of the issue, namely, the patient's right to the security of his person, as entrenched in section 12(1) of the Constitution. A patient who goes to a hospital, argues Du Plessis, typically puts his or her physical and psychological well-being in the hands of the hospital and its personnel, because he or she needs special care. An indemnifying clause in a contract, construed with due regard to the spirit, purport, and objects of the Bill of Rights, could thus hardly indemnify a hospital against negligent non-performance of precisely that

²¹⁶ Du Plessis L "Interpretation" in Woolman S and Roux T (eds) *et al Constitutional Law of South Africa* (2009) at 32-155.

which the patient sought to procure by contracting with the hospital, namely, the diligent and expert care for the security of his or her person. It is submitted that this reasoning is correct, and is in the spirit of the Bill of Rights.

2.14 Neutrality in interpretation

A factor that has been a silent challenge to judges interpreting a constitution has been the maintenance of neutrality. As will be seen in the next Chapter, the fact that judges who have to interpret a constitution are part of society, poses a challenge for them when called upon to adjudicate on matters which they can take judicial notice of. They witness developments in the communities in which they live. They have their own personal feelings about developments. These developments sometimes end up in their courts for a legal settlement.

Acknowledging the difficulty that he personally had in the enforcement of a discriminatory law, the Group Areas Act,²¹⁷ King J in *S v Adams*,²¹⁸ expressed the difficulty he was faced with in these words:

An Act of Parliament creates law but not necessarily equity. As a Judge in a Court of Law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if

²¹⁷ Act 77 of 1957.

²¹⁸ *S v Adams* 1979 (4) SA 793 (T).

I were sitting as a Court of Equity, I would have come to the assistance of the appellant.²¹⁹

It must be noted that the difficulties judges sometimes face existed even prior to our constitutional democracy, as seen in *S v Adams*. Du Plessis²²⁰ mentions as an example of courts' failure to maintain impeccable neutrality the fact that more often than not, they enforced harsh apartheid legislation.²²¹

With the beginning of the new constitutional jurisprudence since 1994, some judges of the Constitutional Court of South Africa have been candid in admitting the difficulty of maintaining clean neutrality, while some have indicated that their integrity in this regard is unquestionable. For example, Kentridge AJ admitted in *S v Zuma*,²²² that it is not easy for a judge to avoid the influence of one's personal intellectual and moral preconceptions.²²³ On the other hand, Sachs J in *Makwanyane*,²²⁴ maintained that their function was to interpret the text of the Constitution as it was, and that because of this, whatever their personal

²¹⁹ *S v Adams* 1979 (4) SA 793 (T) at 801A–B; see also Du Plessis L “Interpretation” in Woolman S and Roux T (eds) *et al Constitutional Law of South Africa* (2009) Vol 2 at 32–46.

²²⁰ Du Plessis L “Interpretation” in Woolman S and Roux T (eds) *et al Constitutional Law of South Africa* (2009) Vol 2 at 32–46.

²²¹ *Rossouw v Sachs* 1964 (2) SA 551, 562E–H (A).

²²² *S v Zuma and Others* 1995 (2) SA 642 (CC).

²²³ at par. 17.

²²⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

views were on the subject of capital punishment, their response should be a purely legal one.²²⁵

The expressed stance by Sachs J is a standard that the Court as represented by all its members should strive to reach, but not necessarily the personal views of each member of the Court. Some of the factors which contribute to the difficulty of maintaining impeccable neutrality are dealt with in the next Chapter.

It was as early as before the Constitutional Court could sit for its first constitutional case that it expressed its duty to be apolitical in its function. The text of the Constitution had not been certified yet, because it was in the *Certification Judgment*²²⁶ that the Court emphasised that it had a judicial and not a political mandate, that its function was to certify that all the provisions of the interim Constitution complied with the constitutional principles. That could only be described as a judicial function, a legal exercise. A constitution, by its very nature, deals with the extent, limitations and exercise of political power. The Constitutional Court acknowledged that it had no power, mandate, or right to express

²²⁵ at par. 349.

²²⁶ *Certification of the Constitution of the Republic of South Africa, 1996, In re: Ex Parte Chairperson of the Constitutional Assembly* 1996 (4) SA 744 (CC).

views on the political choices made by the Constitutional Assembly in putting together the text of the Constitution.²²⁷

Several judges, both of the Constitutional Court and the High Courts respectively,²²⁸ have since the time of the *Certification Judgment* acknowledged the fact that constitutional interpretation may, to a certain extent, be tainted with considerations other than the purely legal ones. In *Makwanyane*,²²⁹ Kriegler J mentioned the folly of denying that the adjudication of matters by courts, particularly constitutional matters, calls for value judgments in which extra-legal considerations may loom large.²³⁰ A year later, O'Regan J²³¹ opined that different courts interpreted the right to equality differently not only because of differences in the text of their constitutions, but also because of the different philosophical understandings of the right to equality by the judges.²³² However, the most candid acknowledgement of extra-legal considerations influencing judgments was made by the South African Constitutional Court itself when in *President of the RSA v SA Rugby*

²²⁷ at 784D–F.

²²⁸ *Certification of the Constitution of the Republic of South Africa, 1996, In re: Ex Parte Chairperson of the Constitutional Assembly* 1996 (4) SA 744 (CC); *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); *President of the RSA v SA Rugby Football Union* 1999 (4) SA 147.

²²⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

²³⁰ at 476B.

²³¹ *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).

²³² at par.216–I.

Union,²³³ not just an individual judge, but the entire Court, expressed the words that “absolute neutrality on the part of a judicial officer can hardly if ever be achieved”.²³⁴ In feeling this way, the Court quoted as source of solace the words of Cardozo J,²³⁵:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and actions. Judges cannot escape that current anymore than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them.²³⁶

It would appear, therefore, that despite the best of intentions, constitutional interpretation is likely to be tainted by considerations other than legal.

²³³ *President of the RSA v SA Rugby Football Union* 1999 (4) SA 147 (CC).

²³⁴ at 173C to 175A .

²³⁵ Cardozo B N *The Nature of Judicial Process* (1921) 12, 13, 167; *R v S* (1997) 118 CCC (3d) 353.

²³⁶ Cardozo B N *The Nature of Judicial Process* (1921) at 12, 13, 167.

CHAPTER 3

Inadequacy of interpretation theories without consistency

3.1 Introduction

The previous Chapter has outlined the foundation on which constitutional interpretation is based. Other principles have also been considered which fall outside the conventional theories, but which may assist, at least in the opinion of some writers,²³⁷ in coming to a proper understanding of constitutional provisions.

However, litigants who are laypersons are not interested in the interpretation theories applied by courts in interpreting a constitution, but in the certainty that, just as a court ruled in a particular way in a prior case with similar facts, their litigation has prospects of success, based on previous similar cases. This is where consistency becomes relevant.

This chapter sets the tone for a discussion, in the next chapter, which shows the desirability of consistency in constitutional interpretation, as consistency is found to be lacking in different areas of constitutional

²³⁷ Du Plessis L "Interpretation" in Woolman Roux *et al Constitutional Law of South Africa* Vol 2 (2009) at 32; Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 36-25; Devenish G E A *Commentary on the South African Bill of Rights* (1999) 585.

jurisprudence which have been the frequently trodden ground before courts.

3.2 Lack of consistency

It is disturbing, for instance, to find that a court uses the generous approach together with the purposive approach in a matter where the litigant is not in danger of losing his life, but in a more deserving matter which involves the loss of life, the court restricts itself to the literal meaning approach.²³⁸ A case in point is the *Makwanyane* case,²³⁹ which will be dealt with at length later, where the right to life was given a generous interpretation where the right-bearer was facing death. However, in *Soobramoney v Minister of Health*,²⁴⁰ the right to life was at issue, and the right bearer was similarly facing death, but a different approach was used, the ordinary meaning approach.²⁴¹ Thus, Mr Makwanyane and his co-accused had their lives saved while Mr Soobramoney had his life sacrificed. Because of inconsistency, a litigant whose right to life is under threat, and is approaching a court for relief, cannot count on the certainty which should characterise the adjudication of rights of a similar nature. Further, judges interpreting the Constitution

²³⁸ Cockram G *The Interpretation of Statutes* (1987) 3rd ed at 36.

²³⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

²⁴⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

²⁴¹ Cockram G *The Interpretation of Statutes* (1987) 3rd ed at 36.

have emphasised²⁴² the wisdom of a value judgment which, according to Mahomed CJ, as he then was, “requires objectivity to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the . . . people”.²⁴³ Against this background, it was felt in *Makwanyane* that a court may not allow itself to be guided by public opinion in interpreting the Constitution, *in casu* the right to life. With these two thoughts in mind, it is difficult to draw a line between a “value judgment”, as endorsed by Mahomed CJ, and public opinion. This is because public opinion reflects the values of society.

The combination of all approaches to constitutional interpretation without the thread or element of consistency running through, merely underscores Solove’s²⁴⁴ view that courts do not seem to strive at all towards consistency in their interpretation approach. Rather, they are “all over the map when it comes to the method of constitutional interpretation. Sometimes the Court reads the Constitution broadly and dynamically; sometimes it interprets the Constitution narrowly; sometimes it becomes a textualist; sometimes it becomes obsessed with original intent. And all this can happen in the same year”.²⁴⁵

²⁴² In *Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSc).

²⁴³ at 91D–F.

²⁴⁴ Solove DJ “Is There One Best Method of Constitutional Interpretation?” 2005 *Concurring Opinions*, October 20, 2005.

²⁴⁵ at 1.

In South Africa, High Courts and the Supreme Court of Appeal have had the jurisdiction bestowed upon them of pronouncing on constitutional matters and interpreting the Constitution.²⁴⁶ The Constitutional Court, on the other hand, is the apex court in constitutional matters.²⁴⁷

3.3 Influence of personal beliefs on consistency

In examining the subject of inconsistencies in constitutional interpretation, one must not lose sight of the fact that judges are human. Of course, once seated on the Bench, they are officers entrusted with the onerous responsibility of wielding the sword of justice, and of interpreting the Constitution. Entrusted though they are with this high office, judges have to battle with the indisputable fact that they are still human beings, and go about their personal affairs of life in the midst of society for whom they have to administer justice. Sometimes judges,²⁴⁸ *mero motu*, take judicial notice of certain facts, or events, in the local or international community. True, they exercise restraint in taking judicial notice. The point is, however, the fact that they sometimes do take judicial notice, is evidence that they are not detached from the communities in which they administer justice.

²⁴⁶ Section 168(3), read with section 169(a) of the Constitution.

²⁴⁷ Section 167(3) of the Constitution.

²⁴⁸ *Hassan v Hassan* 1998 (2) SA 589 (D) 590; *R v Dumezweni* 1960 (3) SA 490 (E) 493.

Further, it cannot be gainsaid that judges go to polling stations and cast a vote on election day. This indisputable fact points in the direction that judges have political sympathies like the community they serve, and they may also have religious and cultural leanings. Judges may also not be immune to feeling a sense of loyalty or allegiance to the government or head of government, if that head of government had a role in their nomination or appointment.

What Sachs J states in this regard,²⁴⁹ that:

Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject might be, our response must be a purely legal one²⁵⁰

is a noble principle which should guide judges in interpreting the Constitution, but the question of whether this noble principle is, in fact, practised to the letter, is a question best answered honestly only by each individual judge, when seized with a constitutional matter which challenges society's, an individual's, and the judge's own beliefs.

The question whether the political climate, religious or cultural idiosyncrasies influence judges or not — and to what extent — is a moot point. If this influence is conceded, it automatically extends to the

²⁴⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

²⁵⁰ at par 349.

question of consistency in constitutional interpretation, especially where the same right, in different cases, is at stake.

The point must not be lost sight of as to what consistency is desirable. It is not the consistency of a judge in reading into the Constitution his or her preferred idiosyncrasies, so that whenever a constitutional right is at stake before court, the judge interprets the constitution consistently guided by his or her personal preferences. Rather, it is consistency in employing the conventional methods of constitutional interpretation whenever a right which was previously in issue before the same judge comes before him or her again for adjudication. The same right cannot be sacrosanct, inalienable, uncompromisable by the limitation clause, in one case, and yet be vulnerable, alienable, and subject to the limitation clause, in another future case.

Kelly²⁵¹ is strongly of the view that “the courts have shown *no consistency* with regard to any particular approach . . . and this gives rise to the suspicion that individual judges are willing to rely on any such approach as will offer adventitious support for a conclusion which they have already reached”.²⁵²

²⁵¹ Kelly JM *The Irish Constitution* 3rd ed (1994).

²⁵² at 5 [emphasis added].

The allowing of personal inclinations to becloud judgment may cause a judge to depart from a well-decided interpretation precedent, or to stick to a badly decided interpretation precedent. The law, interpretation principles, and consistency, may be thrown to the winds.

No human is endowed with the supernatural ability to read hearts and minds. What Sachs J stated in *Makwanyane*, that regardless of their personal inclinations, their duty is to interpret the Constitution as it stands, is a desire, a principle, expected of judges, and does not necessarily reflect the true position. Constitutional interpretation involving the right to life, the right to equality as applied to homosexuals, and the right to exercise one's culture — can hardly be said to be possible without the judge's own personal, religious, political, or cultural ideologies being touched.

Confirming the fact that personal feelings cannot be dismissed as of no consequence in constitutional interpretation is the response given by an aspirant Constitutional Court judge, Cameron J, of the Supreme Court of Appeal at the time. Asked at the interview as a self-declared HIV-positive judge, whether his HIV-positive status would stop him from hearing HIV-related cases brought before the Constitutional Court, he responded that he would not hear cases related to HIV treatment.²⁵³ This response

²⁵³ http://www.mail-archive.com/gay_bombay@yahogroups.com/msg14727.html (2011/08/01)

confirms two things: first, that it is possible for a judge interpreting the Constitution to allow himself or herself to be swayed in his or her judgment by personal feelings of whatever nature; second, that it is possible, though hard, for a judge interpreting the Constitution to be mindful of what is expected of him or her while on the Bench, namely, to strip oneself of personal idiosyncrasies, and to interpret the Constitution with integrity, having regard to constitutional interpretation precedent.

Consistency in constitutional interpretation does not render the Constitution an old obsolete book. Well has it been said²⁵⁴ that the Constitution is a living document, and it must be seen to continuously reflect the values of the generations in which it continuously finds itself, and the will of the generation it finds itself in at any given time in history.²⁵⁵

However, versatile and a living document though a constitution should be, this does not render a healthy pattern of consistency impossible. A sound interpretation of a constitutional provision, arrived at after a thorough exploration of all factors, will pass the test of time. It will prove to be sound interpretation in good as well as in bad times. Thus, its consistent application will never be regretted. Not many judges have

²⁵⁴ *Theophanous v The Herald and Weekly Times* (1994) 182 CLR 104.

²⁵⁵ at 173.

come to realise the unsurpassed value of this. Barak J²⁵⁶ is one of the few who have come to this plausible realisation. In a lecture, Barak J made this remarkable statement: “We should assume that whatever we decide when terror is threatening our security will linger many years after the terror is over. Indeed, *we judges should strive for coherence and consistency*. A wrong decision in a time of war and terrorism plots a point that will cause the judicial graph to deviate after the crisis passes”.²⁵⁷

The following chapters will deal with practical situations in constitutional interpretation, showing the desirability of consistency in constitutional interpretation.

²⁵⁶ In his lecture entitled “Human Rights in Israel”, as part of the annual John Foster Lecture Series, at the University College of London, on 1 November 2005.

²⁵⁷ emphasis added.

CHAPTER 4

Consistency as applied to the right to life

4.1 Introduction

Life. This word probably ranks among the shortest words in humankind's vocabulary. Yet, nothing can be performed without life, nor can anything be enjoyed without it. In fact, so many rights hinge on it as a pivot. All the rights encapsulated in the Bill of Rights are reduced to no rights at all without life as they cannot be enjoyed without it, and once life ceases, cease all the rights in the Bill of Rights.²⁵⁸ In the field of human rights litigation "the value of life" has been described as being "immeasurable for any human being" and life itself has been described as something to be protected by the States.²⁵⁹ Viewing the right to life through the prism of the Constitutional Court of South Africa, one finds that it is judged as a right that is given greater protection than the protection extended to it by other jurisdictions.²⁶⁰ For example, article 21 of the Constitution of India²⁶¹ entrenches the right to life by providing that no person shall be deprived of his life, but attenuates the entrenchment by adding the

²⁵⁸ Mubangizi J C *The Protection of Human Rights in South Africa* (2004) at 82.

²⁵⁹ Committee member B. Wennergren of the United Nations Human Rights Committee expressed these words regarding the matter of *Joseph Kindler v Canada* 1992 (6) CRR (2d) 193 SC.

²⁶⁰ *S v Makwanyane and Another* 2005 (3) SA 391 (CC) at par. 35.

²⁶¹ The Constitution of the Republic of India came into operation in 1950.

qualification “except according to procedure established by law”. Article 2(2) of the Constitution of Germany²⁶² also protects the right to life and other related rights by providing that “every person shall have the right to life”, but attenuates that protection by adding that this right “may be interfered with only pursuant to law”. Likewise, article 4(1) of the Constitution of Botswana²⁶³ affords protection for the right to life by providing that “no person shall be deprived of his life intentionally”, but that protection is weakened by the addition of the qualification “save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted”. By comparison, however, section 11 of the Constitution of South Africa does not have these qualifications in entrenching the right to life.

Judged by the protection it enjoys and by the immeasurable value it is said to have, one logically expects that the right to life will be accorded consistent recognition throughout all litigation battles where it features.

There is a need to maintain consistency in the construction of constitutional rights, guided by the fundamental principle of judicial precedence.²⁶⁴ The construction of the right to life is no exception to the

²⁶² The Constitution of Germany came into operation in 1949.

²⁶³ The Constitution of Botswana came into operation 1960.

²⁶⁴ Interestingly, on the vital importance of this principle, O'Connor J had this to say in the US case of *Planned Parenthood of Southeastern Pennsylvania v Casey*: “The very concept of the rule of law underlying our Constitution requires such continuity over time that a respect for

rule.²⁶⁵ Comparative law may be an invaluable guide and international law an indispensable instrument in arriving at the appropriate interpretation of a constitutional right.²⁶⁶ Comparative law has been defined by Church *et al*²⁶⁷ as “a discipline which involves a scientific legal discourse relating to two or more legal systems at least one of which is one foreign to the comparatist”. According to the learned authors, where there are gaps, or where there is ambiguity in our law, recourse to other systems in comparative perspective would be wise. Especially would such a step be necessary where concepts in our law have been transplanted from another jurisdiction.²⁶⁸ A fact cited by the authors²⁶⁹ as an example of jurisdictions making use of comparative law is the practice of the European Court of Justice of the European Communities where the judges from the various Member States of the European Union are bound to draw upon their experience as lawyers within those various states.

As far as international law is concerned, section 231(4) of the Constitution provides that any international agreement becomes law in South Africa when it is enacted into law by national legislation. In *S v*

precedents is, by definition, *indispensable*” [emphasis added].

²⁶⁵ It was held in *Arizona v Rumsey* 467 US 203 (1984) at 212 that “departure from the doctrine of *stare decisis* demands special justification”.

²⁶⁶ Section 39(1)(b), (c) of the Constitution.

²⁶⁷ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 22.

²⁶⁸ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 18.

²⁶⁹ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 18.

*Makwanyane*²⁷⁰ the Constitutional Court made it clear that both binding and non-binding international agreements may be used as tools of interpretation. As such, international agreements and customary international law provide a framework within which the Bill of Rights can be understood.²⁷¹

There is a distinction between binding and non-binding international law. According to Church *et al*,²⁷² binding law in the context of the pronouncements made by the Constitutional Court in *S v Makwanyane*²⁷³ would refer to human rights conventions ratified and enacted into law²⁷⁴ by South Africa and such international human rights norms that have assumed the status of customary international law. Non-binding law would include a variety of international instruments such as conventions not ratified by South Africa, declarations, resolutions by the General Assembly and other bodies, decisions and general comments of treaty monitoring bodies. Church *et al*²⁷⁵ explain that these sources are tools of interpretation, and as such, they must be considered alongside other tools. It is the view of the learned authors that the ability of these tools

²⁷⁰ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 35.

²⁷¹ The Bill of Rights was contained in Chapter 3 of the Interim Constitution, when *S v Makwanyane* was decided.

²⁷² Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 214.

²⁷³ *S Makwanyane and Another* 1995(3) SA 391 (CC) at par. 35.

²⁷⁴ In terms of section 231(1), (2) and (4) of the Constitution.

²⁷⁵ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 215.

to guide courts will depend on the comparability of the instrument concerned.

However, having made use of comparative law, international instruments, and legal interpretation principles, judges should be able to arrive at an interpretation in which reasonable consistency rings through.

When the Constitutional Court started functioning, it was probably not faced as it is today with accusations of being politically biased and handing down judgments which manifest its being swayed by political considerations. Today, however, accusations of this nature are more of a reality than a prediction and a perception. Thus, the words of Rycroft written fourteen years ago are today apt. He expressed the view²⁷⁶ that, faced as it is with many challenges, the Constitutional Court would rescue itself from the morass of accusations of bias by adhering to *stare decisis* as a guiding rule which will go some way in protecting it from allegations of shifting to conform to the prevailing political will.

Where this study deals with consistency in the interpretation of the right to life in respect of capital punishment, and in respect of preserving the life of the terminally ill, and in respect of extending constitutional protection to an unborn life, this study endorses neither side of the

²⁷⁶ Rycroft A "The Doctrine of *Stare Decisis* in Constitutional Court Cases" 1995 *SAJHR* 587, 592.

controversies surrounding these matters, as that is not meant to be its purpose. This study simply deals with the sorely neglected and yet desirable need for consistency at all times when the right to life had occasions of becoming the subject matter of litigation before courts and the need for consistency in future adjudication.

4.2 Consistency in interpreting “life” as a right

It is a trite rule of interpretation that interpretation — whether of a statute, or a constitutional provision — begins with the most rudimentary approach, the “ordinary meaning” approach.²⁷⁷ Almost invariably, in harnessing this approach, courts consult a dictionary as a point of departure.²⁷⁸ One reference work defines “life”, *inter alia*, as “all *living things*, taken as a whole”.²⁷⁹ *Webster’s Third New International Dictionary*²⁸⁰ defines “life”, *inter alia*, as “the quality that distinguishes a vital and functional being from a dead body or purely chemical matter.” It becomes vividly clear that on the basis of these reference work definitions, life — if one uses the common everyday language — simply means the state of being alive, and that this state of being alive encompasses, according to Collins, even “things” — not only a person in

²⁷⁷ Crabble V, *Understanding Statutes* (1994), at 85, emphasises that if the words are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

²⁷⁸ Miers D R and Alan C Page *Legislation* (1990) at 164 [emphasis added].

²⁷⁹ Makins M *et al* (eds) *Collins English Dictionary* (1991) 3rd edition.

²⁸⁰ By Gove P B (ed) 1961 edition.

the legal sense, referred to in legal terminology as a legal *persona*. It is worthy of note that reference works shun restricting their definition of “life” to “person”, although this, of course, does not exclude “person.”

The celebrated case of modern times in which the right to life became a bone of contention was the *Christian Lawyers Association* case.²⁸¹ In that case, the salient fact that strikes one’s mind is that the Court was at pains to maintain that the unborn is not a person:

It is not necessary for me to make any firm decision as to whether an unborn child is a legal persona under the common law . . . There is no express provision affording the foetus (or embryo) legal personality or protection.²⁸²

Perhaps this was the first step taken by the Court in the straying direction. Section 11 of the Constitution entrenches the right to life, and not the right to personhood, or the right to the status of being a legal *persona* or a legal subject, and therefore the pondering of the question when does personhood start was a misguided effort on the part of the honourable Court. The submission that the Court was asked to accept was not that the unborn was a person, as the Court misguided itself to think, but that the unborn was an organism, something that had life in it, and that it was therefore entitled to retain that life. The Court went on to

²⁸¹ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T).

²⁸² McCreath J at 1441 G – H 1443 B– C.

express its view that if the drafters of the Constitution had wanted to protect the foetus in the Bill of Rights, section 28, which specifically protects the rights of the child, would have been an appropriate vehicle, and that if the drafters had intended to include the right of the unborn to life, they would expressly include this in section 11.²⁸³ What the Court failed to realise is that, by the same argument, if the drafters had intended section 12(2) to include the right of a woman to terminate the life of her unborn, they would have expressly included this.

It is an inexplicable oversight that each time the interpreters of the South African Constitution — the Court *in casu* included — interpret section 12(2), they invariably interpret it with narrowly. The subsection is invariably construed as applying only to women. This is inexplicable. The word “everyone” encompasses both sexes. “Bodily and psychological integrity” is a phenomenon claimable by both men and women. “Security in and control over” one’s body is a desirable phenomenon applicable to both sexes. “Reproduction” is a miracle of nature that takes two — a man and a woman — to occur. The right “not to be subjected to medical or scientific experiments without [one’s] informed consent” is a right claimable by both men and women.

²⁸³ at 1442.

It becomes an unsolved puzzle, then, why the subsection, in an endeavour to construe it, is made to apply only to women. Positing that the reason therefor is the use of the word “reproduction”, that, too, does not satisfy the enquiry. The dictionary meaning of the word “reproduction” as a noun is: “any of various processes, either sexual or asexual, by which an animal or plant *produces* one or more individuals similar to itself; the act or process of reproducing; the state of being reproduced”.²⁸⁴ The dictionary meaning of the verb form, “reproduce”, is: “to *produce* or exhibit again; to bring back into existence again; to recreate; to regenerate”.²⁸⁵ It may be observed from the dictionary phases of meaning that the word has as its meaning *producing* as opposed to “*not producing*”. The construction breathed by the Court into section 12(2)(a) is that of “not reproducing.”

This point is confirmed if one looks at the argument advanced by Van Oosten²⁸⁶ in his discussion of the Choice on Termination of Pregnancy Act.²⁸⁷ He pays particular attention to “reproductive rights” as promoted by the Act and then comments as follows:

The use of the expression ‘promotes *reproductive rights*’ is in one sense ironic and in another sense redundant, because from the title and provisions of the Act it transpires that

²⁸⁴ Makins M *et al* (ed) *Collins English Dictionary* (1991) 3rd edition at 1315 [emphasis added].

²⁸⁵ Makins M *et al* (ed) *Collins English Dictionary* (1991) 3rd edition at 1315.

²⁸⁶ Van Oosten F “The Choice on Termination of Pregnancy Act: Some Comments” 1999 *SALJ* 62.

²⁸⁷ Act 92 of 1996.

what is promoted is the *right not to reproduce*. It may be argued that the right not to reproduce is implicit in the right to reproduce and that these rights simply represent reverse sides of the same coin. But that does not alter the fact that reproduction and non-reproduction are not quite the same thing, and that the provisions of the Act are concerned exclusively with the promotion of non-reproduction rights [emphasis added].²⁸⁸

The above argument by Van Oosten applies squarely to section 12(2)(a) of the Constitution. The emphasis is on the positive, the “doing” side, of the “coin” and not on the negative, desisting side. The view advanced by the Court that if the drafters had intended to include a foetus in the right to life they would have expressly expressed such intention, applies here with equal force. If the drafters had intended “reproduction” to mean “non-reproduction” they would have used that term.

It is submitted that the Court further missed the point in holding that:

The answer hereto does not depend on medical or scientific evidence as to when the life of a human being commences and the subsequent development of the foetus up to date of birth. Nor is it the function of this Court to decide the issue on religious or philosophical grounds.²⁸⁹

The challenge may well have been brought by a religious entity, but the question to be unravelled was not a religious one, nor was it one of philosophy, as the Court was inclined to believe, and indeed not even one

²⁸⁸ Van Oosten F “The Choice on Termination of Pregnancy Act: Some Comments” 1999 *SALJ* 62.

²⁸⁹ at 1438 D.

of law, as the Court asserted it was.²⁹⁰ Questions of law do indeed fall in the domain of the court, to be resolved by a court by way of interpretation. But there are “certain matters on which the court is not competent to form an opinion, or in which it is not . . . qualified . . . to draw an inference from certain facts”²⁹¹ since the subject may be one which requires sophisticated study. And there is no doubt that the question involved here was one belonging to a particular discipline — that discipline being medical science ²⁹² — in which the Court needed to be guided by experts of a “special study”.²⁹³ Undoubtedly, the question of the formation of life, since it involves the functioning of the body

²⁹⁰ Fedler J “Life” 1998 (2) *Revision Service* at 3.

²⁹¹ Scoble C N *The Law of Evidence in South Africa* (1952) 3rd edition at 196; Hoffman L H and Zeffert D *The South African Law of Evidence* (1988) 4th edition at 97.

²⁹² See in this regard Davel C J *Introduction to Child Law in South Africa* (2000) at 7 where Davel states that in matters of this nature “medical evidence is used”.

See also Cronjé D S P *et al The South African Law of Persons and Family Law* (1986) 2nd edition who write: “*The courts will naturally rely on medical evidence to prove that a child was born alive and in medical practice the test applied to determine whether the child was born alive is also to establish whether it has breathed*” at 14 [emphasis added].

In addition, in her article “Are the Human Embryo and the Foetus *extra uterum* sufficiently protected in terms of South African Law?”, 2001 (495) *TSAR* at 498, Slabbert M N makes the point that “in determining what would be legally permissible or impermissible, the courts will take into account the views of reputable members of a profession as to what activities in the field of their discipline are proper or improper.”

See also Naudé T “A Note on *Christian Lawyers Association of SA v Minister of Health*” 1999 *SAJHR* at 541, 547: “A careful consideration of these issues might have revealed that *medical evidence may be relevant* to the interpretation of s12(2)(a), which, in turn, has a bearing on the interpretation of s11” [emphasis added].

See also *Planned Parenthood of Southeastern Pennsylvania* 120 ed 2d 674; 112 SCt 2791; 505 US 833 at paragraph 95: “There may be some *medical* developments that affect the precise point of viability” [emphasis added].

²⁹³ Buzzard J H *et al Phipson on Evidence* (1970) 11th edition at 507. It is noteworthy that the authors enumerate among subjects which require expert testimony: “gestation” at 511 and 512, which term is defined by *Collins English Dictionary* as “the development of the embryo of a viviparous mammal, between conception and birth.”

cells,²⁹⁴ is a science, and these sciences command deserved respect, which respect they are accorded by courts by letting scientists speak the first word in their own territory of study. From as long ago as the sixteenth century, in 1556, Saunders J held that:

If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.²⁹⁵

Further support for the fact that the formation of life and its development in the womb is a science falling in the realm of medical scientists can be found in the words of Hiemstra J in *Pinchin*²⁹⁶ :

Why should an unborn infant be regarded as a person for the purposes of property but not for life and limb? I see no reason for limiting the fiction in this way, and the old authorities did not expressly limit it. It is probably because the state of *medical knowledge* at the time did not make it possible to prove a causal link between pre-natal injury and a post-natal condition, that it did not occur to them to deal with this situation [emphasis mine].

As can be seen from the quotation, Hiemstra J links the “unborn infant” to “medical knowledge”, something which — and in fact a precedent —

²⁹⁴ Jordaan D W “The legal status of the human pre-embryo in the context of the genetic revolution” 2005 237 *SALJ* at 238: “Our biological discussion should logically start with *the basic building block of life on earth: the ‘cell’* . . . An adult human will have approximately 100 billion cells in his or her body” [emphasis added].

²⁹⁵ *Buckley v Rice-Thomas* (1554) 1 Plowd. 118, at 124.

²⁹⁶ *Pinchin and Another, NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) at 259.

McCreath J in *Christian Lawyers Association* failed to take notice of or to attach due weight to. Astonishingly, McCreath J himself refers to the *Pinchin* case in his judgment, but apparently failed to appreciate its importance.

This was the first time that the Court gave little consideration to the golden rule of judicial precedence or *stare decisis*, and thus failed to give effect to the wise guidance given by Saunders J. If the reasoning of the Court in *Christian Lawyers Association* were to be followed²⁹⁷ it would mean, in effect, that in adjudicating questions of the cause of death of a human being in criminal cases,²⁹⁸ the Court does not need to listen to the evidence of a district surgeon called by the State. It would also mean that in endeavouring to establish how close the gunman was to the deceased when he fired a shot,²⁹⁹ it would be unnecessary to call and listen to the evidence of a ballistic expert, since these are matters upon which the court is competent to adjudicate without the assistance of an expert. It is common knowledge that in law such reasoning is fraught with danger,

²⁹⁷ The reasoning of the Court was that the answer to the question of when does the life of a human being begin does not depend on answers offered by medical or scientific scholars, but was a legal question which fell within the realm of the court to unravel and settle.

²⁹⁸ Cause of death where criminal prosecution will ensue is often ascertained by means of a postmortem examination, and a postmortem examination report in the form of an affidavit is compiled for the court by the doctor dissecting the dead body. See, for example, *S v Thomo and Others* 1969 (1) SA 385 (A).

²⁹⁹ The gunpowder blackening around the gunshot wound is, according to ballistic experts, a conclusive indication that the gunman shot the deceased at close range. See, for example, *S v Van As* 1991 (2) SACR 74 (W) at 89.

and any cases decided on this unwise reasoning fall to be set aside on appeal.

4.3 “Life” seen through the prism of experts

There is a rich body of embryology textbooks in which the medical science fraternity shed convincing light on the subject of how and when life begins, thus assisting courts in deciding — in a manner that would reflect consistency — the perplexing question of whether the constitutional right to life extends to the unborn.

For example, Moore and Persaud³⁰⁰ (their qualifications are indicated in the footnote to found their authority in their scientific field)³⁰¹ write that the zygote (the cell resulting from the union of an ovum and a spermatozoon) is the beginning of a new human being. Human development begins at fertilisation, they write, the process during which a male gamete or sperm unites with a female gamete to form a single cell called a zygote. They state that this highly specialised cell marks the beginning of each of us as a unique individual.³⁰²

³⁰⁰ Moore K L and Persaud T V N *The Developing Human: Clinically Oriented Embryology* (2006) 6th ed at 2-18.

³⁰¹ Moore holds a PhD degree, and Persaud an Md (Master of Medicine) degree.

³⁰² at 2 - 18.

O’Rahilly and Muller³⁰³ write that fertilisation is an important landmark “because, under ordinary circumstances, *a new, genetically distinct human organism is thereby formed*”.³⁰⁴

Authors Potter and Craig³⁰⁵ scientifically assert that “every time a sperm cell and ovum unite a new being is created *which is alive and will continue to live* unless its death is brought about by some specific condition”.³⁰⁶

In addition to the consistent scientific findings found in medical textbooks, experts have gone on record publicly affirming their sophisticated scientific research findings. For example, in 1981 a United States Senate judicial subcommittee listened to the following scientifically researched testimony from a sizable number of medical experts:

Professor Micheline Matthews–Roth³⁰⁷ said that it is incorrect to say that biological data cannot be decisive, but what is scientifically correct is that an individual human life begins at conception.

³⁰³ O’Rahilly RR and Muller F *Human Embryology & Teratology* (1996) at 5 – 55.

³⁰⁴ emphasis added.

³⁰⁵ Potter E L and Craig J M *Pathology of the Fetus and the Infant* (1975) 3rd edition at vii.

³⁰⁶ emphasis added.

³⁰⁷ of Harvard University Medical School.

Dr Alfred M Bongioanni³⁰⁸ said: “I have learned from my earliest medical education that human life begins at the time of conception.”

Dr Jerome LeJeune³⁰⁹ made these remarks: “After fertilisation has taken place a new human being has come into being. *It’s no longer a matter of taste or opinion. It is plain experimental evidence.* Each individual has a very neat beginning, conception”.³¹⁰

Gordon³¹¹ remarked: “By all the criteria of modern *molecular biology, life is present* from the moment of conception” [emphasis mine].

Faced with these scientific public assertions, the United States Senate was persuaded that physicians, biologists and other scientists are in agreement that conception marks the beginning of life, something that the Court in *Christian Lawyers Association* dismissed as religious and philosophical views, choosing instead to attempt to give a legal answer to a scientific question. By the same token, the Zimbabwean Supreme Court missed the mark in *S v Jasi*³¹² when it expressed the view that “those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus” regarding the

³⁰⁸ Professor of Pediatrics and Obstetrics, University of Pennsylvania.

³⁰⁹ Professor of Genetics, University of Descartes.

³¹⁰ emphasis added.

³¹¹ Gordon H is a professor of Mayo Clinic.

³¹² 1994 (1) SACR 568 (Z) at 571 A.

commencement of life. The true position is that those trained in the discipline of medicine are *ad idem* on the question. The Court erroneously thought that such consensus should exist among the professionals of all three disciplines, and in so doing it lost sight of the fact that the question involved was one of biology and medical science, and that it does not land in the realm of philosophy and theology.

Put simply, death is the antithesis of life. In fact, death brings an end to what is called life. It also brings an end to legal personality. Lawyers and judges have accepted it as a matter of practice that it is people in the medical profession who are scientifically competent to certify a person dead.³¹³ By the same token, it is people in the medical profession who are scientifically competent to certify the beginning of the opposite of death — life. Regrettably, however, this simple fact of life eluded the Court in *Christian Lawyers Association*.

In South Africa, scientists at the University of Cape Town Bioethics Centre³¹⁴ are in unison with scientists internationally. Noteworthy is the fact that their scientific findings are in line with the law. They ascribe the

³¹³ See B Van Heerden *et al Boberg's Law of Persons and the Family* (1999) 2nd ed at 50.

³¹⁴ In 1994 these scientists were: S R Benattar (Director), C Abels, R Abratt, J Anthony, D Benatar, D Brooks, J Degenaar, D Dent, M de Villiers, J Dommissie, F du Preez, A du Toit, K Espley, J Glasewski, W Landman, G Lawrence, A Malan, D Meyerson, E Nash, S Ress, P Reynolds, M F N Shutte, J van den Heever, J G van der Vyver, J P V van Niekerk, R van Zyl Smit and T Zabow.

status of personhood to the moment of birth,³¹⁵ but the status of possessing life they ascribe to the foetus stage.³¹⁶ It is submitted that this is the view that the Court should have adopted as this view finds support in the legal rule of *stare decisis* as will be shown below.

4.3.1 Consistent legal view of “life” established by precedent

If one traces the development of law by almost five decades to the 1960’s during the time of cases like *Pinchin*,³¹⁷ and if one does not stop there but traces further back to the times of Roman and Roman–Dutch law,³¹⁸ one finds that there has always been respect — sometimes subdued respect — for the unborn child as an entity that has life in itself. This respect does not necessarily mean the recognition of the unborn as a person, but as an entity possessing life, and consequently as an entity entitled to life. This respect has consistently manifested itself both in common law and statute.

³¹⁵ Cronjé D S P *Die Suid-Afrikaanse Persone- en Familiereg* (1986) 2nd edition at 13.

³¹⁶ They wrote in the *South African Medical Journal* of August 1994, Volume 84, No. 8 that “*The fetus is unquestionably a living organism, biologically a member of the human species (human being) and has the potential to mature into a person with the intellectual and emotional features which characterize normal adult life. However, a fetus lacks these characteristics of personhood and the possession of potential is not the same as actual personhood*” [emphasis added].

³¹⁷ *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W).

³¹⁸ Davel C J *Introduction to Child Law in South Africa* 2000 at 3.

4.4 At common law

Commendably, the Court in *Christian Lawyers Association* alluded to *Pinchin*, but as stated in the preceding paragraph, the development by no means starts there.

The protection of the interests of the unborn entity can be traced back to Roman and Roman–Dutch law where it was embodied in the Latin maxim *nasciturus pro iam nato habetur quotiens de commodo eius agitur*.³¹⁹ The maxim was especially invoked in matters of succession.³²⁰ Put in simple terms, it was applied to the advantage of an unborn child who was already *in ventre matris* (in the mother’s womb) when the testator made a will. It is of significance that the maxim excluded a child who was not yet conceived when the testator made his last will and testament.

The consistent chain of the application of this principle commences in 1905 in the matter of *Estate Lewis v Estate Jackson*.³²¹ It was used to justify the inheriting of a benefit by an heir where the testator had died prior to the birth of the heir, but where the heir had already been conceived. The fact that a child who was not already conceived at the time of the testator’s death did not inherit is pregnant with significance.

³¹⁹ Meaning: “The unborn is deemed to have been born where his or her inheritance is concerned”.

³²⁰ *Estate Lewis v Estate Jackson* 1905 22 S.C. 73.

³²¹ 1905 22 SC 73 75.

It established beyond question the recognition given to the life of the unborn child, though not regarded as a legal *persona*, and that since no life had started forming in the case of a child who was not already conceived at the time of the testator's death, there was no basis for such a child to benefit from the testator's estate.

Later in 1910 the recognition was echoed in *Estate Delponte vs De Fillipo*³²² where the child heir was born seven months after the testator's death, in other words, the child was already conceived when the testator made his will. The next child, however, was born three years after the testator's death. Basing its decision on *Voet*³²³ the Court held that:

as the vesting took place then, it would affect only such nieces and nephews as were then already in *ventre matris*, and accordingly Luigi Delponte, who was not born until three years after the testator's death, cannot share in this bequest; but Loreta Delponte, who was born seven months after the event, and who, in the course of Nature, must then have been in *ventre matris*, will participate.³²⁴

Once again it will be noticed that only the child who was already conceived during the lifetime of the testator, and not the child conceived thereafter, was entitled to benefit. This is so notwithstanding the fact

³²² *Estate Delponte vs De Fillipo and Others* (Supreme Court Reports) 1910 Vol 1 CPD 334 – 346

³²³ "It is clear that this is a case where the principles laid down in *Voet* (28, 5, 13) . . . should be applied," held the court at 345 of the *Estate Delponte* case.

³²⁴ at 346.

that the child was not a legal subject *in ventre matris*, but on the ground that life had begun forming.

Twenty-six years later, in 1936, the principle was further consistently entrenched when the matter of *Botha and Others*³²⁵ served before courts. The Court upheld the defendant's contention that any child *in ventre matris* at the time of the testator's death shares in the bequest of the residue.

Just before the emergence of *Pinchin* the chain of recognition for life *in ventre matris* once again had occasion to be entrenched in *Boedel Steenkamp*.³²⁶ Worth of mention is the fact that in seeking to arrive at the correct interpretation, the Court traced back to the beginning of the twentieth century the correct view to be held of the interests of the unborn life. The cases referred to in the preceding paragraphs were relied upon, and they led the Court to this order:

Dit word bevel dat wat die restant van die testateur se boedel betref Paul Johannes beskou moet word as in lewe by die dood van die testateur en geregtig is om gelykop te erf . . .³²⁷

Since then the celebrated case of our later times, *Pinchin* in 1963, has been the guide relied upon where the interests of a life in the mother's

³²⁵ *Botha and Others v Thompson, N. O.* 1936 SA CPD 1.

³²⁶ *Ex Parte Boedel Steenkamp* 1962 (3) 954 OPD.

³²⁷ at 958.

womb are concerned. Little did the Court know, or so it would seem, when deciding *Christian Lawyers Association* that the authority it made reference to, *Pinchin*, was not the beginning, but was just one link in a long chain of judicial precedence with its beginning in times of Roman and Roman–Dutch law. Nor did the Court fully appreciate that this case has some other significance other than the significance it attached to it. As a matter of fact, the *Pinchin* case propped up the very view the Court elected to leave unsupported — that the question of the development of life in the womb is one that falls within the purview of medical science,³²⁸ and that life itself begins before birth and not at birth.³²⁹ The Court in *Pinchin* did not waiver in holding that these questions had been settled a long time ago by our Roman law.³³⁰ As a consequence hereof, the Court’s verdict was that the plaintiff was successful on the question of law, but the only reason the plaintiff’s civil claim was not successful was

³²⁸ at 259.

³²⁹ at 255.

³³⁰ The Court referred to Roman law which gave an answer in *D.1.5.7*. where it stated:
 “A child in its mother’s womb is cared for just as if it were in existence.”

And in *D.1.5.96*:

“Those who are unborn are, by almost every provision of the Civil Law, understood to be already in existence; for estates legally descend to them, and if a pregnant woman is taken by the enemy, her child has the right of *postliminium*.”

And in *D.50.16.231*:

“When we say that a child, who is expected to be born, is considered as already in existence, this is only true where his rights are in question.”

that on the merits the plaintiff failed to prove the *nexus* between the injury and the damage caused on a balance of probabilities.

The Court then forestalled the likely argument — that the passages reproduced in the footnotes on this page are not always regarded as decisive of the issue — by stating that it is because all commentators have related them to the law of succession and to the question of status, that is, whether a person is a slave or a free man. In this regard, it is submitted by this study that it really does not matter whether it was only in connection with the law of succession that Roman law accorded an unborn infant the status of a person, because the nature or status of a thing does not vacillate from one thing to another depending on reasons or circumstances. If something is something, then it is that something. A baboon or a guerrilla is not an animal when it is to its disadvantage to be an animal, but a human being when it will be in its interests to be regarded as a human being. To illustrate further, theft does not become something less than theft if the person stealing was prompted by hunger, nor does it become something more serious than theft simply because the person stealing was prompted by an incorrigible criminal heart. By the same token, the fact that an unborn infant was regarded in Roman law as already being born or in existence when it would be in its advantage, that alone establishes the fact that it has life. And if one

thinks of it really, there is no stage when anything good is *not* to the advantage of the unborn infant.³³¹

Further adding weight to the point that courts have consistently — though sometimes in a subdued way — shown respect for the unborn as possessing life, is the English case of *Re S*³³² where the Court said:

The court would exercise its inherent jurisdiction to authorise the surgeons and staff of a hospital to carry out an emergency Caesarian section operation upon a patient contrary to her beliefs if the operation was vital to protect *the life of the unborn child*.³³³

And at 672–C the Court again reiterated the point:

He has done his best, as have other surgeons and doctors at the hospital, to persuade the mother that the only means of saving her life, *and also I emphasise the life of her unborn child*, is to carry out a Caesarian section operation.

Thus, respect for life has been an identifiable common thread throughout common law and case law.

³³¹ Hiemstra J holds at 256: “Whether the *foetus* is a ‘person’ or not, seems to me to be irrelevant. If the legal fiction applies that it is to be regarded as if it is already born whenever this should be to its advantage.”

³³² *Re S (adult: refusal of medical treatment)* [1992] 4 All ER 671.

³³³ at 671–E.

4.4.1 In statutes

The ring of consistency in recognising the unborn as having life is evident not only at common law but also in statutory law. Invariably, statutes do not furnish reasons why they contain a certain provision which protects the unborn, but logic makes it sufficiently clear that the underlying reason is the recognition of and respect for the life that has started forming.

The now obsolete section 278 of the Criminal Procedure Act 51 of 1977 (with its predecessor being section 331 of the same Act of 1955) is a case in point.³³⁴ The statutory provision provided that if a woman who had been sentenced to death happened to be pregnant, her execution would be held in abeyance until such time that she had delivered the child. However, the onus was, according to the wording of the section, on her to bring an application for such a suspension of execution. This consideration was made out of regard for the fact that what she was

³³⁴ Section 278 of the Criminal Procedure Act 51 of 1977 provided:

- (1) When sentence of death is passed upon a woman, she may at any time after the passing of sentence apply for an order to stay execution on the ground that she is quick with child.
- (2) If such an application is made, the court shall direct that one or more duly registered medical practitioners shall examine the woman in a private place, either together or successively, to ascertain whether she is quick with child or not.
- (3) If upon the report of any of them on oath it appears that the woman is quick with child, the court shall order that the execution of the sentence be stayed until she is delivered of a child or until it is no longer possible in the course of nature that she should be so delivered."

carrying was life. This consideration also stood in stark contrast to the theory that the unborn attains personhood after being separated from the mother. The consideration underscores the fact that life begins earlier than birth.

Cronjé³³⁵ raises a question, left unanswered by section 278, as to what the position would be in the case where the woman was in fact pregnant but did not bring the application — it could be out of ignorance, or she could be refusing to do so. Cronjé's own speculated answer is that the state would *mero motu* stay the execution until the birth of the child.

Further statutes have continued to maintain the chain of the consistency of the law in recognising the unborn as life and, accordingly, entitled thereto. Under "Definitions" The Long Term Insurance Act³³⁶ defines "life insured" as meaning "the person or *unborn to whose life*, or to the functional ability or health of whose mind or body, a long-term policy relates".³³⁷ Section 1(2) provides that "for the purposes of entering into a long-term policy *the life of an unborn shall be deemed to begin at conception,*" something which the Court had difficulty coming to terms with, and the long chain of consistency it elected to disregard.

Interestingly, The Long Term Insurance Act became law in the same year

³³⁵ Cronjé D S P *et al* *The South African Law of Persons & Family Law* (1986) 2nd edition at 27.

³³⁶ Act No 52 of 1998.

³³⁷ emphasis added.

in which the Court interpreted the right to life in a way which runs counter to consistency and established precedence.

It is true that this case did not have the benefit of being decided by the Constitutional Court. Even so, however, it was heard and decided by a court which, in terms of the Constitution,³³⁸ has the jurisdiction to hear and decide constitutional conflicts.

At this juncture it is apt to reiterate what was pointed out at the outset in this chapter, that it is not the purpose of this study to endorse any side of the controversy as to when life begins — albeit it may so sound. Where it does sound like the study endorses one side or the other, it is only because consistency resulting from adherence to precedence, yields such result.

4.4.2 In the academic sphere

Writers seem to align themselves with the pattern established by courts from time fathomable. For example, Slabbert refers to the Medical Research Council guidelines as being consistent with the law, albeit they themselves do not constitute law. One such guideline protects the pre-natal life by requiring that “the pre-embryo must be treated with the

³³⁸ Section 169.

utmost respect because it is a genetically unique, viable human entity” and that if it is to be transferred to a woman’s uterus, special care should be taken to ensure its “welfare”.³³⁹

It must be noted that here Slabbert’s discussion centred around the protection of this living organism prior to its being inserted into the woman’s uterus. It is informing to note that even at this rudimentary stage of an endeavour to form life, the medical discipline is of the view that this rudimentary organism warrants protection and welfare considerations.

Slabbert then took the subject a step further by considering the question after the organism was transferred into the womb.³⁴⁰ She ponders a question not covered anywhere in our law of the right to medical treatment of an infant born alive prematurely in the course of termination of a pregnancy.³⁴¹ She holds the view that the rights of such an infant are similar to those of an infant born prematurely and spontaneously.³⁴² As pointed out nowhere does our law provide an answer to this question. However, this view is not without basis. The long chain of court

³³⁹ Slabbert M N “Are the human embryo and the foetus *extra uterum* sufficiently protected in terms of South African law?” 2001 (495) *TSAR* 499.

³⁴⁰ Slabbert M N “Does South African abortion legislation protect the human embryo and the foetus *in utero* sufficiently?” 2001 (729) *TSAR*.

³⁴¹ in terms of the Choice on Termination of Pregnancy Act, 92 of 1996.

³⁴² at 740.

decisions handed down over the centuries, together with the pattern established by some statute law, lends support to this academic view.

Jordaan³⁴³ prefaces his scientifically sophisticated and erudite discussion of the legal status of the human pre-embryo in the context of the genetic revolution by highlighting the great strides made in the scientific understanding of life. He points out that certain mysteries which surrounded this subject prior to these historic times of science have progressively been replaced by scientific understanding. He distinguishes between a pre-embryo and an embryo and the legal status presently afforded the two. Incidentally, the point is made in his discussion of what was referred to earlier in this chapter as a subdued (as opposed to overt) recognition of life in its pre-natal beginning.

The National Health Act³⁴⁴ imposes certain limitations to the use of certain tissues or fluids extracted from a human body, and it expressly prohibits *embryo* research, although permission may be obtained for research on *pre-embryos* specifically.³⁴⁵ This is another indication of subdued recognition of the beginning of life.

³⁴³ Jordaan D W "The legal status of the human pre-embryo in the context of the genetic revolution" 2005 SALJ 237 - 249.

³⁴⁴ Act 61 of 2003, which repealed the Human Tissue Act of 1983.

³⁴⁵ Section 57(4) of the Act.

Relying on Silver's textbook,³⁴⁶ Jordaan concludes that a pre-embryo is alive, that a pre-embryo is human, but that the embryo is not human life *per se* since it does not have any neurological attributes that are ascribed to human life in a special sense. It is, however, a human life in a general sense. This scientific conclusion has, according to Jordaan, found backing in our recent case law. In *Clarke v Hurst*,³⁴⁷ the Court made a distinction between mere *biological life* and *human life*. The detailed distinction, however, falls outside the scope of this study. Suffice it to say that the pre-embryo, argues Jordaan, "possesses an important characteristic that is its moral lifejacket: it has the potential to become human life."³⁴⁸ In conclusion, he maintains that "potential" has value and therefore if the pre-embryo has that potential, it deserves that protection. Since the potential gradually becomes more of a reality with time, so must protection accorded gradually increase.

It should be borne in mind that these arguments relate to the *pre-embryo*, and that they apply with even greater force to the *embryo*. To be sure, academic views do not constitute law, but they are desperately consulted by courts as a guide in endeavouring to arrive at an

³⁴⁶ Silver L M *Remaking Eden* (1999) 25. (Lee M Silver is professor of molecular biology and public affairs at the Woodrow School of Public and International Affairs at Princeton University. He holds a PhD degree in biophysics from Harvard University).

³⁴⁷ 1992 (4) 630 (D).

³⁴⁸ See fn 133 *supra*, at 243.

appropriate interpretation of the law in general and the Constitution.³⁴⁹ That being the case, the subject of the desirability of consistency in constitutional interpretation is not complete without them.

It is believed that the permissive, free-for-all interpretation and counter-interpretations of the life of the unborn would be put to an end if the Constitution had included a section dealing specifically with abortion by name, or if the right to life was crafted in express terms which settle once and for all the question of when life begins and, consequently, whether the pre-natal life should enjoy legal protection. This is the view entertained by, among others, Sarkin.³⁵⁰ Of course, at the time of his writing the article, only the interim Constitution was available, and the final Constitution had not yet seen the light of day. But the final Constitution is now our constitution, and it still left it to the courts to decide the question.

While it is true that the inclusion of such a section in the Constitution would settle the matter once and for all, that would be the case perhaps only as far as litigation is concerned. It would not silence those who clamour for the opposite situation. This can be seen from the fact that the matter of capital punishment was settled once and for all, of course

³⁴⁹ See, for example, *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T) at 13, 14.

³⁵⁰ Sarkin J "Why There Should Be an Abortion Clause in the Final Constitution" 1995 (582) *SAJHR* 583.

not by the text of the Constitution, but by the Constitutional Court. Notwithstanding the finality of the matter, a large section of society still clamours for the reinstatement of capital punishment. In fact, there was even talk of a referendum by the President of the ANC, Jacob Zuma, in 2008 prior to his elevation to the Presidency of the Republic.

It cannot be said with certainty why the Constitutional Assembly and the drafters of the Constitution decided to draft the right to life in an open-ended fashion, being open to more than one interpretation. It could well be that the Assembly itself was not unanimous in abolishing the death penalty, or that it was timid in its decision to abolish it. It is also possible that the Assembly simply transplanted a constitution of another jurisdiction into South Africa without pondering how the open-ended nature of the provision would ramify.

On the other hand, it would appear that the provision was left open-ended so that it could allow flexible application in the future. In other words, it was left open-ended to allow for the abolishing of capital punishment if conditions of the country warrant it and to reinstate it when conditions warrant — in both ways by interpreting the provision in a way that favours the circumstances at that particular time. This latter supposition finds support in the judgment of the Canadian Supreme

Court in *Hunter et al v Southam Inc*³⁵¹ where the Court pointed out that a constitution is drafted with an eye to the future. The Court pointed out that provisions of a constitution, once enacted, cannot be repealed or amended at will, and therefore it should be drafted with some leeway to accommodate unforeseen future circumstances for many years to come.³⁵² The view that the section entrenching the right to life, and in fact the entire Bill of Rights, was drafted with a view to accommodating future developments, finds support in Church *et al*,³⁵³ who also refer to the case of *Hunter et al v Southam Inc*. The authors express the view that the phrase “advancement of human rights and freedoms” in section 1 (a) of the Constitution denotes a continuing process of developing and improving the existing body of human rights norms.³⁵⁴ It is submitted that if human rights and freedoms are to be advanced, their interpretation must have some elasticity, depending on the prevailing circumstances.

If the judgment in *Hunter et al v Southam Inc*³⁵⁵ is anything to be guided by, this means that we may expect vacillation from the Benches with regard to some or all of the rights contained in the Bill of Rights. It means that we may witness the overturning of the decision to abolish

³⁵¹ *Hunter et al v Southam Inc* 1984 2 S.C.R. 145.

³⁵² *Hunter et al v Southam Inc* 1984 2 S.C.R. at 584.

³⁵³ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 170.

³⁵⁴ *Ibid.*

³⁵⁵ *Hunter et al v Southam Inc* 1984 2 S.C.R. 145.

capital punishment if conditions in the land warrant a re-interpretation of *Makwanyane*.

According to Rycroft,³⁵⁶ such a turn of events is more of a certainty than just a likelihood. Writing at the time when the Constitutional Court was only delivering its first judgment in its existence, he said it would seem premature to consider how the Constitutional Court should approach overruling its own judgments when the time came, but changing circumstances and the changing composition of the Court would make revision inevitable. Indeed, a new generation of the Constitutional Court judges may feel that some of the decisions of this Court reflect the *boni mores* of society and public policy of generations no longer now represented in our present society, and they may feel that a swing to another direction is due.³⁵⁷ A case in point is the American case *Planned Parenthood of Southeastern Pennsylvania v Casey*.³⁵⁸ In this case the majority view of the United States Supreme Court was that the Court should faithfully adhere to precedence virtually at all costs. The minority view, however, per Rehnquist CJ, was that *the court is obliged to correct its errors* despite reliance on those errors, by reason of precedence.³⁵⁹

³⁵⁶ Rycroft A “The Doctrine of Stare Decisis in Constitutional Court Cases” 1995 *SAJHR* 587.

³⁵⁷ See Duplessis M A “Stare Decisis: Is the Onus in Restraints of Trade Hanging on Thread” 2006 *TSAR* 423.

³⁵⁸ *Planned Parenthood of Southeastern Pennsylvania v Casey* 120 L ed 674; 112 SCt 2791 (1992).

³⁵⁹ *Planned Parenthood of Southeastern Pennsylvania v Casey* 120 L ed 674; 112 SCt 2791 (1992) at 767.

Commenting on the decision of the Supreme Court of America in *Planned Parenthood of Southeastern Pennsylvania v Casey*,³⁶⁰ Church *et al*³⁶¹ write that since the seminal decisions of the Supreme Court of America on abortion and abortion funding by the state, unborn life forms had the misfortune of ending up in the “hammer and anvil literature of the pro-choice and pro-life groups”.³⁶² According to Church *et al*, these groups have not been able to come up with a solution to the dilemma surrounding abortion. One of the negative results of the controversy surrounding abortion has, according to the authors, been the attack on abortion clinics and the killing of abortion-performing doctors, a result that was probably not foreseen.³⁶³

However, for purposes of this discussion, a pertinent point made by Church *et al* is the failure of constitutions and international conventions to provide clarity as to when life begins.³⁶⁴ They point out that the only exception is the Inter-American Convention on Human Rights³⁶⁵, Article 4(1) of which provides:

³⁶⁰ *Planned Parenthood of Southeastern Pennsylvania v Casey* 120 L ed 674; 112 SCt 2791 (1992).

³⁶¹ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 277.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ Church J Schulze C Strydom H *et al Human Rights from a Comparative and International Law Perspective* (2007) at 276.

³⁶⁵ Inter-American Convention on Human Rights, which came into effect in 1978 http://www.hrcr.org/docs/American_Convention/oashr4.html (accessed: 2011/08/19).

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

A point is made by Church *et al*,³⁶⁶ however, that despite the provisions of Article 4(1) which bring some certainty as to when life begins, some uncertainty still exists due to the insertion of the words “in general”. According to the learned authors, the Inter-American Commission decided that the drafting history of the American Convention and the insertion of the words “in general” left the possibility open that states could, by their national legislation, regulate the most diverse cases of abortion.³⁶⁷

Thus far it has been established that from the times of Roman and Roman-Dutch law the common law has been consistent in recognising — whether overtly or in a subdued way — the beginning of life before birth and the right of the unborn not to be deprived of what it is entitled to. Locally, respect for *stare decisis* which yields consistency has led courts in the earlier centuries to faithfully maintain the pattern which started in Roman times. This pattern has manifested itself — again in some overt and subdued ways — in some local statutory provisions. Regrettably, in recent years this consistency based on judicial precedence has been lost

³⁶⁶ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 276–277.

³⁶⁷ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 277.

sight of by our local court in interpreting the right to life in the case of the unborn.

4.5 In the law of the United States of America

In deciding *Christian Lawyers Association*,³⁶⁸ McCreath J relied heavily, *inter alia*, on the United States case of *Roe v Wade*.³⁶⁹ Worth mentioning at the outset is that the very case McCreath J relied on enshrined the very principle he did not honour — precedence. Also, McCreath J missed the most crucial point of the case he relied on. And finally, while the majority judgment in *Roe v Wade* is to be applauded for honouring *stare decisis* — the majority judgment lacked foundation in interpreting the relevant United States constitutional provision in the way that it did. These three points will now be discussed one at a time.

The first consideration is that McCreath J, either unbeknown to him or because he simply ignored it, relied on a foreign judgment which enshrined the very principle he failed to honour. Tracing the chain of precedence, the Court in *Roe v Wade* stressed that at common law it is undisputed that the termination of pregnancy before “quickening”, that is, the recognisable movement of the foetus *in utero*, was not an indictable offence. Thus, the common law afforded a woman the leeway

³⁶⁸ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T) (the first case).

³⁶⁹ *Roe v Wade* 410 U. S. 113 (1973).

to terminate the life of the unborn in the first trimester, but prohibited this after this stage of development. In so doing, the law recognised the scientific fact that life had begun forming and that the protection of that life should gradually increase as the foetus gradually developed.

The Court then established the chain by referring to the English statutory law, a case in point being the Malicious Shooting or Stabbing Act,³⁷⁰ which made the abortion of a quick foetus a capital crime, but provided for a lesser sentence where it was procured before quickening, thus preserving the “quickening” distinction. The emphasis of the Act was on the destruction of the life of a child capable of being born alive. It made a wilful act performed with the necessary intent a felony.

The Court then drew attention to the laws of its own jurisdiction which provide guidance by way of judicial precedence as to how the life of the unborn should be viewed. The Court referred to a case of the early part of the twentieth century, *Jacobson v Massachusetts*³⁷¹ which dealt with vaccination. In this case the Court refused to recognise an unlimited right to terminate the life of the unborn at any stage of the pregnancy.

³⁷⁰ Malicious Shooting or Stabbing Act of 1803, which became known as the Lord Ellenborough Act, 1803. It became known as the Lord Ellenborough Act because it was proposed by the Lord Chief Justice of England and Wales, Edward Law, 1st Baron Ellenborough. Lord Ellenborough wished to clarify the law relating to abortion, which at the time was not clearly defined in the common law.

³⁷¹ *Jacobson v Massachusetts* 197 U. S. 11 (1905).

Further strengthening the correctness of its interpretation of the right to life of the unborn, the Court drew attention to another precedent authority in its own jurisdiction, that of *Buck v Bell*,³⁷² a case which dealt in the main with sterilisation. *In casu*, the right of a woman to bring an end to the life of the unborn at any stage was not allowed to go uncurtailed.

In this regard the Supreme Court of the United States acted responsibly in arriving at an interpretation of the relevant constitutional provision — the Fourteenth Amendment. As a consequence of this deeply entrenched legal view in the history of American law, the American Medical Association echoed for the practice of its medical practitioners an oath or affirmation which has its origin from an ancient philosopher — Hippocrates. A portion of this oath relevant for the purposes of this discussion reads: “I will not give a deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion”.³⁷³ This oath or affirmation has come to be known as the Hippocratic Oath.

It is submitted that this oath or affirmation is the product of the consistent and unwavering view of the courts in the United States. It is

³⁷² 274 U. S. 200 (1927).

³⁷³ *Ethical Codes and Declarations Relevant to the Health Professions*, by Amnesty International 1994, pages 42, 43. See also *Truth and Reconciliation Commission of South Africa Report* (1998) Volume 4, Chapter 5, Appendix 1, page 158.

unfortunate that our own court was not exemplary in this regard. Even more unfortunate is the fact that it relied on an American judgment but failed to take heed of its way of arriving at an appropriate constitutional construction.

A judge will, where necessary, consider foreign law in establishing how best to construe a constitutional provision.³⁷⁴ However, in invoking foreign law, a judge should not seek to interpret a constitution in a way that gratifies his or her personal preferences by being selective in his or her use of foreign law. If a judge decides to rely on the law of a particular jurisdiction, then it must be manifest in his or her judgment that he or she has thoroughly considered all the laws of that country, even those that are unfavourable to the interpretation he or she prefers. And not only that, but he or she must state in the judgment the basis of his discarding certain laws of the same country. In this regard, the Court in *Christian Lawyers Association* fell short of meeting the criteria.

The Court seems to have been selective in invoking the laws of the United States. It elected to overlook the developments in the United States after the *Roe v Wade*³⁷⁵ decision. *Roe* did not mean the final settlement of the issue of the right to life of the unborn. Nineteen years later, the Supreme Court of the United States had to deal with the same issue in the *Planned*

³⁷⁴ Section 39(1)(c) of the Constitution.

³⁷⁵ *Roe v Wade* 410 U. S. 113 (1973).

*Parenthood*³⁷⁶ case. Interestingly, this case served before the United States Court in 1992, whereas McCreath J was seized with the *Christian Lawyers Association*³⁷⁷ case in 1998. Thus, the *Planned Parenthood* case already existed in the body of the United States case law when McCreath J had to adjudicate the question of the right to life of the unborn. Astonishingly, however, he lets the matter rest at the *Roe v Wade* stage.

The *Planned Parenthood* case is of no little significance. Its whole objective was to have the *Roe v Wade* decision overruled as the feeling was intense that *Roe* was badly decided. The majority decision in *Planned Parenthood* was that the three pillars of *Roe* should be retained. The Court referred to these three pillars as the “essential holding”,³⁷⁸ namely, (a) a recognition of the woman’s right to choose to have an abortion before foetal viability; (b) a confirmation of the State’s power to restrict abortions after viability; and (c) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the foetus that may become a child.³⁷⁹

The crucial significance of the majority decision is that it resisted the overruling of *Roe* because the Court felt that it was bound by *stare*

³⁷⁶ *Planned Parenthood of Southeastern Pennsylvania v Casey* 120 L ed 2d 674; 112 SCt 2791 (1992).

³⁷⁷ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T) (the first case).

³⁷⁸ Davis D *et al Fundamental Rights in the Constitution* — Commentary and Cases (1997) at 64.

³⁷⁹ at page 2 par. 1.

decisis.³⁸⁰ This approach of the Court is indeed commendable as it makes for certainty in constitutional litigation. The Court felt that no judicial system could benefit society if it eyed each issue afresh each time the issue was raised in courts. The Court so revered the principle of *stare decisis* that it went so far as to say that even international instruments need to be interpreted in the light of all its precedents.³⁸¹

The second point referred to as worth mentioning at the outset is that McCreath J missed the most crucial point of the case he relied on. As stated at the outset, McCreath J got carried away in finding an answer to a question that was not an issue raised by the plaintiffs nor was it supposed to be — that a foetus is a person. The issue raised by the plaintiffs was that the unborn has life. McCreath J leaned heavily on *Roe* in dismissing the issue raised.

However, *Roe* was not the right case law authority to sustain the Court's view. On the contrary, *Roe* pointed in an opposite direction altogether. While it acknowledges the right of a woman to terminate a pregnancy prior to viability, this case entrenches the duty of the State to protect the life of the unborn as soon as "quickenings" or viability of the foetus

³⁸⁰ "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v Wade* should be retained and once again reaffirmed," was the Court's judgment at 42.

³⁸¹ at 184.

begins.³⁸² This decision also underscored the scientific fact of when life is presumed to begin — before birth, though not necessarily at conception according to the *Roe* decision, a fact which McCreath J missed. As a matter of fact, the Court decried the grave defects in the country's laws — both common and statute — in that the law fully acknowledges the foetus *in utero* and its inherent rights for civil purposes, while it fails to do so in criminal law.³⁸³

The fact that McCreath J was selective and thus inconsistent further becomes manifest in the light of his deliberate failure to take cognisance of the Court's view of a woman's right to terminate her pregnancy. In response to the appellant and some amici's argument that a woman's right to terminate her pregnancy was absolute and could be exercised at any time and in any way and for any reason, the Court was firm in expressing its disagreement.³⁸⁴ Thus, the Court reaffirmed the position which, according to the Court, had been established by precedence.

³⁸² See Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 106.

³⁸³ at 75 – 76.

³⁸⁴ “On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. . . . a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. . . . The privacy right involved, therefore, cannot be said to be absolute. . . . The court has refused to recognize an unlimited right of this kind in the past,” was the court's reasoning per Blackmun J.

If McCreath J had referred to the United States case law with a view to be guided thereby, he would have arrived at an interpretation consonant with the whole body of that case law and different from the interpretation he arrived at.³⁸⁵

The third point referred to as worth mentioning at the outset is that while the majority judgment in *Roe v Wade* is to be applauded for honouring *stare decisis*, the majority judgment lacked foundation in interpreting the relevant United States constitutional provision in the way that it did.

The constitutional provisions relied upon by the plaintiff in *Roe v Wade* were, *inter alia*, the First, the Fourth, the Fifth and the Fourteenth Amendments of the United States Constitution.³⁸⁶ It will be noted that

³⁸⁵ Smyth J “Moving Towards Improvement in SA Abortion Legislation,” 2006 *Tydskrif vir Christelike Wetenskap* 223 – 239, makes the point that the *Planned Parenthood* decision reinforced the State’s legitimate interests in the life of the foetus, and that this interest might be legitimately promoted “by enacting restrictive measures to encourage childbirth rather than abortion”, at 223.

³⁸⁶ The Amendments in question provide:

Amendment I

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Amendment IV

“The right of the people to be secure in their persons, houses, papers, and effects, against the unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Amendment XIV (1868)

Section 1

“All persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

other amendments have not been reproduced in the footnote. This is because of their irrelevance to the questions raised before the court. The litigant claimed that the laws of Texas infringed on her right to privacy — the right to do what she pleased to do in her privacy. By any stretch of the imagination, the Amendments simply fall short of covering the right to privacy, let alone the right to terminate a pregnancy.

On the contrary, the First Amendment merely protects the right to practice one’s religion, the freedom of speech, of the press, to assemble, and to express grievances against Government.

The Fourth Amendment deals with physical security to be enjoyed by citizens indoors, and the right not to be unduly searched.

The Fourteenth Amendment merely deals with the right of citizens and or naturalised citizens, and their right not to be deprived of certain privileges without due process of the law. Indeed the dissenting minority was correct in holding that “a woman’s decision to abort her unborn child is not a constitutionally protected ‘liberty’ because (1) the Constitution says absolutely nothing about it.”

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

As a matter of fact, the context of the Fourteenth Amendment makes it clear that the “liberty” the Constitution had in mind was liberty from being deprived of life, liberty from incarceration, liberty from expropriation. This is underscored by the use of the phrase “without the due process of law”. This phrase contextualises the Amendment by showing that if any person were to be deprived of his or her life by being executed, deprived of his or her liberty by being kept in custody, deprived of his or her property through expropriation by the State, it would invariably be by due process of the law, and not arbitrarily. Assuming that the “liberty” also envisaged the liberty of a woman to terminate a pregnancy, it boggles the mind how a woman would first have to go through the “due process of the law”. This glaring lack of insight on the part of the majority of the court in this regard betrays its failure to make use of the contextual approach to the interpretation of a constitutional provision.

Further strengthening the correctness of the view that the word “liberty” in the Fourteenth Amendment refers to liberties other than the liberty of a woman to terminate the life of the unborn, is the content of the same right as contained in the European Convention on Human Rights — an international instrument.³⁸⁷ As can be seen from the content of article 5

³⁸⁷ Article 5 of the Convention provides:

“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

in the footnote, nowhere does this right in any way come near the right of a woman to decide on reproduction as was mistakenly so believed in *Roe v Wade* and in *Christian Lawyers Association*.

The majority decision in *Roe v Wade* further missed the point in reading into the Fourteenth Amendment the right to privacy. As already pointed out in the actual reading of the Amendment, nothing comes near to even suggesting the right to privacy, in which privacy a woman could be free to do as she pleases with her body or pregnancy. The minority judgment correctly and emphatically maintained, per Rehnquist CJ, that “I have difficulty in concluding, as the Court does, that the right ‘of privacy’ is involved in this case . . . A transaction resulting in an operation such as this is not ‘private’”. Indeed, Douglas J was poignant in stating that “there is no mention of privacy in our Bill of Rights.” This is significant because the South African court relied on this right.

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- (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person . . .
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority . . .
 - (d) the detention of a minor by lawful order . . .
 - (e) the lawful detention of persons for the prevention of . . .
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country . . .”

See also P van Dijk and G J H van Hoof *Theory and Practice of the European Convention on Human Rights* (1990) 2nd ed at 251.

Besides, even if the right to privacy featured in the United States Constitution, as it does in the South African Constitution, holding that a woman is not answerable to the State for what she does in her privacy — in this case, terminating the life of the unborn — would imply that any conduct of a citizen is irreprehensible and lawful as long as it is committed in the privacy of their home. It would mean that such offences as incest and indecent assault cease to be criminal when carried out in privacy. Such a view is not sustainable.

It is astonishing, therefore, how the majority of the Court arrived at the conclusion that the Amendment extends to the right of a woman to terminate the life of the unborn. Powell³⁸⁸ also finds the interpretation of the majority, while commendable in some respects as mentioned earlier, to be “imprecise”.

Relying on *Roe v Wade*, the South African court duplicated the same lack of insight in the South African counterpart case, *Christian Lawyers Association*. Just as the Fourteenth Amendment of the United States Constitution makes no mention of the termination of pregnancy, its South African counterpart — section 12(2)(a) — makes no such mention either. The section only mentions “reproduction”.

³⁸⁸ Powell D “BOOK REVIEWS” 1995 *SAJHR* 353, reviewing Cachalia A *et al Fundamental Rights in the New Constitution* (1994) .

However, as correctly pointed out by Naudé,³⁸⁹ section 12(2)(a) of the Constitution does not become “meaningless if abortion is left out of it”. As a matter of fact, section 12(2)(a) could well have been intended to entrench the right of a woman to control “reproduction” by means of contraceptives or by means of sterilisation,³⁹⁰ or it could have been intended to protect the right of a woman to “reproduce” — a verb from the word “reproduction” in section 12(2)(a) — as much as she wishes. In addition, the right of a woman to “make decisions concerning reproduction” could also extend to the option of offering the undesired baby to adoption institutions established by the State.

Crann³⁹¹ is of the view that “it is ludicrous to expect to find the specific word ‘abortion’ in a constitutional document”. He defends this view by pointing out that a constitution is intended to endure a long time, and therefore taking into account that the views of society may change over a particular issue, constitutional provisions are wisely drafted in a general and open-ended language to allow for new circumstances in the future.

³⁸⁹ “CASES AND COMMENTS — The Value of Life — A Note On *Christian Lawyers Association of SA v Minister of Health*” 1999 *SAJHR* 546.

³⁹⁰ Van Zyl Smit D “Reconciling the Irreconcilable? Recent Developments in the German Law on Abortion” 1994 *Medical Law Review* 302 – 320.

³⁹¹ Crann G P “*Morgentaler* and American Theories of Judicial Review: the *Roe v Wade* Debate in Canadian Disguise’ (1989) 47 (2) *University of Toronto Faculty of Law Review* 499 at 508.

This may well be so. But we must understand what this will mean in practical terms. It will mean that a constitution is not a guide nor a fundamental law of a nation because that which is supposed to be an anchor for all laws, turns out to be shifting sands. A constitution of any nation cannot in one decade countenance the termination of life and in the next proscribe it. It would boil down to such a nation not having a supreme law — which is what a constitution is supposed to be.³⁹²

As was correctly acknowledged in *Hunter et al v Southam Inc*³⁹³, a constitution “cannot easily be repealed or amended,” and in the South African context such a move has been made achievable, but with difficulty.³⁹⁴ The latest edition of the South African Constitution in 2010 shows that it is the ninth edition, indicating the number of times amendments have been made to the Constitution.

What the majority of the court did in *Roe v Wade*³⁹⁵ is what amounts to “reading in”³⁹⁶ — a remedy often resorted to by judges to cure an imperfection in legislation. The judges attempted to ‘read in’ into the

³⁹² See Section 2 of the Constitution; see also Chaskalson *et al Constitutional Law of South Africa* (2005) 2nd ed at 11–34.

³⁹³ *Hunter et al v Southam Inc* 1984 2 S. C. R. 145.

³⁹⁴ See section 74(1)(2)(3) of the Constitution.

³⁹⁵ *Roe v Wade* 410 U. S. 113 (1973).

³⁹⁶ “Reading in” is a mechanism used by judges to cure a defect, usually of unconstitutionality, in a piece of legislation. See Currie I and de Waal J *The Bill of Rights Handbook* (2005) 5th ed at 204–206.

Constitution a right which was not provided for by the Constitution of their State.

However, it is unfortunate that judges may not make use of the “reading in” remedy in a constitution. A constitution is the foundation law brought into existence by various groups representing a nation. If judges attempted to ‘read in’ into it something that was obviously omitted by either the constitutional assembly or by the drafters, they are presuming upon a task falling outside their prerogative, namely, rewriting a constitution. The only appropriate place for the “reading in” is legislation.³⁹⁷ It serves the purpose of remedying defects in a piece of legislation, which defects become manifest when the piece of legislation is tested as to its constitutionality.³⁹⁸ Then the legislation can be tailored to be in harmony with the foundation law — the Constitution. But the Constitution itself, being the foundation, cannot be tailored by the judges.³⁹⁹

³⁹⁷ Okpaluba C “Of ‘forgiving new tools’ and ‘shaping innovative remedies’: Unconstitutionality of legislation infringing fundamental rights arising from legislative omissions in the new South Africa” 2001 *Stell LR* 462–464.
See also in this regard *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 1 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC)

³⁹⁸ See Currie I & de Waal J *The Bill of Rights Handbook* (2005) 5th ed, 204 – 206;
Furthermore, the following cases all illustrate the point that the “reading in” remedy is invariably utilised to cure a defect in a piece of legislation which does not conform to the Constitution, not to cure the Constitution itself: *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *S v Manamela* 2000 (3) SA (CC) ; *S v Niemand* 2002 (4) SA 858 (CC)

³⁹⁹ In Canada as well, the “reading in” mechanism is used to cure constitutional defect in a statute, not in the text of the Constitution. See in this regard: P W Hogg *Constitutional*

The Court in the South African case of *Christian Lawyers Association*⁴⁰⁰ fell into the same pitfall — “reading in” into the foundation document — the Constitution, a right which neither the Constitutional Assembly nor the drafters of the Constitution had envisaged. Whether they did so by oversight or for a purpose is immaterial. A judge is not authorised to arrogate to himself or herself that responsibility.

In the United States of America, matters came to a head when, after the *Planned Parenthood*⁴⁰¹ case had failed to overturn *Roe v Wade*,⁴⁰² concerned individuals⁴⁰³ did not give up but organised themselves and set out to overthrow *Roe v Wade* by means of legislation this time. They proposed and processed a Bill called the “Life at Conception Bill”. This Bill expounded in its long title its purpose as being “to implement equal protection under the 14th article of amendment to the Constitution for the right to life of each born and pre-born human person”.

Law of Canada Vol 2 (2007) at 40–15. The following cases in Canada substantiate this point: *Schachter v Canada* [1992] 2 S.C.R. 679; *Miron v Trudel* [1995] 2 S.C.R. 418; *Vriend v Alberta* [1998] 1 S.C.R. 493.

⁴⁰⁰ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T) (the first case).

⁴⁰¹ *Planned Parenthood of Southeastern Pennsylvania v Casey* 120 L ed 674; 112 SCt 2791 (1992).

⁴⁰² *Roe v Wade* 410 U. S. 113 (1973).

⁴⁰³ These individuals were: Mr Wicker; Mr Vitter; Mr Demint; Mr Enzi; Mr Brownback; Mr Martinez; Mr Voinovich; Mr Thune; Mr Coburn, and Mr Inhofe.

These concerned individuals introduced the Bill, which was then read twice and referred to the Committee on the Judiciary. The salient point of the Bill was its definition of “human person” or “human being”. It defined these as including “each and every member of the species homo sapiens at all stages of life, including, but not limited to, the moment of fertilisation, cloning, and other moment at which an individual member of the human species comes into being.”

The Bill did not, however, succeed in becoming an Act due to lack of sufficient support in the legislature.

Matters did not reach a dead end with the failed “Life at Conception Bill”. An unexpected breakthrough was reached in 1997 when an official recognition of the life of the unborn became a reality in the United States of America by way of legislation. This became possible by means of the Unborn Victims of Violence Act of 1997, which was assented to and signed into law by former President George W. Bush on April 1 2004. The Act was enacted after a five-year effort led by the National Right to Life Committee (NRLC).

It is worth mentioning at the outset that the Act does not overturn the principles of the *Roe v Wade*⁴⁰⁴ decision. This means that it does not

⁴⁰⁴ *Roe v Wade* 410 U. S. 113 (1973).

take away the right of a woman to bring an end to a life-threatening pregnancy. It however recognises the right to life of an unborn child from another perspective. The “Unborn Victims of Violence Act” recognises that when a law breaker assaults an expecting woman, and causes injury to or kills both the woman and her unborn child, such a criminal has claimed two human lives.⁴⁰⁵ The Act⁴⁰⁶ has established that if a child *in utero* (in the womb) is injured or killed during the commission of certain state crimes of violence, in that case the assailant may be charged with a second offence on behalf of the second victim, the unborn child.

As to which charge exactly would be applicable would depend on which federal law is involved, the nature and extent of harm perpetrated on the child, and other factors. The law applies this two-victim principle to 68 existing federal laws dealing with acts of violence.

Prior to the enactment of this law, an unborn child was not recognised as a victim with respect to violent crimes. If an offender, for example, beat a woman and this consequently led to the death of her unborn child, the offender would be charged only with the assault of the woman because the life of the unborn child was not recognised by the law. By the same

⁴⁰⁵ National Right to Life Committee, Inc “Key Facts on the Unborn Victims of Violence Act (“Laci and Conner’s Law) (H. R. 1997) April 1 2004 at 1.

⁴⁰⁶ Also called the “Laci and Conner’s Law” because it was initially enacted to protect the life of the mother, Laci, and her unborn son, Conner.

token, if a bomb explosion killed an unborn child but its mother was only injured and was not killed, the bombing was not regarded as having resulted in a loss of life.

The “Unborn Victims of Violence Act” protects the child *in utero* defined as a “member of the species homo sapiens, at any stage of development, who is carried in the womb.”⁴⁰⁷

As mentioned earlier, the Act does not conflict with the *Roe v Wade*⁴⁰⁸ decision, albeit it may ostensibly appear to be so. As a direct result of this ostensible conflict, misinformed citizens have been lured into challenging the unborn victim law and other similar laws, basing their challenge on the Supreme Court’s holding in *Roe v Wade*. However, these attempts failed. One such attempt is *S v Merrill*⁴⁰⁹ where the Minnesota Supreme Court ruled that “*Roe v Wade* . . . does not protect, much less confer on an assailant, a third-party unilateral right to destroy the foetus”, thus setting a commendable example in honouring precedent. In other words, an accused could not rely on the abortion decision in *Roe v Wade* to minimise the seriousness of his or her offence of bringing about the death of a child in its mother’s womb, even though the mother herself survives the assault.

⁴⁰⁷ at 1.

⁴⁰⁸ *Roe v Wade* 410 U. S. 113 (1973).

⁴⁰⁹ *S v Merrill* 450 N. W. 2d 318 (Minn. 1990).

Another misguided attempt to challenge the unborn victim law, based on the *Roe v Wade* decision, was in 1989 in the case of *Webster v Reproductive Health Services*⁴¹⁰ when litigants sought a court order invalidating a Missouri statute declaring that “the life of each human being begins at conception,” that “unborn children have protectable interests in life, health and well-being”, and that all state laws (including criminal laws “shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state.”⁴¹¹ A lower court had ruled that Missouri’s law impermissibly adopted “a theory of when life begins,” and blocked its enforcement, but the Supreme Court nullified that ruling, allowing the law to go into effect as long as the State did not use it to restrict the termination of pregnancy in deserving cases, thus setting an example in upholding its own precedent.

As was the case in South Africa prior to the demise of the death sentence, the United States enacted the Innocent Child Protection Act of 2000. The South African counterpart of this Act was section 278 of the Criminal Procedure Act 51 of 1977, with section 331 of the Criminal Procedure Act of 1955 as its predecessor. Like the South African Act, the United States

⁴¹⁰ *Webster v Reproductive Health Services* (1989) 492 U. S. 490.

⁴¹¹ at 2.

Innocent Child Protection Act provided that no state may “carry out a sentence of death on a woman while she carries a child in utero”. It defined “a child in utero” as a “member of the species homo sapiens, at any stage of development, who is carried in the womb.”⁴¹² The principle embodied in the Act was loud and clear: that carrying out the execution would take two human lives, including one convicted of no crime.

Interestingly, the mother and grandmother of the two victims vehemently opposed the adoption of a single-victim approach in cases where a pregnant mother dies simultaneously with the unborn child. She decried it in these words: “Adoption of such a single-victim amendment would be a painful blow to those, like me, who are left alive after a two-victim crime, because Congress would be saying that Conner [the unborn grandchild] and other innocent unborn victims like him are not really victims — indeed, that they never really existed at all. But our grandson did live. He had a name, he was loved, and his life was violently taken from him before he ever saw the sun.”⁴¹³

Taking stock of the United States jurisprudence, one establishes that, admittedly, the United States Supreme Court, at least in the matter of the unborn life, was not prone to drawing from the decisions of other

⁴¹² Section 2 of the Act.

⁴¹³ National Right to Life “Key Facts on the Unborn Victims of Violence Act (‘Laci and Conner’s Law’) (H. R. 1997) at 3.

jurisdictions. It did not endeavour to bind itself by judicial precedent of other jurisdictions. However, it did consider itself bound by its own chain of precedent, and it stayed faithfully within the bounds of its own precedent,⁴¹⁴ although in law it is free to depart therefrom.⁴¹⁵

4.5.1 In German law

The Basic Law of Germany,⁴¹⁶ as the Constitution of Germany is called, was relied upon by the South African Constitutional Court in *S v Makwanyane*⁴¹⁷ in dealing with the right to life in the context of capital punishment. According to Church *et al*,⁴¹⁸ the Basic Law⁴¹⁹ was called such because the Parliamentary Council did not want to bestow the dignified term “constitution”⁴²⁰ on a document drafted to govern a part of Germany for a transitional period that would only last until national reunification. It was envisaged that the Basic Law would cease to exist

⁴¹⁴ *Jacobson v Massachusetts* (1905) 197 U. S. 11; *Buck v Bell* (1927) 274 U. S. 200; *Byrn v New York City Health & Hospitals Corp* (1972) 31 N. Y. 2d 194, 286 N. E. 2d 887; *Keeler v Superior Court* (1970) 2 Cal. 3d 619, 470 P. 2d 617

⁴¹⁵ The best known example is *Brown v Bd of Education* (1954) 347 U. S. 483 where it refused to follow *Plessy v Fergusson* (1896) 163 U. S. 537

⁴¹⁶ The Basic Law of Germany came into operation in 1949.

<http://www.iuscomp.org/gla/statutes/GG.htm> (accessed: 2011/08/22)

⁴¹⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 108.

⁴¹⁸ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 99.

⁴¹⁹ In German, *Grundgesetz*. See Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 99.

⁴²⁰ In German, *Verfassung*. See Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 99.

when national reunification was achieved, with the adoption of a German constitution by a free decision of the people of Germany.⁴²¹

There is a striking similarity between the Constitution of Germany and the Constitution of South Africa, namely, that in both Constitutions the right to dignity precede the right to life.⁴²² Church *et al*/⁴²³ write that the human rights in the German Constitution are not listed at random, as may at first glance seem to be the case, but constitute a system of values and rights. Referring to the decision of the Federal Constitutional Court,⁴²⁴ the learned authors write that the right to human dignity is the most important of the basic rights.⁴²⁵

As is the case in South Africa, where human rights may be limited in terms of a law of general application,⁴²⁶ human rights in Germany are not

⁴²¹ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 99. The vision to replace the Basic Law with a constitution adopted by the people was contained in article 146 of the Basic Law, which provided:

“The Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

⁴²² In the Constitution of South Africa, the right to dignity is entrenched in section 10, followed directly thereafter by the right to life in section 11. In the Constitution of Germany, the right to dignity is entrenched in article 1(1), followed directly thereafter by the right to life in article 2(2).

⁴²³ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 100.

⁴²⁴ *BVerfGE* 6 32 at 4; 32 98 at 108; 45 187 at 227.

⁴²⁵ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 100.

⁴²⁶ In terms of section 36(1) of the Constitution.

absolute, a point mentioned by Church *et al.*⁴²⁷ The fundamental rights provisions of the Basic Law are aimed at protecting the individual against interference by the state.⁴²⁸

Among the jurisdictions our South African court relied on for its decision in *Christian Lawyers Association*⁴²⁹ was Germany. In this regard it is informing to look, as a departure point, at the Constitution of Germany itself.⁴³⁰ The provision of the Constitution on which Germany based its decision to outlaw the termination of a pregnancy is reproduced in the footnote. It is noteworthy that the same provision features in the South African Constitution, though in a slightly different wording. The substance remains the same, though.

It must be noted that article 2(2) of the German Constitution which deals with the right to life contains no reference to abortion. If the German drafters had intended to include the protection of the right to life of the unborn, they would have done so under article 6 which deals with marriage, family and children. However, even article 6, though dealing

⁴²⁷ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 102.

⁴²⁸ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 103.

⁴²⁹ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T) (the first case).

⁴³⁰ Article 2(2) of the German Constitution reads:

“Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law”.

with children, falls short of expressly protecting the right to life of the unborn.

Despite this lack of express protection for the right to life of the unborn in the German Constitution, the German Constitutional Court,⁴³¹ has consistently ruled that the protection afforded life in the Constitution includes that of the unborn. In a case decided in 1975,⁴³² and again in a case decided in 1993,⁴³³ the German Constitutional Court held that a foetus does enjoy some constitutional protection under article 2(2) of the German Constitution.

Specifically, the State was burdened with the duty to protect the life of the unborn even against its own mother. This burden could only be shouldered by the State if the State fundamentally outlawed the termination of the unborn life and placed on a woman the responsibility of carrying the foetus to term.⁴³⁴ Viewed in this light, the termination of the unborn life had to be regarded as against the law throughout the pregnancy. No stage of the pregnancy was to be viewed as a stage where the law could be relaxed or compromised. Thus, the position is that the termination of the unborn life is illegal and unconstitutional in Germany. It is apropos at this juncture to emphasise that the German Constitutional

⁴³¹ Called in the German language the *Bundesverfassungsgericht*.

⁴³² (*BVerfGE* 39, 1).

⁴³³ (*BVerfGE* 88, 203).

⁴³⁴ Davis D *et al* *Fundamental Rights in the Constitution — Commentary and Cases* (1997) at 65.

Court came to this conclusion notwithstanding the fact that article 2(2) of the German Constitution is silent about the unborn or foetus and does not expressly extend the right to life to the unborn.⁴³⁵

With this clear background in mind, it is intriguing how the High Court in South Africa considered the position in Germany but did not follow it. In this regard, the South African High Court dismissed the need to be bound by precedent by endeavouring to explain the probable reason for the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) to so decide the issue. The Court sought to dismiss the German precedent by surmising that Germany was trying to make up for the wanton destruction of human life during the Nazi regime of Hitler's time. The Court further sought to dismiss the German precedent on three other grounds. First, by saying that the two German cases⁴³⁶ referred to earlier could not be used to support the contention advanced by the plaintiffs in the case before the Court, namely, that section 11 of the South African Constitution conferred an absolute right to life on the foetus. Second, the Court sought to dismiss the German precedent by stating that in the German case⁴³⁷ the German Constitutional Court did not hold that a foetus is a person,⁴³⁸ but that foetal life had an independent legal value

⁴³⁵ See also Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 108 –109.

⁴³⁶ *BVerfGE* 39, 1 and *BVerfGE* 88, 203.

⁴³⁷ (*BVerfGE* 39, 1)

⁴³⁸ As already pointed out, the South African High Court per McCreath J missed the point when it used its time to persuade the litigants that a foetus was not a person, when in fact the point

worthy of protection. Third, the South African High Court further sought to dismiss the German precedent by holding that in both cases of the German jurisprudence⁴³⁹ the German Constitutional Court gave express recognition to the constitutional protection of the woman's right to her own dignity, physical integrity and personal development. The South African High Court also maintained that the German Constitutional Court sought to strike a balance between the State's obligation to protect foetal life, on the one hand, and its obligation to protect the autonomy of the woman, on the other.⁴⁴⁰

In surmising that by protecting the life of the unborn Germany was trying to make up for the wanton destruction of human life during the Nazi regime of Hitler's time, the South African High Court was merely echoing the view of an author, Neuman of the Columbian University of Law.⁴⁴¹ It was not the Court's objective and independent assessment of the German jurisprudence.⁴⁴²

was that a foetus has life in it.

⁴³⁹ (*BVerfGE* 39, 1) and (*BVerfGE* 88, 203).

⁴⁴⁰ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T) at 1125, 1126.

⁴⁴¹ In his article "Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany" published in the *American Journal of Comparative Law* (1995) at 273.

⁴⁴² Van Zyl Smit D "Reconciling the Irreconcilable? Recent Developments in the German Law on Abortion" 1994 *Medical Law Review* 302 – 320

4.5.2 In Ecuador, Philippines, Chile and Ireland

Ecuador, Philippines and Chile are jurisdictions which have proscribed the termination of the life of the unborn. The difference between these jurisdictions is that Ecuador and the Philippines have done so flowing from the interpretation they have given to their constitutions. The constitutional courts of these jurisdictions bowed to the arguments which were presented before them that life begins at conception and that, accordingly, the termination of an unborn life is unconstitutional.⁴⁴³ It would seem that Ecuador bases its interpretation on article 1 of its Constitution.⁴⁴⁴ The relevant section in the Republic of Philippines Constitution is Section 1.⁴⁴⁵ Chile, on the other hand, has drafted its Constitution in such a way that the right to life of the unborn does not need to be interpreted, but has been expressly entwined in the wording of the Constitution in article 19(1).⁴⁴⁶

⁴⁴³ Hansson D & Russell D E H “Made to Fail: The Mythical Option of Legal Abortion for Survivors of Rape and Incest” 1993 500 *SAJHR* at 505, footnote 31.

⁴⁴⁴ Article 1 of the Ecuador Constitution provides:

“Nature or Pachamama, where life is reproduced and exists, has the right to exist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognition of rights for nature before public institutions. The application and interpretation of these rights will follow the related principles established in the Constitution.”

⁴⁴⁵ Section 1 of the Republic of Philippines Constitution provides:

“No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.”

⁴⁴⁶ Article 19(1) of the Republic of Chile Constitution provides:

“The right to life and to the physical and psychological integrity of the individual. The law protects the life of those about to be born. The death penalty may only be instituted for a crime considered in a law approved by a qualified quorum.”

Therapeutic termination of the life of the unborn was allowed by the Health Code of Chile in 1931. However it was later banned with the argument that medical science had advanced far enough that it was no longer justifiable.

Today's laws against the termination of the life of the unborn are codified in the Penal Code of Chile in articles 342 to 345 under the title "Crimes and Offences Against Family Order, Public Morality and Sexual Integrity". The Code penalises induced termination as well as termination caused by a violent act against a woman. Consent of the woman is legally invalid; thus any person inducing the termination with the consent of the woman equally risks legal sanctions. Needless to say, these laws cannot be taken on review since the Constitution, which is the basic law of the land, "protects the life of those about to be born." The only change can be brought about by the amendment of the Constitution itself.

The legal and constitutional position in Chile was not considered by South African High Court, nor was the position in the Republic of Philippines and the Republic of Ecuador considered. These jurisdictions share the same view of life as Germany, which was cited by the South African court court.⁴⁴⁷ What becomes very salient, however, is that the

⁴⁴⁷ That foetal life needs to be protected from the time of conception, and that the State has the

text of all four constitutions — the Constitutions of South Africa, Germany, Ecuador⁴⁴⁸ and Philippines⁴⁴⁹ — contain nothing relating to the life of the unborn. The same applies to the First and Fourteenth Amendments of the Constitution of the United States. Yet, these jurisdictions were able to sense the scope of the right to life which the South African court inconsistently and contrary to *stare decisis* failed to do.

Ireland enacted the Criminal Justice Act of 1945.⁴⁵⁰ The relevant section 25 contains points which can hardly escape one's notice: (a) It refers to the unborn as an entity with life; (b) it recognises the unborn entity as being a child; (c) it refers to the entity as being susceptible to death; (d) a criminal sanction ensues for destroying it even though it does not yet exist independently of its mother, that is, while it is in the womb.

responsibility of protecting foetal life against its own mother and against others, throughout the period of pregnancy.

⁴⁴⁸ The only relevant section on the right to life in the Constitution of Ecuador is Article 1, which provides:

"Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist and regenerate its vital cycles, structure, functions and its processes in evolution".

⁴⁴⁹ Section 1 under Article III of the Constitution of the Philippines provides:

"No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws".

⁴⁵⁰ Section 25 of the Act creates the offence of child destruction as follows:

"Any person who, with intent to destroy the life of a child then capable of being born alive, by any willful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction".

This provision of the Act is not unconstitutional. As a matter of fact, it gives effect to the constitutional demands of the Constitution of Ireland.⁴⁵¹ Like Chile, Ireland elected to expressly recognise the unborn as a living organism without the need for such an interpretation to be breathed into the Constitution. It is noteworthy that such recognition is not entrenched at the expense of the right to life of the mother, but the two lives are each accorded the respect and protection they duly deserve.

One does not have all the underlying considerations which the constitutional assembly and the drafters in Ireland had in mind when they decided to expressly entrench the protection of the unborn in their Constitution. It would appear, though, that such considerations as are brought to the fore by Meyerson⁴⁵² are germane here. Meyerson, while concurring with the Court in *Christian Lawyers Association*,⁴⁵³ that a foetus does not have the right to life, explores the other extreme. He argues that denying the foetus the right to life does not then countenance destroying it.⁴⁵⁴ The destruction of foetal life, albeit it violates no constitutionally protected subject's right to life, nevertheless undermines human dignity.

⁴⁵¹ In its Chapter XII, Article 40(3)(3) the Constitution of Ireland provides:

“The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right . . .”

⁴⁵² Meyerson D “Abortion: The Constitutional Issues” 1999 *SALJ* 50.

⁴⁵³ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T).

⁴⁵⁴ Meyerson D “Abortion: The Constitutional Issues” 1999 *SALJ* at 56.

It is interesting to note that Meyerson does not only recognise a fact that is not often recognised, that a foetus possesses life in it, but he recognises also that it deserves to be treated with dignity.⁴⁵⁵ He argues that “a foetus is not just a bit of human tissue, comparable to something like the appendix. It is a living human organism, whose destruction is not a morally trivial matter but something to be regretted”.⁴⁵⁶ He then substantiates the point by drawing from Dworkin who compares a foetus to a work of art because of the marvellously complex and creative processes it embodies.⁴⁵⁷

Meyerson points out,⁴⁵⁸ and this could be the rationale behind Ireland’s Constitution and statute forbidding the termination of a pregnancy, that if the foetal life were not protected the State could pass laws countenancing the killing of fetuses for any frivolous reason right up to the moment of birth. Not only that, argues Meyerson,⁴⁵⁹ but the State could enact laws subjecting embryos and fetuses to experimentation and research. It could even pay women to snuff the life of a foetus in order to ensure a ready supply of cadaver foetal brain tissue, since such tissue is known to have therapeutic value in the treatment of some

⁴⁵⁵ Meyerson D “Abortion: The Constitutional Issues” 1999 *SALJ* at 56; Section 10 of the Constitution.

⁴⁵⁶ Meyerson D “Abortion: The Constitutional Issues” 1999 *SALJ* at 56.

⁴⁵⁷ Dworkin R *Life’s Dominion* (1993) 81–84.

⁴⁵⁸ Meyerson D “Abortion: The Constitutional issues” 1999 *SALJ* at 55.

⁴⁵⁹ at 55.

diseases.⁴⁶⁰ Indeed, the assumption or constitutional construction that a foetus is not a possessor of life could have far-reaching lamentable effects, equal to the “far-reaching” effects which would be our lot if, according to McCreath J, women were denied the relief to snuff the life of their unborn.

Not so many years ago, Fletcher,⁴⁶¹ a columnist in a medical journal, spoke of the dilemma of a new category of “patients” — the little patient in the womb. Surgery in the womb reached a new height when California surgeons inserted a tiny plastic tube into the bladder of a foetus to drain a urinary blockage. In this connection, Fletcher said that such developments in treating the unborn make it appear “likely that the foetus with a treatable birth defect is on the threshold of becoming a patient.”⁴⁶²

Scientists worldwide establish scientifically the fact of the unborn being a living organism. In his book, *A Child is Born*⁴⁶³, Nilsson outlines the development of the unborn. As the brain grows, he explains, connections are formed between its neurons. By the eighth week, these connections,

⁴⁶⁰ at 55.

⁴⁶¹ Fletcher J C “The Fetus as Patient: Ethical Issues” *The Journal of the American Medical Association* 1981 772–777.

⁴⁶² *Journal of the American Medical Association* 1981 August 14, 777; See also 1981 November 22 edition, at 22, published by Watchtower Bible and Tract Society of New York, Inc (as a matter of policy, the Society’s articles do not carry a by-line).

⁴⁶³ Nilsson L *A Child is Born* (1976) 4th ed 2.

called synapses, are developing and soon number into millions as they assume the multitudinous functions of the brain. By this time all its body parts are in place, and it is no longer an embryo. The earliest movements of the foetus begin at seven and a half weeks. By thirteen weeks taste buds are functioning, and later on if sugar is added to the amniotic fluid, the rate of swallowing doubles. But if something distasteful is added, the foetus sharply curtails its swallowing and grimaces to impress its displeasure. By fifteen and sixteen weeks, breathing, hiccupping, sucking, swallowing, yawning, eye movement, all of these are occurring.⁴⁶⁴

O'Sullivan's⁴⁶⁵ reasoning is in unison with the above. She writes that: "There are good reasons to allow a state to prohibit abortion after viability. At about that point, foetal brain development is sufficient to feel pain, which indicates that the foetus has protectable interests of its own".

Thus, the recognition of a child *in utero* as a living organism, not necessarily as a legal *persona*, rings through as a common thread, not only the medical field, but also in the legal and political spheres.

⁴⁶⁴ Nilsson L *A Child is Born* (1976) 2.

⁴⁶⁵ O'Sullivan M "Reproductive Rights" in Woolman S and Roux T (eds) et *Constitutional Law of South Africa* (2005) Vol 2 at 37-39.

Notably, the right to life of citizens in general is given a casual mention in the Constitution of Ireland when compared to the specific mention given to the right to life of an unborn child.⁴⁶⁶ The Constitution therefore leaves open the question of the right to life of those facing criminal sanctions.

4.5.3 In Canadian law

In 1982 the Constitution Act of Canada⁴⁶⁷ was proclaimed, of which Part I is the Canadian Charter of Human Rights and Freedoms.⁴⁶⁸ A striking similarity between the Constitution of South Africa and the Constitution of Canada is that both constitutions regulate the extent to which rights protected in them may be exercised. In the Constitution of South Africa, section 36(1) allows the limitation of rights if such limitation is in terms of law of general application and takes into account the factors listed thereunder. In the Constitution Act of Canada, the equivalent clause is section 33(1) which provides that:

“Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision

⁴⁶⁶ Article 40(3)(2) of the Constitution of Ireland provides:

“ The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

⁴⁶⁷ Constitution Act, 1982.

⁴⁶⁸ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 86.

thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter”.

According to Church *et al*,⁴⁶⁹ this limitation clause, the so-called “legislative override”, was a compromise that bridged the political gap between those provincial premiers who objected to the entrenchment of constitutional rights and those premiers, and the prime minister, who supported the Charter’s adoption. The fundamental rights that may be limited by an Act of Parliament in Canada in terms of section 33 of the Charter are the freedoms in section 2, the legal rights in sections 7 to 14, and the equality rights in section 15.⁴⁷⁰ Since the right to life is protected by section 7 of the Charter, it is included in the fundamental rights that may be overridden.

Another limitation clause of the Canadian Charter is section 1 which provides that:

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

Thus, the rights in the Charter are relative in nature. In reviewing a piece of legislation which has the effect of limiting a right, a Canadian court

⁴⁶⁹ *Ibid* at 88.

⁴⁷⁰ *Ibid* at 89.

has to decide whether the challenged law has the effect of limiting one of the guaranteed rights. If so, the second stage would be to decide whether the limitation is a reasonable one and can be justified.⁴⁷¹ *Church et al* do not discuss the right to life, but the remedies that are at one's disposal if one's rights and freedoms have been infringed.⁴⁷²

The South African High Court did not rely in its judgment as heavily on Canada's jurisprudence as it did on the jurisprudence of the United States of America. What becomes salient, however, is that once again the Court reiterated its misguided point — that the foetus is not a person. As pointed out at the outset of this discussion, that was not the point argued by the plaintiffs. It is interesting to note that this jurisdiction which the Court lightly relied on, endorsed the view which the Court sought to brush aside, which view was the plaintiffs' argument: that though the foetus may not be a person in law, it is a possessor of life. In *R v Morgentaler*,⁴⁷³ a case referred to by the South African Court in its judgment, Wilson J stated:

She is the passive recipient of a decision made by others as to whether her body is to be used to nurture *a new life*.⁴⁷⁴

⁴⁷¹ *Ibid* at 90.

⁴⁷² *Ibid* at 92–98.

⁴⁷³ *R v Morgentaler* 1988 44 DLR (4th) 385.

⁴⁷⁴ at 492 [emphasis added].

The authors of *South African Constitutional Law — the Bill of Rights*⁴⁷⁵, in their discussion of the right to freedom and security of the person,⁴⁷⁶ do not interpret this right as containing the freedom to terminate a pregnancy. They merely mention that the concept of bodily integrity of section 12(2) was first broached from a gender perspective in the Declaration of the 1975 Women's Year Conference which declared that the "human body, whether that of a woman or a man, is inviolable freedom."⁴⁷⁷

Cheadle *et al* then proceed to merely state what Wilson J in *R v Morgentaler*⁴⁷⁸ held in the matter of abortion in Canada. By and large, the authors discuss the application of section 12 of the Constitution in other spheres of life such as the detention of offenders, the prohibition of torture as part of physical and psychological integrity, cruel and inhuman treatment, and the limitations which may be applicable to these freedoms.

⁴⁷⁵ Cheadle M H *et al* *South African Constitutional Law — the Bill of Rights* (2005) 2nd ed at 7-1 to 7-17.

⁴⁷⁶ Section 12(2) of the Constitution.

⁴⁷⁷ See section 7 - 34 of the Cairo Programme: Report of the International Conference on Population and Development, Cairo 5 - 13 1994, UN Doc A/Conf 171/13; footnote 86 of Cheadle *et al* *South African Constitutional Law — the Bill of Rights* 2nd ed at 7-16.

⁴⁷⁸ *R v Morgentaler* (1988) 44 DLR (4th) 385.

In Canada the question of the right to life in respect of an unborn child served before courts in the matter of *R v Morgentaler*.⁴⁷⁹ Three doctors, among them Doctor Morgentaler, impugned the constitutionality of section 251 of the Canadian Criminal Code which required a woman to obtain a certificate from a therapeutic abortion committee of three doctors in order to lawfully terminate a pregnancy.⁴⁸⁰ It required further that the pregnancy not be terminated by one of the doctors on the committee. It further required that the termination be performed in an accredited or approved hospital, and not in a clinic.⁴⁸¹

The accused doctors argued that section 251 of the Canadian Criminal Code was unconstitutional in that it offended the guarantee to life, liberty and security of the person as protected by section 7 of the Canadian Charter of Rights and Freedoms.⁴⁸² Admittedly, the Court did find that the Criminal Code was out of harmony with the spirit of the Canadian Charter of Rights and Freedoms in that the long chain of requirements before a pregnant woman would get the relief sought did not take into account the urgency that might be involved in some situations. The Court further established that the unconstitutionality of section 7 of the

⁴⁷⁹ *R v Morgentaler* (1988) 44 DLR (4th) 385.

⁴⁸⁰ Matthewson G C "Security of the Person, Equality and Abortion in Canada" 1989 *University of Chicago Legal Forum* 251.

⁴⁸¹ Davis D *et al* *Fundamental Rights in the Constitution — Commentary and Cases* (1997) at 66.

⁴⁸² Section 7 of the Canadian Charter of Rights and Freedoms (1932) reads:

"Everyone has the right to life, liberty, and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Charter could not be saved by the limitation clause, namely section 1 of the Charter.⁴⁸³ However, what the South African court avoided to unearth is the other side of the matter. The Supreme Court of Canada struck down section 251 of the Criminal Code *on procedural grounds*.⁴⁸⁴ The Supreme Court did not go so far as to expressly pronounce that section 7 of the Canadian Charter includes the right to abortion. On the contrary, the majority of the Court held that the protection of unborn human beings from being aborted is a valid legislative objective, that it is within Parliament's constitutional jurisdiction to enact a Criminal Code dealing with the termination of life of the unborn.⁴⁸⁵

As a matter of fact, the Court held that the Charter does not prohibit the Canadian parliament from passing a *procedurally fair* abortion law which restricts the termination of pregnancy to cases where the pregnancy threatens the life or health of the mother, with "health" defined as relating only to therapeutic grounds and excluding grounds of a socio-economic nature. What is of even more relevance is that the Supreme Court did not rule out the State's responsibility to adopt a more stringent stance on the termination of a pregnancy towards the late stages of

⁴⁸³ The limitation clause of the Charter, section 1, which is the counterpart of section 36(1) of the South African Constitution, provides:

"*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

⁴⁸⁴ Birenbaum J "Contextualising Choice: Abortion, Equality and the Right to Make Decisions Concerning Reproduction" 1996 *SAJHR* 499, 500.

⁴⁸⁵ Hogg P W *Constitutional Law of Canada* Vol 1 (2006) at 18-13.

pregnancy. In fact, in later cases the Supreme Court of Canada again reiterated that the matter of rights relating to an unborn child is one that must be decided by the legislatures, not the courts. In *Winnipeg Child and Family Services*,⁴⁸⁶ for instance, McLachlin J wrote in his judgment:

If Parliament or the legislatures wish to legislate legal rights for unborn children or other protective measures, that is open to them, subject to any limitations imposed by the Constitution of Canada.⁴⁸⁷

It is obvious that a pregnant woman's right to terminate the unborn life is not absolute as Wilson J also advocated an approach that would balance the pregnant woman's rights with the State's interest in protecting the foetus, based on the stage of development of the foetus.

Comparing the Canadian majority judgment in *R v Morgentaler*⁴⁸⁸ with the United States majority judgment in *Roe v Wade*,⁴⁸⁹ one without fail notices this striking analogy. In both constitutions of the two jurisdictions the relevant sections are completely silent on either privacy or abortion as a constitutional right. In both cases the majority decisions breathed into the respective constitutions a right which neither the constitutional assemblies nor the drafters saw fit to expressly include.

⁴⁸⁶ *Winnipeg Child and Family Services (Northwest Area) v G. (D. F.)*, [1997] 3 S. C. R. 925 at par 11.

⁴⁸⁷ at par 12.

⁴⁸⁸ *R v Morgentaler* (1988) 44 DLR (4th) 385.

⁴⁸⁹ *Roe v Wade* 410 U. S. 113 (1973).

While the majority decisions in both jurisdictions may be plausible in some respects, they do not escape objective criticism in this aspect.

On the other hand, one notices some conspicuous analogy also in the minority decisions of both jurisdictions. The minority of the court in both cases declined to align itself with the reasoning of the majority for the reason that, in the case of the United States matter, nothing in the relevant constitutional provisions even suggests the right to privacy, or alternatively the right to terminate the life of the unborn. Similarly, the relevant provision of the Canadian Charter was correctly adjudicated upon by the minority when they found that the makers or the drafters of the Charter deliberately kept the section silent on abortion as an entrenched right. While the minority judgment in both jurisdictions may have its flaws, it is submitted that it is, however, correct in this finding.

In general, Canadian courts accept and revere the doctrine of *stare decisis*.⁴⁹⁰ Before 1949 the Privy Council ranked the highest tribunal in Canada in the appeal process. The Supreme Court of Canada was therefore lower in the hierarchy and was accordingly bound by the decisions of the Privy Council. When the Privy Council ceased to be the appeal tribunal in 1949, the Supreme Court of Canada then became the

⁴⁹⁰ Hogg P W *Constitutional Law of Canada* Vol 1 (2007) at 8-21 to 8-22. For examples of cases accepting the doctrine of *stare decisis*, see *Stuart v Bank of Montreal* (1909) 41 S.C.R. 516; *Robins v National Trust Co.* [1927] A.C. 515, 519; *London Street Tramways Co. v London County Council* [1898] A.C. 375 (H.C.).

highest court in the hierarchy. However, even during the time that the Supreme Court of Canada was lower than the Privy Council, it regarded itself bound by its own previous decisions.⁴⁹¹

When the Supreme Court of Canada graduated to the final appellate status, it gradually accepted that, while still bound by its prior decisions under normal circumstances, it did not have to stick to its prior decisions through thick and thin.⁴⁹² The House of Lords was unique in holding itself bound by its previous decisions,⁴⁹³ although it relaxed this stance somewhat in later years from 1966.⁴⁹⁴

⁴⁹¹ See in this regard *Stuart v Bank of Montreal* (1909) 41 S. C. R. 516 where the Supreme Court of Canada said of itself:

“The Supreme Court of Canada occupies a somewhat peculiar position. From it no appeal lies as of right. By special leave an appeal may be had to the Judicial Committee. In the great majority of the cases which it hears it is a final appellate tribunal; in other cases, it occupies the position of an intermediate appellate court. But, whether it be regarded as final or intermediate, in view of the current or recent decisions to which reference has been made, *the attitude of this court towards its previous decisions upon questions of law should, in my opinion, be the same*” [emphasis added] at 548.

⁴⁹² Some of the cases in this regard are: *Brant Dairy v Milk Comm. of Ont.* [1973] S. C. R. 131, 152 – 153; *Paquette v The Queen* [1977] 2 S. C. R. 189, 197; *McNamara Construction v The Queen* [1977] 2 S. C. R. 655, 661; *Keizer v Hanna* [1978] 2 S. C. R. 342, 347. For example, in the last listed case, *Keizer v Hanna*, the court said the following:

“Since drafting these reasons, I have had the opportunity of reading and considering the reasons for judgment prepared by Mr Justice Dickson and Mr Justice Grandpré. I am still of the opinion that if this Court was correct in the view it adopted in *The Queen v Jennings, supra*, then exactly the same course is proper in the case of an action under the *Fatal Accidents Act* and I said so for the majority in *Gehrmann v Lavoire, supra*. If this Court is now of the opinion that such a course was in error, *then the latter authority must be considered as overcome*” [emphasis added] at 365.

⁴⁹³ *London Street Tramways Co. v London County Council* [1898] A.C. 375 (H.L.).

⁴⁹⁴ Practice Statement (Judicial Precedent) [1966] 1 W. L. R. 1234; Hogg P W *Constitutional Law of Canada* Vol 1 (2007) at 8–22.

Canada's record of its reverence for precedent can be seen from the following subsequent attempts by individuals to have it overturn its decision in *R v Morgentaler*.⁴⁹⁵

For instance, in 1989 a legal challenge was brought before the Canadian Supreme Court in *Tremblay v Daigle*⁴⁹⁶ when a pregnant woman who had recently ended a relationship elected to terminate the pregnancy, but before she could proceed, the father of the unborn child obtained a court order interdicting her from terminating it. The judge of the court *a quo* found that an unborn child was a human being under the Quebec Charter of Human Rights and Freedoms and accordingly was entitled to the right to life under section 1 of the Quebec Charter.⁴⁹⁷ The judgment was upheld by the majority of the Quebec Court of Appeal. Leave to appeal was, nevertheless, granted to the Supreme Court of Canada. On the day of the hearing, counsel for the appellant informed the Court that the appellant had in the intervening period gone to the United States to terminate the pregnancy. For this reason the question had thus become technically moot. Due to the importance of the issue the court nevertheless decided to go ahead and adjudicate. The Supreme Court of Canada set aside the order of the court below based on its finding that an

⁴⁹⁵ *R v Morgentaler* (1988) 44 DLR (4th) 385.

⁴⁹⁶ *Tremblay v Daigle* [1989] 2 S. C. R. 530.

⁴⁹⁷ Section 1 of the Quebec Charter of Rights and Freedoms provides:

“Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality.”

unborn child was not included in the term “human being” as contained in the Quebec Charter as there was no concrete indication that the Quebec National Assembly intended it to be included. Thus, the Supreme Court of Canada faithfully stuck to its precedent construction of section 7 of the Canadian Charter in *R v Morgentaler*.⁴⁹⁸

In 1991, in *R v Sullivan*,⁴⁹⁹ two midwives were found guilty of negligence by bringing about the death of an unborn child they were trying to deliver who died while still in the birth canal. The question to be decided was whether the child, since it fell short of being born alive, was a person in the context of the criminal negligence provision of the Criminal Code. The Court held that the term “person” in this provision had the same meaning with the term “human being” also used in the Criminal Code. At that time the Criminal Code stated that the child must be born alive in order for it to be considered a human being for purposes of the Criminal Code.

In 1997, another challenge was brought before the Court. In *Winnipeg Child and Family Services*⁵⁰⁰ a woman was pregnant with her fourth child and addicted to glue sniffing which has the potential of damaging the nervous system of the developing unborn child. As a consequence of this

⁴⁹⁸ *Roe v Morgentaler* (1988) 44 DLR (4th) 385.

⁴⁹⁹ *R v Sullivan* [1991] 1 S. C. R. 489.

⁵⁰⁰ *Winnipeg Child and Family Services (Northwest Area) v G. (D. F.)*, [1997] 3 S. C. R. 925.

long-time addiction, two of her previous children had been born permanently disabled and were wards of the State. The Winnipeg Child and Family Services brought a motion to the court to have the mother placed in the custody of the Director of Child and Family Services and detained in a health centre for treatment until the birth of her unborn. The Court granted the order, but it was later set aside by the Court of Appeal. By the time the Supreme Court of Canada was seized with the matter the mother had completed her treatment and given birth to the child. So the facts of the case were no longer relevant, but the legal question remained relevant for adjudication. The majority of the Supreme Court upheld the decision of the Court of Appeal that an unborn child was not recognised as a legal person with rights. Accordingly, the Court found, there was no legal person in whose interest a court order could be made. Thus, the Court was consistent with its precedent.

What cannot be ignored, however, is that the Court, perhaps unbeknown to itself, entrenched a scientific fact that an unborn child, though it may not be a legal *persona* in terms of the laws of a particular jurisdiction, is an entity possessing life. This the Court alluded to and entrenched when it referred to the words of a tribunal with an international status, the European Commission of Human Rights. The Court reiterated the words

of McLachlin J (as he then was) in *Paton v United Kingdom*⁵⁰¹ when he said:

Before birth the mother and unborn child are one in the sense that “*the ‘life’ of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman*”.

Thus the Court established that the unborn is a possessor of life.

In 1999, a further attempt was made to have the Supreme Court of Canada overturn its own decision in *R v Morgentaler*.⁵⁰² In *Dobson v. Dobson*,⁵⁰³ a pregnant woman was involved in a car accident, causing prenatal injuries to her unborn child. The child suffered permanent mental and physical disabilities. The child, acting through its grandfather *nomine officij*, sued its mother for damages alleging that the damage was caused by her negligence. The legal question was whether a mother could be liable in delict for damages to her born-alive child arising from a prenatal negligent act. The Court focused on whether a duty of care should be imposed upon a pregnant woman in such a situation. The majority of the Court found that no such duty should attach in the light of public policy considerations relating to the privacy and autonomy rights of women. Cory J, writing for the majority, referred to the decision of the

⁵⁰¹ *Paton v United Kingdom* 3 EHHR 408 1980 Application No. 8416/78.

⁵⁰² *R v Morgentaler* (1988) 44 DLR (4th) 385.

⁵⁰³ *Dobson v Dobson* [1999] 2 S. C. R. 753.

majority in *Winnipeg Child and Family Services*,⁵⁰⁴ and noted that the imposition of a duty of care upon a pregnant woman towards her unborn child “would require judicial scrutiny into every aspect of that woman’s behaviour during pregnancy” and thus “would involve severe intrusions into the bodily integrity, privacy and autonomous decision-making of that woman”.⁵⁰⁵

Thus, the Supreme Court of Canada consistently manifests its reverence for precedent, as all these subsequent cases reflect the basic reasoning of the Court in *R v Morgentaler*.⁵⁰⁶

4.5.4 In Indian law

In India, human rights are classified under two types of rights: fundamental and ordinary rights.⁵⁰⁷ Fundamental rights are guaranteed by the Constitution,⁵⁰⁸ whereas ordinary rights are protected by legislation.⁵⁰⁹

⁵⁰⁴ *Winnipeg Child and Family Services (Northwest Area) v G. (D. F.)*, [1997] 3 S. C. R. 925.

⁵⁰⁵ *Winnipeg Child and Family Services (Northwest Area) v G. (D. F.)*, [1997] 3 S. C. R. 925 at par. 31.

⁵⁰⁶ *R v Morgentaler* (1988) 44 DLR (4th) 385.

⁵⁰⁷ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 113.

⁵⁰⁸ The Constitution of India came into effect in 1950.

<http://indiacode.nic.in/coiweb/coifiles/part.htm> (accessed: 2011/08/20).

⁵⁰⁹ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 113.

A seeming paradox is that the fundamental rights entrenched in Part III of the Indian Constitution cannot be waived by citizens,⁵¹⁰ whereas the same rights can be restricted or limited by law where the Constitution permits such.⁵¹¹ For example, the right to life can be taken away by the state, according to the wording of article 21, which contains the phrase “except according to procedure established by law”, but the right cannot be waived by the citizen. Emphasising the point that these rights cannot be waived, the Supreme Court of India in *Bheshar Nath v I.-T. Commr*⁵¹² held that the fundamental rights have not been put in the Constitution merely for individual benefit, although ultimately they come into operation in considering individual rights. The Court illustrated the point by referring to the right not to be discriminated against entrenched by article 15 of the Indian Constitution. “A citizen cannot get discrimination by telling the state ‘You can discriminate’”.⁵¹³

The phrase in article 21 of the Indian Constitution “procedure established by law” has received some consideration by the Supreme Court of India in the case of *A K Gopalan v State of Madras*.⁵¹⁴ The majority held that the phrase “procedure established by law” meant the procedure legislated by

⁵¹⁰ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 118.

⁵¹¹ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 114; Bajwa G S *Human Rights in India* (1995) 35–49.

⁵¹² *Bheshar Nath v I.-T. Commr*. AIR 1959 SC 149 at 163, 180–181.

⁵¹³ *Bheshar Nath v I.-T. Commr*. AIR 1959 SC 149 at 181.

⁵¹⁴ *A K Gopalan v State of Madras* AIR 1950 SC 27. Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 126.

Parliament and State Legislatures,⁵¹⁵ whereas the minority held that the phrase had to be understood in the same way that the phrase “due process clause” was understood in the United States of America.⁵¹⁶ The question of the proper meaning of the phrase “procedure established by law” was finally settled in the cases of *Collector of Malabar v E Ebrahim Hajee*⁵¹⁷ and *Ram Chander Prasad v State of Bihar*,⁵¹⁸ where the Supreme Court of India confirmed that the phrase “procedure established by law” meant procedure legislated by parliamentary or state legislatures.⁵¹⁹

In India, the legislative history with regard to the protection of life had its beginning in 1860 with the Indian Penal Code.⁵²⁰ The legislature protected not only one’s life from being snuffed out by others, but also by oneself. Thus, an attempt to commit suicide was made a punishable criminal offence. Section 309 of the Indian Penal Code provided:

“Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year [or with fine, or with both.]”

⁵¹⁵ *A K Gopalan v State of Madras* AIR 1950 SC 27 at par. 111.

⁵¹⁶ *A K Gopalan v State of Madras* AIR 1950 SC 27 at par. 161. See Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 126.

⁵¹⁷ *Collector of Malabar v E Ebrahim Hajee* AIR 1957 SC 688.

⁵¹⁸ *Ram Chander Prasad v State of Bihar* AIR 1961 SC 1624 at 1627.

⁵¹⁹ *Collector of Malabar v Ebrahim Hajee* AIR 1957 SC 688 at 975; *Ram Chander Prasad v State of Bihar* AIR 1961 SC 1624 at 1627. See also Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 127.

⁵²⁰ Indian Penal Code 45 of 1860 <http://districtcourttallahabad.up.nic.in/44A7BD1F-1378-4BED-AAFO-DDCB3A52B23F/FinalDownload/Down> (accessed: 2011/09/05).

The taking of the life of the unborn was also covered by the Indian Penal Code. Ending the life of the unborn was made a criminal offence except where it was done in good faith with the intention of saving the life of the mother. Section 315 provided of the Penal Code provided:

“Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both”.

The Penal Code did not specify who was lawfully authorised to act to save the life of the mother.

The modern law regulating abortion in India is now the Medical Termination of Pregnancy Act.⁵²¹ The Medical Termination of Pregnancy Act does not repeal or amend the Indian Penal Code. Section 3(2) of the Medical Termination of Pregnancy requires, however, that the termination of pregnancy be carried out by a registered medical practitioner. Section 315 of the Penal Code was open to interpretation in this regard as it merely provided that to escape criminal liability one had to show that one had acted in good faith with the intention of saving the life of the mother.

⁵²¹ The Medical Termination of Pregnancy Act 34 of 1971 http://bhind.nic.in/Sparsh_MTP-Act-1971.pdf (accessed: 2011/09/05).

Section 3(2)(i) allows the termination of pregnancy where it would endanger the life of the pregnant woman or put at risk her physical or mental health. Section 3(2)(ii) allows the termination of pregnancy where there is a substantial risk that if the child were to be born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Section 3(4)(a) requires that the termination of the pregnancy of a minor, or a lunatic, be terminated with the consent of her guardian. Section 3(4)(b) stipulates that any termination of pregnancy be carried out with the consent of the pregnant woman.

Section 4 provides that the termination of pregnancy should take place at a government hospital, or at a place approved by government for purposes of this Act.

The failure of the Indian legislature to repeal or amend section 315 of the Indian Penal Code when enacting the Medical Termination of Pregnancy Act has caused problems in that it is not clear to what extent the Medical Termination of Pregnancy Act overrules the Penal Code. For example, in the case of *Murari Mohan Koley v the State and Another*,⁵²² a woman whose baby was only six months old conceived again, and she and her

⁵²² *Murari Mohan Koley v the State and Another* (2004) 3 CALLT 609 HC.

husband agreed that a registered medical practitioner should terminate the pregnancy. However, the medical procedure had complications, and the wife died. The medical practitioner was charged with culpable homicide as the prosecution contended that he had acted negligently. The medical practitioner sought to have the charge quashed, and relied for his defence on the provisions of section 3 of the Medical Termination of Pregnancy Act which provided that, notwithstanding the provisions of the Indian Penal Code, a registered medical practitioner would not be guilty of any offence under that Code, or under any other law, if any pregnancy was terminated by him in accordance with the provisions of the Medical Termination of Pregnancy Act. The prosecution contended that in order to get the protection of the Medical Termination of Pregnancy Act, the medical practitioner had to establish that he had acted in good faith, but that the stage the court proceedings were at were not the appropriate stage for the Calcutta High Court to embark upon an enquiry to ascertain the claim of acting in good faith. Such an enquiry would require that the matter proceed to trial, and evidence to that effect be led. The Calcutta High Court refused the application by holding⁵²³ that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection.

⁵²³ *Murari Mohan Koley v the State and Another* (2004) 3 CALLT 609 HC at pars. 22, 23.

In the case of *Dr Nisha Malviya and Another v State of M.P.*,⁵²⁴ the Madhya Pradesh High Court enforced the legislative requirement of the consent of the woman whose pregnancy is terminated or, in the case of a minor, the consent of her guardian. In *casu*, two registered medical practitioners had performed abortion on a 12-year-old girl who had been taken to them for the termination of a pregnancy which was the result of rape. This attempt was calculated to conceal the consequence of rape. The medical practitioners relied for their defence on section 3(1) of the Medical Termination of Pregnancy Act which provides that:

“Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act”.

Despite the apparent indemnification provided by this section to the medical practitioners, the High Court found⁵²⁵ that the legislative requirement of consent by the woman or her guardian could not be dispensed with, and neither the minor nor the guardian had consented to the termination of the pregnancy.

⁵²⁴ *Dr Nisha Malviya and Another v State of M.P.* 2000 CriLJ 671.

⁵²⁵ *Dr Nisha Malviya and Another v State of M. P.* 2000 CriLJ 671 at par. 4.

The Supreme Court of India in *Suman Kapur v Sudhir Kapur*,⁵²⁶ in a matter dealing with divorce matters, extended the requirement of consent to the husband by stating, *obiter*, that if a wife undergoes abortion without the consent of her husband, such an act amounts to cruelty to her husband.

Germane to this discussion is article 21 of the Constitution of India. Article 21 is crafted in a way that purports to protect life and attach value thereto.⁵²⁷ As the wording of section 21 of India's Constitution shows, the right to life is not absolute. Life may be taken, with the proviso that it must be taken in accordance with the "procedure established by the law".

Unlike the Constitution of Ireland,⁵²⁸ for example, which expressly includes the unborn as an entity whose life is to be protected,⁵²⁹ thus excluding the need to interpret, the Constitution of India does not expressly refer to the unborn. The fact that its interpretation does not

⁵²⁶ *Suman Kapur v Sudhir Kapur* AIR 2009 SC 589 at par. 34.

⁵²⁷ Section 21 of the Constitution of India reads:

"No person shall be deprived of his life or personal liberty except according to procedure established by law".

⁵²⁸ The Constitution of Ireland came into effect in 1937.

http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20Ireland.pdf (accessed 2011/09/08).

⁵²⁹ Article 40(3)(iii) of the Constitution of Ireland provides:

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right".

protect the right of the unborn to life is confirmed by India's legislation which countenances its violation.⁵³⁰

What stands out in the India's Medical Termination of Pregnancy Act is its regard for not just the informed consent of a woman but also, if the woman has not attained the age of eighteen, the consent in writing of a guardian.⁵³¹ It is noteworthy that the Act prescribes that not only is the consent of a guardian a pre-requisite, but it must be *in writing*.

4.5.5 In South African law

Against this background, it is enlightening to consider the counterpart of this piece of legislation in South Africa. In South Africa, the counterpart of the Indian Act is the Choice on Termination of Pregnancy Act.⁵³² Its constitutionality and its clash with the existing body of law was impugned by a religious society of lawyers, in *Christian Lawyers Association v Minister of Health*.⁵³³ *Inter alia*, the bone of contention centred around

⁵³⁰ The Medical Termination of Pregnancy Act 34 of 1971 .

⁵³¹ Section 3(4)(a) of the Medical Termination of Pregnancy Act of 1971, provides:

“No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian”.

⁵³² Act 92 of 1996.

⁵³³ *Christian Lawyers Association v Minister of Health* 2005 (1) SA (T) 509 (hereinafter to be referred to as “the second case” of *Christian Lawyers Association* to distinguish it from the earlier case of 1998 bearing the same name) .

the consent of a minor and the minor's dispensing with the consent of a guardian.

The High Court in the second case of *Christian Lawyers Association* found nothing amiss with the legislation — either when weighed against the Constitution, or the existing body of law. The fact is, however, that the impugned provision was, indeed, inconsistent with the established body of law. Such inconsistency found no justification in the Constitution nor in other existing laws — either common or statute.

The Age of Majority Act (now repealed), the Guardian's Act, a portion of the Criminal Procedure Act, the Children's Act, all these and other laws point out the inconsistency of interpretation the High Court settled for.

The Age of Majority Act⁵³⁴ set the age of majority as the age of twenty-one. At any stage of life before reaching this stage a natural person was considered a minor. As such, he or she was incompetent to undertake or face certain challenges on his or her own. The consent of a parent or guardian could not be dispensed with in undertaking or facing certain prescribed challenges. The minor did not have *locus standi* by reason of minority, and consequently could not enter into binding contracts without the assistance of the guardian. The law often resorts to logic in

⁵³⁴ Act 57 of 1972.

endeavouring to establish the most probable intention of the legislature or drafters. Applying the same measuring yardstick, it defies logic that a minor would be adjudged as incompetent to undertake non-life threatening challenges without the assistance of a guardian, and yet adjudged as competent to undertake a sometimes-life-threatening challenge without the assistance or consent of a guardian. The Age of Majority Act has now been repealed and replaced by the Children's Act.⁵³⁵ The Children's Act has lowered the age of majority from twenty-one to eighteen.⁵³⁶

Section 74(1) of the Criminal Procedure Act⁵³⁷ provides as follows:

Where an accused is under the age of eighteen years, a parent or, as the case may be, the guardian of the accused *shall* be warned, in accordance with the provisions of subsection (2), to attend the relevant criminal proceedings [emphasis mine].

The section uses the word “shall” to leave no room for doubt that the provision is peremptory. It was not left up to the guardian to elect to attend the proceedings or not. As a matter of fact, subsections (6) and (7) provide for a sanction of a fine or imprisonment in case of default. Justifying this stern position, Du Toit⁵³⁸ comments that “the object of s 74 is to protect the immature offender.” Default by guardian to assist the

⁵³⁵ Act 38 of 2005.

⁵³⁶ Section 17 of the Children's Act, 38 of 2005.

⁵³⁷ Act 51 of 1977.

⁵³⁸ Du Toit *et al* *Commentary on the Criminal Procedure Act* (2010) at 11–34.

minor is so serious that it renders the proceedings irregular and open to review and to be set aside.⁵³⁹

In *S v Gibson*,⁵⁴⁰ the lack of assistance by the parent or guardian was described as, not only causing ‘difficulty’ but also ‘unwise’, especially where the minor was to plead to serious criminal charges. Indeed, the correctness of these pronouncements by our courts cannot be questioned. However, such pronouncements on matters involving minors need to be weighed against the lack of such pronouncements by our courts on surgical matters involving minors.

The most relevant and recent piece of legislation in this regard is the Children’s Act 38 of 2005 which has replaced the Age of Majority Act and in fact encapsulates into one piece of legislation all Acts of Parliament dealing with children.

Part 3 of the Act deals with “Protective measures relating to health of children”.⁵⁴¹ Thus, section 129 expressly proscribes treatment or surgical operation if consent has not been obtained. It must be borne in

⁵³⁹ *S v Khumbusa* 1977 (1) SA 394 (N).

⁵⁴⁰ *S v Gibson* 1979 (4) SA 115 (D) 138B – C.

⁵⁴¹ Under Part 3, section 129 of the Act provides:

(1) Subject to section 5(2) of the Choice on Termination of Pregnancy Act, 1996 (Act 92 of 1996), a child may be subjected to medical treatment or a surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4), (5), (6) or (7).”

mind that the relevant section of the Act deals with the medical treatment of children in cases where their health or life is at stake. Needless to say, if such medical treatment is withheld for any reason, the child would die. Even though the child would die, consent is not dispensed with.

On the other hand, and by way of comparison, the termination of a pregnancy is not medical treatment — it is not intended to salvage the health or life of the individual, save in those rare situations where fertilisation took place in the fallopian tubes and its development thus poses a threat to the woman. The termination of a pregnancy is intended, rather, in most instances, to save the mother-to-be from possible condemnation by society who still uphold high moral standards. It is also intended, in some instances, to get rid of an inconvenience of having to raise a child which was unwanted, or it is resorted to for economic reasons.

The subsections to which section 129 refers provide that a child faced with medical treatment may consent to such medical treatment himself or herself if he or she is over the age of twelve years; if he or she is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment. As regards surgical operation, a child may consent to this procedure himself or herself provided he or she is over the age of twelve years, but in addition

he or she must have sufficient maturity and the mental capacity to understand the benefits, risks, social and other implications of the surgical operation. In addition, the child must be duly assisted by the guardian.⁵⁴² Consent by parent or guardian is further required for medical treatment, or surgical operation if the child, though over the age of twelve years, but is nevertheless of insufficient maturity, or is unable to understand the benefits, risks and social implications of the treatment.⁵⁴³

Consent is made so crucial in saving the life of a child that it goes beyond the parent or guardian. The mere fact that the parent or guardian is not readily within reach to give consent does not make the requirement of consent one that can be dispensed with. If the parent or guardian is for any reason not readily within reach, consent of the medical superintendent ought to be sought: in order to save *life*, not to get rid of a pregnancy!⁵⁴⁴

The hospital superintendent is by no means the final arbiter in deciding whether consent can be dispensed with or not. Beyond the hospital superintendent, there is the Minister of Health whose consent is necessary if the parent or guardian unreasonably refuses to give consent,

⁵⁴² Section 129(3)(a), (b), (c) of the Children's Act 38 of 2005.

⁵⁴³ Subsection (4)(b) of the Children's Act 38 of 2005.

⁵⁴⁴ Subsection (6) of the Children's Act 38 of 2005.

or to assist the child in giving consent. Consent of the Minister of Social Development, or any other Minister may also be sought if the parent or guardian is incapable of giving consent, cannot readily be traced, or is deceased.

Finally impressing the importance of consent is the fact that after all these authorities have been approached for consent without quick results or success, the High Court as the upper guardian of all minors may be approached.⁵⁴⁵

Notwithstanding the fact that the Court in the second case of *Christian Lawyers Association* adjudicated the matter in a manner inconsistent with the body of existing law, the Children's Act itself added its own glaring inconsistency. The opening phrase of section 129(1) says the following: "Subject to section 5(2) of the Choice on Termination of Pregnancy Act".⁵⁴⁶ The Children's Act immediately makes itself subject to the Choice on Termination of Pregnancy Act as if the Choice on Termination of Pregnancy Act is the underlying law or constitution. That is a glaring inconsistency in itself, especially when one has regard to the objectives of the two Acts, namely, for the Children's Act, to save the life of a child,

⁵⁴⁵ Subsection (9) of the Children's Act 38 of 2005.

⁵⁴⁶ Section 5(2) of the Choice on Termination of Pregnancy Act provides:

"Notwithstanding any other law or the common law, but subject to the provisions of subsection (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy".

and for the Termination of Pregnancy Act, to save a child or woman from a personal inconvenience or social embarrassment. It remains unexplained why, in terms of the Children's Act, children below the age of twelve years who are of sufficient maturity are not empowered with any independent consent-giving authority, whereas in terms of the Termination of Pregnancy Act, children below this age who are of insufficient maturity are empowered with an independent consent-giving authority.⁵⁴⁷

A more recent piece of legislation which is still a Bill, the Criminal Law (Forensic Procedures) Amendment Bill⁵⁴⁸ does not depart from the established legal stance. In a section dealing with the taking of body samples for purposes of DNA analysis, section 15J (1)(b) provides that:

If the volunteer is a child, a sample may only be taken for the purposes of paragraph (a), with the informed consent of the child's parent or guardian.

Thus, the interpretation given to the Termination of Pregnancy Act by the Court in the second case of the *Christian Lawyers Association* fails to meet the standard of consistency.

⁵⁴⁷ Davel C J Skelton A M (eds) *Commentary on the Children's Act* (2007) at 7 - 35.

⁵⁴⁸ Bill 2 of 2009.

4.5.6 In international instruments

International instruments are binding on those states who are signatories at the time an instrument comes into effect and to those who consent later to being bound.⁵⁴⁹ Although international instruments may not be binding on non-signatory states, they may be seen by non-signatory states as a trend to be followed. For example, Malanczuk⁵⁵⁰ states that in terms of the general rule with regard to treaties, a treaty creates no rights or obligations for third parties, that is, states which are not parties to a treaty. However, according to Malanczuk, there may be exceptions to the rule, for example the United Nations Charter⁵⁵¹ and the Vienna Convention⁵⁵². According to Malanczuk, Article 2(6) is sometimes regarded as imposing obligations on states without their consent.

⁵⁴⁹ Dugard J *International Law — a South African Perspective* (2005) at 28.

⁵⁵⁰ Malanczuk P *Modern Introduction to International Law* (1996) 7th edition at 137.

⁵⁵¹ Article of 2(6) of the United Nations Charter, adopted in 1945, provides:

“ The Organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security”.

⁵⁵² Articles 35 – 37 of the Vienna Convention, adopted in 1969, provide as follows, respectively:

“Article 35

Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing”.

“Article 36

Treaties providing for rights for third States

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

It is submitted in this work that although treaties are only binding on member states, they may have a persuasive or influential effect on non-member states. This view is supported by Dugard,⁵⁵³ and is an exception to the general rule known as *pacta tertiis nec nocent nec prosunt*.⁵⁵⁴

Sometimes, certain conduct among states develops into settled practice, commonly referred to in international law language as *usus*. Settled practice is, admittedly, difficult to prove in court, and courts may be reluctant to take judicial notice of thereof. However, once settled practice is codified, it may afford evidence of a widespread customary rule. In such a case, an international customary rule may have a persuasive effect on a non-signatory state.⁵⁵⁵

For consistency in constitutional interpretation to be a valuable common thread, it must entwine in it international instruments. International

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2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty".

"Article 37

Revocation or modification of obligations or rights of third States

1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.
2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State".

⁵⁵³ Dugard J *International Law — a South African Perspective* (2005) 3rd ed at 28.

⁵⁵⁴ Meaning, treaties do not confer obligations or benefits upon non-signatory states.

⁵⁵⁵ Dugard J *International Law — a South African Perspective* (2005) 3rd ed at 28.

instruments have a bearing on how the constitution of a state is interpreted by courts since a state must honour its international obligations.

Some international instruments are express in the manner in which they expect certain human rights to be regarded. An example in this regard is the International Covenant on Civil and Political Rights (ICCPR). On the subject of whether the right to life extends itself to the unborn, the ICCPR expressly provides that: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women".⁵⁵⁶

As pointed out earlier, the now repealed section 278 of the Criminal Procedure Act was worded similarly. It is abundantly clear that even before the repeal of the section as a consequence of the abolition of the capital punishment, the international trend was to regard the unborn as a possessor of life. This trend manifested itself in the drafting of the ICCPR.

What becomes salient is the fact that the subsection provides that the "sentence of death . . . shall not be carried out on pregnant women".⁵⁵⁷

Thus, a woman is contrasted with her unborn. Put differently, the life of

⁵⁵⁶ Section 6 subsection (5) of the Covenant.

⁵⁵⁷ Sieghart *PThe International Law of Human Rights* (1983) at 128.

the expectant woman is contrasted with the life of the unborn. When weighed on the scales of life, the interpretation that cannot be avoided is that the life of the unborn carried by the mother weighs more heavily than the life of the carrier — the mother. This is because the mother's execution is held in abeyance until such time that she has delivered her unborn. After delivery, the death sentence is carried out on the mother, and the baby survives.⁵⁵⁸

South Africa ratified the Covenant in 1998.⁵⁵⁹ This fact has far-reaching dimensions in the interpretation of the right to life in South Africa. Up to this far, the discussion has shown the consistent common thread as a guide in adjudicating the question whether the unborn possesses life, not whether it is a legal *persona* or not. This international covenant, the ICCPR, is the zenith of this long, winding common thread in the field of law and constitutional interpretation. The question is whether the South African Court in the earlier case of *Christian Lawyers Association*⁵⁶⁰ applied its mind enough to be guided by all of this common thread.

⁵⁵⁸ In the now obsolete section 278 of the Criminal Procedure Act, the section provided that the woman was at liberty to apply for an order “*to stay execution*” on the ground that she was quick with child [subsection (1)]. Subsection (3) provided that execution would be stayed “*until she is delivered of a child or until it is no longer possible in the course of nature that she should be so delivered*” [emphasis added].

⁵⁵⁹ Olivier M E “South Africa and international human rights agreements: procedure, policy and practice (part 1)” 2003 *TSAR* 293.

⁵⁶⁰ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T) (the first case).

In the international sphere there is also the American Convention on Human Rights (ACHR).⁵⁶¹ The relevant portions of the Convention in this regard are section 4 subsections (1) and (5). Subsection (1) provides that:

Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

Subsection (5) of the Convention provides as follows:

Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

The ACHR is the only international instrument which dares to address the much avoided question of when life begins.⁵⁶² Accordingly, an international voice is heard guiding courts in their adjudication of this right.

Besides establishing the fact of possessing life “from the moment of conception”, the ACHR, like the International Convention on Civil and Political Rights, prohibits the execution of a mother together with the contents of her womb.

⁵⁶¹ The American Convention on Human Rights was adopted in 1969.

⁵⁶² Sieghart P *The International Law of Human Rights* (1983) at 131.

It is perhaps for these international guidelines that states such as Ireland have included in their constitutions provisions which leave no doubt as to how courts should interpret issues relating to life and the unborn. As discussed above on page 73, O’Sullivan⁵⁶³ expresses the view that even if the unborn does not have a right to life, the state still has a detached interest in fostering the sanctity of human life by protecting potential life and by regulating its termination in the last stages of pregnancy. Again in the international sphere, this reasoning finds backing in the statement by the European Court of Human Rights when it held in *VO v France*⁵⁶⁴:

At best, it may be regarded as common ground between states that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person enjoying protection under the civil law, moreover, in many states, such as France, in the context of inheritance and gifts, and also in the United Kingdom, requires protection in the name of human dignity, without making it a ‘person’ with the ‘right to life’ for purposes of Article 2.⁵⁶⁵

Therefore, an earnest examination of the history of how the unborn life was regarded from the time of Roman and Roman–Dutch law, the case law since then and in our modern times, foreign law, foreign constitutions, foreign constitutional interpretations, medical science and

⁵⁶³ O’Sullivan M “Reproductive Rights” in Woolman S and Roux T (eds) *et al Constitutional Law of South Africa* (2005) Vol 2 at 37–8.

⁵⁶⁴ *VO v France* [2004] 2 FCR 577.

⁵⁶⁵ at 84.

its practitioners, and international instruments — all reveal an amazing consistency in constitutional interpretation.

CHAPTER 5

Consistency as applied to capital punishment

5.1 Introduction

The interpretation of the right to life in the context of capital punishment and in the context of each jurisdiction's constitution has proved to be a challenging task. There is no uniformity in the manner in which each country's constitution is worded; there is thus no uniformity also in the wording of the right to life.

Some jurisdictions⁵⁶⁶ have elected to word the right to life in their constitutions in unambiguous terms, thus eliminating the need for courts to interpret. Other jurisdictions⁵⁶⁷ have crafted their constitutions in such a way that they can manoeuvre at any time in the future to accommodate any unforeseen circumstances.⁵⁶⁸

⁵⁶⁶ Examples are the United States and Uganda. The Fourteenth Amendment of the United States Constitution is crafted thus: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law". Section 22 of the Uganda Constitution is almost similarly crafted, thus: "(1) No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court. (2) No person has the right to terminate the life of an unborn child except as may be authorised by law".

⁵⁶⁷ South Africa is one example, with section 11 of its Constitution crafted thus: "Everyone has the right to life".

⁵⁶⁸ *Theophanous v The Herald and Weekly Times* (1194) 182 CLR 104 at 173.

As in the case of the right to life in respect of the unborn, the South African Constitution is silent on capital punishment. The Constitution does not render capital punishment unlawful, nor does it condone it. Hence, this right in this context has had to be interpreted. The Constitution does, however, express itself on the right not to be subjected to cruel, inhuman or degrading treatment.⁵⁶⁹

5.2 Cruel, inhuman and degrading treatment

This right has been associated by courts to the right to life in the context of the death penalty. Closer examination of this prohibition — not to subject anyone to pain-inflicting treatment — will determine whether there is any *nexus* between the right to life and the right not to be subjected to cruel, inhuman and degrading treatment.

The South African Constitutional Court abolished capital punishment mainly on the grounds that it is inconsistent with the right not to be subjected to cruel, inhuman and degrading treatment. To start with, the Constitution, unlike Acts of the legislature, does not contain “definitions”, and consequently, cruel, inhuman and degrading treatment is not defined

⁵⁶⁹ Section 12(1)(e) of the Constitution.

in the Constitution.⁵⁷⁰ However, resorting to some of the methods of constitutional construction may shed some light. In this regard, the contextual approach proves to be an aid.

Looking at the right not to be subjected to cruel, inhuman and degrading treatment, one finds that it appears under the subheading “Freedom and security of the person”.⁵⁷¹ The various sub-rights making up the main right to “freedom and security of the person” are a clear indication that the Constitutional Assembly and the drafters of the Constitution did not have in mind the rights of a sentence-awaiting, convicted person under this heading.

This view is reinforced by the right contained in section 12(2) which deviates completely from anything that has to do with the sentencing of convicted prisoners — whether they should be treated cruelly or with mercy. Rather continuing in the line of torture, cruel and inhuman treatment, the subheading goes on to include unrelated subjects, namely, the making of decisions concerning reproduction, and medical or scientific experiments.

⁵⁷⁰ Maduna P M “The Death Penalty and Human Rights” 1996 *SAJHR* 193, 196.

⁵⁷¹ For convenience, this work uses the Constitution of the Republic, 1996, whereas the Court used the Interim Constitution, 1993 since the final Constitution, 1996 had not been finalised at that time.

The Constitutional Assembly and the drafters of the Constitution made special provision for the rights of convicted persons who are awaiting, or are undergoing sentence under a special section, namely, section 35(2), under the subheading, “Arrested, detained and accused persons”.⁵⁷² If the Constitutional Assembly and the drafters of the Constitution had intended the right not to be subjected to cruel, inhuman and degrading treatment to be specifically applied to sentences of convicted persons, they would list the right under section 35.

It goes without saying, therefore, that the right not to be subjected to cruel, inhuman and degrading treatment was applied to convicts. Admittedly, this right is a right of general application — it stands to be claimed by all citizens, law-abiding and those who are not. However, upon proper construction, this would have been listed under rights of persons who are dealt with in terms of the criminal law. As a matter of fact, this is the construction that was arrived at by the Court in *Christian Lawyers Association*⁵⁷³, that if the drafters had intended to include the unborn under the right to life by crafting the provision to say “everyone”, they would expressly have stated this; they would have expressly stated that the intention was to include another species of right-bearers. The

⁵⁷² Section 35(2) starts with the words: “Everyone who is detained, *including every sentenced prisoner*, has the right . . .” [emphasis added].

⁵⁷³ *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (11) BCLR 1434 (T) (the first case).

same reasoning applies here in respect of the right of convicts and the right not to be subjected to pain–inflicting treatment or punishment.

It is particularly worthy of note that section 12(1)(e) uses the words “treated or punished”. It does not use the word “sentence”. This is an indication that the section was intended for punishment in its general use, and not in the context of sentence, which is punishment for convicted persons by a court of law. On the other hand, section 35(2) does not use the word “treat” or “punish”, but uses the word “sentenced” — an indication, coupled with the subheading — that a particular category of citizens was intended, namely, the punishment of convicted persons.

5.3 Consistency in interpretation

The Constitutional Court of South Africa, in analysing the propriety of the death penalty, dwelt at length on its characteristic — that of being cruel, inhuman and degrading. It is noteworthy that the Court pointed to the execution itself as being cruel, inhuman and degrading.⁵⁷⁴ The Court then substantiates the view by referring to foreign judgments, *inter alia* judgments of India, Zimbabwe and Jamaica.⁵⁷⁵

⁵⁷⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 26.

⁵⁷⁵ *Zimbabwe v Attorney–General, Zimbabwe and Others* 1993 (4) SA 239 (ZSC);
Pratt v Attorney–General for Jamaica [1993] 3 WLR 995 (JPC).

True, courts in these jurisdictions did find that there was an element of cruel, inhuman or degrading treatment, but the point not given much attention by the South African Court is that the finding was not in relation to the death itself, but in relation to the prevailing circumstances prior to execution. These circumstances have been generally referred to as the death row phenomenon.⁵⁷⁶

In the authority the Court placed reliance on, namely, the *Catholic Commission for Justice and Peace*,⁵⁷⁷ the applicant (the Catholic Commission) was a human rights organisation and they sought an order interdicting the execution of four convicted prisoners who were faced with the death penalty. The condemned prisoners had been nervously waiting for the execution of the sentence since February 1987. The state was ready to execute them in March 1993. The human rights organisation, the applicant, brought an application interdicting the execution on the grounds of the inordinate delay between the date of their conviction and their execution, worsened by the harsh and degrading conditions under which they had been confined. It was submitted in the application that these conditions, considered jointly, rendered undesirable and, in fact, unconstitutional, the carrying out of

⁵⁷⁶ Bojosi K N "The death row phenomenon and the prohibition against torture and cruel, inhuman or degrading treatment" 2004 *AHRLJ* 303.

⁵⁷⁷ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe and Others* 1993 (4) SA 239 (ZS).

the sentence of death as they militated against the provisions of section 15(1) of the Zimbabwean Constitution.⁵⁷⁸

Like its South African counterpart, the Zimbabwean Constitution does not define torturing, cruel, inhuman or degrading treatment, nor does it attempt to contextualise it.

A closer scrutiny of both constitutions — the South African and the Zimbabwean — makes one thing stand out, namely, that both sections⁵⁷⁹ do not provide that should a prisoner suffer inhuman treatment, such treatment would balance scales of justice and thus render subsequent execution inexcusable. As pointed out, in *Makwanyane*⁵⁸⁰ it was the execution that was judged to be inhuman and an affront to human dignity. So the Court's reliance on the Zimbabwean precedent was misplaced. The Zimbabwean precedent was not the appropriate authority for the construction favoured by the Court.

There is another dimension to the problem not to be overlooked whenever a court, in seeking to come to the relief of condemned prisoners, relies heavily on the harsh treatment experienced by them.

⁵⁷⁸ The last amendment to the Zimbabwean Constitution is the 19th Amendment, incorporated in 2009. Section 15(1) of the Zimbabwean Constitution provides:

“No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.”

⁵⁷⁹ Section 12(1)(e) in the South African Constitution.

⁵⁸⁰ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 409.

The harsh conditions suffered by condemned prisoners are not the lot of condemned prisoners to the exclusion of trial–awaiting prisoners.⁵⁸¹ It has become a world phenomenon that trial–awaiting prisoners who have organised themselves into prison gangs subject one another to the most brutal inhuman treatment so much so that some even lose consciousness at the hands of other prisoners.⁵⁸² Knife stabbings and assaults by means of other objects or instruments totally forbidden to be in the possession of a prisoner and inside the walls of any prison have become the norm rather than an exception in some lands.⁵⁸³

The question then arises whether the treatment meted out to prisoners by other prisoners who are awaiting trial should not be a legal or constitutional justification for the courts to exempt trial–awaiting prisoners from sentence after conviction. The reasoning behind this is that these prisoners have already suffered enough, and justice has been done to them, not just by individuals — the trial–awaiting prisoners — but indeed by the state. Since the treatment is meted out while all the prisoners are in the custody of the state, having been arrested by the state, and awaiting to be tried by the state, justice has indeed been meted out to them by the state.

⁵⁸¹ *S v Masuku and Others* 1985 (3) SA 908 (A).

⁵⁸² Gaum L “The use of mechanical restraints by correctional services in South Africa and Namibia: *Namujero v Commanding Officer, Windhoek Prison* [2000] 6 BCCR 671 (NmS)” 2002 *AHRLJ* 175.

⁵⁸³ Pete S “The good, the bad and the warehoused: The politics of imprisonment during the run–up to South Africa’s second democratic election” 2000 *SACJ* 1–56.

The fact of the matter is that indeed such harsh treatment of trial-
awaiting prisoners by other trial-
awaiting prisoners cannot be overlooked
and does serve as a mitigating factor when such prisoners are eventually
convicted and sentenced. This is borne out by the appeal judgment in
the case of *S v Brophy*⁵⁸⁴ where Schwartzman J, Masipa J and Saldulker J
held as follows:

What cannot be disputed is that the lot of the awaiting-trial prisoner is harsher than that of
a sentenced prisoner in that he or she cannot participate in the programmes that
a prison may run. What he or she is condemned to is a seemingly endless routine of
boredom in the course of which he or she cannot earn any privileges for which serving
prisoners can qualify by reason of good conduct.⁵⁸⁵

In the above case, the Court relied on a Canadian case⁵⁸⁶ in the Quebec
Court of Appeal, where it was held that imprisonment whilst awaiting trial
is equal to double the time served by a sentenced prisoner.

It is debatable whether the fact of mistreatment by other prisoners, or by
the state should go as far as replacing a duly considered sentence of a
court in the form of capital punishment, since prisoners who receive this
extreme sentence are legally beyond rehabilitation.

⁵⁸⁴ *S v Brophy and Another* 2007 (2) SACR 56 (W).

⁵⁸⁵ at 59.

⁵⁸⁶ *Gravino* (70/71) 13 Crim LQ 434.

The Court further leaned on India, in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*,⁵⁸⁷ as its pillar in construing capital punishment as flying in the face of the spirit of the Constitution. A scrutiny of the Indian Constitution, framed from 1948 to 1950, discloses, however, that there is no provision in the Indian Constitution, as there is in the South African Constitution, which expressly proscribes torture, inhuman or degrading punishment or treatment.

The Supreme Court of India became painfully aware of this deficiency in the fundamental law of the land and pondered how best to remedy the defect.⁵⁸⁸ The Supreme Court filled the void by bringing the Bill of Rights in the Indian Constitution into unison with international norms as set out in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁵⁸⁹ and in article 7 of the International Covenant on Civil and Political Rights.⁵⁹⁰

⁵⁸⁷ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746.

⁵⁸⁸ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746 at par. 518.

⁵⁸⁹ The European Convention for the Protection of Human Rights and Fundamental Freedoms, of 1950, which came into force in 1953, with its latest amendments having come into force in 1971. Source: <http://www.hri.org/docs/ECHR50.html#C.Secl> (accessed: 2011/08/04).

Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

⁵⁹⁰ International Covenant on Civil and Political Rights, of 1996, which was adopted by the United Nations General Assembly in 1996, and came into force in 1976. Source: <http://www2.ohchr.org/english/law/ccpr.htm> (accessed: 2011/08/04).

Article 7 of the International Covenant on Civil and Political Rights provides:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or

This endeavour of the Court became clear in the *Francis Mullin* case.⁵⁹¹ In its judgment the Supreme Court of India held that the right to dignity which, in the Court's view, was intrinsic to the right guaranteed under article 21, included the right not to be subjected to torture, or cruel, inhuman or degrading punishment or treatment. This right was, therefore, breathed by the Supreme Court of India into the right to life and made part of domestic jurisprudence.

The point here is: a court seized with the construction of a constitutional provision has the latitude to draw from the constitutions of other jurisdictions. The Constitutional Court of South Africa, in interpreting the right to life as being violated by execution in the hands of the state, drew parallels from, *inter alia*, India and the instruments referred to above. But India was not the perfect jurisdiction as its Constitution contains no provision expressly proscribing torture, inhuman or degrading treatment.

A court is not the drafter of a constitution, nor is it the compiler thereof as the constitutional assembly is.⁵⁹² Just as a court is not the legislature and does not enact laws, but is restricted to interpreting them, by the same token it may not bring into the text of the constitution what is

scientific experimentation.”

⁵⁹¹ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746.

⁵⁹² Okpaluba C “Constitutionality of legislation relating to the exercise of judicial power: the Namibian experience in comparative perspective (part 1)” 2002 *TSAR* 308.

missing, or was an oversight on the part of the constitutional assembly or drafters. The latitude it has is to interpret the text of the constitution within the limits of what is already in the text.

5.4 In Indian law

Indian law has cases⁵⁹³ pointing in the direction opposite the one favoured in *Makwanyane*. *Francis Coralie Mullin*,⁵⁹⁴ referred to above, was just one among many. Especially instructive is the *Vatheeswaran* case.⁵⁹⁵ It was not the Court, but the applicants themselves who, in their application, recognised that it was not the sentence of death itself that could be constitutionally challenged, but the circumstances surrounding it. They argued that to take away their lives after they had been left for eight years in illegal solitary confinement was a gross violation of the fundamental right guaranteed by article 21 of the Constitution.⁵⁹⁶

⁵⁹³ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746; *Vatheeswaran v State of Tamil Nadu* AIR 1983 SC 361; *Javed Ahmed v State of Maharashtra* AIR 1985 SC 231.

⁵⁹⁴ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746.

⁵⁹⁵ *Vatheeswaran v State of Tamil Nadu* AIR 1983 SC 361.

⁵⁹⁶ Article 21 of the Indian Constitution bears the following subheading and provides:

“Protection of life and personal liberty

No person shall be deprived of his life or personal liberty except according to procedure established by law”.

Understandably, the Court did not rescue the applicants on the basis of the sentence itself, but on the basis of the supervening circumstances.⁵⁹⁷ However, whether the Court was correct or not in basing its decision on article 21 of the Indian Constitution, is another matter and open to argument. It falls, in any event, outside the parameters of this discussion.

Interestingly, it is not just the supervening circumstances in the form of harsh treatment that may serve as a reprieve to a condemned prisoner in India, but such things as a change in the personality of the convict. In *Javed Ahmed*,⁵⁹⁸ the petitioner had been found guilty of murder and sentenced to death. His appeal against the sentence had brought no desirable result and a petition for clemency was rejected by the President of India. In an unprecedented approach, the Court examined the conduct of the petitioner while waiting for execution for two years and nine months. It was found that he had behaved satisfactorily in prison, was genuinely repentant and anxious to atone for the grave wrongs he had committed. The hanging was substituted for life imprisonment.

The Court's reasoning in this regard raises questions of legal propriety. It is trite that the question of remorse and preparedness to make restitution is, in terms of criminal procedure, considered after conviction

⁵⁹⁷ *Vatheeswaran v State of Tamil Nadu* AIR 1983 SC 361 at par. 367.

⁵⁹⁸ *Javed Ahmed v State of Maharashtra* AIR 1985 SC 231.

but prior to sentencing, and it serves as a mitigating factor. The question of genuine repentance is determined by courts at the time of sentencing, not extra-judicially, in prison. The question of remorse and good behaviour is something considered by prison authorities in determining the propriety of affording a sentenced prisoner early release after the prisoner has served a satisfactory portion of the sentence.

Whether it was proper for the Court or not to take into consideration the factors that it did, is beside the point. The point is that whereas the South African Constitutional Court leaned heavily on the jurisprudence in India in coming to a proper construction of the right to life when applied to capital punishment, the entire foundation of Indian jurisprudence does not reinforce the interpretation the South African Court sought to give to the right to life.

This view finds support in the Indian jurisprudence that the delay from the time of the imposition of sentence to the time of hearing the appeal cannot be taken into account by the Supreme Court in determining whether the sentence of death should now be commuted to life imprisonment. The view of the Supreme Court in India is that the incidence of delay does not qualify as a circumstance capable of reducing an appellant's moral guilt in perpetrating a murder. The view of the Court is that the delay is entirely irrelevant to the commission of the

offence of which the appellant was convicted. In other words, it is not the circumstances outside the convict's personal circumstances at the time these were weighed by the Court during the mitigation-of-sentence stage, which cause the Court to commute the sentence of death to life imprisonment. The circumstances outside the personal circumstances of the convict have nothing to do with the reprehensibility or otherwise of the accused.

If the accused wants to escape the sentence of death he or she must establish on a balance of probabilities the existence of extenuating circumstances.⁵⁹⁹ These extenuating circumstances are invariably to be shown prior to the imposition of sentence, not many years after the imposition of sentence.⁶⁰⁰

5.4.1 In the United States law

A glance at the position in the United States of America is informative. It must be borne in mind that the United States is one of the jurisdictions the Constitutional Court of South Africa drew from. As the analysis of the system in the United States will show, consistency in interpretation would not have supported the reasoning of the South African Constitutional

⁵⁹⁹ Section 314A(a) of the Criminal Procedure and Evidence Act, Chapter 59.

⁶⁰⁰ *S v Chaluwa* 1985 (2) ZLR 121 (SC) 130B.

Court with regard to the right not to be subjected to cruel, inhuman and degrading treatment as applied in the context of the right to life.

As a departure point, it is appropriate to state at the outset that the Supreme Court of the United States had never, at the time that the South African Constitutional Court decided *Makwanyane*,⁶⁰¹ directly addressed the question of delay in the execution of the death sentence, nor the question of harsh conditions as a ground for commuting the sentence of execution to life imprisonment. When it eventually had occasion to do so, it is revealing to find that it did not set precedent for the interpretation that the South African court settled for.

As was the finding of the Zimbabwean Supreme Court in the *Catholic Commission* case,⁶⁰² it was not the execution of the death penalty that was found to be unconstitutional in *Ex Parte Medley*,⁶⁰³ the first case to be considered by the United States. But it was the uncertainty as to the precise time when execution would take place. Waiting for the unknown moment was a horrible feeling. To this kind of feeling, the Court added limitations on visitations as “an additional punishment of the most . . . painful character”.⁶⁰⁴

⁶⁰¹ *S v Makwanyane and Another* 1995 (3) (SA) 391 (CC).

⁶⁰² *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe and Others* 1993 (4) SA 239 (ZS).

⁶⁰³ *Ex Parte Medley* 134 U S 160 (1890) at 172.

⁶⁰⁴ at 171.

In a later development in the United States, in *People v Chessman*,⁶⁰⁵ the applicant himself did not claim that it was his punishment by death that was inhuman, but the mental suffering occasioned by the years he had spent on the death row. The applicant had spent eleven years waiting, and had felt that this unusually prolonged confinement was due to unconstitutional delays on the part of the California judiciary.

The Supreme Court of the United States held that the California courts had proceeded without unreasonable delay and the state of California was, accordingly, not guilty of cruel and unusual punishment. Referring to this case, Gubbay CJ, in delivering judgment in *Catholic Commission*,⁶⁰⁶ reasoned that this rationale implies that regardless of the extent of Chessman's mental agony because of his confinement, and regardless of the length of the confinement, his suffering would not have been a factor in determining whether cruel and unusual punishment had occurred as long as there was a legitimate reason for him to be confined. It seems reasonable to infer that that "legitimate" reason was, in the mind of Gubbay CJ, that the applicant was not a law-abiding citizen.

⁶⁰⁵ *People v Chessman* 52 Cal 2d 469 (1959).

⁶⁰⁶ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe and Others* 1993 (4) SA 239 (ZS).

This last thought, that the applicant was not a law-abiding citizen, ties in with what Chaskalson J said in *Makwanyane*,⁶⁰⁷ that we are long past the time of the old biblical injunction of “tooth for a tooth” and “eye for an eye”.

5.4.2 In international instruments

International instruments are an indispensable asset in an endeavour to come to a proper construction of constitutional provisions. This is because not a few constitutions have been drafted with international instruments in mind so as not to have the constitution of a country deviate significantly from the general trend of the world. This would result in a country with such a constitution being isolated on its own island, as it were. In South Africa, the important role of international instruments is emphasised by the inclusion in the country’s Constitution of a section⁶⁰⁸ which compels courts to consider international law when they interpret the Bill of Rights.

Dugard⁶⁰⁹ endorses the view that international instruments influence, not only the interpretation, but also the drafting, of constitutions. He writes:

⁶⁰⁷ *S v Makwanyane and Another* 1995 (3) (SA) 391 (CC) at 446A.

⁶⁰⁸ Section 39(1)(b) of the Constitution.

⁶⁰⁹ Dugard J “BOOK REVIEWS” 1992 *SAJHR* 602, reviewing Schabas W A *International Human Rights Law and the Canadian Charter: A Manual for the Practitioner* (1991).

It is highly likely that our courts will adopt a new approach to legislative history in the interpretation of both constitution and bill of rights and therefore turn to the international human rights conventions for the purpose of interpreting the bill of rights as *it is already clear that these conventions will influence the drafting of such an instrument*.⁶¹⁰

Tobin⁶¹¹ examines the transformative effect of international law, and the extent to which human rights instruments, particularly the United Nations Convention on the Rights of the Child,⁶¹² have influenced the treatment of children in national constitutions. Tobin makes the point⁶¹³ that the rights of children and other rights in the United Nations Convention of the Rights of the Child find expression in the constitutions of countries such as Brazil, Colombia, Ecuador, and others. He expresses the view⁶¹⁴ that it would be necessary to examine the drafting debates for each constitution to determine the extent to which any of the international human rights instruments influenced the drafting of the constitutions.

Adding weight to the point that constitutions have been drafted with international instruments in mind is Cockrell,⁶¹⁵ who writes that:

Given that the Bill of Rights has clearly been influenced in its drafting by international human

⁶¹⁰ at 603–604 [emphasis added].

⁶¹¹ Tobin J “Increasingly seen and heard: The constitutional recognition of children’s rights” 2005 *SAJHR* 86.

⁶¹² The United Nations Convention on the Rights of the Child, adopted by the United Nations General Assembly resolution 44/25 of November 20 1989, and came into force in 1990. <http://www2.ohchr.org/english/law/crc.htm> (accessed: 2011/08/04).

⁶¹³ at 115.

⁶¹⁴ at 115.

⁶¹⁵ Cockrell A “Rainbow jurisprudence” 1996 *SAJHR* 1.

rights instruments, it is likely that international human rights law will, as a result of the constitutional interpretation clause, play a very significant role in the development of a South African human rights jurisprudence.⁶¹⁶

It must be borne in mind, however, that international instruments are not the sole guidance, but they, together with other factors to have regard to, shed some light on the direction that can safely be taken by a court seized with the interpretation of a constitutional provision.

Admittedly, not all international instruments contain a definition of cruel, inhuman or degrading treatment or punishment. But at least two⁶¹⁷ contain a definition of torture, which is a concept similar to cruel, inhuman or degrading treatment or punishment.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture in article 1 as follows:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or

⁶¹⁶ at 415.

⁶¹⁷ The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted in 1984, and came into effect in 1987 <http://www2.ohchr.org/english/law/pdf/cat.pdf> (accessed: 2011/08/05); and the Inter-American Convention to Prevent and Punish Torture, which was adopted in 1985, and came into effect in 1987 <http://www.oas.org/juridico/english/treaties/a-51.html> (accessed: 2011/08/05).

intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Inter-American Convention to Prevent and Punish Torture defines torture in article 2 as follows:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

It is necessary to mention that these Conventions use the word “torture” as opposed to the phrase “cruel, inhuman or degrading treatment”. It is submitted that constitutions of various countries⁶¹⁸ all use slightly

⁶¹⁸ United States Constitution, 8th Amendment (1791): “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”;
 Uganda Constitution (1995), article 24: “No person shall shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment”;
 Japan Constitution (1946), article 36: “The infliction of torture by any public officer and cruel punishments are absolutely forbidden”; South African Constitution (1996), section 12(1): “Everyone has the right to freedom and security of the person, which includes the right . . . (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or

varying wording, but one thing discernible is that the basic concept prohibited is the same.

In terms of this Convention, the proscribed treatment is any act which inflicts severe pain. Therefore, cruel, inhuman, degrading treatment must essentially inflict pain, and this pain may either be felt physically or mentally. For treatment to be cruel, inhuman or degrading it must have a motive behind it; it must have been intentionally inflicted.⁶¹⁹ The motive must be to obtain from the sufferer information or a confession. This immediately calls to mind that such treatment is often at the hands of the state where police officials endeavour to extract a confession from a suspect. One then immediately asks oneself whether the prohibited cruel, inhuman or degrading treatment envisaged in various constitutions, is the kind of treatment meted out for this purpose.

It will be recalled that the context in which the phrase “cruel, inhuman or degrading” was referred to in *Makwanyane*⁶²⁰ was absolutely not in the context of obtaining information or a confession.⁶²¹

degrading way”.

⁶¹⁹ Keightley R “Torture and Cruel, inhuman and degrading treatment or punishment in the U N Convention Against Torture and other instruments of international law: recent developments in South Africa” 1995 379 *SAJHR* 382–3.

⁶²⁰ *S v Makwanyane and Another* 1995 (3) (SA) 391 (CC).

⁶²¹ In terms of the requirements of a confession or a pointing-out in criminal prosecutions, a confession or a pointing-out must be made freely and voluntarily, in one’s sober and sound senses, and without undue influence, failing which the confession or pointing-out falls to be ruled as inadmissible evidence.

However, the most enlightening aspect of the definition of painful treatment in terms of this Convention is that the definition itself excludes “pain or suffering arising only from, inherent in or incidental to *lawful sanctions*”.⁶²² In terms of this exclusion, lawful sanctions, such as being confined after conviction, invariably bring with them a measure of suffering whether physical or mental.

Against this background, it was not the death-row conditions that were found to be cruel, inhuman or degrading in *S v Makwanyane*,⁶²³ but the execution of convicts. This conclusion in interpretation is not in consonance with this definition of cruel, inhuman, degrading treatment in the United Nations Convention Against Torture.

This dissonance in interpretation becomes clear especially in view of the fact that the Convention came into force on 26 June 1987, eight years before the Constitutional Court of South Africa was seized with the duty of interpreting the right not to be subjected to painful treatment in relation to the right to life. Not only that, South Africa is a member state of the Convention, and therefore bound by it.

⁶²² emphasis added.

⁶²³ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 26.

As indicated, there is a slight variation in the wording of various constitutions of various jurisdictions in their prohibition of inhuman, degrading treatment. The Constitution of the United States of America and the Constitution of South Africa omit “torture” in their prohibition. But whether or not the word “torture” is left out, this presents no significant change. In fact one writer⁶²⁴ describes these variations as being “academic” in the sense that all this kind of treatment is prohibited by international instruments.

This is underscored by the fact that in the case of *Denmark, Norway, Sweden and the Netherlands v. Greece*,⁶²⁵ it was held that all torture is essentially inhuman and degrading treatment, and inhuman treatment is essentially degrading. This means that the underlying idea is the same.

In that case, the European Commission of Human Rights,⁶²⁶ in endeavouring to elucidate the notion of inhuman treatment, held that it is treatment which at least deliberately causes severe mental or physical suffering, which in the particular circumstances is unjustifiable.

⁶²⁴ Sieghart P *The International Law of Human Rights* (1983) at 162.

⁶²⁵ *Denmark, Norway, Sweden and the Netherlands v. Greece*, Application 3321-3/67; 3344/67 before the European Commission of Human Rights.

⁶²⁶ Hereinafter referred to as the “Commission”.

In *Ireland v. United Kingdom*⁶²⁷, the European Commission of Human Rights gave an example of inhuman, degrading, or cruel treatment. The Commission cited as an example the coercing of an interrogated person to stand for an extended period on his toes against the wall. It would add to the inhuman treatment if such a person were to have his head covered with a black hood, subjected to constant intense noise, and be even deprived of sleep and sufficient food and water. Such treatment was described by the Commission as contrary to the spirit of article 3 of the European Convention on Human Rights.⁶²⁸

What stands out in this and the previous example, is that these examples are dissimilar to the view held by the South African Constitutional Court on the cruel, inhuman and degrading treatment. The South African Constitutional Court viewed the death penalty itself as fitting the description of being inhuman and degrading. Furthermore, all these cases have a common denominator, and that is, for treatment or punishment to be classified as inhuman, the person must be alive to continue to experience the treatment. By comparison, however, the sentence of execution is instant and the person does not continue to experience any treatment.

⁶²⁷ *Ireland v. United Kingdom* Application No 5310/71.

⁶²⁸ European Convention on Human Rights, which was adopted in 1950, and came into effect in 1953 <http://www1.umn.edu/humanrts/instree/z17euroco.html> (accessed: 2011/08/05).

Of interest is the interpretation and ruling of the European Court of Human Rights in the *Soering* case,⁶²⁹ where Mr Soering was to be extradited to his country of origin, the United States, where he could possibly face execution if convicted. In its interpretation of article 3, the Court was of the view that the European Convention on Human Rights was to be read as a whole, and that article 3 of the Convention should therefore be interpreted in harmony with the provisions of article 2.⁶³⁰ Based on this approach, the Court held that article 3, which enshrines freedom from torture and other inhuman or degrading treatment, could not have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the unambiguous wording of article 2, paragraph 1.⁶³¹

In conjunction with inhuman treatment, one must consider the view held⁶³² by the Commission regarding degrading treatment or punishment. The Commission expressed the view that for punishment or

⁶²⁹ *Soering v United Kingdom* 11 Eur. Ct. H.R. (1989), Series A, No 161, Application No 14038.

⁶³⁰ Article 2 of the European Convention on Human Rights is drafted as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

⁶³¹ Van Dijk P and Van Hoof G J H *Theory and Practice of the European Convention on Human Rights* (1990) at 239.

⁶³² In *Soering v United Kingdom* 11 Eur. Ct. H.R. (1989), Series A, No 161, Application No 14038.

treatment to fit the description of being inhuman, the humiliation or degrading treatment must reach the level where it is beyond the usual element of humiliation involved in judicial punishment. To determine whether the humiliation reaches the level where it is beyond the usual element of humiliation involved in judicial punishment, certain factors come into play, such as the nature and context of the punishment itself and the manner and the method of its execution.⁶³³ In this regard, one must bear in mind that courts have held that some humiliation that is inherent in the sentences of a court cannot be avoided and does not count as inhuman, degrading treatment.

The upshot of the guidance that can be gleaned from international instruments and judgments of human rights courts of international status is that the view held by the South African Constitutional Court in interpreting the right to life in conjunction with the right not to be subjected to cruel treatment, is not consistent with the general interpretation that can be generally gleaned from foreign jurisdictions and international instruments.⁶³⁴

The striking fact of the matter is that almost all these international instruments, while they uphold the right to life, they do not put an end to

⁶³³ *Soering v United Kingdom* 11 Eur. Ct. H.R. (1989), Series A, No 161, Application No 14038, at 171.

⁶³⁴ European Convention on Human Rights, 1950; American Convention on Human Rights, 1978; International Covenant on Civil and Political Rights, 1966.

sentences which take away life. For example, the International Covenant on Civil and Political Rights,⁶³⁵ adopted in 1966 and having come into force in 1976, provides that “no one shall be arbitrarily deprived of his life.”⁶³⁶ This wording suggests that although life is protected by the Covenant, room is left for the taking of life in circumstances which are not arbitrary. Such circumstances undoubtedly include the state powers to end life in extreme circumstances.

The same Covenant goes on to provide that:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. *This penalty can only be carried out pursuant to a final judgment rendered by a competent court* [emphasis mine].⁶³⁷

The Covenant thus regulates the imposition of a sentence which takes away life by prescribing circumstances in which such a sentence would be justified, and by directing that the imposition of such a judicial penalty should not be inconsistent with the provisions of the Covenant itself and the Convention on the Prevention and Punishment of the Crime of

⁶³⁵ International Covenant on Civil and Political Rights, which was adopted in 1966, and came into force in 1976.

⁶³⁶ Article 6(1).

⁶³⁷ Article 6(2).

Genocide.⁶³⁸ The name of this Convention suggests that an equivalent sanction in the case of genocide would be the judicial ending of the life of the one guilty of genocide.

It is crucial to mention at this stage that South Africa is party to the International Covenant on Civil and Political Rights.⁶³⁹

Further, another international aid, the American Convention on Human Rights,⁶⁴⁰ throws light on the subject. Instead of applying the prohibition of cruel, inhuman and degrading treatment to capital punishment, the Convention regulates capital punishment by providing, in part, that “no one shall be arbitrarily deprived of his life,”⁶⁴¹ and that “the death penalty shall not be re-established in states that have abolished it.”⁶⁴²

Finally, the Convention provides that “in no case shall capital punishment be inflicted for political offences or related common crimes,”⁶⁴³ and that “capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.”⁶⁴⁴

⁶³⁸ Convention on the Prevention and Punishment of the Crime of Genocide (1948).

⁶³⁹ International Covenant on Civil and Political Rights (1996). South Africa became party to the Covenant on 28 August 2002.

⁶⁴⁰ American Convention on Human Rights, adopted in 1969, came into force in 1978 <http://www.oas.org/juridico/english/treaties/b-32.html> (accessed: 2011/08/05).

⁶⁴¹ Article 4(1).

⁶⁴² Sub-article (3).

⁶⁴³ Sub-article (4).

⁶⁴⁴ Sub-article (5).

With the above position in mind, as found in the American Convention on Human Rights, it is enlightening to take a glance at what authors have to say and compare their remarks with what the South African Constitutional Court held in its interpretation of the right to life as it applies to the sentence of execution.

The South African Constitutional Court, basing its interpretation on the fact that the wording of the right to life in the Constitution simply reads: “Everyone has the right to life” and has no qualifications, came to the conclusion that the right to life is given more protection and is therefore absolute.⁶⁴⁵ In contrast, Sieghart⁶⁴⁶ remarks that “international instruments do not in fact accord [the right to life] any formal primacy: on the contrary, ICPR, HER, and AMR all contain qualifications rendering the right less than absolute, and allowing human life to be deliberately terminated in certain specified cases. [AFR] too prohibits only the ‘arbitrary’ deprivation of the right to respect for life”.⁶⁴⁷

Sieghart draws a further comparison between the right to life and the right not to be subjected to inhuman and degrading treatment. He points

⁶⁴⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 39.

⁶⁴⁶ Sieghart P *The International Law of Human Rights* (1983) at 130.

⁶⁴⁷ Sieghart P at 130. ICPR stands for International Covenant for Civil and Political Rights. EHR stands for the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms. AMR stands for American Convention on Human Rights.

out that the right to freedom from torture and other related kinds of ill-treatment together with the right not to be subjected to slavery and servitude are both absolute in the way they are drafted in international instruments, and they are subject to no exceptions of any kind whatsoever. This stands in stark contrast to the right to life which, although no other rights can be enjoyed without it, is construed as being relative by international instruments. At this juncture it is proper to consider the construction of the South African Constitutional Court of this right. The Court, in its leading judgment per Chaskalson P,⁶⁴⁸ did refer to international instruments. However, it did not honour the provisions of these international interpretation aids, justifying its position by saying that the South African Constitution is worded without qualifications in entrenching the right to life.

Sieghart goes on to make the observation that international instruments rather accord a higher value to the quality of life one leads than to life itself. In other words, attention is given to bettering the lives people enjoy than to preventing at all cost the ending of life.

In analysing the construction of the right to life by the South African Constitutional Court as regards capital punishment, one finds that the Court is to be commended for having considered international

⁶⁴⁸ *S v Makwanyane and Another* 1995 (3) SA 391 at pars. 63–69.

interpreting aids. However, the result yielded by their consideration is not in line with the totality of the guidance provided by these international interpreting aids.

There is no approved definition, nor any definition for that matter, of inhuman or degrading treatment — neither in the various constitutions which include the prohibition hereof in their Bill of Rights nor in the international instruments.⁶⁴⁹ But what international instruments do not do is to place an embargo on death as a form of sentence by a competent court.⁶⁵⁰

5.5 Comparison with various jurisdictions

There has been an attempt by the Supreme Court of Canada to give guidance by holding that the words “cruel and unusual” are interacting expressions colouring each other, as it were, and that they should therefore be considered together and not disjunctively in breathing meaning to the phrase.⁶⁵¹

⁶⁴⁹ Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 53–3.

⁶⁵⁰ Keightley R “Torture and Cruel, Inhuman and Degrading Treatment or Punishment in the UN Convention Against Torture and Other Instruments of International Law: Recent Developments in South Africa” 1995 379 *SAJHR* 389.

⁶⁵¹ *R v. Miller and Cockriell* [1972] 1 S. C. R. 711, 736.

The United Nations Convention Against Torture⁶⁵² did define “torture”. It did not, though, define inhuman and degrading treatment or punishment. It is submitted that whether a constitution uses the words “inhuman or degrading treatment”, or includes the word “torture”, or includes or does not include the word “unusual”, the concept is the same; and therefore what is prohibited can be summed up in one word: cruel.

What has thrown the concept into even deeper confusion, however, is the fact that there is almost no end to things to which the adjectives “cruel”, “inhuman”, “degrading”, “torturous” are applied. Even court sentences which are not the death penalty have been described as sentences to which these adjectives can properly be applied.

For example, in *Makwanyane*⁶⁵³ the South African Constitutional Court concluded that life imprisonment is an alternative to the sentence of death. However, even this very sentence has been adjudged in some jurisdictions⁶⁵⁴ as being cruel, inhuman and degrading if it means what it means, that is, imprisonment for life, with no hope of possible release.

⁶⁵² United Nations Convention Against Torture, which was adopted in 1984, and came into effect in 1987 <http://www2.ohchr.org/english/law/pdf/cat.pdf> (accessed: 2011/08/05).

⁶⁵³ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁶⁵⁴ For example in Namibia, in *S v Tcoeb* 1996 1 SACR 390 399; and in Canada in *R v Lyons* [1987] 2 S.C.R. 309.

Indeed, if one seriously thinks about it, the sentence of death may be preferable to some when compared to a mind-torturing thought of languishing inside prison walls indefinitely.⁶⁵⁵

There are jurisdictions, such as the United States of America and England, where a sentence of life imprisonment means nothing less, but just that. The question arises whether a sentence which carries with it no prospect of release at any time in the future, is not cruel. And if it is, the question arises as to where the line can be drawn between capital punishment and life imprisonment. In South Africa, a prisoner may be considered for parole after serving 25 years. This does not mean that at the end of that period the prisoner will automatically be released; certain requirements have to be met. In some cases the only reprieve is if the President exercises his powers and extends pardon. The words expressed by the European Court of Human Rights confirm this point. This international tribunal held that the early release of a prisoner, the remission, the release of a prisoner with conditions attached, or the parole as it is often called, is not a right. The Court stated that such a release may be a legitimate expectation, but in the final analysis, it remains a privilege.⁶⁵⁶

⁶⁵⁵ Wright J “Life without parole: The view from death row” 1991 *Criminal Law Bulletin* 334 – 357.

In his article, J Wright observes that to lock up a prisoner and take away all hope of release is to resort to another form of death sentence. As a matter of fact, the author says that convicts who are undergoing life imprisonment oppose their sentences with all their might and prefer instead to be hanged to being kept alive behind bars for the rest of their natural lives.

⁶⁵⁶ *Ezeh and Connors v The United Kingdom* (Application 39665/98 & 40086 [2003])

The judgment of the Namibian Supreme Court in *Tcoeib*⁶⁵⁷ further underscores the fact that imprisonment for life is tantamount to death penalty. The Court expressed its view that a sentence of life imprisonment cannot be constitutionally sustainable if it effectively throws a prisoner into a cell for the rest of his or her natural life as if the prisoner was a thing and not a person. It is especially interesting to note that the Namibian Supreme Court linked imprisonment for life to the very constitutional right which the South African Court said was affected by the death sentence — dignity. If then the death penalty should be avoided because it is an affront to a person's right to dignity and to the right not to be subjected to inhuman and degrading treatment, and life imprisonment is preferred, and yet life imprisonment also infringes these rights, it follows that the conclusion that the death penalty is inhuman or degrading is not an impeccable conclusion, as it is not the only sentence which can be described as infringing these rights.

Interestingly, even in the South African context, a tribunal that is not the final arbiter in constitutional matters, the Supreme Court of Appeal, saw the matter in its correct perspective when it expressed that it is only the prospect of parole that saves a sentence of life imprisonment from being

ECHR 48F.

⁶⁵⁷ *S v Tcoeib* 1996 1 SACR 390 399.

in conflict with section 12(1)(e) of the Constitution.⁶⁵⁸ By the same token, it can be added that not only does the preferred sentence of life imprisonment also constitute inhuman, degrading treatment, but it is also an affront to one's dignity.⁶⁵⁹

It becomes clear, then, that it is not only the sentence of taking away life that fits the description of inhuman, degrading, cruel treatment, and that it is not only the sentence of taking away life that violates a person's dignity.⁶⁶⁰ And since this is the case, and especially in the light of the position taken by various international instruments which have been considered, pinning the label of "inhuman, degrading" treatment to capital punishment only, and preferring instead a term of imprisonment for the rest of one's conscious life, is not in harmony with the international spirit of placing the right to life in its proper place.

What comes to light in the final analysis is that what can be construed as cruel, inhuman or degrading punishment, is punishment which is out of proportion to the offence committed, or punishment which is out of proportion to the manner in which the offence was committed. Facet⁶⁶¹ upholds this view when he writes that:

⁶⁵⁸ *Bull and Another v The State* 2001 ZASCA 105, par 23.

⁶⁵⁹ In *S v Tcoeb* 1996 1 SACR 390 399, the Namibian Supreme Court held that imprisoning a convict for life is tantamount to treating the convict as a "thing" and not a person.

⁶⁶⁰ Which is protected by section 10 of the Constitution.

⁶⁶¹ Facet J E S *The Application of the Human Convention on Human Rights* (1969) 34, 41.

'inhuman treatment' would then be the deliberate infliction of physical or mental pain or suffering against the will of the victim, and, when forming part of criminal punishment, *out of proportion to the offence*.⁶⁶²

This view was aptly brought to the fore by Stewart C J in *S v Chabalala*⁶⁶³ wherein he maintained that notwithstanding the fact that some foreign law had made it appear that capital punishment was inhuman and degrading, it was not necessarily so. Stewart C J accepted for purposes of *S v Chabalala* that degrading punishment would include all forms of punitive process that would dishonour or treat a convict with contempt. However, he was not prepared to accept that the concept of inhuman and degrading punishment was to be applied when the Bill of Rights was considered. He maintained that if it was to be, then imprisonment would not be permissible. It was his view that imprisonment indeed brings dishonour to the one imprisoned, that it is not kind to shut a person up in prison, that it was cruel to do so. Imprisonment was, however, specifically authorised in the Bill of Rights.⁶⁶⁴

The South African Constitutional Court in *Makwanyane*⁶⁶⁵ somehow failed to observe what has been observed by various courts in the international domain, namely that what constitutes cruel punishment,

⁶⁶² emphasis added.

⁶⁶³ *S v Chabalala* 1986 (SA 3) 623.

⁶⁶⁴ *S v Chabalala* 1986 (3) SA 623, 626 D – F.

⁶⁶⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

really, is not what the sentence is, but whether the punishment weighs more heavily when compared to the gravity of the offence, or the manner in which the offence was committed. Surprisingly, in a later matter serving before the same court in 2002, the Court came to this realisation, thus becoming inconsistent with its own previous reasoning on a similar issue. In *S v Niemand*,⁶⁶⁶ the Court had to settle the question of sentences of indeterminate imprisonment imposed in terms of section 286 of the Criminal Procedure Act on convicts who are declared by Regional Courts or High Courts as habitual criminals. The Court came to the conclusion that a sentence of indeterminate imprisonment, where there is no prospect of release at the time the sentence is imposed, effectively amounts to life imprisonment. It labelled such a sentence as a cruel, inhuman, degrading sentence and consequently one that is unconstitutional. It was held that a remedy to this would be to end the open-endedness of the sentence by placing a ceiling of fifteen years as a maximum.

Interestingly, when the same court expressed its preference of life imprisonment over capital punishment, it did not have in mind that life imprisonment would be tempered in its harshness by the Correctional Services Act⁶⁶⁷ by providing for parole after a term of twenty-five years. It had in mind that life imprisonment would be just that — life

⁶⁶⁶ *S v Niemand* 2002 (1) SA (CC).

⁶⁶⁷ Section 73(6)(b)(iv) of Act 8 of 1959.

imprisonment. But the Court did not consider that life imprisonment, as a sentence without the prospect of release, was a cruel, inhuman, degrading sentence.

In the case of *S v Niemand*,⁶⁶⁸ however, the Constitutional Court came to a balanced interpretation of inhuman, degrading punishment as a punishment that is grossly disproportionate to the offence.

Likewise, in a Canadian counterpart of the South African section 286 of the Criminal Procedure Act, namely, section 18 of the Canadian Criminal Code Amendment Act,⁶⁶⁹ the “habitual criminal” provisions were found by the Canadian Supreme Court⁶⁷⁰ to constitute cruel, inhuman, degrading punishment if a habitual criminal was sentenced to indeterminate sentence — an open-ended sentence with no ray of hope on the other side of the tunnel. Consequently, these provisions were repealed by the legislature in 1977. The “habitual criminal” phenomenon was replaced by “dangerous criminal”, as a distinction had to be drawn between an offender who is a social nuisance and an offender who was dangerous to society.

⁶⁶⁸ *S v Niemand* 2002 (1) SA (CC).

⁶⁶⁹ The Criminal Code Amendment Act of 1947.

⁶⁷⁰ *Hatchwell v The Queen* [1976] 1 S. C. R. 39 at 43.

Thus, in *R v Lyons*,⁶⁷¹ the Supreme Court of Canada found that in the case of a convict who has been declared a dangerous offender, a sentence of indeterminate sentence is not unconstitutional, as such an offender is less of a harm than an offender who commits crime habitually.⁶⁷²

There are judicial decisions⁶⁷³ pointing to the direction that inhuman, degrading punishment can fittingly be defined as punishment which does not correspond to the seriousness of the offence committed in the sense that the punishment is more severe whereas the offence is less serious. First, though, it is proper to point out that inhuman, degrading punishment can be divided into two classes of punishment, namely, punishment that is barbaric in itself, and punishment that is grossly disproportionate to the offence or to the modus operandi of the offence.⁶⁷⁴ An example of the first category, namely, barbaric punishment, is the castration of sexual offenders.⁶⁷⁵

⁶⁷¹ *R v Lyons* [1987] 2 S.C.R. 309.

⁶⁷² at pars. 118–125.

⁶⁷³ *R v Smith* [1987] 1 S. C. R. 1045; *R v Luxton* [1990] 2 S C R 711; *Namunjepo v Commanding Officer, Windhoek Prison* 2000 6 BCLR 671 (NmS); *S v Williams and Others* 1995 (7) BCLR 961 (CC); *Ex-Parte Attorney-General, Namibia* (1991) 3 SA 76 (NmS) 861.

⁶⁷⁴ Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 53–3.

⁶⁷⁵ Sieghart P *The International Law of Human Rights* (1983) at 163.

An example of the second category can be found in the case of *R v Smith*,⁶⁷⁶ where the accused had been convicted of importing drugs. The minimum sentence imposed for this offence was seven years. He was, however, sentenced to eight years imprisonment. The question before the Supreme Court of Canada was whether the *minimum sentence itself* provided for by section 5(2) of the Narcotics Control Act of Canada constituted an inhuman, degrading punishment, let alone a sentence of eight years which exceeds the prescribed minimum sentence by one year, thus infringing sections 7, 9 and 12 of the Canadian Charter of Rights and Freedoms.⁶⁷⁷

In its analysis, the majority of the Court held that the sentence infringed section 12 of the Charter, that is, it amounted to “cruel and unusual” punishment, as the mandatory sentence had no regard for factors such as whether the narcotics in question were a small quantity.⁶⁷⁸

⁶⁷⁶ *R v Smith* [1987] 1 S. C. R. 1045.

⁶⁷⁷ Section 7 of the Canadian Charter of Rights and Freedoms, assented to on 29 March 1982, provides:

“Everyone 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.”

Section 9 of the Canadian Charter provides:

“Everyone has the right not to be arbitrarily detained or imprisoned.”

Section 12 of the Canadian Charter provides:

“Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”

⁶⁷⁸ *R v Smith* [1987] 1 S. C. R. 1045 at par. 117.

The point that is being emphasised here is that the concept of cruel or inhuman punishment is so open-ended that it finds application, not only in serious court sentences such as capital punishment, but also in sentences of a term of imprisonment, even in shorter sentences.

By way of contrast, whereas a short term of imprisonment for eight years was considered cruel in the above scenario, in *R v Luxton*⁶⁷⁹ — another Canadian case — the sentence was not a short term one, but life imprisonment for first degree murder.⁶⁸⁰ The convict challenged, not the sentence of life imprisonment, but the denial of parole attached to a conviction for first degree murders. In terms of section 745(a) of the Canadian Criminal Code,⁶⁸¹ a prisoner in these circumstances cannot be considered for parole until after 25 years. The convicted murderer submitted that the denial of parole constituted cruel punishment. The Supreme Court of Canada dismissed the challenge on the grounds that “the punishment is not excessive and clearly does not outrage our standards of decency”.⁶⁸²

⁶⁷⁹ *R v Luxton* [1990] 2 S C R 711.

⁶⁸⁰ In Canada a “first degree” murder is a murder where the murder was planned and deliberate or the deceased was a police officer. In South Africa such murders also attract a minimum sentence of life imprisonment in terms of the Criminal Law Amendment Act 105 of 1997.

⁶⁸¹ The Criminal Code R. S. C., 1985, C. C46.

⁶⁸² *R v Luxton* [1990] 2 S. C. R. 711 at 716.

What stands out here is the fact that in *R v Smith*,⁶⁸³ a sentence of eight years of imprisonment was held to be cruel and unusual, whereas life imprisonment was held to be a proper sentence. This illustrates the point that what determines whether a sanction imposed by a court is inhuman or degrading is not whether it takes away life as in the case of capital punishment, but whether the sanction balances the scales when the offence or the manner in which the offence was committed is considered.

The concept of inhuman, degrading, or cruel treatment is found not only in connection with sentences of imprisonment, but also in treatments that are not a punishment imposed by a court. In *Namunjepo*,⁶⁸⁴ the appellants were awaiting-trial prisoners who had escaped from prison. They were subsequently rearrested. Upon re-incarceration, they were kept in leg irons for more than five months. They were unable to wash their bodies as the chains prevented the taking off of their trousers. They were unable to perform any form of exercise, and they could not sleep properly.

An application was brought by the prisoners in terms of section 80 of the Namibian Prison Act,⁶⁸⁵ which proscribed the chaining of prisoners beyond a specified time limit, namely, one month, with the extension of

⁶⁸³ *R v Smith* [1987] 1 S. C. R. 1045.

⁶⁸⁴ *Namunjepo v Commanding Officer, Windhoek Prison* 2000 6 BCLR 671 (NmS).

⁶⁸⁵ The Prisons Act of 1959.

up to three months in extraordinary circumstances. In particular had the Court to determine whether the restraining of the prisoners was within the spirit of article 8 of the Namibian Constitution.⁶⁸⁶

It will be noted that the relevant article of the Namibian Constitution does not only prohibit cruel, inhuman or degrading treatment or punishment, but it also encapsulates dignity. Thus, had the Court to find that the chaining violated the spirit of article 8, it would find that both the dignity of a person has been violated *and* the person has also been subjected to cruel, inhuman or degrading treatment.

The Court found that the keeping of the prisoners in leg irons reduced the prisoners to hobbled animals who were restrained to prevent them from straying. It was the Court's view that the chaining was reminiscent of the age of slavery. That being the case, it followed, so held the Court, that the mechanical restraint of prisoners flew in the face of, at least, sub-articles (1) and 2(b) of article 8 of the Constitution — utter disregard for human dignity and subjecting a person to cruel treatment.

⁶⁸⁶ The Constitution of the Republic of Namibia, which came into effect in 1990 <http://209.88.21.36/opencms/export/sites/default/grnnet/AboutNamibia/constitution/constitution1> (accessed: 2011/08/06)

Articles 8 of the Namibian Constitution provides:

“(1) The dignity of all persons shall be inviolable.

(2)(a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment”.

What is not clear is whether — as it appears to be so — the Court found to be cruel the leg-ironing of prisoners irrespective of the duration of such leg-ironing, or only the leg-ironing which exceeds the time limit fixed by statute. There exists a view in the academic fraternity that it is not the leg-ironing itself that constitutes cruel treatment, but the continuation of it “in the manner and excessive length” as pointed out by Gaum.⁶⁸⁷

What is clear, though, is that the concept of cruel, inhuman, degrading treatment cannot be pinned down to and construed only in terms of the death penalty.

There is nothing that can create worse confusion than a court showing itself as having different views of a legal or constitutional concept when that concept comes under consideration by the same court on separate occasions and in different matters. What would save anybody from such confusion would be for the court to state in no unclear terms that it proposes, and does in fact adopt, a new stance on the concept.⁶⁸⁸

⁶⁸⁷ Gaum L “The use of mechanical restraints by correctional services in South Africa and Namibia: *Namunjepo v Commanding Officer, Windhoek Prison* [2000] 6 BCLR 671 (NmS) 2002 *AHRLJ* 175.

⁶⁸⁸ In terms of the doctrine of *stare decisis*, a court has the prerogative of correcting itself and deviating from its previous decisions if it realises that subsequent developments since its previous decision have thrown more light on a previously mysterious issue. However, such a departure must not be subtle, but must be stated in certain terms.

In this regard the Constitutional Court of South Africa had occasion to interpret or define the perplexing issue of inhuman, degrading, cruel treatment in the case of *Makwanyane*.⁶⁸⁹ One of its main findings leading to its abolishing of the death penalty was that such a sentence was inhuman, cruel, or degrading.⁶⁹⁰

This observation was based on the fact that the execution of the death sentence is final and irrevocable and puts an end to other rights which cannot be enjoyed without life. Furthermore, the death penalty strips the executed person of humanity as it treats the person as an object to be eliminated by the state. For lack of definition of what is to be regarded as cruel, inhuman or degrading treatment, the Court felt that it had to give meaning to this concept itself.⁶⁹¹

Then the Court had further occasion to refine the concept of cruel, inhuman, degrading treatment or punishment in *S v Williams*.⁶⁹²

However, when this occasion presented itself it was a totally different set of facts and circumstances. The Court had to adjudicate whether the imposition of corporal punishment by a court of law to juveniles constituted the concept of inhuman, degrading treatment.

⁶⁸⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁶⁹⁰ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 26.

⁶⁹¹ *Ibid* at par. 8.

⁶⁹² *S v Williams and Others* 1995 (7) BCLR 961 (CC).

Interestingly, the Court preferred to consider the dictionary definition of the words forming the concept, doing so disjunctively. As an additional feature, the Court adopted the view that the interpretation of the concept involved the making of a value judgment which “requires objectively to be articulated and identified, *regard being had to the contemporary norms, aspirations, expectations and sensitivities of the . . . people* as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised “international community”.⁶⁹³

It has to be noted that in advocating a value judgment in *S v Williams*, which approach stands in stark contrast from the approach in *Makwanyane* where the same issue was under consideration, the Constitutional Court, albeit drawing from Mahomed CJ in *Ex parte Attorney-General*,⁶⁹⁴ saw the need to be guided, regardless of the extent, by the contemporary norms, aspirations, expectations, and sensitivities of the people. Mahomed CJ correctly pointed out⁶⁹⁵ that such aspirations, expectations and contemporary norms are reflected in the national institutions and the Constitution.

⁶⁹³ *S v Williams and Others* 1995 (7) BCLR 961 (CC) at par. 22.

⁶⁹⁴ *Ex parte Attorney-General, Namibia* (1991) 3 SA 76 (NmS).

⁶⁹⁵ at pars. 13, 16.

It is interesting to note that in *Makwanyane*,⁶⁹⁶ the Court felt strongly that in its endeavour to weigh the propriety of the death penalty, it should not let itself be guided by what public sentiments may favour.⁶⁹⁷ In its observation that the issue could not be decided by having regard to public sentiments — and it is submitted that the Court was correct — the Court noted that the majority view would prevail. This was certainly the correct decision, but it has to be kept in mind that nothing can prevent the same majority of the population to exercise their majority in Parliament to amend the Constitution so as to clearly provide for the death penalty for certain crimes, as is the case in Botswana and Lesotho. As a matter of fact, California is one such jurisdiction which has gone back and forth, amending its constitution for the sole purpose of sanctioning capital punishment, as seen from the paragraph below.

It was in 1972 when the California Supreme Court held in the case of *The People of the State of California v Robert Page Anderson*,⁶⁹⁸ that the death sentence amounted to cruel and unusual punishment when measured against the constitution of that state. Nine months after that decision, the public, through its elected representatives in the legislature, amended the Constitution and thus overruled the Supreme Court's

⁶⁹⁶ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁶⁹⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at pars. 87 to 89.

⁶⁹⁸ *The People of the State of California v Robert Page Anderson* 493 Pd .2d 880, 6 Cal. 3d. 628 (Cal. 1972).

decision. The amendment came in the form of Proposition 17 of 1972, which added Article 1, Section 27, which provided as follows:

All statutes of this state in effect on February 17, 1972, requiring, authorising, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article , Section 6 nor shall such punishment for such offences be deemed to contravene any other provision of this Constitution.⁶⁹⁹

Acting independently of the California legislature in its move to amend the state Constitution, in 1973 the United States Supreme Court found in the case of *Furman v Georgia*,⁷⁰⁰ that the death sentence was unconstitutional in the manner in which it was being administered at that time. In the meantime, California had passed legislation⁷⁰¹ in 1973 which made the death sentence mandatory in some circumstances.

In the late part of 1976, the California Supreme Court, relying for its decision on the ruling of the United States Supreme Court earlier that year,⁷⁰² found in the case of *Roberts v Louisiana* ⁷⁰³ that the California statute providing for the death penalty was unconstitutional under the

⁶⁹⁹ [http://en.wikipedia.org/wiki/California_Proposition_17_\(1972\)](http://en.wikipedia.org/wiki/California_Proposition_17_(1972)) (accessed: 2011/08/06).

⁷⁰⁰ *Furman v Georgia* 408 U. S. 153 (1972) at 408.

⁷⁰¹ Stats. 1973, ch 719, p. 1300 <http://law.justia.com/cases/california/calapp3d/55/23.html> (accessed: 2011/08/06).

⁷⁰² *Gregg v Georgia* 428 U. S. 1976.

⁷⁰³ *Roberts v Louisiana* 428 . S. 325 (1976).

Federal Constitution for the reason that it denied the accused the opportunity to give evidence in mitigation of sentence.⁷⁰⁴

As a direct response to this decision, the California legislature re-enacted the death sentence statute in 1977. Under the new statute,⁷⁰⁵ the legislature permitted the giving of evidence in mitigation of sentence. Thus, the death penalty was reinstated.⁷⁰⁶ This back-and-forth movement of court and legislature surrounding the constitution demonstrates that while public opinion cannot directly determine the direction to be taken by a court, public opinion can make itself a force to be reckoned with from another angle.

While dealing with the facet of public opinion, it is necessary to state that the desirability of consistency in constitutional interpretation becomes evident when regard is had to the court's standpoint with regard to public opinion in *Makwanyane*⁷⁰⁷ and in *Williams*.⁷⁰⁸ Both matters served before the Constitutional Court of South Africa in the same year. As already pointed out, it was the position taken by the Court that the public opinion is not a factor in arriving at the correct construction of constitutional provisions. Indeed, in his own judgment, Sachs J took the

⁷⁰⁴ at 428.

⁷⁰⁵ Proposition 7, of 1977.

⁷⁰⁶ Currently the California Constitution in article 7(a) provides, in part, that: "A person may not be deprived of life, liberty, or property without due process of law".

⁷⁰⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁷⁰⁸ *S v Williams and Others* 1995 (7) BCLR 961 (CC).

view that their function as judges is to interpret the text of the Constitution as it stands and that, accordingly, whatever their personal views on a subject, their response must be a purely legal one.⁷⁰⁹

However, in *Williams*, the same court per Langa J had regard to public opinion on an international scale when it expressed the view that “there is unmistakably *a growing consensus in the international community* that judicial whipping . . . *offends society’s notions of decency*”.⁷¹⁰ The Court further acknowledged that this consensus had found expression through the courts and legislatures of various countries and through international instruments.⁷¹¹ The acknowledgment by the Court that this consensus found expression through the courts and legislatures confirms the view espoused here that public opinion, though it may be overlooked by courts, binds the courts within the parameters of legislation enacted by the representatives of the public.

It is submitted that it makes no difference whether public opinion is on a smaller scale such as local public opinion, or on an international scale, such as the “international community”.⁷¹² What matters is that a court

⁷⁰⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 349.

⁷¹⁰ *S v Williams and Others* 1995 (7) BCLR 961 (CC) at par. 39.

⁷¹¹ *S v Williams and Others* 1995 (7) BCLR 961 (CC) at par. 39.

⁷¹² *Ex parte Attorney-General, Namibia* (1991) 3 SA 76 (NmS) at 861.

would be allowing itself to be swayed, at least to some extent, by the opinion of the public.⁷¹³

It is also significant that while the South African Constitutional Court took the view in *Makwanyane*⁷¹⁴ that the South African Constitution is unique and therefore the court does not have to follow foreign jurisdictions, the Court appeared to have compromised its consistency in *Williams*⁷¹⁵ when determining the constitutionality of corporal punishment, by stating that “corporal punishment has been abolished in a wide range of countries”,⁷¹⁶ and by stating that “already South Africa has lagged behind. The Constitution now offers an opportunity for South Africans to join the mainstream of a world community”.⁷¹⁷ From this passage it becomes abundantly lucid that the Court was no longer guided by the proper construction of the “text of the Constitution”⁷¹⁸ and *stare decisis* consistency.

⁷¹³ In *S v Chabalala* 1986 (3) SA 623, 626D–F, Stewart CJ made abundantly clear that public opinion is something that courts, advertently or inadvertently, rightly or wrongly, find themselves considering when he said at 629 C – D: “The fact that some courts in other countries as well as various legal writers have expressed the view that, for one reason or another, the death penalty is inhuman or degrading, cannot override *its express acceptance by the representatives of the people* of Bophuthatswana, in formulating the Bill of Rights, as the usual and appropriate punishment in certain prescribed circumstances. Since such acceptance on 6 December 1977 nothing has happened to make me believe that *the people of Bophuthatswana now think otherwise*” [emphasis added].

⁷¹⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁷¹⁵ *S v Williams and Others* 1995 (7) BCLR 961 (CC).

⁷¹⁶ *S v Williams and Others* 1995 (7) BCLR 961 (CC) at par. 40.

⁷¹⁷ *S v Williams and Others* 1995 (7) BCLR 961 (CC) at par. 50 [emphasis added].

⁷¹⁸ *S v Makwanyane and Another* 1995 (3) (SA) 391 (CC) at par. 349.

It must be borne in mind that the crux of the matter was the placing of the concept of inhuman and degrading treatment in its proper perspective. In its endeavour to do so, the Court echoed the words of Aguda JA in *S v Petrus and Another*⁷¹⁹:

Any punishment involving torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs, burning alive or at the stake, crucifixion, breaking on the wheel, embowelling alive, beheading, public dissection and the like, or involving mutilation or a lingering death, or the infliction of acute pain and suffering, either physical or mental, is inherently inhuman and degrading⁷²⁰.

What is striking in the definition which was approvingly reiterated by the Court for purposes of invalidating corporal punishment, is the fact that in the list of cruel acts which constitute cruel, inhuman, degrading punishment, punishment by death does not feature in the list.

It is enlightening to find that the elasticity of inhuman and degrading punishment extends itself from such serious punishments as the execution of capital punishment to such less serious punishments as judicial corporal punishment, and further down to corporal punishment at schools and, questionably enough, further down to the administering of corporal punishment in the home. If the definition of cruel, inhuman, degrading treatment is so elastic, the question appropriately arises

⁷¹⁹ *S v Petrus and Another* [1985] LRC (Const) 699.

⁷²⁰ at 725g–726b.

whether the right to life could be construed as excluding capital punishment on the grounds of being cruel, inhuman, and degrading.

Since judicial corporal punishment was condemned in *Williams*,⁷²¹ it was expected that the Constitutional Court would have occasion to express itself on a closely related matter of corporal punishment by schools and, by way of extension, on another closely-related matter of disciplinary chastisement by parents. In the case of corporal punishment by schools, the legislature, in response to the spirit of the Court in *Williams*, decided that the same reasoning of the Court in *Williams* applies *ipso facto* to corporal punishment by schools. Thus, the South African Schools Act⁷²² was produced by the legislature.⁷²³

Whether the definition of cruel, inhuman, degrading treatment was elastic enough to stretch to the schools was now ripe for decision. This decision was prompted by the constitutional challenge brought by a voluntary association representing certain private schools. In the case of *Christian Education South Africa v Minister of Education*⁷²⁴, the voluntary association impugned the constitutionality of section 10 of the South

⁷²¹ *S v Williams and Others* 1995 (7) BCLR 961 (CC).

⁷²² South African Schools Act 84 of 1996.

⁷²³ Section 10 of the South African Schools Act provides:

“No person may administer corporal punishment at a school to a learner”.

⁷²⁴ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

African Schools Act ⁷²⁵ on the grounds that it encroached on the constitutional right to religious freedom. It was submitted that corporal punishment in private learning institutions was an indispensable part of instruction, which was scripturally based. It was further argued by the appellant that parents had consented to corporal punishment being administered to their children.

Adjudicating the matter, the Constitutional Court held that the legislative enactment was not unconstitutional on the grounds claimed, that is, religious. It went so far as to say that even if the enactment was unconstitutional, its unconstitutionality was condoned by the limitation of rights provided for by the Constitution. It is obvious that the Court relied heavily on its previous decision in *Williams* ⁷²⁶ that corporal punishment constituted inhuman, degrading punishment. The Court, however, fell short of pronouncing itself on disciplinary chastisement of children by their parents and left this question open.

However, it is inconceivable how the reasoning behind the decision in *Williams* ⁷²⁷ should have influenced the Court in *Christian Education*.⁷²⁸ For one, in *Williams* the Court had stated the following as its reason for declaring judicial corporal punishment unconstitutional: “it involves the

⁷²⁵ South African Schools Act 84 of 1996.

⁷²⁶ *S v Williams and Others* 1995 (7) BCLR 961 (CC).

⁷²⁷ *S v Williams and Others* 1995 (7) BCLR 961 (CC).

⁷²⁸ *Christian Education South Africa v Minister of Education* 2004 (4) SA 757 (CC).

intentional infliction of physical pain on a human being by another human being at the instigation of the State”.⁷²⁹ In the case of private schools the element of “the instigation of the state” was unquestionably not involved. Needless to say, in the case of disciplinary chastisement of children by parents the element of state instigation is missing. At common law the defence of parental authority of disciplinary chastisement is available as a ground of justification. This results in an unresolved question of where to draw the line: does all chastisement constitute inhuman, degrading punishment?

The South African legislature has also not filled the void created by its enactment of the South African Schools Act, namely, the uncertainty as to the legal or constitutional propriety of disciplinary chastisement in the home.⁷³⁰

A jurisdiction that has pioneered an exemplary way in this regard is Scotland. In 2003, the Scotland legislature enacted the Criminal Justice Act.⁷³¹ Section 51 of the Act set clear guidelines as to what constitutes reasonable chastisement by setting out factors to be considered.⁷³² This

⁷²⁹ *S v Williams and Others* 1995 (7) BCLR 961 (CC) at pars 89, 90.

⁷³⁰ Burchell J *Principles of Criminal Law* (2008) 3rd ed at 291.

⁷³¹ Criminal Justice (Scotland) Act of 2003, which came into effect in 2003

<http://webarchive.nationalarchives.gov.uk/2008/0814090217/opsi.gov.uk/legislation/scotland/acts2003/pdf> (accessed: 2011/08/06).

⁷³² Section 51 provides:

“Where a person claims that something done to a child was a physical punishment carried out

would also make clear what constitutes cruel, inhuman, degrading punishment.⁷³³

Though not guided or influenced by the Scotland Criminal Justice Act, the Israel Supreme Court was able to distinguish between inhuman, degrading punishment, and the right of parents to corporally punish their children. In *Plonit v Attorney-General*⁷³⁴, the appellant had struck her children on the buttocks and slapped them in the face over a period of time. She had thrown a vacuum cleaner at her daughter and thrown a punch at her son. Her defence was that her actions had an educational purpose. Beinisch J showed insight and saw beyond the veneer of disciplinary action and found that the chastisement amounted to inhuman, degrading punishment.

in exercise of a parental right or of a right derived from having charge or care of the child, then in determining any question as to whether what was done was, by virtue of being in such exercise, a justifiable assault a court must have regard to the following factors—

- (a) the nature of what was done, the reason for it and the circumstances in which it took place;
- (b) its duration and frequency;
- (c) any effect (whether physical or mental) which it has been shown to have had on the child;
- (d) the child's age; and
- (e) the child's personal characteristics (including, without prejudice to the generality of this paragraph, sex and state of health) at the time the thing was done."

⁷³³ Pete S "To Smack or not to smack? Should the law prohibit South African parents from imposing corporal punishment on their children?" 1998 *SAJHR* 430.

⁷³⁴ *Plonit v Attorney-General* 1998 54 (1) PD 145.

In a similar vein, in 1997, the European Court of Human Rights held that the repeated beating of a young boy by his stepfather with a cane amounted to inhuman, degrading treatment.⁷³⁵ It would seem that the Court based its decision on the fact that the beatings were repeated.

This aspect alone of inhuman, degrading punishment illustrates the desirability of consistency in constitutional interpretation.

⁷³⁵ *A v United Kingdom* 27 EHRR 611 (1997).

CHAPTER 6

The right to life of the terminally ill

It was emphasised in *Makwanyane*⁷³⁶ that the right to life reigns supreme and over all other rights since other rights cannot be enjoyed or exercised if one is dead. Therefore all other rights hinge on life as a pivot.

In view of the pivotal nature of the right to life, it was the Court's view that this right, of the various available approaches to constitutional interpretation, must be given a generous and a purposive interpretation⁷³⁷, as was the case in *Zuma*.⁷³⁸ It was also the Court's view that South Africa's right to life was unqualified and therefore was given more protection.⁷³⁹ A comparison was drawn⁷⁴⁰ between the Hungarian Constitution⁷⁴¹ which prohibits only the arbitrary deprivation of life, and the South African Constitution which merely states that everyone has the right to life without qualification. Because of the absence of the phrase "arbitrarily deprived" in the South African Constitution, the Court held that in South Africa the right to life is more securely protected in its

⁷³⁶ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁷³⁷ *Ibid* at par. 9.

⁷³⁸ *S v Zuma and Two Others* 1995 (2) SA 642 (CC).

⁷³⁹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 85.

⁷⁴⁰ *Ibid* at pars. 83–86.

⁷⁴¹ Constitution of the Republic of Hungary, as adopted in 1949 and amended in 1989.

Constitution than the right to life in section 54(1) of the Hungarian Constitution.⁷⁴² Nothing wrong can be found in this interpretation, as long as it is consistently maintained throughout with regard to the right to life.

Indeed, the South African Constitution itself lists⁷⁴³ rights which are non-derogable. Among these is the right to life, and the extent to which it is protected is indicated as “entirely”. This listing by the Constitution of the right to life as being non-derogable, together with the interpretation and importance attached by the Constitutional Court as explained above, must be borne in mind as the discussion unfolds.

Three years after the Court had asserted the non-derogability of the right to life in *Makwanyane*,⁷⁴⁴ little did the Court foresee that the same right would have to be weighed on constitutional scales, but from a different angle. A man whose life depended on the ruling of the same Court for the prolonging of his life approached the Court. Mr Soobramoney⁷⁴⁵ was a diabetic suffering from heart disease, and a cerebro-vascular disease which caused him to have a stroke. Later his kidneys also failed. His

⁷⁴² Section 54(1) of the Hungarian Constitution provides:

“In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights”.

⁷⁴³ The listed rights are equality (section 9), human dignity (section 10), life (section 11), freedom and security of the person (section 12), slavery, servitude and forced labour (section 13), children (section 28), and arrested, detained and accused persons (section 35).

⁷⁴⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁷⁴⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

condition was diagnosed as being irreversible and, at the time of seeking relief from the Court, he was at the final stages of renal failure. His life could be prolonged, however, by means of regular kidney dialysis.

He had sought such medical relief from a local state hospital. The hospital was constrained in its ability to offer relief as it only could do so to a limited number of patients who had to fall within a particular category, and according to the hospital Mr Soobramoney did not fall under that category, and was therefore turned away — to die.

Mr Soobramoney was a man of limited means who had become impoverished by his kidney ailment. In this regard, Liebenberg⁷⁴⁶ makes a valid point, that socio-economic rights in the Bill of Rights must be interpreted in the light of the constitutional commitment to eliminate poverty and deprivation. The writer links the rescue of poverty-stricken individuals to the values of human dignity, equality and freedom, and expresses the view that concern for the material and social context of human life is integral to the development of a jurisprudence that gives effect to the underlying purposes and values of the Constitution.⁷⁴⁷

⁷⁴⁶ Liebenberg S *Socio-Economic Rights: Adjudication Under A Transformative Constitution* (2010) at 100.

⁷⁴⁷ *Ibid.*

Mr Soobramoney relied for relief on the constitutional right to life,⁷⁴⁸ and the right to emergency medical treatment,⁷⁴⁹ and the proper interpretation of these was the bone of contention. With regard to the right to life, the Court deliberately avoided the challenge of interpreting the right to life as it applied to the situation placed before it by the appellant, that is, the right to life as it applied to the prolonging or sustaining of life if so desired by a litigant. The additional judgment by Sachs J gave an interpretation to the right to life in a way which is completely at odds with the approach adopted by this same court with regard to the right to life in the context of capital punishment. Sachs J came to the conclusion that regardless of the definition of the right to life, there is in reality no meaningful way in which it can constitutionally be extended to encompass the right to evade death indefinitely.⁷⁵⁰ Indeed, if this interpretation is correct and were to be applied, it would mean that: any sick persons, even those admitted to treatment by hospitals, may as well have their treatment terminated by the hospitals, since they are endeavouring to achieve the ultimately impossible goal, namely, to evade death.

⁷⁴⁸ Section 11 of the Constitution.

⁷⁴⁹ Section 27(3) of the Constitution.

⁷⁵⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 57.

What is more, the Court's judgment in this matter may also be subject to criticism on the ground that it violates the right to equality.⁷⁵¹ Though not constituting automatically unfair discrimination, in that it is not based on the subsection 3 criteria,⁷⁵² it nevertheless constitutes discrimination, as it treats differently patients who are terminally ill as against those who are "normally" ill.⁷⁵³

Surely, this approach runs counter to the principle of legality, which principle has a part to play in the interpretation of statutes and, by way of extension, in the interpretation of a constitution. The principle of legality lays down that where a statutory provision is open to more than one interpretation, one interpretation being favourable and the other being prejudicial to a party, the interpretation *favoram libertatis* must be preferred.⁷⁵⁴ By the same token, if a constitutional provision is vague, or its interpretation is uncertain or, if it is open to more than one interpretation, one being favourable to a party and the other being less favourable, it is submitted that the interpretation favourable to a party should prevail.

⁷⁵¹ As guaranteed in section 9 of the Constitution.

⁷⁵² Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

⁷⁵³ De Waal J "Equality and the Constitutional Court" 2002 *South African Mercantile Law Journal* 148.

⁷⁵⁴ Snyman C R *Criminal Law* (2008) 5th ed at 44; See also Jonathan Burchell J *Principles of Criminal Law* (2008) 3rd ed at 101.

A strong indication that the principle of legality was woven in the text of the Constitution is section 35(3)(l) and (n), which prohibits the conviction of a person for an act or omission that was not an offence under either national or international law at the time it was committed or omitted.

The section also reflects the principle of legality by providing that a convicted person shall be entitled to the benefit of the least severe of the prescribed punishments or sentences, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

6.1 The law in the United States of America

It is necessary to observe the trend in other jurisdictions with regard to the interpretation of the right to life. The Constitutional Court of South Africa has in various matters before it, including the matter of the right to life, made reference to the position in the United States as one of the jurisdictions with a long history of democracy. The United States of America has set a generous pattern which differs from the one followed by the South African Constitutional Court. On the issue of preserving life, the United States legislature has honoured the right of an individual to life by enacting the Emergency Medical Treatment and Active Labour Act.⁷⁵⁵

⁷⁵⁵ The Emergency Medical Treatment and Active Labour Act, which came into effect in 1986

The objective of the Act was to combat the practice of “patient dumping”, that is, the refusal to treat patients because they are unable to pay for their treatment, or their medical cover is insufficient. It was also intended to put an end to the transferring, or discharging of patients due to high treatment costs. The Act requires hospitals and ambulance services to provide care to anyone needing emergency medical treatment regardless of citizenship, or their ability to pay for treatment. Patients who are in need of emergency medical treatment can only be discharged with their informed consent, or when their condition requires that they be transferred to a hospital better equipped to administer treatment.⁷⁵⁶ In terms of the Act, if the hospital does not have the capacity to treat a condition, as was the case in *Soobramoney*,⁷⁵⁷ the hospital must transfer the patient to another state medical institution, in honour of the right to life. Further, an overloaded hospital may not discharge a patient who is unable to pay for treatment in order to make room for a patient who is able to or who is viewed by society as a more valued citizen. If the emergency room is overloaded, patients must be treated in an order based on their determined medical needs, not their ability to pay.⁷⁵⁸

(hereinafter referred to as “the Act”)

<http://www.medlaw.com/healthlaw/EMTALA/statute/emergency-medical-treatme.shtml>
(accessed: 2011/08/08).

⁷⁵⁶ Sections 2 and 3 of the Act.

⁷⁵⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁷⁵⁸ This is laid down in section 3 of the Act.

The Act provides for the enforcement of a hospital's responsibility to render medical assistance to patients who are in need of such assistance. To this end, the Act provides in section 2A for civil action to be taken against a hospital should it fail to discharge its obligations under the Act.

The South African Constitutional Court declined to grant an order of relief to a terminally ill patient who wanted to preserve his life, but was turned down by a state hospital on grounds of financial constraints, as pleaded by the state hospital. On the other hand, the United States legislature has deemed it necessary to preserve the life of even a terminally ill patient by providing⁷⁵⁹ that a hospital may start the process of enquiring about payment and billing only after the patient has been stabilised to a certain degree.

The failure in South Africa to preserve life must be seen in the light of an unwavering defence for the right to life of a convict, whereas a law-abiding citizen cannot have this right enforced if his or her life is at stake. This must also be seen against the right to life which was described by the South African Court as being "unqualified" and thus warranting unqualified protection. By way of comparison, the United States Constitution qualifies the right to life by stating in its Fifth Amendment that one cannot be denied it arbitrarily. Yet the same jurisdiction

⁷⁵⁹ Section 3(5)(h) of the Emergency Medical Treatment and Active Labour Act of 1986.

honours its qualified constitutional right to life by extending or preserving life, if the person who is about to lose that life so desires.

Mr Soobramoney placed reliance on the phrase used by section 27(3) of the Constitution, namely, emergency medical treatment. While the South African Court does have regard to public international law and foreign law as an aid to constitutional interpretation,⁷⁶⁰ its interpretation of human rights does not reflect this. Foreign jurisdictions such as the United States of America have for many years had their definition of “emergency medical treatment”. The South African Court interpreted an “emergency” narrowly and strictly, contrary to the principle of legality, and to the trend in interpreting constitutional provisions. It construed an emergency merely as “a dramatic, sudden situation or event which is of a passing nature in terms of time”.⁷⁶¹ According to this construction, an emergency resulting from a chronic condition does not constitute an emergency. But constitutional provisions are to be interpreted generously and purposively, as was explained by the same Court in *Makwanyane*⁷⁶² and *Zuma*.⁷⁶³

The difficulty is caused by the fact that the Constitution of South Africa itself contains no definition of “emergency”; nor do our pieces of

⁷⁶⁰ Section 39(1) of the Constitution.

⁷⁶¹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 38.

⁷⁶² *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 24.

⁷⁶³ *S v Zuma and Others* 1995 (2) SA 642 (CC) at 15.

legislation which are pertinent in this regard: the National Health Act of 2003; the Health Professions Act of 1974; the Health Professions Amendment Act of 2007; the Nursing Act of 1978; the Department of Health's Ethical Rules of Conduct of 2009, and the Department of Health's Patients' Rights Charter of 2002 and 2008, are all silent on the definition of "emergency". What is astonishing is that the legislator did not see the need created by *Soobramoney* to define "emergency" in those Acts⁷⁶⁴ that were enacted after the *Soobramoney*⁷⁶⁵ judgment. The only exception is the Medical Schemes Act of 1998, which defines "emergency medical condition" as "the sudden and, at the time, unexpected onset of a health condition that requires immediate medical or surgical treatment, where failure to provide medical or surgical treatment would result in serious impairment to bodily functions or serious dysfunction of a bodily organ or part, or would place the person's life in serious jeopardy".⁷⁶⁶

On the other hand, the United States Emergency Medical Treatment and Active Labour Act of 1986 defines "emergency medical treatment" generously and purposively as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the individual's health [or the health of an unborn child]

⁷⁶⁴ The National Health Act of 2003; the Health Professions Amendment Act of 2007.

⁷⁶⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁷⁶⁶ Section 7 of the Act.

in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of bodily organs”.⁷⁶⁷ The generous approach is seen in the fact that the definition is so encompassing that it also covers pregnancy as a condition that may give rise to an emergency. It is instructive to find that the United States Bill of Rights⁷⁶⁸ does not contain any provision relating to emergency medical treatment. Therefore, the United States was and is not under constitutional obligation to provide for the needs of those who are suddenly overtaken by indisposition and need emergency medical treatment. Despite being free from any constitutional obligation to provide for the needs of those who need emergency medical treatment, it is submitted that the United States legislature has seen reason to provide for the preservation of life of those who need that care, especially if they are indigent, by enacting the Emergency Medical Treatment and Labour Active Act.

If the interpretation of the concept “emergency medical treatment” by the South African Constitutional Court is a guideline, whatever life-threatening condition arises from the pregnancy of a woman would not constitute an emergency in terms of section 27(3) of the Constitution, since the woman had known for months that she is pregnant. A fact that escapes the reasoning of the Court is that even a condition that has a long history can suddenly develop life-threatening symptoms, thus

⁷⁶⁷ Section 1.

⁷⁶⁸ As contained in the fourteen amendments to the United States Constitution, 1791.

becoming an emergency. In the case of *Soobramoney*,⁷⁶⁹ this turned out to be just so. The appellant had had his condition of renal failure for quite some time, and it was accompanied by other complications. Since the condition was chronic, it can, on the face of it, not be seen as an emergency. However, the sudden turn of developments in the ailing person actually changes a known condition to that of an emergency needing swift medical attention. A sudden change of developments in the ailing person may be called a *novus actus interveniens*.⁷⁷⁰ An HIV-positive person would be classified in this category. It is submitted that a patient enduring illness as a result of this virus has a known and a long-standing condition, but an episode of vomiting as a result of an infection which is untreatable because of full-blown AIDS is an intervening episode which has now become an emergency, calling for emergency medical treatment.⁷⁷¹

The Court acknowledged that the words “emergency medical treatment” are open to a broad construction, and would include ongoing treatment of chronic illnesses for the purpose of preserving life, but at the same time the Court took the view that this is not the ordinary meaning of these words, and that if this is what the meaning which section 27(3) was

⁷⁶⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁷⁷⁰ Meaning, a new intervening act, cause, or development. See Neethling J *Law of Delict* (2006) 5th ed at 189.

⁷⁷¹ Van der Walt A J “Dancing With Codes — protecting, developing and deconstructing property rights in a constitutional state” 2001 *SALJ* 309.

intended to serve, one would expect that to be expressed in positive and specific terms.⁷⁷²

Certainly, this approach is inconsistent with the generous and purposive approach recommended by the same court in matters of this nature, especially where life is at stake. If the Court expected that the intention to extend section 27(3) to the preservation of life should have been expressly stated in the text of the Constitution, then by the same token, the Court should have been consistent and expected that section 11 (the right to life) should have been stated unambiguously in the text of the Constitution to include the express prohibition of capital punishment. But this was not the case. Instead, the Court was prepared to afford section 11 a generous and purposive approach on the basis that the right to life was unqualified.

Defending its approach in denying Mr Soobramoney the much needed emergency treatment, the Court referred to the words of section 27(3): “No one may be refused medical emergency treatment”. The Court held⁷⁷³ that these words ought to be understood in the context of sections 26 and 27(1) and (2).

⁷⁷² *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par 13.

⁷⁷³ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 11.

This conclusion is untenable. Both sections 26 and 27(1) and (2) respectively are expressly qualified by the words “within its available resources, to achieve the progressive realisation” of these rights. This qualifying statement does not appear in section 27(3). Section 27(3) does not say: no one may be refused emergency medical treatment “within its available resources, to achieve the progressive realisation” of this right; nor does section 27(3) say: no one may be refused emergency medical treatment, subject to the availability of resources.⁷⁷⁴

The drafters of the Constitution applied the qualification of the availability of resources, and the progressive nature of realisation to housing, in section 26 of the Constitution, for the simple reason that the provision of houses is not an emergency that is life-threatening, but can be realised gradually and to the extent of available resources.

Similarly, the drafters of the Constitution applied the qualification of the availability of resources and the gradual nature of realisation to health care services, reproductive health care, sufficient food, water, social security and social assistance (section 27(1)(a), (b) and (c)), with the understanding that the provision of these sorely needed services is not a life-threatening emergency, though the lack of these services could prove to be life-threatening if ignored over a long stretch of time.

⁷⁷⁴ Van der Walt J “Law as sacrifice” 2001 *TSAR* at 724.

However, as long as the state ensures that they are gradually or progressively provided, lives can be saved. But, the same cannot be said about emergency medical treatment.⁷⁷⁵ The mere fact that this treatment is qualified by the drafters of the Constitution not just as medical treatment, but as “emergency” medical treatment, is sufficient to show that the provision of this service cannot be gradual, or progressive, or made to be dependent on the availability of resources, at a time when a patient is about to lose his or her life. For these reasons, the view that the Court could not order the state to save the life of a terminally ill patient due to constraints of financial resources, does not pass constitutional scrutiny. The fact that the Court made a mistake in holding this view is evidenced by the fact that the same Court did make similar orders later, as will be shown later in this Chapter. By so doing, the Court opened the door to further inconsistencies in construing certain constitutional provisions.

Liebenberg⁷⁷⁶ explains that the phrase “progressive realisation” was borrowed from the International Covenant on Economic, Social and Cultural Rights.⁷⁷⁷ Article 2(1) of the ICESCR provides as follows:

⁷⁷⁵ Section 27(3) of the Constitution.

⁷⁷⁶ Liebenberg S *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) at 107; Liebenberg S “Socio-economic Rights” in Chaskalson M *et al Constitutional Law of South Africa* Vol 1 (1999) at 41–39.
Africa Vol 1 (1999) at 41–39.

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Liebenberg⁷⁷⁸ explains the context in which the phrase “progressive realisation” should be understood by referring to the General Comments No 3 of *The Nature of States Parties Obligations*,⁷⁷⁹ a document prepared by the United Nations Committee on Economic, Social and Cultural Rights. In the document the Committee imposes an obligation on states parties to the Covenant to “move as expeditiously and effectively as possible towards” the goal of achieving the full realisation of economic and social rights.⁷⁸⁰ Liebenberg concludes from the words of the Committee that the latitude to achieve the realisation of the rights “progressively” should therefore not be interpreted as an invitation for the state to drag its feet interminably.⁷⁸¹

⁷⁷⁷ Hereinafter referred to as “ICESCR”. <http://www2.ohchr.org/english/law/cesr.htm> (accessed: 2012/03/25). The ICESCR came into effect in 1976.

⁷⁷⁸ Liebenberg S “Socio-economic Rights” in Chaskalson M *et al* *Constitutional Law of South Africa* Vol 1 (1999) at 41–39.

⁷⁷⁹ *The Nature of States Parties Obligations (Art. 2, par. 1)*: 1214/1990, par. 9. [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument) (accessed 2012/03/25).

⁷⁸⁰ *The Nature of States Parties Obligations (Art. 2, par. 1)*: 1214/1990 at par. 9.

⁷⁸¹ Liebenberg S “Socio-economic Rights” in Chaskalson M *et al* *Constitutional Law of South Africa* Vol 1 (1999) at 41–40.

It was submitted on behalf of the appellant in the *Soobramoney* case⁷⁸² that section 27(3) should be construed consistently with the right to life as entrenched in section 11. It is true that section 27(3) is a separate section dealing with separate rights, to the exclusion of the right to life contained in a separate section. But it does not take wild reasoning to acknowledge that the treatment of ailments has as its purpose the saving of life, and that the denial of medical treatment can lead to loss of life. Thus, section 27(3) is inseparably linked to section 11. The Court, however, failed to acknowledge this fact, justifying its failure by arguing that it is its duty to apply the obligations imposed on the state as formulated in the Constitution, and not to draw inferences that would be inconsistent therewith.

In this context, it is appropriate to reflect on the reasoning of the Court in *Makwanyane*.⁷⁸³ The right under scrutiny was the right to life. The right to life is and was a separate right contained in its own section, then in section 9 of the Interim Constitution. Finding it difficult to do justice to its interpretation without tapping other sections, especially since the death sentence was not mentioned in the Constitution, the Court felt obliged to link the section under scrutiny to other sections which contain rights of their own nature. Thus the Court linked the right to life in the then section 9 to the right to dignity in the then section 10; it further

⁷⁸² *Soobramoney v Minister of Health, KwaZulu-Natal* (1998) SA 765 (CC).

⁷⁸³ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

linked the right to life to the right not to be subjected to inhuman, degrading treatment or punishment in the then section 11(2).

In justifying the propriety of linking the right to life to other pertinent rights, though, contained in other sections, the Court reasoned that section 11(2) must not be construed in isolation, but in its context which includes the history and background to the adoption of the Constitution. It felt obliged to construe the section in a way which secures for individuals the full measure of its protection.⁷⁸⁴

It is submitted that, by the same token, if the Court could depart from the section under scrutiny in order to arrive at an appropriate construction of another section, the Court could expand its territory on which it relied for interpretation, in order to come to a relief-giving interpretation of section 27(3) where life was at stake.

When dealing with the right to life of the unborn, reference was made to the words of Saunders J in *Buckley v Rice-Thomas*,⁷⁸⁵ that where there are professionals in a particular field, the Court is best guided by the prevailing tested ideas of the professionals in that field, rather than relying on its own view. With that point in mind, the incorrectness of the definition of “emergency medical treatment” formulated by the Court in

⁷⁸⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par.10.

⁷⁸⁵ *Buckley v Rice-Thomas* (1554) 1 Plowd. 118 at 124.

*Soobramoney*⁷⁸⁶ is shown by professionals in the medical practice. Medical professionals agree with the view submitted above that the Court's definition of "emergency" is narrow and causes serious life-threatening problems. Kramer,⁷⁸⁷ a medical professional, refers in his article to the definition of "emergency" as found in the Medical Schemes Act.⁷⁸⁸ In this Act, "emergency" is defined as "the sudden and, at the time, unexpected onset of a health condition that requires immediate medical or surgical treatment, where failure to provide medical or surgical treatment would result in serious impairment to bodily functions or serious dysfunction of a bodily organ or part".

It is submitted that this definition, though not crafted by constitutional interpreters, is attune to one of the principles of constitutional interpretation, namely, that a constitution must be interpreted generously.⁷⁸⁹ This definition takes into consideration that an emergency does not only arise, and not always arise, from an accident, as the Court in *Soobramoney*⁷⁹⁰ was inclined to think. A chronic condition can suddenly take a turn for the worse and become an emergency, and it is

⁷⁸⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁷⁸⁷ Kramer E "'No one may be refused emergency medical treatment' — ethical dilemmas in South African emergency medicine" December 2008 *South African Journal of Bioethics and Law* Vol 1 No 2 at 53.

⁷⁸⁸ Act 131 of 1998.

⁷⁸⁹ Currie I and de Waal J *The Bill of Rights Handbook* (2005) at 150.

⁷⁹⁰ *Soobramoney v Minister of Health, KwaZulu* 1998 (1) SA 765 (CC).

an emergency if, as defined in section 1 of the Medical Schemes Act, it would result in serious impairment to bodily functions.

In his medical article, Kramer makes it clear that this definition of the Constitutional Court of South Africa may pose particular difficulties in the South African context. He illustrates the point with a known asthmatic patient, who may develop breathing problems, which may or may not be related to the asthma, and which a patient may initially treat at home, as medically recommended, with medication that has been prescribed. He hypothesises that the breathing problem may linger without receiving attention due to financial, logistical transport, or personal domestic problems. In the meantime, the breathing problem may worsen, and by the time it finally receives the attention of doctors, the patient is about to lose his or her life. This medical writer makes a very significant point which eluded the Court, that many acute life-threatening medical emergencies involve diseases already diagnosed in the past, and therefore which both the doctor, or hospital, and the patient are aware of. HIV/AIDS patients fall, according to medical experts, under this category of patients. They usually present to the emergency department with symptoms of being malnourished, sapped of strength and life, dehydrated, immuno-compromised, with chronic diarrhoea. By 'constitutional' interpretation these patients who are reaching the end of their lives may, sadly, not be defined as a medical emergency. Kramer

writes emphatically that these patients are, in fact, a medical emergency. He highlights⁷⁹¹ that the Court's interpretation may have major legal implications in common law, namely, that there may be significant numbers of patients with genuine medical emergency symptoms who may be excluded from urgent care, as their presenting condition may not have been sudden, dramatic, unexpected, or catastrophic. His pertinent view is contained summarily in the concluding part of his article:

It therefore mandates the medical fraternity, not the legal profession, to consider and redefine what medically constitutes an appropriate definition of a medical emergency in modern-day South Africa for purposes of section 27(3). This is fundamental in order to prevent *the 'socio-economic injustices, imbalances and inequities of health services of the past'*.⁷⁹²

The question of an appropriate definition of “emergency” in the spirit of the Constitution is a question that needs circumspection. It obviously did not occur to the Court at the time that it adjudicated the question of “emergency”, that not only chronic illnesses and sudden catastrophes like accidents can present themselves as an “emergency”. But the medical profession maintains that rape constitutes a sudden catastrophe which in the light of the incidence of HIV/AIDS calls for immediate medical attention to prevent the survivor from contracting HIV.⁷⁹³ According to

⁷⁹¹ Kramer E “‘No one may be refused emergency medical treatment’ — ethical dilemmas in South African emergency medicine” December 2008 *South African Journal of Bioethics and Law* Vol 1 No. 2 at 54.

⁷⁹² at 54.

⁷⁹³ McQuoid-Mason D; Dhali A; Moodley J “Rape survivors and the right to emergency medical

medical professionals,⁷⁹⁴ the sooner prophylactic treatment is commenced and evidence collected, the better the chances of protecting the health of the patient. Rape is “sudden” and may have catastrophic consequences for the victim.⁷⁹⁵ According to medical professionals, the consequences may be severe both physically and psychologically and, when considering the high risk of HIV infection, may be catastrophic, since the survivor may be confronted with the possibility of contracting a fatal illness. It is the view of these medical professionals⁷⁹⁶ that a rape survivor qualifies for the constitutional right to emergency medical treatment as defined by the Constitutional Court.

In this regard, it is worth mentioning that, by comparison, a rape victim is not facing death immediately, but may face death later in life, perhaps after five to seven years. No doubt, however, the fluids left in her body need to be removed, or decisive measures need to be taken now to forestall the future *possibility* of death. It is also worth mentioning that the future death is more of a possibility than a reality. It may be that the rapist is not a bearer of the virus. Be that as it may, action needs to be taken now and not later, as a matter of medical emergency. Against this

treatment to prevent HIV infection” January 2003 *South African Medical Journal* Vol 93, No 1 at 42.

⁷⁹⁴ Hansson D and Russell D E H “Made to fail: The mythical option of legal abortion for survivors of rape and incest” 1993 *SAJHR* 505.

⁷⁹⁵ *Ibid.*

⁷⁹⁶ McQuoid–Mason D; Dhali A; Moodley J “Rape survivors and the right to emergency medical treatment to prevent HIV infection” January 2003 *South African Medical Journal* Vol 93, No 1 at 42.

background, there is a chronically ill patient, whom the Court judged as failing to meet the definition of “emergency”, and his life is at the breaking point now, not in the future. In terms of the Court’s definition⁷⁹⁷ of “emergency”, such an immediately dying patient is turned away in compliance with the Constitution.

It is also worthy of note that the Court, in entrenching the right to life of convicts, deemed it wise and beneficial, as an aid to interpretation, to consider the historical background giving rise to a provision in the Constitution.⁷⁹⁸ By contrast, the right to life was relied upon in seeking relief for an appellant whose only hope for life depended on the Court.

The historical background as an aid to interpretation was passively considered in this matter-of-life-or-death appeal.⁷⁹⁹ Among various historical factors, which had given rise to the constitutional provision, and which were enumerated by the Court, were the great disparities in wealth, the deplorable conditions in which people were living in extreme poverty, inadequate social security, and the lack of access to health services. The Constitution was adopted with the commitment to address

⁷⁹⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 38.

⁷⁹⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 12.

⁷⁹⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 16 where, having regard to the historical background in *Soobramoney*, the Court held that the rights in issue should not be construed in isolation, “but in (their) context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of (the bill of rights) of which (they are) part”.

these socio-economic reversals. The Court made a sobering acknowledgement that for as long as these socio-economic setbacks persisted, the aspiration of a new constitutional order would have a hollow ring.⁸⁰⁰

Adding weight to the propriety of this interpretational approach is the preamble to the Constitution itself. In view of the injustices of the past, the preamble echoes the determination of the representatives of the nation to improve the quality of life of all citizens, and to free the potential of every citizen. The Court accurately pointed out that this determination is reflected in the provisions of the Bill of Rights, such as sections 26 and 27, which deal with housing and health care respectively. However, this approach to constitutional interpretation inconsistently led to a different conclusion on a right which was so highly protected by the Court.

In view of the non-derogable nature of the right to life, the question arises whether the constitutional right to life extends itself to a terminally ill person who wishes his or her life to be prolonged or preserved. A related question is whether it is a state health care institution, or the person whose life is at stake, who has the right to decide whether he or she should give up on his or her life. It should be borne in mind that in

⁸⁰⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 8.

Soobramoney, it was held that the right to life does not encompass the right to indefinitely evade death.⁸⁰¹

A starting point in answering this question is the consideration of the right of a person to direct that life-supporting systems be disconnected so that he or she should die sooner rather than later, perhaps due to unbearable pain. In English law, it is a trite rule that an adult person who has the necessary mental capacity and who has been fully informed of the consequences of his or her decision, has the right to refuse medical treatment, even though his or her only intention in such refusal is to precipitate death.⁸⁰²

In the United States law, the position is similar. In *Schloendorff*,⁸⁰³ the New York Court of Appeals held that every human being of adult years and sound mind has a right to determine what shall be done with his or her own body. It emerges from these cases that it is not the health care institution that had to determine the fate of a patient whose life was hanging by a thread, but it was the patient. It emerges also that the view to be adopted by a state health care institution is that it has the duty to

⁸⁰¹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 57.

⁸⁰² *In Re T (Adult: Refusal of Treatment)* [1992] 3 WLR 782; See also *Sidaway v Bethlehem Royal Hospital Governors* [1985] 1 AC All ER 643 where Lord Scarman held that a doctor who operates without the consent of a patient is guilty of the civil wrong of trespass to the patient, and that he is also guilty of the criminal crime of assault to the patient. It follows from this judgment that a patient who is sound in mind may: (1) refuse treatment, and (2): treatment may not be forced upon such a patient against his or her will.

⁸⁰³ *Schloendorff v Society of New York Hospital* 211 NY 125, 105 NE 92 (a 1914 case).

sustain life, and that the choice to give up on life can only be exercised by the patient, not by some other person — and definitely not by the state. The state, through its institutions — clinics or hospitals — must assume the position that life is worth saving unless the patient, after being adequately informed of the consequences of withdrawal of life-sustaining treatment, still gives his or her life up.

Further guidance on this constitutional question whether a terminally ill patient is entitled to medical relief from a state health care institution notwithstanding the institution's defence of constrained funds, is to be obtained from the World Medical Associations.⁸⁰⁴ World Medical Associations can be a source of guidance to courts in reaching an appropriate and informed decision when seized with motions where applicants seek medical relief which has been refused by a hospital or any health care facility of the state.

In this regard, the World Medical Association's Declaration of Venice⁸⁰⁵ proves to be of assistance. This Declaration confirms⁸⁰⁶ without mincing words that the duty of a medical practitioner when faced with a terminally ill patient is to heal and, if possible, to relieve suffering. The Declaration

⁸⁰⁴ World Medical Associations are international organisations representing medical practitioners, which were created in order maintain a high standard of ethical behaviour.

⁸⁰⁵ World Medical Association on Terminal Illness was Adopted by the 35th World Medical Assembly, Venice, Italy, and came into effect in October 1983.

⁸⁰⁶ World Medical Association's Declaration of Venice on Terminal Illness, on page 1.

states that a physician may relieve suffering of a terminally ill patient by withholding treatment with the consent of the patient or that of his immediate family member if the patient is unable to express his or her will.⁸⁰⁷ The Declaration further provides that there shall be no exception to this principle even in the case of incurable disease or malformation.⁸⁰⁸ This consent requirement emphasises the fact that a physician is not at liberty to deny the patient necessary relief simply because the patient is going to deny anyway, as was suggested by the Court in *Soobramoney*.⁸⁰⁹ Even when the patient or family member consents to the withholding of treatment, the declaration does not free the physician from his or her obligation to assist the dying person by giving him or her the necessary medication to attenuate the painful terminal phase of his or her illness.

Since the declaration was adopted in 1983, it was already in existence to be consulted by courts, and since the *Soobramoney* matter came before court for consideration in 1998, the Court could have had regard to this source of guidance.

This obligation contained in the World Medical Association's Declaration of Venice should be seen against the failure of the health care institution

⁸⁰⁷ on page 1.

⁸⁰⁸ on page 1.

⁸⁰⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

and the failure of the Court to act in harmony with the spirit of this Declaration.

There is also the World Medical Association Declaration of Lisbon on the Rights of the Patient.⁸¹⁰ This Declaration contains principles by which those in the medical profession should be guided in circumstances such as those we find in *Soobramoney*. Among other principles, it lays down that in circumstances where a choice must be made between potential patients for a particular treatment that is in limited supply (as was the case in *Soobramoney*), all such patients *are entitled* to a fair selection procedure for that treatment. It lays down that this choice must be based on medical criteria and made without discrimination.⁸¹¹

This World Medical Association Declaration also stipulates that the patient has the right to *continuity* of health care, and that the physician has an obligation to cooperate in the co-ordination of medically indicated care with other health care providers treating the patient. The physician may not discontinue treatment of a patient as long as further treatment is

⁸¹⁰ This Declaration was adopted by the 34th World Medical Assembly in Lisbon, Portugal, in September/October 1981. It was amended by the 47th World Medical Association General Assembly in Bali, Indonesia, in September 1995. It was editorially revised at the 171st Council Session in Santiago, Chile in October 2005.

⁸¹¹ Principle 1(e) of the Declaration provides:
 “In circumstances where a choice must be made between potential patients for a particular treatment that is in limited supply, all such patients are entitled to a fair selection procedure for that treatment. That choice must be based on medical criteria and made without discrimination”.

medically indicated, without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care.⁸¹²

The Court in *Soobramoney*⁸¹³ denied him the right to life which he believed he was constitutionally entitled to, denying him that right because the Court's interpretation of "emergency medical treatment" was that of a "dramatic, sudden situation or event which is of a passing nature in terms of time".⁸¹⁴

It is self-evident from this interpretation that it did not matter whether the situation giving rise to an emergency was not one set in motion by the patient himself. In other words, even if the patient was not responsible, or was not at fault for the sudden emergence of an emergency, he could still be refused medical relief simply because his situation was not a "dramatic, sudden situation or event which is of a passing nature in terms of time".

Against this background, it is proper to bring to the fore a principle contained in the World Medical Association Declaration adopted in

⁸¹² Principle 1(f) of the Declaration provides that:

"The patient has the right to continuity of health care. The physician has the obligation to cooperate in the coordination of medically indicated care with other health care providers treating the patient. The physician may not discontinue treatment of a patient as long as further treatment is medically indicated, without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care".

⁸¹³ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁸¹⁴ *Ibid* at par. 38.

Lisbon, already referred to above. The fourth principle contained therein stipulates that “physicians *should always try to save the life of a patient unconscious due to a suicide attempt*”.⁸¹⁵

This principle specifically refers to a suicide attempt. Needless to say, an emergency arising from a suicide attempt is an emergency brought about by the person himself. It is a medical condition over which the patient had control, or could be blamed for. Thus, the patient is, viewed from all angles, to blame for his “catastrophe”, even though there may be depressing situations which he felt he could not live with. Yet, even in such a self-perpetrated condition, the World Medical Association Declaration stipulates that physicians should always endeavour to save the life that is hanging by the thread. This principle establishes the sanctity of life as was entrenched in *Makwanyane*,⁸¹⁶ but inconsistently less honoured in *Soobramoney*.⁸¹⁷

Then the Declaration turns to directly addressing the plight of terminally ill patients. It is informing to see that the plight of terminally ill patients is dealt with under the subheading “The Right to Dignity”. It must be borne in mind that in *Soobramoney* the right to life was construed as not

⁸¹⁵ Principle 4(c) of the Declaration [emphasis added].

⁸¹⁶ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁸¹⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

encompassing “the right indefinitely to evade death”.⁸¹⁸ It was also held that “dying is part of life, its completion rather than its opposite”.⁸¹⁹ It is abundantly clear that a terminally ill patient had to come to grips with his situation and nothing further could be done for him or her. In fact, this stance becomes clear from the Court’s words that “we can, however, influence the manner in which we come to terms with our mortality”.⁸²⁰

With this approach of the Court in mind, the World Medical Association Declaration of Lisbon stipulates that “the patient is entitled to *humane* terminal care and to be provided with all available assistance *in making dying as dignified and comfortable as possible*”.⁸²¹

From the foregoing it emerges that, in view of the non-derogable nature of the right to life as stated by the Constitution itself, the constitutional right to life extends itself to a terminally ill person who wishes his or her life to be prolonged or preserved. It emerges also from the foregoing that it is not a state health care institution, but the patient himself or herself whose life is at stake who can decide whether he or she should give up on his or her life. But a court, or a health care institution, especially a state health care institution, may not tell a patient or even

⁸¹⁸ *Ibid* at par. 57.

⁸¹⁹ *Ibid*.

⁸²⁰ *Ibid*.

⁸²¹ Principle 10(c) of the Declaration [emphasis added].

insinuate that a patient should give up on his or her life, while the patient still wants to hold on to life.

Apparently with the painful realisation of the plight of the terminally ill brought about by the Court's interpretation of the right to life in *Soobramoney*,⁸²² no sooner had the Court construed the right to life in this fashion than the South African Law Reform Commission⁸²³ released its recommendations in the same year in which the Court reneged on its previous construction. The Commission came to the conclusion that it was essential that more attention be given to pain management, medical care, and spiritual care of those who are terminally ill. The Commission emphasised the need for health workers to be oriented to view end-of-life care as important.⁸²⁴

Clearly as a response to the court decision in *Soobramoney*, the Commission further recommended that all people who are terminally ill, notwithstanding their poor financial standing, should have access to palliative care services. Since for many persons in South Africa palliative care would in all likelihood be the only available and affordable treatment, the Commission recommended that access to, and availability of, palliative care in South Africa should be improved. The Commission

⁸²² *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁸²³ Hereinafter referred to as "the Commission."

⁸²⁴ Project 86 of the South African Law Reform Commission on "Euthanasia and Artificial Preservation of Life" – page (x).

endorsed the proposal that the availability of palliative care in South Africa be thoroughly examined with a view to expanding the provision of such care. It also supported the development of policies or regulations by the Minister of Health with regard to increased provision of palliative care.⁸²⁵

The Commission went on to recommend⁸²⁶ that legislation be enacted with a view to entrenching its recommendations made after assiduous research into the subject of terminal illnesses and the plight of the terminally ill. The recommendation dealt with the conduct of a medical practitioner in relieving distress. The Commission recommended⁸²⁷ that should it be clear to a medical practitioner, or a nurse responsible for the treatment of a patient who has been diagnosed as suffering from a terminal illness, that the dosage of medication that the patient is currently receiving is not adequately alleviating the patient's pain or distress, the medical practitioner or nurse should, with the object to provide relief of severe pain or distress, and with no intention to kill, increase the dosage of medication to be given to the patient until relief is obtained. This dosage of medication could be in the form of analgesics or sedatives. It was recommended that the dosage should be increased,

⁸²⁵ South African Law Reform Commission, Report 86 on "Euthanasia and Artificial Preservation of Life" – page 4.

⁸²⁶ South African Law Reform Commission, Report 86 on "Euthanasia and Artificial on Preservation of Life" – page (x).

⁸²⁷ South African Law Reform Commission, Report 86 on "Euthanasia and Artificial Preservation of Life"— page (xvi).

even if the secondary effect would be to shorten the life of the patient, since the objective would be to attenuate the pain suffered by the patient, and to create a condition in which the patient would die as comfortable as possible.

What emerged in this recommendation of the South African Law Reform Commission reflects the worldwide trend of respecting the sanctity of life of a patient, even if the patient considers it necessary to end the life which he or she regards as his or her own and nobody else's. In Oregon, United States, for example, legislation was proposed with the intention to make it legal for a patient to enlist the help of a physician to end his or her life. This legislation emerged in the form of the Die With Dignity Act.⁸²⁸

This Act permits a terminally ill patient to obtain a doctor's prescription for a fatal drug's dose for the sole purpose of terminating his or her life. In terms of the provisions of the Act, however, a doctor himself may not carry out the ending of life, but the patient must administer the drug himself or herself.⁸²⁹ It was a prerequisite that a patient not be allowed to receive a prescription for medication to end his or her life in a humane and dignified manner, unless he or she had made an informed decision.

⁸²⁸ Oregon Die With Dignity Act, (Act of 1994) <http://public.health.oregon.gov/Pages/Home.aspx> (accessed: 2011/08/08).

⁸²⁹ Section 2 of the Act.

Immediately before writing a prescription for medication, the attending physician had to verify that the patient is making an informed decision.⁸³⁰

The patient was afforded the right to rescind his or her request at anytime and in any manner before obtaining and administering the medication. The attending physician was also obliged to afford the patient an opportunity to rescind his or her request.⁸³¹

6.1.1 In Australian law

It comes as no surprise that Australia's Northern Territory Legislative Assembly attempted to have a piece of legislation similar to the Oregon Die With Dignity Act, in the form of the Rights of the Terminally Ill Act. The Act legalised active euthanasia at the instance of the terminally ill. However, a medical practitioner was not supposed to assist a patient in terms of the Act if in the medical practitioner's opinion there were palliative care options reasonably available to the patient to alleviate the patient's pain and suffering. The important point to mention, however, is that the Act did not survive long, as the Australian Federal Parliament challenged it as failing to pass the constitutional muster,⁸³² and enacting the Euthanasia Laws Act⁸³³ instead. The latter did not formally repeal the Rights of the Terminally Ill Act, which had been passed by Australia's

⁸³⁰ Section 7 of the Act.

⁸³¹ Section 10 of the Act.

⁸³² In 1997 the Australian Federal Parliament challenged the Act.

⁸³³ Euthanasia Laws Act of 1997.

Northern Territory Legislative Assembly. The result is that the Rights of the Terminally Ill Act remains technically in force in the Northern Territory, but to the extent that it permits euthanasia, it is constitutionally invalid and of no legal effect.

6.1.2 In Canadian law

In the same spirit, a Canadian court was seized with a similar matter in which a woman sought a declaratory order to the effect that she could be assisted to end her life in the event of her situation becoming unendurable.⁸³⁴ The woman had a disorder of the nerves, which had the potential of rendering her speechless and motionless. The Canadian Supreme Court refused the application. The basis of the refusal was that life was so sacred that even the person who could ordinarily be viewed as the owner of the life concerned did not have the right to terminate it as and when he wanted to do so, but had to let it end on its own. The view held by the Court is clear from the following extract from its judgment:

Assisted suicide, outlawed under the common law, has been prohibited by Parliament since the adoption of Canada's first *Criminal Code*. The long-standing blanket prohibition in s. 241 (b), which fulfils the government's objective of protecting the vulnerable, *is grounded in the state's interest in protecting life* and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. This state policy is part of our fundamental conception of the sanctity of life. A blanket prohibition on assisted suicide

⁸³⁴ *Re Rodriguez and Attorney-General of British Columbia* 1993 3 S. C. R. 519.

similar to that in s. 241 (b) also seems to be the norm among Western democracies, and *such a prohibition has never been adjudged to be unconstitutional or contrary to fundamental human rights*.⁸³⁵

Substantiating its view, the Court further pointed out that no consensus can be found in favour of the decriminalisation of assisted suicide. On the contrary, the consensus that can be found is that human life must be respected, and that this consensus finds legal expression in the Canadian legal system, which prohibits capital punishment. The prohibition against assisted suicide serves a similar purpose.

This case underscored the high regard with which life is to be viewed, as was held in *Makwanyane*,⁸³⁶ but inconsistently held in *Soobramoney*.⁸³⁷ It is also to be noted that the Canadian courts have, on their part, been consistent in their interpretation of the right to life. The view which they held in dealing with capital punishment was not warped when dealing with assisted suicide, or when dealing with circumstances where the life of the terminally ill had to be preserved. It is this kind of consistency that is desirable in constitutional interpretation.

This consistency manifests itself also in Indian law as will be seen under the next subheading.

⁸³⁵ *Ibid* at par.14 [emphasis added].

⁸³⁶ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁸³⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

6.1.3 In Indian law

The South African Constitutional Court, in dealing with *Soobramoney*,⁸³⁸ made reference to the Indian case, *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another*⁸³⁹. The fact of the matter is that India was exemplary in following the route which the South African court did not want to follow. The Court excused its failure to follow the pattern established by the Indian court by stating that, although the Indian jurisprudence contains valuable insights, our Constitution is structured differently from the Indian Constitution.⁸⁴⁰ The difference in the text of the two Constitutions is that section 11 of the South African Constitution provides that “everyone has the right to life”, whereas section 21 of the Indian Constitution provides that “no person shall be deprived of his life or personal property except according to procedure established by law”. According to the Constitutional Court of South Africa in *Makwanyane*,⁸⁴¹ this difference in the wording of the two respective Constitutions means that the question we have to consider is not whether the imposition of the death sentence is totally devoid of reason and purpose. It is whether in the context of the South African

⁸³⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁸³⁹ *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another* (1996) AIR SC 2426.

⁸⁴⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par.15.

⁸⁴¹ *S v Makwanyane and Another* 1995 (3) 391 (CC) at par. 77.

Constitution the death penalty is cruel, inhuman or degrading, and if it is, whether it can be justified in terms of section 36 of the Constitution.

It is submitted that this view of the Court is untenable. Firstly, it is actually the South African Constitution that protects the right to life in the case of an emergency by providing that no one may be refused emergency medical treatment. On the other hand, the Indian Constitution is totally silent on the right to be admitted to emergency treatment. As a matter of fact, the Indian Constitution does not even allude to health matters. The only pertinent right in this connection is the right to life, which is not even protected absolutely by the Indian Constitution. The Indian Constitution qualifies the right to life, by stating that “no person shall be deprived of his life or personal liberty except according to procedure established by law”.⁸⁴² This provision is placed under the subheading “Protection of life and personal liberty”.

The paradox is that although the Indian Constitution contains no provision dealing with health or emergency treatment, as the South African Constitution does, it is actually the Supreme Court of India that has come out as the defender of the right to have one’s life saved from an emergency regardless of the cost to the state. It is also remarkable that this is the position in India notwithstanding the fact that the

⁸⁴² Section 21 of the Constitution of India.

Constitution does not make the right to life absolute, as life may be forfeited if it is “according to procedure established by law”.⁸⁴³

Thus, the South African Constitutional Court’s stance⁸⁴⁴ that it could not follow the pattern established by Indian jurisprudence, because the Constitution of India is structured differently from the South African Constitution, leaves something to be desired.

Although the Constitution of India does not make the right to life an unqualified one, as the Constitution of South Africa does, that jurisdiction sacrifices only the life of offenders. As regards the life of law-abiding citizens, who are on the verge of losing their precious lives, such life is too dear in the eyes of the courts of that land.

Hakim Seikh⁸⁴⁵ fell off a train in West Bengal, India. As a result, he sustained serious head injuries and brain haemorrhage. The germane aspect of the case is that he was taken from one state health institution to another — a total of ten in all. The reasons given for these transfers were that necessary facilities for treatment were not available.

The constitutional question which needed to be considered was whether the scarcity, or non-availability, of facilities for the treatment of the

⁸⁴³ Section 21 of the Constitution of India.

⁸⁴⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par. 77.

⁸⁴⁵ Second Applicant in *Paschim Banga Khet Samity v State of West Bengal* 1996 AIR SC 2426.

serious injuries sustained by Hakim Seikh in various state health institutions had resulted in the denial of his fundamental right as allegedly found under article 21 of the Constitution of India.⁸⁴⁶

In unravelling this question, the Supreme Court of India approached the question from the angle that the Indian Constitution envisaged the establishment of a welfare state at the federal level, as well as at the state level,⁸⁴⁷ and that in a welfare state the crucial duty of the government is to secure the welfare of the people. As opposed to the judgment of the South African Constitutional Court⁸⁴⁸ that the right to life does not extend to preserving life indefinitely, the Supreme Court of India constructed the right to life as obliging the state to safeguard and preserve the life of every person. Preservation of human life was thus ruled to be of unparalleled importance. The Supreme Court found that government hospitals run by the state and medical officers employed therein are duty-bound to extend medical assistance for preserving human life, and that failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed by article 21.

⁸⁴⁶ As pointed out earlier, article 21 of the Indian Constitution does not contain any reference to the right to emergency medical treatment. It merely refers to the right to life in broad terms in the context of capital punishment, guaranteeing that no life shall be taken away except in the manner established by law.

⁸⁴⁷ By way of comparison, one finds that the situation is similar in South Africa. Sections 27 and 28 of the Constitution are examples of this.

⁸⁴⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 57.

Not only was there a violation under that article, but the Court went further and found that in respect of the deprivation of constitutional rights entrenched under Part III of the Constitution, the position is well settled that adequate compensation can be awarded by the court as a way of redress. Indeed, the applicant in this case, Hakim Seikh, was awarded with an order that he be suitably compensated for the breach of his right to the preservation of his life.

It is also interesting to note that the Indian Court did not rationalise that the patient had brought about his own predicament, and that therefore the element of emergency was quashed by his own negligence. Since the patient had fallen off a moving train, this could only occur if the doors were kept open while the train was in motion and the patient was riding on the edge of the doorway, or was riding between coaches.

Notwithstanding this possible negligence on the part of the patient, the generous approach adopted by the Court in its interpretation led the Court to be the protector of life. By way of contrast, the patient in *Soobramoney*⁸⁴⁹ also found his life hanging by the thread — a situation which was not of his own making. But the interpretation by the South African Constitutional Court of the right to emergency medical treatment denied him relief. The Court refused to be persuaded that his condition

⁸⁴⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

was a proper case for invoking the right to life, notwithstanding the fact that denial of access to emergency medical treatment would cost him his life, which it did in a matter of days thereafter.

The exemplary adjudication of claims to constitutional rights in the Indian jurisprudence is also pointed out by Liebenberg,⁸⁵⁰ who makes reference to directive principles of state policy in the Constitution of India.

Regarding these directive principles, the writer draws attention to article 37 of the Constitution of India⁸⁵¹ which provides that the principles contained in Part IV of the Constitution of India are not enforceable by courts, but are nevertheless fundamental in the governance of the country, and that it is the duty of the state to apply these principles in making laws. Liebenberg points⁸⁵² to the exemplary course followed by the Supreme Court of India in that notwithstanding the fact that the directive principles are unenforceable by courts, the Supreme Court of India has drawn on them to enlarge the scope of rights such as the right to life, and to infuse the principles with substantive content. On this basis, points out the learned writer,⁸⁵³ that the right to life in India has been held to include the right to basic necessities of life such as adequate

⁸⁵⁰ Liebenberg S *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) at 122.

⁸⁵¹ <http://hcmimphal.nic.in/Documents/constitutionofindiaacts.pdf> (accessed: 2012/03/23).

⁸⁵² *Ibid.*

⁸⁵³ *Ibid.*

nutrition, clothing, reading facilities,⁸⁵⁴ the right to livelihood,⁸⁵⁵ the right to shelter,⁸⁵⁶ and the right to education.⁸⁵⁷

The South African Court also based its denial of relief to the appellant on the interpretation that section 27(3) of the Constitution is couched in negative terms — it is a right not to be refused emergency treatment.⁸⁵⁸ It is submitted that it eluded the Court that a right in *negative* terms imposes *positive* duty, and because it imposes *positive* duty, it becomes a right in positive terms. For example, if a constitution obliges the state *not to refuse* emergency medical treatment, the state is *prohibited* from refusing, and it has no option but to provide emergency medical treatment. Thus, the prohibition not to refuse becomes an injunction to perform.

The right to have access to emergency medical treatment, which is expressly provided for in the South African Constitution,⁸⁵⁹ but only by way of a remote interpretation in India, was enforced by the Court that measures were taken by the Court to prevent a recurrence of incidents of refusal of treatment due to bureaucratic requirements. These measures

⁸⁵⁴ *Francis Coralie Mullin v The Administrator* (1981) 1 SCC 608.

⁸⁵⁵ *Olga Tellis and others v Bombay Municipal Corp* (1985) 3 SCC 545.

⁸⁵⁶ *Shanti Star Builders v Narayan K Totame* (1990) 1 SCC 520; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 123.

⁸⁵⁷ *Jain v State of Karnataka* (1992) 3 SCC 666; *Krishnan v State of Andhra Pradesh & others* (1993) 4 LRC 234.

⁸⁵⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 20.

⁸⁵⁹ Section 27(3).

were recommended by a committee that was appointed to investigate whether the state health institutions had failed in their constitutional obligation. The findings of the committee resulted in recommendations by the committee, and in turn the recommendations were made an order of court. The justiciability of the committee recommendations is something that the South African Constitutional Court had to learn, as it believed that courts ought to be slow in enforcing socio-economic rights, due to its belief that they fell within the province of political organs and medical authorities.⁸⁶⁰ By contrast, in the case of *Paschim Banga*,⁸⁶¹ the Supreme Court of India ordered that in hospitals the emergency medical officer, in consultation with the senior specialist on duty, should admit a patient whose condition is life-threatening. The Court further ordered that if necessary, the patient may be kept on the floor, or on the trolley beds.⁸⁶² This part of the order is reasonable, since what a patient needs in an emergency is not comfort, but the preservation of life. The order of the court also becomes significant when one considers that a patient did not have to be in an emergency condition in the strict sense of the word, as was the view adopted by the South African court, but only had to be a patient and in need of treatment.

⁸⁶⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 29.

⁸⁶¹ *Paschim Banga Khet Samity v State of West Bengal* 1996 AIR SC 2426.

⁸⁶² *Paschim Banga Khet Samity v State of West Bengal* 1996 AIR SC 2426 at par. 10(ii).

This question of justiciability or judicial activism with regard to socio-economic rights, life included, is a point to be returned to shortly, since there is lack of consistency in the interpretation of constitutional provisions in this area.⁸⁶³

The preservation of life has been regarded as a constitutional requirement in other jurisdictions as well. For example, in *Cruz Bermudez*,⁸⁶⁴ the right to health care was intertwined with the right to life, as HIV-positive citizens sought relief from the government's failure to come to their rescue. A few aspects of the Court's judgment are quite pertinent to the judgment of the South African Court in *Soobramoney*.⁸⁶⁵ In the latter, the Court leaned towards judicial avoidance,⁸⁶⁶ feeling that it should be "slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters".⁸⁶⁷ In the former, the Court leaned towards judicial activism, forthrightly making an order ordering the state to provide medicines to the patients; not only that, but also to cover the

⁸⁶³ Lenta P "Judicial restraint and overreach" 2004 *SAJHR* 544;

See also Haysom N and Plasket C L "Judicial Activism and the Appellate Division 1988 *SAJHR* 303;

See also Ziff B "The irreversibility of commodification" 2005 *Stell LR* 544.

⁸⁶⁴ *Cruz Bermudez and Others v Ministerio de Sanida y Asistencia Social* Supreme Court of Justice of Venezuela, Case No 15.789, Decision No 916 15 July 1999.

⁸⁶⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁸⁶⁶ Van Marle K "In support of a revival of utopian thinking, the imaginary domain and ethical interpretation" 2002 *TSAR* 501.

See also O'Regan C "From form to substance: The Constitutional jurisprudence of Laurie Ackermann" 2008 *Acta Juridica* 1.

⁸⁶⁷ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 29.

costs of undergoing tests. The Court also ventured into a territory which is generally believed, and was believed by the South African Court, to be out of bounds for the Court, namely, the policy-making of the government, and the question of budget. In this regard, the Supreme Court of Justice of Venezuela ordered the Ministry of Health to develop policies and programmes for the treatment of those infected, and ordered the Ministry to go out of its way to make funds available so that there should be no excuse for failing to implement the Court's order.⁸⁶⁸

The law of delict with its aspect of the duty of care ⁸⁶⁹ also provides insight into this issue. In terms of the law of delict, a cause of action may arise from an omission where the defendant is in a protective relationship towards the plaintiff and the defendant has failed to live up to the legal convictions of society as far as the discharging of the duty of care is concerned. There must, however, be an undeniable legal duty resting on the shoulders of the one party to protect the other party. This was underscored in *Minister van Polisie v Ewels*,⁸⁷⁰ where the state as represented by the police was regarded as being in a protective relationship towards the plaintiff, and had failed to live up to the legal

⁸⁶⁸ Kiromba T B "Exploring judicial strategies to protect the right of access to emergency obstetric care in Uganda" 2007 *AHRLJ* 303.

⁸⁶⁹ Neethling J *et al Law of Delict* (2006) (4th ed) 148 - 150.

⁸⁷⁰ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

convictions of society by protecting the plaintiff from assault at the hands of a police officer who represented the state.⁸⁷¹

By the same token, the state as represented by its Department of Health was in a protective relationship towards the patient in *Soobramoney*.⁸⁷²

There was a duty of care which, in terms of the legal convictions of society, it had to discharge — preserving life. This duty to preserve life was emphasised in *R v Chenjere*⁸⁷³ by Briggs FJ:

To cause death by inaction may be criminal if there is a positive duty to preserve life of the person in question. The duty arises where the potential victim is helpless through . . . illness and the potential killer stands, either naturally or through a deliberate acceptance of responsibility, in a protective relationship to the victim.⁸⁷⁴

As argued, the state stands in such a protective relationship towards a patient through its Department of Health, and hospitals.

The right to be alive has been viewed by courts⁸⁷⁵ as being so deeply rooted that not only factors that are a direct menace to it are to be removed, but even factors that are an indirect menace. The denial of

⁸⁷¹ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597.

⁸⁷² *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁸⁷³ *R v Chenjere* 1960 (1) SA 473 (FC).

⁸⁷⁴ at 482.

⁸⁷⁵ *Attorney-General v Salvatori Abuki* Supreme Court Constitutional Appeal No. 1 of 1998; *State of Himachal Pradesh v Umed Ram Sharma* 1986 AIR SCR 847; *Olga Tellis v Bombay Municipal Corporation* 1986 AIR SCR 180; *People's Union for Civil Liberties v Union of India and Others* (Civil) No. 196 of 2001.

emergency medical treatment would fall under such factors that are a direct menace to life.

However, in Uganda, courts have construed even such things as banishment from one's home as a threat to life, and consequently such banishment as being unconstitutional. In *Attorney-General v Salvatori*,⁸⁷⁶ the respondents who were convicted of practicing witchcraft were, in addition to their court sentence, banished from their homes by the Court for ten years after serving a sentence of two years imprisonment. The appeal court held in their favour that the legislation providing for such a sentence was unconstitutional, since it deprived the respondents of the means of sustenance, which constituted a threat to their life in contravention of articles 22⁸⁷⁷ and 44(a)⁸⁷⁸ of the Constitution⁸⁷⁹ respectively. By depriving the respondents of access to their property, the Court found that there was also a contravention of article 26 of the Constitution.

⁸⁷⁶ *Attorney-General v Salvatori Abuki* Supreme Court Constitutional Appeal No. 1 of 1998

⁸⁷⁷ Article 22 of the Constitution of the Republic of Uganda simply provides that no one shall be deprived of one's life intentionally except in the case of a court sentence after conviction for a criminal offence.

⁸⁷⁸ Article 44(a) merely protects the citizens of Uganda from torture, cruel, inhuman or degrading treatment or punishment.

⁸⁷⁹ Constitution of the Republic of Uganda, 1995, which came into effect in 1995

<http://www.ugandaonlinelawlibrary.com/6F24D36C-AEB8-4001-AF4F-B18D9EE4DC5B/FinalDownload> (accessed: 20//08/10).

The courts' reasoning in these foreign cases provide insight into another perspective in which the right to life must be interpreted. It is that not only should life itself be protected, but also elements which help to buoy it up. Indeed, the matter boils down even to the quality of life citizens are subjected to. This becomes clear in the Indian case of *State of Himachal Pradesh v Umed Ram Sharma*,⁸⁸⁰ where the Supreme Court of India construed the right to life as being dependent upon certain socio-economic rights. Aggrieved citizens referred their complaint to the Chief Justice, complaining about the poor condition of their road in their area. The citizens felt that this did not only affect their livelihood, but also their development as citizens. The Court expanded on its construction of the right to life and came to the conclusion that the right to life as provided for in article 21 of the Indian Constitution embraced not only the right to a physical existence, but also included the question of quality of life. For these Indian citizens who lived high up in the hills, having proper roads was not less critical than having life itself.⁸⁸¹ Similarly, in *Olga Tellis v Bombay Municipal Corporation*,⁸⁸² the Supreme Court of India made it a trite position that the importance of life demands that factors supporting

⁸⁸⁰ *State of Himachal Pradesh v Umed Ram Sharma* 1986 AIR SCR 847.

⁸⁸¹ Davis D *et al* *Fundamental Rights in the Constitution — Commentary and Cases* (1997) at 69.

⁸⁸² *Olga Tellis v Bombay Municipal Corporation* 1986 AIR SCR 180. Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 128 refer to this case in the context of the procedure prescribed by law for the deprivation of the right to life conferred by article 21 of the Indian Constitution.

its continuation be viewed in the appropriate light. How these factors should be viewed is indicated in the words of the Court's judgment:

The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. *That is but one aspect of the right to life.* An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. *If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.*⁸⁸³

The point that is driven home is that if even such trifling situations as lack of proper roads infringe the quality of life, how much more so the denial of medical treatment which has a more direct consequence on life itself. It is submitted that the generous approach adopted by the Indian Supreme Court in its construction of the right to life is the correct approach. This approach becomes even more commendable when one considers that the text of the Indian Constitution itself is very mean, and indeed silent, on the right to have access to health care, or to emergency medical treatment.⁸⁸⁴ Interestingly, the South African Constitutional

⁸⁸³ *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 at par. 2.1 [emphasis added].

⁸⁸⁴ The closest the Indian Constitution comes to mentioning anything about health, but not "access to health care" and "emergency medical treatment" is its Article 47 which provides: "Duty of the State to raise the level of nutrition and the standard of living and to improve public health.—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about the prohibition of the consumption except

Court which denied the right to life to a terminally ill patient, reiterated with approval the point of the Indian case, *Himachal Pradesh*,⁸⁸⁵ but failed to recognise its import in its own case and in its own jurisdiction.⁸⁸⁶

The approach that not only life itself, but also socio-economic pillars supporting it should be sustained if justice is to be done to the constitutional right to life, manifests itself not only in different jurisdictions, but also in international instruments. Since article 6 of the International Covenant on Civil and Political Rights enshrines the right to life, the Human Rights Committee recommended that in ensuring that the right to life is given the protection it deserves, each member state is under the obligation to go beyond the negative duty of preventing the taking of life. Each member state must take decisive steps which encapsulate civil and political rights, which are sometimes referred to as the 'first generation rights'.⁸⁸⁷ Also, each member state must take decisive steps which encapsulate socio-economic rights, which are

for medicinal purposes of intoxicating drinks and of drugs which are injurious to health".

⁸⁸⁵ *State of Himachal Pradesh v Umed Ram Sharma* 1986 AIR SCR 847.

⁸⁸⁶ In *S v Makwanyane and Another* 1995 3 SA 391 (CC) at paragraph 326 O'Regan J said: "the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as a mere organic matter that the Constitution cherishes but the right to human life: the right to live as a human being, to be part of the broader community, to share in the experience of humanity." See also Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 10.

⁸⁸⁷ See Currie I and de Waal J *The Bill of Rights Handbook* (2005) 5th ed at 567. Examples of 'first generation rights' are the right to equality, personal liberty, property, free speech, assembly and association. These are thought of as negative rights because they take power away from government by imposing a duty not to act in a particular way. On the other hand, examples of 'second generation rights' are medical treatment, housing, and education. They are thought of as positive rights, since they impose a duty on government to act in a positive way.

sometimes referred to as the 'second generation rights'. The Human Rights Committee holds that, in practical terms, this should include efforts aimed at extending life expectancy, combating malnutrition, and pestilences.⁸⁸⁸

Leaning towards judicial avoidance, the Court in *Soobramoney*⁸⁸⁹ held that "a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters".⁸⁹⁰ This raises the question of justiciability of the right to life and the right to social and economic rights on which the continuation of life pivots.

A view has been expressed that social and economic rights end up not justiciable, because they fall within the realm of social policy, which realm is best controlled by politicians.⁸⁹¹ It is submitted that this should not be the position. If a right is entrenched in a constitution, it becomes justiciable. A constitution is supreme law, and therefore if any right or provision has been made part of the law, it becomes enforceable by courts. Socio-economic rights, notwithstanding the fact that they were created by politicians, once inscribed in a constitution, become justiciable

⁸⁸⁸ Sisk J "The international human rights norms in South Africa: The jurisprudence of the Human Rights Committee" 2005 *South African Mercantile Law Journal* 452.

⁸⁸⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁸⁹⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 29.

⁸⁹¹ Stanley I "Beyond justiciability: realizing the promise of socio-economic rights in Nigeria" 2007 225 *AHRLJ* 231.

by any party who is aggrieved by the denial of these rights. This position is confirmed by Liebenberg.⁸⁹² The learned writer explains that the mere fact that a right has social policy implications does not preclude judicial intervention to protect the right. Without elaborating on reasons for this view, Liebenberg states that judgments concerning the constitutionality of the death penalty and abortion clearly have social policy implications, and that the right to equality has implications for a wide range of social programmes.⁸⁹³ Liebenberg adds that the enforcement of some rights by courts will inevitably have budgetary implications for the state. However, such enforcement by courts does not amount to a breach of the doctrine of separations of powers. In strengthening this view, the learned writer refers to the *Certification Judgment*,⁸⁹⁴ where the Constitutional Court held that the inclusion of socio-economic rights in the Bill of Rights does not burden the Court with a task so extraordinary that it results in a breach of the separation of powers.⁸⁹⁵

The only disturbing factor is that courts are lamentably inconsistent in discharging the duty of enforcing socio-economic rights. It is particularly notable that courts are “slow”, or reluctant, to enforce rights where such

⁸⁹² Liebenberg S “Socio-economic Rights” in Chaskalson M *et al* *Constitutional Law of South Africa* Vol 1 (1999) at 41–7.

⁸⁹³ Liebenberg S “Socio-economic Rights” in Chaskalson M *et al* *Constitutional Law of South Africa* Vol 1 (1999) at 41–7, footnote 2.

⁸⁹⁴ *Ex parte Chairperson of the Constitutional Assembly. In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) (CC); 1996 (10) BCLR 1253 at par. 77.

⁸⁹⁵ *Ibid.*

enforcement would have budgetary implications for the state. The question is whether judicial activism in defence of the rights of citizens can go so far as to make a court order which has financial implications for the state. Indeed, India has pioneered the way in this regard. Reference has already been made to the case of *State of Himachal Pradesh v Umed Ram Sharma*,⁸⁹⁶ but later in 2001, the Supreme Court of India elaborated on the rights of citizens as embedded in the Constitution of India. In the case of *People's Union for Civil Liberties v Union of India and Others*⁸⁹⁷ citizens had died from starvation in the state of Rajasthan. The state had offered the excuse that grain supplies were being stored for famine times. The People's Union for Civil Liberties brought an application for the release of food supplies to the indigent. It is significant that they could not point to the right to food in the Constitution, but by way of extension, they derived this right from the right to life. The state had displayed a recalcitrant frame of mind towards previous court orders, only manifesting a meagre implementation of the court orders. Finally, the Supreme Court of India handed down a powerful judgment in view of the lives which were facing extermination due to famine. Of paramount relevance in the order of the Court is its refusal to entertain the state's submission of scanty resources. The Court ordered that *grain allocation be doubled and financial support*⁸⁹⁸ for

⁸⁹⁶ *State of Himachal Pradesh v Umed Ram Sharma* 1986 AIR SCR 847.

⁸⁹⁷ *People's Union for Civil Liberties v Union of India and Others* (1997) 3 S. C. C. 43.

⁸⁹⁸ emphasis added.

schemes be increased;⁸⁹⁹ the Court also ordered that ration shops remain open so as to provide grain to families who could hardly make ends meet, and further that such grain be provided at a set price. In addition, the Court ordered that all needy citizens such as widows, the elderly, and the disabled be granted a ration card for free grain; and that government departments gradually implement the mid-day meal scheme in schools. This case is a shining example of the justiciability of rights even where this would have budgetary implications for the state — as long as life is involved.⁹⁰⁰ The rights involved here were not the right to life directly, but were socio-economic rights, whose failure to honour would have a consequential denial of the right to life. If rights to things, which only sustain life, are so precious in the eyes of courts entrusted with constitutional interpretation, how much more so if life itself is directly at stake, especially in the case of an emergency.

6.2 Inconsistency in South African law

The South African Constitutional Court itself has on more than one occasion made orders that were either intended to alter policy, or to enforce it with cost implications.⁹⁰¹ These orders were made despite

⁸⁹⁹ Something the Court in *Soobramoney* thought was impractical.

⁹⁰⁰ Ibe S “Beyond justiciability: realizing the promise of socio-economic rights in Nigeria” 2007 *AHRLJ* 234.

⁹⁰¹ *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); *August and Another v Electoral Commission*

urgings that courts should observe the separation of powers of the executive, the legislature, and the judiciary. These urgings were to the effect that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy.

To these urgings the South African Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others*,⁹⁰² has responded that albeit there are no clear lines of demarcation which separate the roles of the legislature, the executive, and the judiciary, there are certain matters which are clearly within the jurisdiction of one arm of government, but not within the others. However, the Court held that although all arms of government should be sensitive to, and respect this separation, this does not mean that courts cannot, or should not, make orders that have an impact on policy.⁹⁰³

Indeed, there have been instances where the Court made orders along these lines. For example, in the case of *Mpumalanga Premier v Executive Committee*,⁹⁰⁴ the Court overruled a provincial government's policy

and Others 1999 (3) SA 1 (CC); *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

⁹⁰² *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).

⁹⁰³ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at par. 98.

⁹⁰⁴ *Premier, Mpumalanga and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC).

decision which terminated subsidies to certain schools, and ordered that subsidies continue beyond the time stipulated by the provincial government. No doubt, this order would not leave the provincial government's coffers unaffected.

Also, in *August and Another v Electoral Commission*,⁹⁰⁵ in order to afford prisoners the right to vote, the Court ordered the Electoral Commission to alter its election policy, planning, and regulations, with manifest cost implications.

Further, in *Dawood v Minister of Home Affairs*,⁹⁰⁶ the Court issued a *mandamus*⁹⁰⁷ directing the Director-General of Home Affairs and immigration officials to exercise the discretion conferred upon them in a manner that took account of the constitutional rights involved.

The fact of the matter is that the Constitutional Court itself, in spite of its inconsistent judicial avoidance, has more than once ruled in favour of the justiciability of socio-economic rights. As submitted earlier, socio-economic rights cannot be justiciable, but the position be different in

⁹⁰⁵ *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC).

⁹⁰⁶ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

⁹⁰⁷ A *mandamus* is an order of court which orders a person to do something, usually in circumstances where a person has failed to act. It is the opposite of an interdict, which prevents a person from doing something.

respect of the right to life, as socio-economic rights are, by their nature, only supporting life.

It was early in the so-called certification judgment⁹⁰⁸ of the Constitutional Court that the question of whether socio-economic rights are justiciable was settled once and for all time. There the Court entrusted with the responsibility of being the final arbiter in constitutional matters came to this conclusion:

These rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] *will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.* At the very minimum, socio-economic rights can be negatively protected from improper Invasion.⁹⁰⁹

In case this judgment of the Court in the certification of the text of the Constitution is second-guessed, the Court reaffirmed its position in *Grootboom*,⁹¹⁰ when it held that “while the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are

⁹⁰⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) (CC); 1996 (10) BCLR 1253.

⁹⁰⁹ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) (CC) at 78 [emphasis added].

⁹¹⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the *Certification* judgment.”⁹¹¹

As if this position was not trite sufficiently, the position of socio-economic rights being enforceable in a court with the jurisdiction to interpret and enforce the Constitution was reiterated in yet a later matter serving before the Constitutional Court, namely, the *Treatment Action Campaign*.⁹¹² There, the Court hit the final nail, so to speak, when it bound itself with the words: “The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are.”⁹¹³

That being the position, the issue to be determined now is whether the Court passed the test of maintaining consistency in its view of the indisputable justiciability of socio-economic rights. Closely intertwined with this issue, is the issue whether the Court maintained consistency in holding that socio-economic rights are constitutionally enforceable regardless of the availability of state resources.

⁹¹¹ *Ex parte Chairperson of the Constitutional Assembly. In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) (CC) at par. 20.

⁹¹² *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).

⁹¹³ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 at par. 25.

It will be recalled⁹¹⁴ that, when faced with the decision to come to the rescue of a terminally ill applicant, the Court declined to grant the relief sorely needed by the applicant, on the ground that the Court should be slow to interfere in policy decisions taken in good faith by political and medical authorities, notwithstanding the pattern set by other jurisdictions, even though these jurisdictions were not expressly bound by the text of their constitutions to enforce the rights in question. These jurisdictions enforced the rights in question simply on the basis of their generous and purposive construction.

First, it stands as a departure from its own precedent that the Constitutional Court was reluctant in *Soobramoney*⁹¹⁵ in upholding rights where the upholding of those rights would have budgetary or cost implications for the state, whereas in its founding judgment,⁹¹⁶ the Court acknowledged that the enforcing of many of the rights in the Constitution would give rise to budgetary implications, and yet these budgetary implications would not compromise the enforceability of the rights. It was the Court's own informed view that "the fact that socio-economic rights will almost inevitably give rise to such implications does not seem

⁹¹⁴ In *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁹¹⁵ *Ibid.*

⁹¹⁶ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) (CC); 1996 (10) BCLR 1253.

to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion”.⁹¹⁷

The Court reiterated its position in the certification judgment when dealing with socio-economic rights in *Government of the Republic of South Africa and Others v Grootboom and Others*,⁹¹⁸ emphasising that socio-economic rights have been interwoven in a convincing manner in the Bill of Rights, and that they cannot be said to exist on paper. That being the position, these rights had to be respected, protected, and promoted. Courts are looked up to, to ensure that expectations of the citizens concerning these rights are fulfilled, as required by section 7(2) of the Constitution.

Socio-economic rights are included in the International Covenant on Economic, Social and Cultural Rights.⁹¹⁹ As a reliable measure to ensure that state parties discharge their obligations as stipulated in the Covenant, the United Nations Committee on Economic, Social and Cultural Rights⁹²⁰ devised what it termed the minimum core.

⁹¹⁷ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) (CC); 1996 (10) BCLR 1253 at par. 78.

⁹¹⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁹¹⁹ International Covenant on Economic, Social and Cultural Rights, which was adopted in 1966, and came into effect in 1976, hereinafter referred to as “the Covenant”.

<http://www2.ohchr.org/english/law/cescr.htm> (accessed: 2011/08/09).

⁹²⁰ United Nations Committee on Economic, Social and Cultural Rights, hereinafter referred to as “the Committee”.

The minimum core was described in *Grootboom* as the minimum expected of a state in order to comply with its obligation under the Covenant. It was said to be the floor beneath which the conduct of a state must not drop, if there is to be a compliance with the obligation.⁹²¹ According to the Court in *Grootboom*, each right has a minimum essential level that must be satisfied by the state parties.⁹²²

In view of the foregoing, it is submitted that if rights which support life, that is, socio-economic rights, have a floor beneath which they must not drop, logic dictates that this should be even more so with life, the right which socio-economic rights are supporting.

In *Soobramoney*,⁹²³ the Court acknowledged that the state's resources were limited, and therefore the hospital could not be ordered to do even what could be called "simple humanity"⁹²⁴ to just one individual who wished to have his life end in a dignified manner. In *Grootboom*, the Court specifically expressed its consciousness of the fact that it was an extremely difficult task for the state to meet its constitutional obligations

⁹²¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 466 (CC) at par. 31.

⁹²² *Ibid* at par. 31.

⁹²³ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁹²⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 466 (CC) at par. 80.

amid the conditions that prevailed in the country.⁹²⁵ In fact, the difficulty the state had to contend with was acknowledged by the Constitution itself by expressly providing that the state is not obliged to go beyond available resources, nor to realise the rights in the Constitution immediately, but could do so progressively and within available resources. Notwithstanding the consideration shown by the constitutional text toward the state, the Court took the view that “despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.”⁹²⁶

If one compares the far-reaching effect the order of the Court in *Grootboom* would have on the “available” resources of the state in accommodating the needs of a large community, and immediately so, in providing them with large scale housing, and comparing this with the effect the order of the Court would have had on the state’s resources, if only one individual was accommodated by ordering the hospital to offer the necessary medical relief to him, it becomes lucid that somewhere, something is amiss with the interpretation of the Constitution in this regard. Liebenberg’s⁹²⁷ argument in this regard becomes appropriate.

⁹²⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 466 (CC) at par. 94.

⁹²⁶ *Ibid.*

⁹²⁷ Liebenberg S “Socio-economic Rights” in Chaskalson M *et al* *Constitutional Law of South Africa* Vol 1 (1999) at 41–43.

The learned writer argues that the minimum core obligation that was emphasised in *Grootboom*⁹²⁸ enjoins the state to ensure that groups in especially vulnerable and disadvantaged circumstances have access to a basic level of the socio-economic rights. According to Liebenberg,⁹²⁹ this should be sufficient to preserve human life and dignity.

In section 27(2) of the Constitution, it is acknowledged that the realisation of the rights contained therein will be progressive and not instant; it is also acknowledged that the availability of resources will be a factor to be considered. For this reason, in *Soobramoney* the relief sought was denied.⁹³⁰

The Court had further occasion to exercise its judicial powers in granting constitutional relief in the *Treatment Action Campaign*⁹³¹ case. It must be borne in mind that the similarity between *Soobramoney* and *TAC* is that life was at stake — the life of an individual on the one hand, and the life of a section of the nation on the other, due to the AIDS epidemic. In both cases, there were bureaucratic impediments created by the state which prevented the obtaining of the necessary medical relief speedily.

⁹²⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* (2001) 1 SA 466 (CC) at par. 31.

⁹²⁹ Liebenberg S “Socio-economic Rights” in Chaskalson M *et al* *Constitutional Law of South Africa* Vol 1 (1999) at 41–43.

⁹³⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par. 37.

⁹³¹ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) (hereinafter referred to as “the TAC”).

In *Soobramoney*, the Court felt that it should be slow to interfere with government policies. In the *TAC* case, however, the Court agreed with the finding of the High Court that the policy of government, insofar as it confined the use of Nevirapine to hospitals and clinics which were research and training sites, constituted a breach of the State's obligations under section 27(2) read with section 27(1)(a) of the Constitution. In the circumstances, the Court was prepared to, and did in fact, order the government to remove "without delay" the restrictions which prevented Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics which were not research and training sites.⁹³²

In South Africa the adjudication of the right to life has not been consistent as a right that is the most important, and as the right that is unqualified in the Constitution of South Africa. It is unqualified in that section 11 of the South African Constitution does not make the right to life subject to conditions in which one may lawfully lose it. This would be the position if the Constitution provided that no one may be deprived of his or her life without the due process of law.

⁹³² *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) at 765.

CHAPTER 7

Consistency as applied to the right to privacy

7.1 Background to the right to privacy

The right to privacy is unique. Unlike equality, privacy is not a creature of the Constitution. It was not bestowed on us by the Constitution. It is an inborn human need which existed long before countries developed and drafted constitutions. A baby is not aware of this need at birth, but as the baby grows to become a child, it naturally gets to sense the need for privacy. A child gets to sense this natural need even before adulthood, while still in teenage years. The child will get to a stage where he or she needs some secluded space for dressing, or for bathing. This need is not inculcated into a child by a parent, but the child becomes conscious of it as he or she grows up.

In fact, it has been suggested⁹³³ that this need is inborn even in the animal world. The need expresses itself in the desire for territoriality. This refers to the personal distance which occurs between individual members of the same group, and social distance which is observed between different groups of animals. McQuoid–Mason likens these traits

⁹³³ McQuoid–Mason DJ *The Law of Privacy in South Africa* (1978) at 1; Ardrey R *The Territorial Imperative* (1969) at 180.

which are observed in the animal kingdom to traits which are also manifest in the human creation. The privacy required by members of the same family may be referred to as personal distance, while the relationship of the family itself to other families in the community can be regarded as social distance.⁹³⁴

However, with the civilisation of the human population, mankind began experiencing gradual inroads into privacy. The decline in morals also contributed to the invasion of privacy. Spouses who suspected infidelity on the part of their partners sometimes tried to gather evidence of infidelity by monitoring their spouse's movements. Strides made in technology have probably been the most to blame in the crumbling of privacy walls within which communities have been living.

For these reasons, even before the advent of the Constitution, people's privacy was defended by common law, as discussed from the paragraph below.

7.2 Privacy in Roman and Roman-Dutch law

Privacy is not specifically mentioned as a right in Roman-Dutch law, but Roman-Dutch law contains several *injuriae* or affronts to one's

⁹³⁴ McQuoid-Mason DJ *The Law of Privacy in South Africa* (1978) at 1.

personality which closely resemble the modern right to privacy. These personality *injuriae* are so intertwined that it becomes difficult to seek remedy for an affront in one aspect without the other aspects of personality being affected. For instance, an invasion of one's privacy becomes linked to the infringement of one's dignity. An infringement of one's good name, or *fama*, becomes linked to an infringement of one's dignity or *dignitas*.

It was an intrusion in Roman–Dutch law to forcibly enter into a person's home, as it was felt that it was an individual's right to keep free from intruders and enjoy his life in private and away from the public gaze.⁹³⁵

Divorce was viewed as publicly and formally ending any kind of relationship between spouses. This is evident from the fact that if an ex-husband subjected his ex-wife to a medical inspection of her womb to establish whether she was pregnant by him or not, that would constitute an invasion of her privacy.⁹³⁶

Since then, law has developed in various jurisdictions, and privacy has been a basis of litigation in a variety of circumstances. It would appear that in South Africa privacy was first acknowledged in the nineteenth

⁹³⁵ Voet 47.10.7.

⁹³⁶ McQuod–Mason DJ *The Law of Privacy in South Africa* (1978) at 31; Voet 47.10.2.

century where, in *De Fourd v Cape Town Council*,⁹³⁷ policemen entered premises suspected of being a brothel without a warrant. Since it was a crime to keep and make a living from the proceeds of a brothel, one would naturally reason that this would authorise the state to enforce the law by storming into premises which gave an indication of a crime of keeping a brothel. It was the Court's view, however, that even prostitutes, whom the Court referred to as "abandoned women", had rights, and without their permission or a warrant, no policeman was justified in interfering with their privacy.⁹³⁸ It should be borne in mind that this was the holding of the Court in the nineteenth century, more than a century ago before our constitutional dispensation. This Chapter will deal with the right to privacy as it relates, among other things, to brothels and prostitution under our constitutional dispensation.

The point has been made in this background information that sometimes a line of distinction is faint between privacy and dignity, as these personality infringements are intertwined. If two ladies, for instance, consent to a photograph being taken of them, as was the case in *Kidson v SA Associated Newspapers Ltd*,⁹³⁹ for the purpose of demonstrating a point in a magazine, but the photograph is unexpectedly published with a caption: "Lonely and nowhere to go", that would naturally be

⁹³⁷ *De Fourd v Cape Town Council* (1898) 15 SC 399.

⁹³⁸ *Ibid* at 402.

⁹³⁹ *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W).

disappointing. But the problem facing a court would be whether the remedy should be based on the infringement of privacy or dignity. In this case, one lady was married, and the other was engaged. The Court was of the view that the ladies' private lives were unnecessarily exposed to the public. Although privacy was at issue, it could not be excised clean from dignity.

In the twentieth century, the United States of America realised the need to protect the privacy of individuals in the matter of reporting on the creditworthiness of individuals. Thus, the Fair Credit Reporting Act⁹⁴⁰ was enacted. The Act promotes accuracy, fairness, and privacy of information in the files of agencies reporting on consumers. The United States has reporting agencies of different kinds, the well known being the credit bureau, which keeps credit records of individuals. Other reporting agencies of a different kind are agencies which sell information about the issuing of cheques, medical records, and rental history records.

In terms of the Act, it is the right of an individual to be informed if the information in the individual's file has been used against the individual.⁹⁴¹ Section 608 of the Act stipulates that access to one's file is limited, in order to protect privacy. A consumer reporting agency may

⁹⁴⁰ Fair Credit Reporting Act, which came into effect in 1970
<http://www.cardreport.com/laws/fcra.html> (accessed: 2011/08/09).

⁹⁴¹ Section 604 (5) (i) (I).

provide information about an individual only to people with a valid need. Such a need usually arises for a creditor, a potential insurer, a potential employer, or landlord. The Act lists entities who may legitimately have a need for access to an individual's information.

As a measure of privacy protection, consent is a requirement for reports to be provided to employers. A consumer reporting agency may not give out information about an individual without the individual's written consent to the employer.

It is the right of an individual to know what is in the individual's file. To this end, an individual may request and obtain all the information relating to him or her contained in the files of a consumer reporting agency. No inaccurate information may be kept. If an individual discovers that the information in his or her file is incomplete or inaccurate, the agency is obliged to investigate unless the dispute has no basis. If negative information is removed as a result of a consumer's dispute, it may not be reinstated without the knowledge of the individual concerned.⁹⁴²

The Act is a legislative endeavour aimed at protecting privacy in the private sector.

⁹⁴² Section 609.

The public sector has not been left unregulated. The aftermath of the Watergate scandal in the United States⁹⁴³ has been a constant flow of legislation aimed partly at giving access to government records, but mainly at providing some control over the collection of private information by government agencies. Almost daily, police need to access criminal records of arrested persons, but the Crime Control Act⁹⁴⁴ of the United States provides limited access to criminal records.

In South Africa, the Constitution entrenches the right of access to information. However, as of this writing, a recent Bill, the Protection of Information Bill, is seen by political parties to be aimed at limiting that right. It remains to be seen to what extent, when the Bill has finally been promulgated into law, it will protect privacy with regard to information held by the state. It also remains to be seen to what extent it will conflict with the constitutional right of access to information.

In California, privacy was protected in a unique way by the Appeal Court.⁹⁴⁵ The appellant was a one-time prostitute who was tried for murder and acquitted. According to her, she had abandoned her former way of life in 1918, rehabilitated herself, and got married a year later. In

⁹⁴³ The Watergate scandal was a political scandal during the 1970s in the United States where the headquarters of the Democratic National Committee were broken into in search of information. The incident led to the resignation of the United States President, Richard Nixon, and the incarceration, trial and conviction of some of the officials of his administration.

⁹⁴⁴ The Crime Control Act (United States) came into effect in 1970.

⁹⁴⁵ *Melvin v Reid* 112 Cal. App. 285, 297 (1931).

1925 the respondents released a film about the appellant's life, using the facts from the record of her murder trial, and using her maiden name.

The film was viewed by the respondents to be a story which accurately reflected the facts of her life. The appellant protested that this caused her harm and to be ill-spoken of. In particular, she based her action on the violation of her right to privacy.

The Appeal Court held that had the respondents used the facts from the appellant's murder trial, there would have been no cause of action, as those facts were public record. However, it was unnecessary, in the Court's view, to use the appellant's real name in conjunction with the facts of the case. That is what constituted violation of the right to privacy. The Court pointed out that the rehabilitation of the fallen and the rehabilitation of the criminal was the main objective of the criminal penal system, and that once an individual has been rehabilitated it would be a violation of the individual's privacy to rake up the past immoral way of life.⁹⁴⁶

In our era, privacy is no longer just a common law aspect of our personality. It is now entrenched as a right in the Constitution. The Constitution specifically protects privacy in its various forms — it protects

⁹⁴⁶ *Melvin v Reid* 112 Cal. App. 285, 287 (1931) at 91.

citizens from having their person and homes searched, their property from being searched, their possessions from being seized, and the privacy of their communications from being infringed.⁹⁴⁷

Now that privacy is a constitutional right, the question arises whether all previous common law notions of privacy will now be forgotten and fall into disuse. McQuoid–Mason⁹⁴⁸ is of the view that this will not be the case. The learned author believes that it is unlikely that in the immediate future, courts will develop an independent constitutional delict of invasion of privacy, unless circumstances arise where such invasion cannot be accommodated by the common law, and courts are thus required to fashion some other appropriate remedy.⁹⁴⁹

7.3 Interpretation consistency of the right to privacy

During the pre–Constitution era, it was necessary for courts to maintain consistency in interpreting any law, be it statutory law, common law, or customary law. Indeed, the doctrine of *stare decisis* enjoined courts to do so. In South Africa, a supreme law, the Constitution, has emerged. The need to be consistent in interpreting any constitutional right, in this

⁹⁴⁷ Section 14 of the Constitution.

⁹⁴⁸ McQuoid–Mason D “Privacy” in *Constitutional Law of South Africa* Vol 2 (2005) Chapter 38 at 2.

⁹⁴⁹ Chapter 38 at 2.

context the constitutional right to privacy, is even greater than it was back then when courts had to interpret the common law right to privacy.

The right to privacy has been the subject of litigation in various forms — in questionable conduct, in searches and seizures, in interference with private life in day-to-day activities, such as communication, and in legal professional privilege.

7.4 In questionable conduct

In 1998, a voluntary association called National Coalition for Gay and Lesbian Equality, approached court, in the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*.⁹⁵⁰ The voluntary association represented gay, lesbian, bisexual, and transgendered people in South Africa. The South African Human Rights Commission joined itself as an *amicus curiae* in the relief sought.⁹⁵¹

The parties approached court seeking relief in the form of an order declaring the common law offence of sodomy to be inconsistent with the Constitution and invalid. Sodomy was defined at common law as

⁹⁵⁰ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

⁹⁵¹ The South African Human Rights Commission is one of the institutions of the Constitution, supporting constitutional democracy, established by section 181 of the Constitution.

“unlawful and intentional sexual intercourse *per anum* between human males”.⁹⁵² A related statutory offence which was also impugned by the applicants was section 20A of the Sexual Offences Act.⁹⁵³ For purposes of this discussion, the relevant portion of section 20A is reproduced:

“(1) A male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence”.

The common law offence of sodomy, together with the above statutory provision, were impugned on the basis of the constitutional right to equality,⁹⁵⁴ dignity, and privacy. The right to privacy almost invariably links itself to the right to dignity. Thus, the common law and the

⁹⁵² Milton J R L *South African Criminal Law and Procedure* (1996) 3rd ed at 248.

⁹⁵³ Sexual Offences Act of 1957.

⁹⁵⁴ The interim Constitution was used at the time when this matter served before the Constitutional Court. However, for convenience, the final Constitution will be used for purposes of this discussion. The relevant subsections of Section 9 of the Constitution provide as follows:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

...

- (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

statutory law offence of sodomy was impugned on the basis of these rights. This Chapter, though, concerns itself with the right to privacy.

As a prelude to analysing consistency or inconsistency in the interpretation of the right to privacy, it is proper to look at the definition of privacy. Privacy has been defined as “an individual condition of life characterised by seclusion from the public and publicity, the extent of which is determined by the individual himself. This implies an absence of acquaintance with the individual or his personal affairs in this state”.⁹⁵⁵

In interpreting the right to privacy, the Constitutional Court of South Africa, in *National Coalition for Gay and Lesbian Equality*,⁹⁵⁶ per Ackermann J, acknowledged that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The Court held that the way in which we give expression to our sexuality is at the core of this area of privacy.⁹⁵⁷

In holding thus, the Court can safely be understood to mean that of all activities we perform in privacy, sexual activity is an activity that occurs in

⁹⁵⁵ Neethling J *et al Law of Delict* (2006) 5th ed at 322.

⁹⁵⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

⁹⁵⁷ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at par. 32.

the innermost of our privacy walls. It is an activity no other person can have access to, or is entitled to know about. If this is the view of privacy the Court had in mind, it is submitted that view is indeed correct. However, the question arises as to whether the State is also excluded from interfering in what is taking place in the bedrooms.

By its wording, the right to privacy is, on the face of it, absolute. This is especially so if the reasoning of the South African Constitutional Court in *S v Makwanyane*⁹⁵⁸ is a principle to be guided by. *In casu*, the Court held that the wording of the right to life in the South African Constitution: “everyone has the right to life”, differs from the wording of this right in the Constitutions of other jurisdictions, such as India and Hungary.⁹⁵⁹ This difference, held the Court, made our constitutional right to life absolute.⁹⁶⁰ In so holding, the Court inferred that the right to life was not subject to limitation by section 36 of the Constitution.

In a similar vein, upon examination of section 14 of the South African Constitution, which entrenches the right to privacy, one finds that the introductory part of the section is similarly worded with section 10 of the Constitution. It merely reads: “everyone has the right to privacy”. The section then continues to enumerate aspects of this right which may not

⁹⁵⁸ *S v Makwanyane and Another* 1995 (3) SA 391 (CC).

⁹⁵⁹ *Ibid* at pars. 15 and 77.

⁹⁶⁰ *Ibid* at par. 84.

be compromised. Also noteworthy is the fact that the section uses the word “includes” in enumerating aspects of the right which may not be infringed. The word “includes” indicates that the list is not exhaustive. There may be other aspects of privacy which are not covered by the section. It becomes interesting, then, how the Court would interpret this right in future cases brought before it.

After the judgment in *National Coalition for Gay and Lesbian Equality*,⁹⁶¹ the Court was seized with a matter which similarly relied, among other rights, on the constitutional right to privacy. This was in the case of *S v Jordan*.⁹⁶² Women involved in prostitution approached the Constitutional Court for an order declaring a statutory provision⁹⁶³ unconstitutional and invalid on the ground that it violated the right to privacy.

A claim to the right of privacy in this regard was based on the same reasoning of the Court in *National Coalition for Gay and Lesbian Equality*,⁹⁶⁴ the case dealing with the constitutionality of laws prohibiting sodomy, that an activity of a sexual nature is the most private activity humans can engage in, and as such it lies outside any intrusion by third parties, whether the parties are private individuals, or public officers.

⁹⁶¹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

⁹⁶² *S v Jordan and Others* 2002 (6) SA 642 (CC).

⁹⁶³ Section 20(1)(aA) of the Sexual Offences Act of 1957.

⁹⁶⁴ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

The doctrine of *stare decisis* dictates that there be consistency in the adjudicating of matters which bear resemblance in material aspects. Both the *National Coalition for Gay and Lesbian Equality*⁹⁶⁵ case and the *S v Jordan*⁹⁶⁶ case deal with sexual activity that can only be engaged in behind closed doors.

Comparing the two cases which served before it, the Court endeavoured to shift from its previous view⁹⁶⁷ by expressing doubt that the prohibition contained in section 20(1)(aA) affected the right to privacy.⁹⁶⁸ The Court endeavoured to establish some differences between the two cases, but in doing so it failed to realise that the common thread between the two cases was “the sphere of private intimacy and autonomy” which should be “without interference from the outside community”.⁹⁶⁹

Section 9 of the South African Constitution deals with the right to equality. Interestingly, section 9(3) of the Constitution lists grounds on

⁹⁶⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

⁹⁶⁶ *S v Jordan and Others* 2002 (6) SA 642 (CC).

⁹⁶⁷ The previous view was that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of privacy. See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1991 (1) SA 6 (CC) at par. 32.

⁹⁶⁸ *S v Jordan and Others* 2002 (6) SA 642 (CC) at par. 27.

⁹⁶⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at par. 32.

which the state may not discriminate directly or indirectly. Among these, it lists “gender” and “sex”. Our South African superior courts, including the Constitutional Court, have as yet not had occasion to deal with “sex” as a ground on which the state may not discriminate. The two concepts, “gender” and “sex”, are often thought of as closely related. In fact, they are often, correctly or carelessly, used as interchangeable in meaning, when referring to the distinction of being male or female.

It is submitted that “gender” in the context of section 9(3) refers to the distinction of being male or female. Therefore, it is submitted, that subsection (3) prohibits discrimination based on the distinction of being male or female.

The question remains, however, what the related concept, “sex”, refers to in the context of subsection (3). It is submitted that “sex” is to be given its ordinary dictionary meaning, namely, “sexual intercourse”.⁹⁷⁰ This, therefore, leads to the conclusion that, just as no one may be discriminated against based on his or her “sexual orientation”, no one may be discriminated against based on an act of sexual intercourse in its natural and widely known form. Consequently, just as the right to privacy was successfully invoked by men practising sodomy as their sexual orientation, in the privacy of their rooms, it is hard to find any reason why

⁹⁷⁰ “Sex” is defined as a shortened form of “sexual intercourse” by Makins M *et al* (eds) *Collins English Dictionary* 3rd ed 1991 at 1417.

the same right cannot be invoked by prostitutes practising sex in the privacy of their rooms.

In terms of section 9(5), discrimination based on “sexual orientation” and “sex” is presumably unfair unless it is established that the discrimination is fair. It follows, then, that just as homosexuals were not to be discriminated against on grounds of their sexual orientation, in terms of section 9(3), prostitutes are not to be discriminated against on grounds of sex, in terms of the same subsection. Further, if homosexuals had their right to privacy protected by the Court, it becomes an inconsistency for the Court to deny prostitutes that right, since both homosexuals and prostitutes engage in sexual conduct in the privacy of their rooms.

In dismissing the claim to the right of privacy, the Court in the *S v Jordan* case⁹⁷¹ refused to accept that a person who commits a crime in private, by the nature of which can only be committed in private, can necessarily claim the protection of the privacy clause. This reasoning is untenable, because sodomy, like prostitution, could only be practiced in private. The minority judgment in a similar case dealing with sodomy in the United States, in *Lawrence et al v Texas*,⁹⁷² raises a pertinent thought, where Thomas J reasons:

⁹⁷¹ *S v Jordan and Others* 2002 (6) SA 642 (CC).

⁹⁷² *Lawrence et al v Texas* 539 U. S. 558 (2003).

*I do not know what "acting in private" means; surely consensual sodomy, like heterosexual intercourse, is rarely performed on stage. If all the Court means by "acting in private" is "on private premises, with the doors closed and windows covered," it is entirely unsurprising that evidence of enforcement would be hard to come by.*⁹⁷³

In further rejecting the right to privacy as claimed by women involved in prostitution, the Constitutional Court of South Africa reasoned that "what compounds the difficulty is that the prostitute invites the public generally to come and engage in unlawful conduct in private".⁹⁷⁴ This line of reasoning, it is submitted, does not dismiss the case of women involved in prostitution. Admittedly, if one thinks of it, what ends up being an act in the privacy of a room, is something that started on the street, for those women who are street prostitutes. But the Court lost sight of the fact that the same reasoning could be applied to the practice of sodomy. It can hardly be argued that homosexuals suddenly find themselves as total strangers in a closed room and, as total strangers, suddenly engage in sodomy. Men practising homosexuality, like heterosexuals, initiate their relationship in the public arena, both agree to be involved in such a relationship, and finally end up behind closed doors.

The claim to the right of privacy by women practicing prostitution, therefore, could not be dismissed on the basis that they engage in

⁹⁷³ *Lawrence et al v Texas* 539 U. S. 558 (2003) at 597 [emphasis added].

⁹⁷⁴ *S v Jordan and Others* 2002 (6) SA 642 (CC) at par. 28.

conduct which started in the public arena, because the sexual conduct of homosexuals is also conduct which started in the public arena.

Furthermore, not all prostitutes solicit outside in the streets. Some women in the sex trade are in the employ of another person in a brothel, and as such, they get clients by waiting indoors. Therefore, not all prostitutes invite the public in the public arena.

The judgment of the Court in the *National Coalition for Gay and Lesbian Equality*⁹⁷⁵ case presents a further problem of inconsistency. Two years earlier, in *Case v Minister of Safety and Security*,⁹⁷⁶ the Court, per Didcott J, expressed the following regarding the viewing of pornographic material in the privacy of one's room:

What erotic material I may choose to keep *within the privacy of my home*, and only for my personal use there, *is nobody's business but mine. It is certainly not the business of society or the state. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy* which section 13 of the interim Constitution (Act 200 of 1993) guarantees that I shall enjoy.⁹⁷⁷

Interestingly, in the same year that the above matter was adjudicated upon, the Court had occasion to deal with yet another matter which

⁹⁷⁵ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

⁹⁷⁶ *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC).

⁹⁷⁷ *Ibid* at par. 91 [emphasis added].

claimed the right to privacy. It was in the case of *Bernstein v Bester*.⁹⁷⁸ The issue before Court was whether the statutory duty⁹⁷⁹ resting on a company to disclose all its affairs to liquidators violated the constitutional right to privacy.

In dealing with the question, the Court distinguished between the privacy enjoyed by a person in the sphere of his or her home, and the privacy enjoyed in the sphere of business:

The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. *In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. . . . Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.*⁹⁸⁰

The fact that the Court in *Case v Minister of Safety and Security*⁹⁸¹ held that what a person does in the privacy of his or her home is nobody's business but his or hers, and the fact that in *Bernstein v Bester*⁹⁸² it referred to one's home as "the inner sanctum", is significant. The view held by the Court on both occasions firmly established a precedent —

⁹⁷⁸ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC).

⁹⁷⁹ Sections 417 and 418 of the Companies Act 61 of 1973.

⁹⁸⁰ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) at par. 67 [emphasis added].

⁹⁸¹ *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at par. 91.

⁹⁸² *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) at par. 67.

that within one's walls is a sacred place, one of total privacy and inviolability.

There is another side to the issue of privacy in the context of sexual activities, particularly in sexual activities involving prostitution. The Court endeavoured to divert attention from the constitutional issue of privacy by pointing out that what was at the heart of the prostitutes' complaint was that they were prohibited from selling their sexual services. The Court emphasised that they were in the industry solely for money, and that the statutory prohibition was directed solely at the sale of sexual activity.⁹⁸³

Indeed, that may be so. But to dismiss the prostitutes' claim to privacy on the basis of this argument only leads to another problem. There are other sexual activities which do not involve trading which are also proscribed by law. Incest is one such activity. In this regard, one must recall what the Constitutional Court held in the *National Coalition* case regarding sodomy. The relevant phrase is: "If, in expressing our sexuality, we act consensually . . .".⁹⁸⁴

⁹⁸³ *S v Jordan and Others* 2002 (6) SA 642 (CC) at par. 29.

⁹⁸⁴ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at par. 32.

This means that any act committed by two *consenting* adults, in private, is, indeed, “no body’s business, but”⁹⁸⁵ that of the two individuals engaging it. This view causes confusion in the minds of society, because incest is a common law offence which still stands even after we have entered the new constitutional dispensation. Incest, which is not rape, is a sexual act engaged in by two consenting adults. True, it is engaged in by adults who are closely related to each other. But if the act is consensual, between adults, in private, without harming one another, it would, to follow the interpretation of the Court in the *National Coalition* case, be free from interference by the state.

Unlike sodomy, the continued existence of the common law offence of incest has not as yet been challenged in the Constitutional Court.

Although it has not been challenged in Court, the feeling is that in so far as it punishes consenting adults, it has no utilitarian purpose.⁹⁸⁶

Admittedly, *as part* of its objective, the prohibition of incest protects children in any family from being sexually exploited by adults. But it has been argued by Milton⁹⁸⁷ that the effect of this prohibition is limited, in that the offence is committed by a relative having vaginal intercourse with a child. It does not include anal intercourse with a child or indecent assaults upon a child in the family, nor does it punish a female relative

⁹⁸⁵ per Didcott J, in *Case v Minister of Safety and Security and Others* 1996 (3) 617 (CC) at par. 91.

⁹⁸⁶ Milton J L R *South African Criminal Law and Procedure* (1996) 3rd ed at 236, 237.

⁹⁸⁷ *Ibid.*

abusing a female child. These offences are punishable under the Sexual Offences Act.⁹⁸⁸

One other objective of the crime of incest, in the light of its definition,⁹⁸⁹ is to prevent genetic defects which may be passed on from one generation to the next among individuals who are related by blood. However, the definition of incest also prohibits marriage and sexual intercourse between persons who are related by marriage or adoption. Such individuals are not related by blood. Milton⁹⁹⁰ argues that it is hard to think of any genetic defects which may be transmitted from generation to generation if two individuals related by marriage ties engage in sexual intercourse. For this reason, he is of the view that since adultery is no longer a crime, and since there does not seem to be any eugenic reasons why intercourse between *affines*⁹⁹¹ should be prohibited, the day may yet come when, as in England and as under the Transkei Penal Code of 1885,⁹⁹² incest is restricted to *consanguines*.⁹⁹³

⁹⁸⁸ Sexual Offences Act of 1957.

⁹⁸⁹ Milton J L R *South African Criminal Law and Procedure* (1996) 3rd ed at 234 defines incest as unlawful and intentional sexual intercourse between two persons who on account of consanguinity, affinity or adoptive relationship may not marry one another.

⁹⁹⁰ *Ibid* at 235.

⁹⁹¹ People related by marriage.

⁹⁹² Section 123 of the Transkei Penal Code of 1885.

⁹⁹³ Milton J L R *South African Criminal Law and Procedure* (1996) 3rd ed at 236; *consanguines* are people related by blood.

In his more than a century old article, Hull⁹⁹⁴ lamented the unreasonable prohibition of relations between a man and his wife's sister as amounting to incest. In particular, he found the unreasonableness of incest when one considered that a statutory provision of that time⁹⁹⁵ had the effect that a man could marry a deceased's wife sister, but he could not marry the sister of a wife who was still alive, even if the wife was divorced. Indeed, it is hard to imagine how such a relationship would result in genetic defects being transmitted down to posterity.

What does happen in society, is that a man and his wife's sister do have relations, whether this was viewed as incest by moral standards, or by law. But the fact is that they do so as consenting adults. Such a conduct constitutes adultery. It also constitutes incest. True, such conduct strains the relationship between the married couple. It may also be frowned upon by society, though not necessarily by every individual in society. Since adultery is no longer punishable by criminal law, regardless of the relationship between the individuals therein, the question then arises why incest is still criminally punishable in terms of the law, when engaged in by consenting adults in private. The undeniable fact is that there are very few cases, if any, of accused

⁹⁹⁴ The Hon. Henry Charles Hull "Notes on Some Controverted Points of Law — Incest as Between a Man and His Wife's Sister" 1910 *SALJ* 522.

⁹⁹⁵ Cape Act 40 of 1892.

persons in our modern times, who appear before courts accused of incest. It would appear that this crime is being abrogated by disuse.

The inconsistency of the Court in dealing with acts committed in private by consenting adults is further pointed out by Nel.⁹⁹⁶ According to Nel, the Court's adjudication in matters of this nature is not only inconsistent with regard to the right to privacy, but also with regard to the right to dignity.

Nel points out that "an extensive incest prohibition prevents persons from being a party to the sexual relationship of their choice without state intervention".⁹⁹⁷ Just as the Constitutional Court, in countenancing the decriminalisation of consensual sodomy, emphasised the degradation and devaluation of those who "are at risk of arrest, prosecution and conviction . . . simply because they seek to engage in sexual conduct which is part of their experience of being human",⁹⁹⁸ consistency requires that this interpretation should stand in favour of those who engage in consensual sexual conduct as adults, but who are frowned upon as committing the crime of incest. Nel argues⁹⁹⁹ that the stigma attached to

⁹⁹⁶ Nel M "The constitutionality of the crime of 'affinity' incest: An argument based on the recognition of Customary Marriages Act" 2002 *Stell LR* 347 to 351.

⁹⁹⁷ at 346.

⁹⁹⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at par. 28.

⁹⁹⁹ Nel M "The constitutionality of the crime of 'affinity' incest: An argument based on the recognition of Customary Marriages Act" 2002 *Stell LR* at 346.

being convicted of incest is as great as that of being convicted of sodomy, when sodomy was still punishable. The view held by the Court regarding sodomy that the sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community, should apply with equal force to other activities engaged in privately.

In any event, types of conduct which were traditionally frowned upon as being immoral and abhorrent, have now passed constitutional muster, and are countenanced by our courts. Same-sex marriages are an example of such conduct.

One of the reasons why the prostitution case in *S v Jordan*¹⁰⁰⁰ was dealt with differently from the sodomy case in *National Coalition for Gay and Lesbian Equality*¹⁰⁰¹ was that in prostitution the nature of commercialised sex negates the nurturing aspect of intimate relationships by emptying the sex act much of its private and intimate character.¹⁰⁰² The Court augmented this view by adding that the prostitute is not nurturing relationships or taking life-affirming decisions about birth, marriage or family, but she is making money.¹⁰⁰³

¹⁰⁰⁰ *S v Jordan and Others* 2002 (6) SA 642 (CC).

¹⁰⁰¹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

¹⁰⁰² *S v Jordan and Others* 2002 (6) SA 642 (CC) at par. 83.

¹⁰⁰³ *S v Jordan and Others* 2002 (6) SA 642 (CC) at par. 83.

In this regard, the views held by some writers become relevant. For instance, Jivan and Perumal¹⁰⁰⁴ are of the view that even if the sexual activity of a prostitute is done for commercial gain, this does not justify removing it from the realm of privacy.

They admit that the commercial aspect might remove it from the inner core privacy, thus making it easier to justify the prohibition, but it does not remove it from the scope of privacy altogether, because even if the expression of sexuality in this context is loveless, it is still very personal. What the Court finds problematic, argue Jivan and Perumal, is that a prostitute has dared to venture into the public arena to make money from a sexual engagement which other women provide for free.¹⁰⁰⁵

In finding the two decisions of the Court in sodomy and prostitution to be irreconcilable, the two writers contend that the moment two people choose to be private, and express their choice by occupying a private room or cubicle out of public sight, they choose to be private, and their interaction is accordingly private. The writers therefore feel that any argument which suggests that the commercial element in the interaction

¹⁰⁰⁴ Jivan U and Perumal D “‘Let’s talk about sex, baby’ — but not in the Constitutional Court: Some comments on the gendered nature of legal reasoning in the *Jordan* case” 2004 *SACJ* 375.

¹⁰⁰⁵ Jivan U and Perumal D “‘Let’s talk about sex, baby’ — but not in the Constitutional Court: Some comments on the gendered nature of legal reasoning in the *Jordan* case” 2004 *SACJ* at 375.

takes the conduct out of the private domain is strained and should be rejected.¹⁰⁰⁶

Another writer, Kroeze,¹⁰⁰⁷ finds some inconsistency on the part of the Court when it dealt with the limits of state interference in questions of morality. She makes reference to the words of the Court, per Ackerman J in the sodomy case:

The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose.¹⁰⁰⁸

Kroeze sees it as inconsistency that the Court did not hold this view in the *Jordan* case with regard to the question of prostitution. She asserts that opinions about prostitution are based on moral considerations, and that people judge prostitution to be wrong or right on the basis of their moral convictions. She finds it disturbing that the Court, in coming to this decision, chose to enforce these private moral views, a step it was unwilling to take in the sodomy case.¹⁰⁰⁹

¹⁰⁰⁶ at 376.

¹⁰⁰⁷ Kroeze IJ "Sin and *Simulacra*: Some comments on the Jordan case" 2003 *TSAR* 563.

¹⁰⁰⁸ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at par. 37.

¹⁰⁰⁹ Kroeze IJ "Sin and *Simulacra*: Some comments on the Jordan case" 2003 *TSAR* at 563.

The approach adopted by the Court in dealing with the discrimination aspect complained of in sodomy, is worth mentioning. It was submitted that the statutory provision is discriminatory in that it punished men who practiced sodomy on other men, but does not punish women who perform lesbian sexual acts on other women.¹⁰¹⁰

A similar anomaly was complained of in the prostitution case. It was brought to the attention of the Court that the statutory provision prohibiting prostitution is discriminatory to the extent that it strikes at the prostitute, and not at the client.¹⁰¹¹

In dealing with this anomaly, the Court upheld the constitutionality of the provision, holding that it is not irrational for the legislature to criminalise the conduct of only one group, and not the other. The Court reasoned that the legislative purpose may have been to target the purveyors of sex for reward, rather than the purchasers.

This reasoning could apply with equal force on the sodomy complaint, but was not followed. It could similarly be reasoned that the statutory provision targeted men because it is men who practiced sodomy, whether on other men, or on women. On the other hand, women, by their

¹⁰¹⁰ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at par. 11.

¹⁰¹¹ *S v Jordan and Others* 2002 (6) SA 242 (CC) at par. 8.

physiological nature, cannot perform sodomy, although they may perform other sexual acts on other women, which fall short of being sodomy.

By reasoning thus, the Court could be sending a signal to the legislature that if the statutory prohibition could be extended to women as well, it would cease to be discriminatory. The Court cannot usurp the functions of the legislature, and amend the impugned piece of legislation. It would, however, be up to the legislature to decide what to do with the impugned statutory provision.

The question of what one does in the privacy of one's room is not only about sexual intimacies, but it extends to what one can rightfully possess, or watch. Pornography is, for example, something that some citizens frown upon. It is also something that one would not view in public. When featured in home entertainment DVDs, it is often marked in a way that serves as a warning to individuals whose moral standards are high, and for that reason would scruple at the explicit nature of sex scenes featured.

It was on this basis that the legislature enacted a law¹⁰¹² which criminalised the possession of material which features explicit sex scenes. This statute became a subject of constitutional litigation in

¹⁰¹² The Indecent or Obscene Photographic Matter Act 37 of 1967, as amended.

which, among other rights, the right to privacy was relied upon. It was in connection with the constitutional adjudication of this matter that Didcott J held that what one does within the walls of one's room is nobody's business, but one's own, not even that of the State.¹⁰¹³ This means, in effect, that one's home is one's castle. It also has the effect that whatever wrongdoing one practices within the inner recesses of one's home is beyond the jurisdiction of the law. Whether this is the position in practice is another question, but this is the logical conclusion. For example, the question that arises is what the position should be if one consumes illegal drugs in the privacy of one's home. It may be asked whether such consumption becomes illegal if it takes place outside one's premises, in the public arena.

If the doctrine of judicial precedent in matters similar in nature was something to rely on, women who make prostitution their career, particularly if they do so within the walls of their *own* homes, could understandably count on the Court's judgment in the pornography case of *Case v Minister of Safety and Security*¹⁰¹⁴.

Unbeknown to the Court, it would soon be faced with a similar challenge dealing with what takes place in the privacy of one's home. This

¹⁰¹³ *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at par. 91.

¹⁰¹⁴ *Case and Another v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) at par. 91.

challenge came in the form of a constitutional challenge to section 27(1) of the Films and Publication Act,¹⁰¹⁵ prohibiting possession of child pornography, in *De Reuck v Director of Public Prosecutions*.¹⁰¹⁶

It is appropriate at this early juncture to point out that the Court in *De Reuck* acknowledged that possession and consumption of child pornography often takes place in the inner sanctum of the home.¹⁰¹⁷ However, although possession and consumption of child pornography often takes place in private, the legislative purpose was to curb child pornography which is universally condemned, as it strikes at the dignity of children, and grooms children to engage in sex.

Indeed, the objective is a noble one. To accomplish its noble objective, the Films and Publications Act defined “sexual conduct” in Schedule 11 as follows:

“For the purposes of these Schedules, ‘sexual conduct’ means genitals in a state of stimulation or arousal; the lewd display of genitals; masturbation; sexual intercourse, *which includes anal sexual intercourse*; the fondling, or touching with any object, of genitals; the penetration of a vagina *or anus* with any object; oral genital contact; or oral *anal* contact”.¹⁰¹⁸

¹⁰¹⁵ The Films and Publications Act 65 of 1996.

¹⁰¹⁶ *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC).

¹⁰¹⁷ at par. 90.

¹⁰¹⁸ emphasis added.

The definition of “sexual conduct” includes anal intercourse, that is, sodomy. It is a fact that not all men who practice sodomy do so on adults, but they have been known to exploit the ignorance of young boys. For this reason, the law proscribes sexual abuse of children in any form.

Admittedly, the Constitution forbids discrimination on the ground of sexual orientation. It is for this reason that the crime of sodomy passed constitutional muster. But homosexual men do not practice sodomy only on other adult consenting men; they are also known to exploit unwary young boys. This hard fact was acknowledged by the Court in the *De Reuck* case:

*Although possession and consumption of child pornography often takes place in the inner sanctum of the home, the legislative purposes identified above remain of great importance. It should not be overlooked that many of the resultant acts of abuse against children take place in private. In other words, where the reasonable risk of harm to children is likely to materialise in private, some intrusion by the law into the private domain is justified.*¹⁰¹⁹

It is submitted that consistency should have guided the reasoning of the Court to at least come to the realisation that the statutory provision which prohibited acts of sodomy even in the privacy of one’s home served the same purpose served by the prohibition against the possession of child pornography, namely, to protect innocent male children against the sodomy acts of adult men.

¹⁰¹⁹ *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC) at par. 90.

7.5 “Without harming one another”

In dealing with the question of privacy as adjudicated upon by the Constitutional Court of South Africa in the *National Coalition* case, it is appropriate to give some consideration to an aspect of the Court’s pronouncements, namely, “without harming one another”. This utterance was part of the Court’s holding: “If, in expressing our sexuality, we act consensually and *without harming one another*, invasion of that precinct will be a breach of our privacy”.¹⁰²⁰

It is clear that by using the phrase: “without harming one another”, the Court was not referring to harm that could be done to a third party, or to society, when two men practice sodomy, but to harm that could be done to either of the two men. Thus, the Court expressed the view that there is no harm inflicted in an act of sodomy.

Medical evidence proves otherwise. In their article, Cooper and Scherer¹⁰²¹ write that the use of the anus for sexual penetration is an unnatural use. They emphasise that since it was not meant for sexual

¹⁰²⁰ at par. 32.

¹⁰²¹ Cooper A and Scherer C “Is Anal Sex or Anal Penetration Safe?” 1998 *Self-Help Magazine* March 18, at 1, edited by Marlene M. Maheu, Ph.D. Dr Al Cooper was the clinical director at the San Jose Marital and Sexuality Centre, California, USA, and ran the training program for Counseling and Psychological Services at Stanford University, California, USA. Dr Coralie Scherer co-ordinates online services for the Centre and specialises in sexual trauma, women’s issues, and marital therapy.

penetration, “the rectum is not self-lubricating like the vagina or even the mouth. The delicate tissues there are easily irritated or damaged and can be an easy route into the body for infecting agents”.¹⁰²²

They further warn that there is also the matter of faeces remains in the anus. The anus “is filled with bacteria that can cause very painful infections if transferred to the mouth, penis or vagina. It’s not a good idea to have anal intercourse followed by vaginal intercourse without carefully washing the penis and using a fresh condom. If not, unseen but highly infectious faecal matter might be introduced into the vagina, often leading to serious infections within a week or two”,¹⁰²³ warn the two medical authorities.

Furthermore, the *Journal of the American Medical Association*¹⁰²⁴ acknowledges that generally, men and women who engage in same-sex behaviour have the same health afflictions as individuals who engage in opposite-sex behaviour. Some diseases, however, warns the journal, are of particular concern to men and women who engage in same-sex

¹⁰²² Cooper A and Scherer C “Is Anal Sex or Anal Penetration Safe” 1998 *Self-Help Magazine* March 18 at 4.

¹⁰²³ Cooper A and Scherer C “Is Anal Sex or Anal Penetration Safe” 1998 *Self-Help Magazine* March 18 at 4.

¹⁰²⁴ Davis R M *et al* “Health Care Needs of Gay Men and Lesbians in the United States” 1996 *JAMA* 275(17) 1 May, at 2.

behaviour, and therefore are important in a differential diagnosis and treatment plan.¹⁰²⁵

Among such diseases, the journal lists HIV infection. It states that infection with HIV is a major health concern for the gay community. It reports that men who have sex with men account for more cases of the acquired immunodeficiency syndrome¹⁰²⁶ in the United States than persons in any other transmission category.¹⁰²⁷ During 1994, 34 974 new cases of AIDS were reported among men whose only exposure to HIV was having sex with other men. In San Francisco, Los Angeles, New York City, and Chicago, the prevalence rate of HIV infection among sexually active gay men has at times reached between thirty percent and fifty percent since 1981.¹⁰²⁸

The HIV–AIDS plague is the health concern brought to the attention of society by the journal. Hepatitis has also taken its toll among men practicing sodomy. “All forms of hepatitis can occur in gay male patients. Because of the risk for hepatitis B virus infection, sexually gay and bisexual men should receive the hepatitis B vaccine. In general, gay men

¹⁰²⁵ Davis R M *et al* “Health Care Needs of Gay Men and Lesbians in the United States” 1996 *JAMA* 275(17) 1 May, at 2.

¹⁰²⁶ AIDS.

¹⁰²⁷ Davis R M *et al* “Health Care Needs of Gay Men and Lesbians in the United States” 1996 *JAMA* 275(17) 1 May, at 3.

¹⁰²⁸ Davis R M *et al* “Health Care Needs of Gay Men and Lesbians in the United States” 1996 *JAMA* 275(17) 1 May, at 3.

are at greater risk for contracting hepatitis B virus than hepatitis C virus infection, which is frequently transmitted by injecting drugs”.¹⁰²⁹

Nor are men who practise sodomy immune from a fourth plague — cancer of the anus. The journal reports that “in a 1992 retrospective study, researchers determined an 84 to 1 relative risk of anal cancer after AIDS diagnosis among gay men compared with the incidence of anal carcinoma in age–and sex–matched persons in the general population”.¹⁰³⁰ In a 1982 study of the cancer of the rectum in the Washington State, the incidence among men who reported homosexual behaviour was 25 to 50 times that of age–matched heterosexual controls.¹⁰³¹

The report concludes by pointing out that most cases of anal syphilis occur in homosexual men.

On the other hand, a medical report by a medical scientist, Diggs,¹⁰³² confirms what medical practitioners Cooper and Scherer in the *Self-Help Magazine*¹⁰³³ pointed out, that there are greater health risks among men

¹⁰²⁹ Davis R M *et al* “Health Care Needs of Gay Men and Lesbians in the United States” 1996 *JAMA* 275(17) 1May at 4.

¹⁰³⁰ *Ibid.*

¹⁰³¹ *Ibid.*

¹⁰³² Diggs J R “The Health Risks of Gay Sex” 2002 *Corporate Resource Council* at 1.

¹⁰³³ Cooper A and Scherer “Is Anal Sex or Anal Penetration Safe?” 1998 *Self-Help Magazine* March 18, at 1.

having sex with other men because of *the nature of sex among men*. Drawing attention to the nature of sex among men, Diggs states that human physiology makes it clear that the body was not designed to accommodate this activity.¹⁰³⁴ He points out that the rectum is significantly different from the vagina with regard to suitability for penetration by a penis. The vagina, he points out, has natural lubricants and is supported by a network of muscles. It is composed of a mucus membrane that allows it to endure friction without damage, and to resist certain actions caused by semen.¹⁰³⁵

When compared with the vagina, the anus is a delicate orifice of small muscles which is designed to be an “exit-only” passage. In other words, it was not designed to take anything in, but was designed to be a conduit for expelling substance out of the body. Consequently, with the repeated trauma, friction, and stretching that takes place during anal intercourse, the sphincter, the inner muscle around the outlet of the rectum, becomes weak and loses its tone and its ability to maintain a tight seal of the anus. The sad consequence of this chafing of the sphincter is that it can no longer hold faeces, and faeces can leak out of the body without control, as the control muscle has become weak and loose, warns Diggs.¹⁰³⁶

¹⁰³⁴ Diggs J R “The Health Risks of Gay Sex” 2002 *Corporate Resource Council* at 3.

¹⁰³⁵ *Ibid.*

¹⁰³⁶ *Ibid.*

According to Diggs, there is a further potential for injury which is exacerbated by the fact that the intestine has only a single layer of cells separating it from highly vascular tissue, that is, blood. As a result of this, any organisms that are introduced into the rectum have a much easier time establishing a foothold for infection than they would in a vagina. The single layer tissue cannot withstand the friction associated with penile penetration, resulting in traumas that expose both men who participate in sodomy to blood, organisms in faeces, and a mixing of bodily fluids.

Diseases, according to Diggs, which are found with extraordinary frequency among male homosexuals as a result of anal intercourse are, among others: anal cancer, herpes simplex virus, HIV, gonorrhoea, syphilis, hepatitis B, haemorrhoids, and anal fissures.¹⁰³⁷

Medical evidence produced above is produced in the light of the Court's assumption that in expressing our sexuality, acting consensually, we act "without harming one another". The Court expressed this in an assumption, yet medical evidence leaves no room for uncertainty that sodomy acts bring harm to the men engaged in them.

¹⁰³⁷ Diggs J R "The Health Risks of Gay Sex" 2002 *Corporate Resource Council* at 3 to 4.

Against this background, it should be borne in mind that the Court, in rejecting the prostitutes' right to privacy in the *S v Jordan*¹⁰³⁸ case, it reasoned that the prohibition against prostitution serves a legitimate governmental purpose, that of criminalising the commercialising of sex. An analysis of sodomy in the *National Coalition for Gay and Lesbian Equality*¹⁰³⁹ case reveals that the prohibition of sodomy served a legitimate governmental purpose, that of protecting men against the medically documented health risks. The unfortunate fact, however, is that the Constitution makers decided, advertently or inadvertently, to decriminalise sodomy by listing it among grounds on which discrimination is prohibited.

This leads to the question of values surrounding the right to privacy in the Constitution. The text of the Constitution of South Africa does not contain the word or words: "morals", or "morality", or "moral principles". It does, however, contain the word: "values". There is uncertainty as to what the Constitutional Assembly or the drafters of the Constitution had in mind when, for example, they provided that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic *values* of human dignity, equality and freedom".¹⁰⁴⁰ However, the ordinary dictionary meaning of the word "values" is: "the

¹⁰³⁸ *S v Jordan and Others* 2002 (6) SA 642 (CC).

¹⁰³⁹ *National Coalition for Gay and Lesbian Equality* 1996 (1) SA 6 (CC).

¹⁰⁴⁰ Section 7(1) of the Constitution.

moral principles and beliefs or accepted standards of a person or social group”.¹⁰⁴¹ It is doubtful that this is the context in which the word “values” is used in the Constitution.

This point is raised by the question: whose values, in the sense of moral principles, should be followed in a country which has a Constitution as the supreme of the law of the land? Some moral standards endorsed by the Constitution are hard to accept in some sections of society. The countenancing of sodomy by the Constitution is one such example.

It may also be asked whether courts may take it upon themselves to be the custodians of high moral standards, or whether they should only enforce these if they are entwined in legislation, or in the Constitution.

This issue became a relevant issue before Court in the United States in dealing with the question whether homosexuals have the constitutional right to practice sodomy in private.

7.6 The position in the United States law

It was in 1982 when a police officer entered the bedroom of a man and found him engaging in sodomy with another man. He was arrested, and

¹⁰⁴¹ Makins M *et al* (eds) *Collins English Dictionary* 3rd ed (1991) at 1694.

the matter finally came before the Supreme Court of the United States, as the *Bowers v Hardwick*¹⁰⁴² case.

The sodomy case of *Bowers v Hardwick* in the United States becomes relevant in the issue of consistency as required by the doctrine of *stare decisis*. The challenge brought before Court was that, while sodomy was a crime, it should be viewed differently when practised in the privacy of one's home. The challenge relied on consistency, from an earlier decision of the Court, in *Stanley v Georgia*,¹⁰⁴³ where the Court held that the First Amendment¹⁰⁴⁴ prevents conviction for possessing and reading obscene material in the privacy of one's home. The Court had held that: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch".¹⁰⁴⁵

In the United States, the decision of the Court in *Stanley v Georgia*¹⁰⁴⁶ protected conduct that would otherwise not have been protected if it were taking place outside the home. In particular did the decision prevent the enforcement of laws which regarded certain activities as

¹⁰⁴² *Bowers v Hardwick* 478 U.S. 186 (1986).

¹⁰⁴³ *Stanley v Georgia* 394 U.S. 557 (1969).

¹⁰⁴⁴ The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

¹⁰⁴⁵ *Stanley v Georgia* 394 U. S. 557 (1969) at 565.

¹⁰⁴⁶ *Stanley v Georgia* 394 U. S. 557 (1969).

obscenity, but the decision was based on the First Amendment of the United States Constitution.

Frankly, like the Fourth, Fifth and Ninth Amendments, which had little or no connection with the right of privacy to which they were linked,¹⁰⁴⁷ it is also difficult to understand how the right to privacy has anything to do with the First Amendment of the United States Constitution. The First Amendment has to do with the right to practise one's religion, to be guided by one's principled conscience, the right to freedom of speech, the right of the press, and the right to assemble.

The problem of the Court in dealing with sodomy in *Bowers v Hardwick* was that, although it was inclined to countenance sodomy when practised in the privacy of one's home, in other laws of the United States, conduct which was otherwise illegal was not rendered non-criminal just because it took place inside the walls of one's home. Crimes which do not have a victim, for instance, such as the possession or use of illegal drugs, do not escape the law when they are committed inside one's home. Possession of unlicensed firearms, or the keeping of stolen goods, in one's home, certainly does not become legal just because such possession is inside the home. Countenancing sodomy, even if it is done on the basis of a

¹⁰⁴⁷ The Fourth, Fifth, and Ninth Amendments were linked to the right to privacy in connection with abortion in *Planned Parenthood of Southeastern Pennsylvania v Casey* 120 L ed 2d 674; 112 SCt 2791 (1992).

constitutional provision such as, for example, section 9(3) of the Constitution of South Africa, which prohibits discrimination on the basis of sexual orientation, presents problems. It raises questions as to what should then happen to other intimate and indoor crimes, such as incest, or bestiality, if they take place where the public eye cannot penetrate. These were some of the problems the United States Supreme Court was faced with before taking a decision on the indoor crime of sodomy. The Court's holding was in these words:

And if [the] submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. *We are unwilling to start down that road.*¹⁰⁴⁸

Indeed, there is close resemblance between sodomy and incest, in that both crimes are committed where the public eye cannot penetrate. They are both intimate criminal conduct and, although they both may be performed by an adult on a child, they both may be performed by two adults, and they both may be performed by mutual consent. If the state were to ban incest on the ground that the other partner may be a defenceless victim, a child, the same argument applies to sodomy. The other partner may be a defenceless and unwilling participant.

¹⁰⁴⁸ *Bowers v Hardwick* 478 U. S. 186 (1986) at 6 [emphasis added].

However, the Court's determination: "we are unwilling to start down that road", becomes significant when one considers the subsequent determination of the Court some years later. From the tenor of the words: "we are unwilling to start down that road", one senses that judicial precedent would prevent the Court from holding differently in future on the same matter.

Some seventeen years later, the same Court, the Supreme Court of the United States, had to reconsider its own decision in *Bowers v Hardwick*.¹⁰⁴⁹ Whether its 'unwillingness to start down that road' would still stand was put to the test in the case of *Lawrence v Texas*.¹⁰⁵⁰ In this case, responding to a weapons complaint in a private residence, police in Texas entered Lawrence's apartment, and found him and another adult male engaging in a private consensual sexual act. The two men were arrested and convicted of deviate sexual intercourse in violation of a Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct.

The matter ultimately came before the Supreme Court of the United States, notwithstanding the fact that this Court had already ruled against homosexual acts between adult males in *Bowers v Hardwick*.¹⁰⁵¹ Thus,

¹⁰⁴⁹ *Bowers v Hardwick* 478 U. S. 186 (1986).

¹⁰⁵⁰ *Lawrence et al v Texas* 539 U. S. 558 (2003).

¹⁰⁵¹ *Bowers v Hardwick* 478 U. S. 186 (1986).

the consistency of the Court would be put to the test. If the Court was going to be persuaded to dishonour its own judicial precedent, it had to be clear what considerations would determine such a course.

The question arises whether developments in the area of jurisdiction of a court should have the effect of altering its reasoning on matters, even causing to it consider *stare decisis* unbinding. Such developments in the area of jurisdiction of a court could be such things as the political climate, legislative developments, and perhaps the change in the composition of the court.

In the case of *Lawrence v Texas*,¹⁰⁵² such considerations turned out to be legislative developments. The Court felt that deficiencies in its earlier holding in *Bowers v Hardwick* “became even more apparent in the years following its announcement. The 25 States with laws prohibiting the conduct referred to in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct”.¹⁰⁵³ The rate at which the state enforced sodomy laws through criminal courts also had an effect on the changed attitude of the Supreme Court towards its earlier decision. This becomes evident in the words of the Court that “in those States, including Texas, that still proscribe sodomy (whether for same-sex or heterosexual conduct), there is a pattern of non-enforcement with

¹⁰⁵² *Lawrence et al v Texas* 539 U. S. 558 (2003).

¹⁰⁵³ *Lawrence et al v Texas* 539 U. S. 558 (2003) at 559.

respect to consenting adults acting in private”.¹⁰⁵⁴ Concerned that the overturning of its earlier ruling in a similar matter would not be taken lightly by the legal fraternity, the Supreme Court prepared itself by saying that “*stare decisis* is not an inexorable command” and that “*Bowers* was not correct when it was decided, is not correct today, and is hereby overruled”.¹⁰⁵⁵

The overruling of *Bowers v Hardwick* by *Lawrence v Texas* is informative.¹⁰⁵⁶ The intervening period between the two decisions is seventeen years, with *Bowers v Hardwick* having been decided in 1986, and *Lawrence v Texas* having been decided in 2003. This may answer some questions relating to the possibility of a court overturning its own previous decisions, such as how long a period of time may pass before such a possibility can become a reality. Also, whether a court would have to be composed differently. Put differently, whether the generation of members of the Bench who arrived at a particular decision would all have to retire, or die, and the court would have to be composed of a completely new generation, for an earlier decision to be overruled.

If the two cases of *Bowers v Hardwicck* and *Lawrence v Texas* are anything to be guided by, it appears that it is unlikely that a court would

¹⁰⁵⁴ *Lawrence et al v Texas* 539 U. S. 558 (2003) at 559.

¹⁰⁵⁵ *Ibid* at 560.

¹⁰⁵⁶ Hunter N D “Living With Lawrence” 2010 *Georgetown Law Faculty Publications* 1103.

review and overrule its own earlier decisions in a short interval. Several years would have to pass. As regards the two cases, seventeen years passed.

With regard to the generation of judges composing the Bench, it appears that the Bench would have to be composed differently for any overruling to take place. In the case of *Bowers v Hardwick* and *Lawrence v Texas*, the Court was composed differently almost entirely, with the exception of one judge who was part of the majority in the earlier decision, and part of the majority in the later decision.¹⁰⁵⁷

Since the the doctrine of *stare decisis* should result in consistency in the decisions arrived at by courts, it is necessary, for purposes of this discussion, to look at the factors which persuaded the Court to deviate from its previous reasoning on an analogous matter.

In overturning its decision in *Bowers v Hardwick*, the Supreme Court of the United States was influenced to a large extent by the developments in its jurisdiction since its earlier decision.¹⁰⁵⁸ Among other things, it had taken note of the changed attitude of law enforcement authorities in

¹⁰⁵⁷ In *Bowers v Hardwick*, the judges of the majority decision were: Kennedy, Stevens, Souter, Ginsburg, Breyer JJ, with O'Connor J concurring. In *Lawrence v Texas*, the judges of the majority decision were: White, Burger, Powell, and Rehnquist JJ. The only judge who was a member of the Bench in the majority judgment in *Bowers v Hardwick*, but who was also a member of the Bench in a later case when the earlier case was overturned was O'Connor J.

¹⁰⁵⁸ *Lawrence et al v Texas* 539 U. S. 558 (2003) at 559.

bringing to justice men who had committed sodomy. There had been a steady decrease of cases brought before courts for homosexual acts.

The attitude of law enforcement authorities can hardly be separated from that of society at large. If law enforcement authorities had begun to view homosexuality with understanding, this was most likely how society viewed homosexuality.

Another factor which persuaded the Supreme Court to abandon its earlier holding was, noticeably, the deteriorating moral values over the years. For example, in *Grisworld v Connecticut*,¹⁰⁵⁹ the Court was faced with the issue of abortion, where some state laws prohibited the use of drugs for contraception. The Court invalidated such laws. The Court found that what one does in the privacy of one's home in the matter of contraception falls under the right to privacy, and the prohibition of contraception by state laws was an unconstitutional infringement of the right to privacy. Significantly, this right was protected among married couples who decided to control birth by using contraceptive drugs. The Court felt that the marital bedroom was a protected space.¹⁰⁶⁰

There was a further development along this line. Since the use of contraceptives was legally the privilege of those who were in a marriage

¹⁰⁵⁹ *Grisworld v Connecticut* 381 U.S. 479 (1965).

¹⁰⁶⁰ *Grisworld v Connecticut* 381 U. S. 479 (1965) at 565.

relationship, it remained to be seen for how long this protection would continue to apply in a discriminatory manner.

Seven years later, in *Eisenstadt v Baird*,¹⁰⁶¹ in a decision further reflecting the deteriorating trend of moral values, the Supreme Court of the United States relaxed its decision in *Grisworld v Connecticut*¹⁰⁶² by invalidating a law which prohibited the distribution of contraceptives among unmarried persons. It thus allowed unmarried persons to take advantage, within the protection of the law, of birth control measures previously available only to married couples. The Court expressed its view in the following words:

It is true that in *Grisworld* the right of privacy in question inhered in the marital relationship ... If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.¹⁰⁶³

The trend observed by the Court which resulted in it abandoning its earlier decision included the fact that the *Grisworld* and *Eisenstadt* decisions were part of the background for the decision in *Roe v Wade*,¹⁰⁶⁴ which invalidated laws prohibiting abortion. Commenting on the case of

¹⁰⁶¹ *Eisenstadt v Baird* 405 U. S. 438 (1972).

¹⁰⁶² *Grisworld v Connecticut* 381 U. S. 479 (1965).

¹⁰⁶³ *Eisenstadt v Baird* 405 U. S. 438 (1972) at 453.

¹⁰⁶⁴ *Roe v Wade* 410 U.S. 113 (1973).

Roe v Wade, Church *et al*¹⁰⁶⁵ refer to pro-choice and pro-life groups who have failed to provide a way out of the abortion dilemma. The authors further mention that the emotionally charged environment of the abortion debate and the radical divisions caused by it have also provided fertile ground for the mushrooming of Hollywood jurisprudence,¹⁰⁶⁶ which is not necessary to delve into for purposes of this discussion.

A further deterioration of moral values was observed by the Court. It will be recalled that the distribution of contraceptives was originally limited to married couples, but the Court subsequently deemed it necessary, based on the claim to equality, to extend the legal use of contraceptives to unmarried persons. As if this was not enough, the Court deemed it necessary to further relax the restrictions on contraceptives. The law had limited the legal use of contraceptives to persons aged 16 and older. The Court, in *Carey v Population Services*,¹⁰⁶⁷ was faced with a New York law forbidding the sale or distribution of contraceptives to persons under the age of 16. The Court relaxed the age restriction by invalidating the law.

¹⁰⁶⁵ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 277.

¹⁰⁶⁶ Church J Schulze C Strydom H *Human Rights from a Comparative and International Law Perspective* (2007) at 277.

¹⁰⁶⁷ *Carey v Population Services Int'l* 431 U.S. 678 (1977).

Thus, the trend of developments over many years were the main factor in the decision of the Supreme Court of the United States to overturn its own earlier decision on male homosexuality.

Whether a court of law should allow itself to be influenced by academic writing on a judgment it has already delivered, is a debatable question. On the one hand, it may be argued that, indeed, academic writers are law scholars who may open the judges' eyes to a mistake of law they may have overlooked, or treated lightly. On the other hand, it may be argued that judges only need to focus their attention on their own research, and decide matters according to their own informed interpretation of the law and the Constitution. If it is accepted that courts should allow themselves to be influenced by academic writing, obviously such influence cannot be of immediate assistance to a judge in connection with the matter that a judge is seized with, since academics will not know that a judge will make a mistake of law in the matter before him or her until a mistake has actually been made. Academics will only express their views in law journals after a mistake has been made. Their views will only be of assistance to the judge in future cases which are similar to the one in which a mistake was made. On the other hand, if academics were to express an opinion, perhaps through the media, on a matter that is

serving before a judge, that could amount to contempt of court *ex facie curiae*.¹⁰⁶⁸

The Constitutional Court of South Africa has already pronounced itself in *S v Mamabolo (E TV and others intervening)*¹⁰⁶⁹ on the constitutionality of the crime of contempt of court *ex facie curiae* in the form of scandalising the court. In this case, the appellant had been convicted by a High Court of contempt of court in the form of scandalising the court in that, as spokesperson of the Department of Correctional Services, he had caused to be published in a newspaper article his view that the judge had erred in refusing bail to a detained person. The learned judge read the criticising newspaper report, and later the same day issued an order to the effect that the appellant, together with other officers of the government department, appear before him to explain whether they had indeed said what was reflected in the newspaper report, and if so, to explain on what basis the judge had erred, and “what right they had to cause to be published in the newspapers that a Judge had erred if they had no grounds for such a statement”.¹⁰⁷⁰

The first issue to be determined by the Constitutional Court was whether the crime of contempt of court in the form of scandalising the court was

¹⁰⁶⁸ Burchell J *Principles of Criminal Law* (2008) 3rd ed at 949; Milton J L R *South African Criminal Law and Procedure* (1996) 3rd ed at 177.

¹⁰⁶⁹ *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 (CC) at 433–434.

¹⁰⁷⁰ *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 (CC) at 416H–I.

constitutional since it had the effect of encroaching on the right to freedom of expression in terms of section 16 of the Constitution. The Court found¹⁰⁷¹ that the right to freedom of expression is not a pre-eminent freedom ranking above all others. The right itself,¹⁰⁷² was the Court's finding, is carefully worded, enumerating specific instances of the freedom, and is immediately followed by a number of material limitations in the succeeding subsection. Further, the Constitution, in its opening statement,¹⁰⁷³ and repeatedly thereafter,¹⁰⁷⁴ proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic, namely, human dignity, equality and freedom. The Court found¹⁰⁷⁵ that the right to freedom of expression cannot be said automatically to trump the right to human dignity, and that the offence of scandalising the court brings the administration of justice into disrepute.¹⁰⁷⁶ It would seem, therefore, that any influence on courts' judgments should be exercised with caution.

It is worth mentioning that the Court in *Carey v Population Services*

¹⁰⁷¹ *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 at 430E–431A.

¹⁰⁷² Entrenched in section 16 of the Constitution.

¹⁰⁷³ Section 1 of the Constitution reads as follows:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms”.

¹⁰⁷⁴ See sections 7(1), 9, 10, 12, 36(1) and 39(1)(a) of the Constitution.

¹⁰⁷⁵ *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 at 431A.

¹⁰⁷⁶ *S v Mamabolo (E TV and others intervening)* 2001 (3) SA 409 at 432B.

*Int'l*¹⁰⁷⁷ also excused male homosexual conduct, in violation of its own precedent, by reasoning that the case it was dealing with did not involve minors. It did not involve persons who might be injured, or coerced, or who were situated in relationships where it would be difficult to refuse to consent. Nor did it involve public conduct or prostitution. It involved two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle. The Court held the view that the litigants were entitled to respect for their private lives, and that their right to liberty under the Due Process Clause¹⁰⁷⁸ gave them the full right to engage in their conduct without intervention of the government.¹⁰⁷⁹ In its decision the Court relied on its finding in the *Casey* case,¹⁰⁸⁰ where it had held, in connection with abortion, that: “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter”.¹⁰⁸¹

The reasoning of the Court in this manner leaves a question unanswered as to why, if homosexual acts enjoy constitutional protection, the Court has not come to the defence of women in the prostitution industry.

Prostitution remains illegal in the states of the United States but one,

¹⁰⁷⁷ *Carey v Population Services Int'l* 431 U.S. 678 (1977).

¹⁰⁷⁸ The Due Process Clause is derived from the Fifth Amendment of the United States Constitution which provides that no one shall be deprived of life, liberty, or property, without the due process of law. Due process means that certain established legal procedures must be followed because a particular action can be taken.

¹⁰⁷⁹ *Carey v Population Services Int'l* 431 U. S. 678 (1977) at 578.

¹⁰⁸⁰ *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 U.S. 833, 850 (1992).

¹⁰⁸¹ *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 U.S. 833, 850 (1992) at 847.

Nevada. This is the position despite the fact that each state has the power to decide what to do with prostitution within its area.

In a sensitive matter such as this one, of disturbing what has become settled law by overturning an earlier decision, it would be a miracle if the Court had become unanimous. As would be expected, some judges dissented. The dissenting judges knew and accepted that it is within the discretion of any court of final instance to overrule its own earlier decision if the decision was manifestly wrong. They stated that they also do not believe in rigid adherence to *stare decisis* in constitutional matters, but that they believe they should be consistent rather than manipulative in invoking the doctrine.¹⁰⁸²

The dissenting judges found it disturbing that *Bowers v Hardwick*¹⁰⁸³ was being overruled simply on frivolous reasons such as that the decision had attracted a lot of criticism, had been eroded by subsequent decision, and had not induced “individual or societal reliance” that counselled against overturning”.¹⁰⁸⁴

At this juncture, it is necessary to highlight, though, that there is a difference between the Constitution of South Africa and the Constitution

¹⁰⁸² *Lawrence et al v Texas* 539 U. S. 558 (2003) at 559.

¹⁰⁸³ *Bowers v Hardwick* 478 U. S. 186 (1986).

¹⁰⁸⁴ *Lawrence et al v Texas* 539 U. S. 558 (2003) at 587.

of the United States. The Constitution of South Africa specifically provides that no one may be discriminated against on the basis of sexual orientation. That would extend protection to persons whose sexual inclinations are considered as falling short of being natural.

By comparison, though, the Constitution of the United States is silent on sexual orientation. It is silent also on matters such as abortion, which is also carried out of the public eye. The Constitution of South Africa does not mention abortion by name either, but comes close to it by providing, at least, that everyone has the right “to make decisions concerning reproduction”.¹⁰⁸⁵

In deciding in favour of abortion, an act that, like sodomy and incest, is carried out in private, the United States Supreme Court had to rely on a right which is also not named by the Constitution of the United States, privacy, but had to be inferred from the Fourth, Fifth and Ninth Amendments.

In rejecting its citizen’s application for the right to practice sodomy, in *Bowers v Hardwick*,¹⁰⁸⁶ the Supreme Court emphasised that “in constitutional terms there is no such thing as a fundamental right to

¹⁰⁸⁵ Section 12(2)(a) of the Constitution.

¹⁰⁸⁶ *Bowers v Hardwick* 478 U. S. 186 (1986).

commit homosexual sodomy”.¹⁰⁸⁷ Indeed, there was no such fundamental right. But the inconsistency of the Court’s finding was that, in terms of the Constitution of the United States as it stands, there was no constitutional right either to abort. The Court had to countenance abortion by reading into the Constitution what was not drafted by the drafters. It is hard to understand the reason why the Court could not interpret generously and purposively any of the constitutional provisions in a way that would accommodate sodomy as a practice that should enjoy privacy without interference by the state.

If the reasoning of the Court was that there is a difference between abortion and sodomy in that sodomy is against the *boni mores* of a large portion of society, so is abortion.

Then, there is the question of morality with regard to practices which are claimed to be constitutional rights. The question arises as to whose moral standards should guide courts and society at large. There is society, there is a Constitution, and there are courts. All these entities may differ when it comes to moral standards. What makes the issue more entangled is the fact that in a democratic society, society as a whole does not speak. But society speaks through elected leaders who constitute a legislature. Just as members of society as an entity do not all

¹⁰⁸⁷ *Bowers v Hardwick* 478 U. S. 186 (1986) at 5.

share the same moral values, the elected representatives of society in the legislature do not all share the same moral principles.

Members of a court may also be from different backgrounds, and may have different beliefs, convictions based on conscience, and divergent religious views.

Thus, in adjudicating matters which are controversial, courts have the difficulty of whose moral values to be guided by. This difficulty loomed prominently in the sodomy case of *Bowers v Hardwick*¹⁰⁸⁸ before the United States Supreme Court. The Constitutional Court of South Africa was also faced with the problem.

In dealing with sodomy, the Constitutional Court of South Africa held that “a state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil.”¹⁰⁸⁹ Referring to the role of the Constitution in the matter, the Court held that “the Constitution certainly does not debar the state from enforcing morality”.¹⁰⁹⁰

¹⁰⁸⁸ *Bowers v Hardwick* 478 U. U. 186 (1986).

¹⁰⁸⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at par.136.

¹⁰⁹⁰ *Ibid.*

The view that “the Constitution certainly does not debar the state from enforcing morality” amounts to closing one’s eyes to reality. It is the state that enacted section 20A of the Sexual Offences Act. The Act proscribed acts of homosexuality between men, in particular sodomy. The Act provided a sanction to follow upon conviction. It is the Constitution that provides that no one may be discriminated against on the basis of his or her sexual orientation. Without a doubt, the two laws, the statute and the Constitution, are in conflict. Adding to the conflict are the views of society. As pointed out, the Constitution was brought into existence by society through its elected representatives, the Constitutional Assembly, and the impugned statute was enacted by representatives of society, the legislature. Notwithstanding the fact that both entities are representatives of the same society, the products produced by the two entities, and indeed, by the same society, are in conflict.

In a democratic state, the voice of the majority determines how the country should be governed. In an election, once the results of an election have been officially made known and accepted, the minority citizens have to accept the results and adapt to, and learn to live with, the will of the majority. Whenever this should be the position in matters of morality, problems arise.

The judgment of the Constitutional Court of South Africa in the sodomy case of *National Coalition for Gay and Lesbian Equality*¹⁰⁹¹ suggests that the Constitution is the final arbiter in matters of morality. The Court, per Sachs J, held that “what is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself”.¹⁰⁹²

The view of the Court that moral standards are to be set by the Constitution is what causes a great deal of dissatisfaction in society. This is because the Constitution is a document compiled by politicians, and politicians are from all walks of life. On the other hand, if religion were to be allowed to be the final arbiter of moral issues, there would still be a problem, since religions are also diverse, and so are their beliefs.

It is submitted that after all sources of views have been considered, whether constitutional, religious, or legal, the reality of the situation under consideration should be the main consideration. In the case of sodomy, the reality of the situation is that medical evidence, as discussed earlier in this Chapter,¹⁰⁹³ shows the practice to be harmful to both

¹⁰⁹¹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA (6) (CC).

¹⁰⁹² *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA (6) (CC) at par. 136.

¹⁰⁹³ Under the subheading “Without harming one another”, pages 359–364.

participants, willing and mutually consenting though they may be. As a matter of fact, this approach has already been adopted by the Constitutional Court of South Africa in a matter where it found that medical considerations weigh more heavily than a constitutional right.

This challenge where health or medical considerations weighed more heavily came before Court in the case of *Prince v President of the Law Society and Others*.¹⁰⁹⁴ Prince, the appellant, was a candidate attorney who was a Rastafarian by religion and, as such, contended that by virtue of section 15 of the Constitution,¹⁰⁹⁵ he was constitutionally entitled to possession, and consumption, of cannabis,¹⁰⁹⁶ and that a statutory¹⁰⁹⁷ prohibition proscribing possession and consumption of cannabis is unconstitutional, as it violates his constitutional right to exercise his religion freely. He contended that cannabis was part of the Rastafarian religion. Although section 15 of the Constitution deals with freedom of religion, it is section 31(1), by virtue of its wording, that adds more weight to the right, by providing:

“Persons belonging to a cultural, religious or linguistic community may not be denied the

¹⁰⁹⁴ *Prince v President of the Cape Law Society and Others* 2002 (2) SA 794 (CC).

¹⁰⁹⁵ The interim Constitution was used at that time. The relevant section in the interim Constitution was section 13. The final Constitution is being used here for convenience. Section 15(1) of the final Constitution provides:

“(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion”.

¹⁰⁹⁶ Commonly known as dagga.

¹⁰⁹⁷ Section 4 (b) of the Drugs and Drug Trafficking Act 140 of 1992, and section 22A of the Medicines and Related Substances Control Act 101 of 1965.

*right, with other members of that community (a) to enjoy their culture, practice their religion . . . and (b) to form, join and maintain . . . religious . . . associations and other organs of civil society".*¹⁰⁹⁸

The Court accepted that Rastafarianism is a religion, and that the impugned legislation proscribing possession and use of cannabis infringed on the religious practices of the Rastafarians. The question the Court had to determine was whether this infringement was justifiable under the limitation of rights as provided for by section 36 of the Constitution.

It is appropriate at this juncture, for purposes of drawing comparisons in the adjudication of this matter and that of the sodomy matter in the *National Coalition for Gay and Lesbian Equality*¹⁰⁹⁹ case, both matters having being heard and decided by the same Court, to have regard to the appellant's evidence in the form of his affidavit. The appellant stated that the casual or recreational use of cannabis is condemned by true Rastafarians, that true Rastafarians use cannabis for religious purposes only.¹¹⁰⁰

The appellant described his own use of cannabis as being for the performance of the rituals prescribed by his religion according to the

¹⁰⁹⁸ emphasis added.

¹⁰⁹⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA (6) (CC).

¹¹⁰⁰ *Prince v President of the Cape Law Society and Others* 2002 (2) SA 794 (CC) at par 99.

tenets of his religion. He stated that he observed religious ceremonies and other gatherings. One such ceremony was the Nyabinghi, which, according to the appellant, is similar to a church service. The appellant emphasised that at these occasions, cannabis is used as a symbol, by either burning it as an incense or smoking it. The object of using cannabis at these gatherings, stated the appellant, is to create unity and to assist them in re-establishing their eternal relationship with their creator.¹¹⁰¹

The inconsistency of the Court in its interpretation becomes glaringly apparent if one considers the Court's view of the consumption of cannabis, and comparing this view with the Court's view of sodomy. In dealing with the constitutional challenge of possessing and making use of cannabis, the Court held that in a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct "considered by it to be *anti-social* and, where necessary, to enforce that prohibition by criminal sanctions".¹¹⁰²

The Court outspokenly expressed recognition of the fact that the smoking of cannabis is "anti-social". In other words, the Court acknowledged that the legislature, as representatives of society, has the

¹¹⁰¹ *Prince v President of the Cape Law Society and Others* 2002 (2) SA 794 (CC) at par. 99.

¹¹⁰² *Prince v President of the Cape Law Society and Others* 2002 (2) SA 794 (CC) at par. 108 [emphasis added].

power to determine what kind of conduct is “anti-social”. Having identified such, it has the duty not to wink at such conduct, but to enact and enforce laws prohibiting such conduct, and to mete out punishment to transgressors.

What should especially be borne in mind is that the type of conduct under consideration here is conduct which, depending on the interpretation of the Constitution, is countenanced by the text of the Constitution on religious grounds.

On the other hand, we have sodomy which was also found by the legislature, as representatives of society, to be “anti-social” conduct. In view of its being “anti-social”, the legislature did what was expected of it. It exercised its power and discharged its duty to enact legislation prohibiting sodomy. Like the possession and consumption of cannabis, sodomy is conduct which may escape criminal sanctions on constitutional grounds, since no one may be discriminated against on the basis of his or her sexual orientation.

Both types of conduct are detrimental to health. The only difference between the two is that the *detrimental effect on health* of the consumption of cannabis has been acknowledged by the legislature, and as a result, law has been enacted by the legislature to combat its

consumption.¹¹⁰³ On the other hand, it is probably the *immorality aspect* of sodomy that led to its criminalisation by the legislature,¹¹⁰⁴ as opposed to its dangerous effect on health. However, the detrimental effect the practice of sodomy has on health is known in the medical fraternity. However, such effect has not as yet been brought to the attention of courts, although it is generally accepted that it is against nature.¹¹⁰⁵

Both types of conduct, though they may be constitutionally excusable, they are both subject to limitation in terms of section 36 of the Constitution. The one type of conduct is allowed to pass the limitation scrutiny, and the other is not allowed. The prohibition of both types of conduct serves a legitimate governmental purpose.

In the sodomy challenge, the Court finds in favour of homosexual men, that they are a minority, and as such, it is impossible for them to exercise political power which will result in them having a piece of legislation decriminalising sodomy.¹¹⁰⁶ Interestingly, the Court acknowledges the same fact with regard to Rastafarians, that they are a small and marginalised group and, obviously like homosexuals, are unable to wield political authority over the majority to have legislation in their

¹¹⁰³ Drugs and Drug Trafficking Act 140 of 1992.

¹¹⁰⁴ Section 20aA of the Sexual Offences Act of 1957.

¹¹⁰⁵ *Lawrence et al v Texas* 539 U.S. 558 (2003) at 568.

¹¹⁰⁶ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA (6) (CC) at par. 25.

support.¹¹⁰⁷ Notwithstanding these striking analogies, though, the Court had little or no regard for its own precedent. It is for this reason that Meyerson¹¹⁰⁸ feels that when comparing the pragmatic approach of the Constitutional Court in different cases, “it is difficult to avoid the impression that the Bill of Rights is being applied selectively”.¹¹⁰⁹

7.6.1 The position in Canadian law

The Canadian law does deal with sodomy, but from a different angle. The challenge to laws pertaining to sodomy was not based on the right to privacy. Therefore, the case dealing with sodomy, *Egan v Canada*,¹¹¹⁰ is of little assistance for purposes of this Chapter, save to say that the interpretation of the Supreme Court of Canada of a right relating to homosexuality leaves much to be desired.

Appellants were homosexuals who had lived together since 1948 in a relationship marked by commitment and interdependence similar to the commitment and interdependence one would expect to find in a heterosexual marriage. When one partner reached the age of 65, he began to receive old age security income from the state in terms of the

¹¹⁰⁷ *Prince v President of the Cape Law Society and Others* 2002 (2) SA 794 (CC) at par. 112.

¹¹⁰⁸ Meyerson D “Does the Constitutional Court of South Africa take rights seriously? The case of *S v Jordan*” 2004 *Acta Juridica* 154.

¹¹⁰⁹ *Ibid.*

¹¹¹⁰ *Egan v Canada* [1995] 2 S.C.R. 513.

Old Age Security Act.¹¹¹¹ Upon reaching the age of 60, the other partner also applied for a spousal maintenance in terms of 19(1) of the Act.¹¹¹² His application was rejected on the basis that the relationship between the two did not fall within the definition of “spouse” in section 2 of the Act. Section 2, as it was, defined “spouse” as “a person of *the opposite sex* who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves *as husband and wife*”.¹¹¹³

The crucial part of this matter is the action that was brought by the couple to the Federal Court seeking a declaration that the definition contravened section 15(1)¹¹¹⁴ of the Charter of Rights and Freedoms,¹¹¹⁵ in that it discriminated on the grounds of sexual orientation.¹¹¹⁶

¹¹¹¹ Old Age Security Act of 1985.

¹¹¹² Section 19(1) of the Old Age Security Act, as it then was, prior to the challenge, provided: “Subject to this Act and the regulations, for each month in any fiscal year, a spouse’s allowance may be paid to the spouse of a pensioner if the spouse

- (a) is not separated from the pensioner;
- (b) has attained sixty years of age but has not attained sixty-five years of age; and
- (c) has resided in Canada after attaining eighteen years of age and prior to the day on which the spouse’s application is approved for an aggregate period of at least ten years and, where that aggregate period is less than twenty years, was resident in Canada on the day preceding the day on which the spouse’s application is approved.

¹¹¹³ emphasis added.

¹¹¹⁴ Section 15(1) and (2) of the Canadian Charter of Freedoms and Rights provides:

- “(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are

From the provisions of section 15(1) and (2) of the Canadian Charter of Rights and Freedoms, as reproduced in the footnote, it is evident that the section relied on by the couple enumerates the grounds on which discrimination is prohibited. It is evident that “sexual orientation” is not listed as one of those grounds.

It is submitted that it amounts to misleading the court to argue before it for relief that is not constitutionally based. It is submitted further that it is *ultra vires* for a court, in its eager and zealous endeavour to grant relief to a litigant, to read into the text of a Constitution a right, or a basis of a right, which was not included by the drafters. The litigants in this matter could base their argument on any ground but sexual orientation.

The Supreme Court, in its endeavour to afford the litigants relief based on “sexual orientation” as a ground of discrimination, stretched the provisions of the impugned Act too far when it held that “the distinction in the Act is based on a personal characteristic, namely sexual orientation. Sexual orientation *is analogous* to the grounds of *discrimination enumerated in s. 15(1)*”.¹¹¹⁷

disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

¹¹¹⁵ Canadian Charter of Rights and Freedoms of 1982.

¹¹¹⁶ *Egan v Canada* [1995] 2 S. C. R. 513 at 514.

¹¹¹⁷ *Egan v Canada* [1995] 2 S. C. R. 513 at 520 [emphasis added].

If, by “analogous”, the Court had in mind that sexual orientation is analogous to “sex” as a ground enumerated by section 15(1), this too would be an error on the part of the Court. It has been shown in this Chapter that there is a distinction between “gender” and “sex”, as grounds on which discrimination is prohibited, enumerated under section 9(3) of the South African Constitution.

A court may read a word or words in into the text of an Act, to cure a defect which renders the Act unconstitutional. It is submitted that a court may not do so in the text of a Constitution, as this would amount to rewriting the Constitution, a duty that falls outside its jurisdiction.

Interestingly, it is the Constitution of a province, Quebec, that specifically lists “sexual orientation” as a ground on which discrimination is prohibited. The Constitution of the Republic of Canada is falling short in this regard. Section 10 of the Quebec Charter of Human Rights and Freedoms¹¹¹⁸ provides:

Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, *sexual orientation*, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to

¹¹¹⁸ Quebec Charter of Human Rights and Freedoms, which came into effect in 1976 <http://www.cdpdj.qc.ca/en/commun/docs/charter.pdf> (accessed: 2011/08/11).

palliate a handicap.¹¹¹⁹

Section 10(1) concludes by providing:

No one may harass a person on the basis of any ground mentioned in section 10.

The inclusion of “sexual orientation” in the provincial Constitution of Quebec makes it clear that “sexual orientation” could not be read into the text of the Canadian Charter of Rights and Freedoms, and that the Court misguided itself in doing so.

Accordingly, the Old Age Security Act was constitutional, since it could not be challenged on the basis of the Canadian Charter of Rights and Freedoms, since the Charter is silent on sexual orientation.

As in South Africa, closely related to homosexual sodomy, is prostitution, in view of the claim that these should enjoy the privacy that the Constitution guarantees. In Canada, prostitution is not illegal. However, the Criminal Code of Canada has contained provisions which have the effect of directly or indirectly criminalising prostitution.¹¹²⁰ The

¹¹¹⁹ emphasis added.

¹¹²⁰ Section 193 of the Criminal Code of Canada provides:

- (1) “Everyone who keeps a common bawdy-house is guilty of an indictable offence and is liable to imprisonment for two years.
- (2) Everyone who
 - (a) is an inmate of a common bawdy-house,
 - (b) is found, without lawful excuse, in a common bawdy-house, or

provisions concerned make it a crime to keep a brothel, referred to in the statute as a bawdy-house. They also make it a crime to be inside a brother without lawful excuse. Further, it is a crime, in terms of the statutory provisions, to hinder the free flow of traffic, or even of pedestrians on a public place. Contravention of these provisions lead to summary conviction and imprisonment.

It was, consequently, contended that these sections run counter to the provisions of section 7¹¹²¹ of the Canadian Charter of Rights and Freedoms which entrenches the right to liberty and security of the person. It had been submitted on behalf of women in the prostitution industry that the statutory provision being challenged also had the effect of infringing on the right to freedom of association, and that this right

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purpose of a common bawdy-house,
is guilty of an offence punishable on summary conviction.

Section 195 provides:

- “(1) Every person who in a public place or in any place open to public view
- (a) stops or attempts to stop any motor vehicle,
 - (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
 - (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.
- (2) In this section, “public place” includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view”.

¹¹²¹ Section 7 of the Canadian Charter of Rights and Freedoms provides:

“Everyone 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”.

shields adult intimate relationships from government control. Decisions about whom or how to court, love, cohabit, marry, experience sexuality, are matters to be regulated by individual private conscience.

The objective of sections 193 and 195 of the Criminal Code of Canada was to curb the nuisance caused by the soliciting done by prostitutes on the streets and public places in general. The legislature felt that the soliciting caused unnecessary hindrance to the free flow of pedestrian movement and vehicular traffic.

However, in its legislative attempt to accomplish this objective, the legislature went too far. It intruded into private premises and, from the reading of the two sections, it becomes abundantly clear that the legislature sought to make prostitution itself punishable.

It is submitted that such a legislative measure is constitutionally *ultra vires*. Among other things, it strikes at a very basic constitutional right — freedom of association, and freedom of expression.¹¹²² No citizen may be policed as to whom he or she associates with, and as to the content of his or her expressions. Further, the sections of the Criminal Code can be described as unenforceable, since it is not easy for law enforcement officers to know the content of a conversation taking place between two

¹¹²² Section 2 of the Canadian Charter of Rights and Freedoms.

individuals, whether the individuals are in a public or private place. Any attempt to intercept a conversation would fly in the face of constitutional guarantees.

As a matter of fact, the Supreme Court of Canada had earlier committed itself to treating the privacy of people in its jurisdiction with the respect that it deserves. In *Hunter v Southam*,¹¹²³ this Court had recognised the significance of the right to privacy, as a “right to be let alone by other people”.¹¹²⁴ It must be mentioned that this was the holding of the Court notwithstanding the fact the Canadian Charter of Rights and Freedoms, like the United States Bill of Rights, contains no right to privacy in its text. The right to privacy is something that Canadian Courts and the United States Courts read into the Constitution.

In this particular case of statutory provisions which hit at prostitution, the Supreme Court of Canada avoided the issue of privacy. It chose instead to deal with the impugned legislative provision on other aspects of the Charter. The Court held, for instance, that section 193 of the Criminal Code, prohibiting the keeping of a brothel, was not unconstitutional. Nor was the prohibition of the presence of anyone who was in a brothel, or was found therein without lawful cause, unconstitutional.

¹¹²³ *Hunter v Southam* [1984] 2 S.C.R. 145.

¹¹²⁴ *Hunter v Southam* [1984] 2 S. C. R. 145 , at 161 -162.

It was held further by the Court that section 195(1)(c), which made it a crime to stop a motor vehicle, or to attempt to do so, or to impede the free flow of traffic and of pedestrians, for the purpose of obtaining sexual services, was not unconstitutional. This had the effect that women who approached men on pavements to solicit for commercial sex were doing so in contravention of the law, and risking being arrested.

In effect, the statutory law in Canada left the position unclear as to whether the act of selling sex *itself* was illegal, as the legislature regulated activities which are only peripheral to the act of prostitution.

7.6.2 In international law

The Constitution of South Africa enjoins courts to consider public international law. They have the discretion to consider foreign law.

Although they are not obliged by the Constitution to follow international law, they are nevertheless obliged to have regard thereto.¹¹²⁵

International law may assist a court in its reasoning where a similar issue has been dealt with by a court of international status, and such reasoning may serve as a persuasive guideline.

¹¹²⁵ Section 39(1)(b) and (c) of the Constitution.

It is also enlightening to examine how a court of international status views its own judicial precedent. Consequently, it is of interest to see whether a court of international status is consistent in its interpretation of international instruments.

The right to privacy with regard to sexuality was dealt with by the European Court of Human Rights in *X v Federal Republic of Germany*.¹¹²⁶ The Court recognised that sexual life forms an important part of a person's private life.¹¹²⁷ This, logically, conveys the understanding that whatever one does in the area of sexuality in one's privacy falls outside the area of operation of the state.

However, whether the Court would be consistent in its interpretation would be tested in a later case involving male homosexuality, *Dudgeon v United Kingdom*,¹¹²⁸ wherein reliance was placed on the right to privacy¹¹²⁹ entrenched in the European Convention on Human Rights.¹¹³⁰ Article 8 of the Convention provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

¹¹²⁶ *X v Federal Republic of Germany*, *Yearbook XIX* (1976) 277; See van Dijk P and van Hoof G J H *Theory and Practice of the European Convention on Human Rights* 2nd ed (1990) at 373.

¹¹²⁷ *X v Federal Republic of Germany*, *Yearbook XIX* (1976) 277 at 277.

¹¹²⁸ *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5.

¹¹²⁹ Sieghart P *The International Law of Human Rights* (1983) 313.

¹¹³⁰ European Convention on Human Rights and Fundamental Freedoms, 1953 (hereinafter referred to as "the Convention").

- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The applicant in the European Court of Human Rights was a 35-year-old homosexual, who had been consciously homosexual from the age of 14, and was aggrieved by the Northern Ireland laws¹¹³¹ which effectively criminalised certain homosexual acts between consenting male adults. In terms of these laws, consent was no defence, and age was not a factor taken into account by the relevant sections. For some time, he and others had been conducting a campaign aimed at bringing the law in Northern Ireland into line with the law in England and Wales and, if possible, achieving a minimum age of consent lower than 21 years.¹¹³² He contended before the European Court of Human Rights that the existence of these law constituted an unjustified interference with his right to have his privacy respected, in breach of article 8 of the European Convention on Human Rights and Fundamental Freedoms.

The government of Northern Ireland defended its law by arguing that the law relating to homosexual acts is not inconsistent with article 8, as it serves a legitimate purpose, and in fact was necessary, to protect morals

¹¹³¹ Section 61 and 62 of the Offences Against the Person Act of 1861 (the two sections have since been repealed).

¹¹³² *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5at par. 32.

and the rights of others. It was for this reason that the drafters of the Convention had added sub-article (2) which provided that there would be no interference with one's privacy by the state authorities, unless this was necessary, in terms of the law, to protect health and morals, and the rights of others.

Thus, the reading of article 8 makes it clear that the right to have one's privacy respected is subject to some considerations, and therefore the right is not absolute. It is submitted that no court may change this. If the text of a constitution, or of an instrument, qualifies a right, the qualification of a right by the drafters places it outside the jurisdiction of a court to interpret the provision as if it is absolute.

The European Court of Human Rights acknowledged that there could be no denial that some degree of regulation of male homosexual conduct was necessary by means of criminal law, in a democratic society. It is of significance that the Court acknowledged the necessity of some regulation even in cases of consensual acts committed in private, in order "to provide sufficient safeguards against exploitation and corruption of others, particularly those who are particularly vulnerable because they are young, weak in body, inexperienced, or in a state of special physical, official or economic independence".¹¹³³

¹¹³³ *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5 at par. 49.

Notwithstanding this candid acknowledgement, however, the Court decided that it was not concerned with making value judgment as to the morality of homosexual relations between adult males.

It is submitted further, that a court, in interpreting rights, ought not to take judicial notice of how morals have evolved or degenerated in society over a period of time. Perhaps the Court may be at liberty to do this whether there is no law enacted by the legislature, or where there is no specific guidance given in a constitution, or international instrument. On the contrary, however, this is precisely what the European Court of Human Rights did. The Court took judicial notice of the trend in society. It reasoned that as compared with the era when sections 61 and 62 of the Offences Against the Person Act¹¹³⁴ were enacted, there was now a better understanding and, consequently, an increased tolerance of homosexual behaviour, to the extent that in the great majority of member states of the Council of Europe, it was no longer considered to be necessary or appropriate to treat homosexual practices as conduct to which criminal law should be applied.¹¹³⁵

See also Burgess-Jackson K "Our millian Constitution: The Supreme Court's repudiation of immorality as a ground of criminal punishment" 2004 *Notre Dame Journal of Law, Ethics & Public Policy* Vol 18 407 (27 May 2004).

¹¹³⁴ Offences Against the Person Act of 1861 (Ireland).

¹¹³⁵ *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5 at par. 60.

In adopting this approach, the European Court of Human Rights reasoned in a manner similar to that of the United States Supreme Court in *Lawrence v Texas*,¹¹³⁶ and in doing so both Courts have been inconsistent.

It is submitted that a softened attitude of society towards a particular conduct which was made a criminal offence by the legislature, who are representatives of society, is no authority for any court of law to base its decision on the softened, or changed, attitude of society. If the law still remains in the statute books, the duty of a court is to be guided by, and to apply, the law, despite the changed frame of mind of society towards conduct which is a crime. The situation can be illustrated by a changed, or softened, attitude of society towards honesty. As levels of integrity of society drop lower and lower over the years, and honesty is no longer viewed as a virtue, the question arises as to whether courts should now take that softened attitude of society into account, when dealing with cases of theft and fraud. If the approach of the European Court of Human Rights is a principle to be guided by, courts would be expected to also adopt a softened attitude towards persons accused of theft or fraud, and acquit them. If they convict them, they would be expected to reflect the change in the attitude of society towards honesty, by passing lenient sentences.

¹¹³⁶ *Lawrence et al v Texas* 539 U. S. 558 (2003).

It is submitted that since the legislature represents society, it is the legislature that should formally and legally reflect the changed, or softened, attitude of society, by making necessary amendments to the law, or by repealing it. Until such time, courts are bound by what is in the statute book.

In the case at hand, the provision was not in the statute books, but in an international instrument. The European Court of Human Rights was bound, it is submitted, by what appeared in the Convention, until such time that the member states deemed it necessary to amend the provision, or repeal it.

For the European Court of Human Rights to adjudicate a matter in a way that is contrary to the provisions of the Convention, is tantamount to saying that it is not bound by the Convention. This is similar to a constitutional court or supreme court of a country saying that it is not bound by the text of the constitution of its own country.

On the other hand, the minority judgment is, by comparison, attune to the text of the Convention. The minority judges approached their interpretation of article 8 of the Convention from the perspective of the majority. It is the view of the minority that a democratic society is

governed by the rule of the majority.¹¹³⁷ The minority judgment finds it rather odd and perplexing to underestimate the necessity of keeping a statutory law which is in force for the protection of morals held in high esteem by the majority of people.

There is also the question of morality. It is generally known that homosexuality, though it may be countenanced by a constitution of a country, is the type of conduct which has to do with morality. Courts are not the community, but they judge members of the community. The question arises, therefore, whether courts are custodians of morality. The majority decision of the European Court of Human Rights had answered this question in the negative. It held that “the Court is not concerned with making any value judgment as to the morality of homosexual relations between adult males”.¹¹³⁸

It is submitted that if morality is not contained in the statute books, indeed, the Court may not take it upon itself to be the custodian of morality. However, if morality is weaved in in a statutory provision, or in the text of a constitution, or in the text of a covenant, the Court is bound to be the custodian of morality, even if such morality applies in the private sphere of one’s home.

¹¹³⁷ *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5 at par. 3 of the minority judgment.

¹¹³⁸ *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5 at par. 54.

In this regard, the text of article 8 of the Convention does contain a morality principle by providing that there will be no interference by the state in one's privacy unless it is necessary, in accordance with the law, "for the protection of health or morals".¹¹³⁹ The "health" aspect of sodomy has already been dealt with earlier in this Chapter.¹¹⁴⁰

Interestingly, of all international instruments, the European Convention on Human Rights and Fundamental Freedoms is the only instrument which covers morality and health.

The inconsistency of the majority decision is pointed out by the minority highlighting the anomaly of decriminalising male homosexual conduct on the ground that it is protected by privacy, while there are other offences which may be committed in private, and pose no danger to the public, and yet remain punishable in terms of criminal law. Such offences include euthanasia, the killing of another at his own request, suicide pacts, duelling, abortion, and incest between brother and sister.¹¹⁴¹

These are acts which could be done in private and without offence to others, and need not involve the corruption and exploitation of others. Yet, no one has ventured to suggest that they should be left outside the criminal law as matters of private morality.

¹¹³⁹ Sub-article (2) of article 8 of the Covenant.

¹¹⁴⁰ Under the subheading "Without harming one another", pages 359–364.

¹¹⁴¹ *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5 at par. 9.

As for morality, it is an issue authorities cannot turn a blind eye to. If they did, they would be deliberately choosing to close their eyes to reality. The reality is that there are laws which are in place, whether by common law, or statute, because there was, and there continues to be, a need to regulate morality. Cruelty to animals is illegal because of a *moral* condemnation of enjoyment derived from the infliction of pain on creatures which feelings. Laws restricting gambling are mentioned by the minority judges as laws aimed at preventing the effect an addiction to gambling may have on the character of the gambler as a member of society.¹¹⁴²

It becomes convincingly clear, therefore, that most laws were enacted, whether consciously or unconsciously, with the maintenance of good moral principles in mind.

Before the European Court on Human Rights could decide on the case *Dudgeon v United Kingdom*,¹¹⁴³ it had to be guided by the recommendations of the Wolfenden Committee¹¹⁴⁴ on the matter of the privacy of male homosexual acts.

In its report, the Wolfenden Committee stated:

¹¹⁴² *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5 at par. 10.

¹¹⁴³ *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5.

¹¹⁴⁴ The Wolfenden Committee was established in 1957. It was set up for the purpose of exploring legality and constitutionality of homosexuality and prostitution.

There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice in action in matters of private morality. Unless a deliberate attempt is to be made by society acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. *To say this is not to condone or encourage private immorality.*¹¹⁴⁵

It is clear that the proper interpretation of article 8 of the European Convention on Human Rights and Fundamental Freedoms is one that takes into account the wording of the Convention. The Convention expressly contains a proviso which, though privacy should not be interfered with by public authorities, allows it to be interfered with for the sake of health and morality. It is submitted that the opinion of the dissenting judges in the case of *Dudgeon v United Kingdom*¹¹⁴⁶ is in harmony with the wording of the Convention, and therefore correct.

7.7 In search and seizure

When it comes to the right of a citizen's privacy with regard to search and seizure, the Constitution of South Africa is direct to the point.¹¹⁴⁷ It

¹¹⁴⁵ Committee On Homosexual Offences And Prostitution, *The Wolfenden Report* (Authorized Am. Ed., Stein & Day 1963) (1957) par. 61.

See also Backer L C "Exposing the perversions of toleration: The decriminalization of private sexual conduct, the model penal code, and the oxymoron of liberal toleration" 1993 *Florida Law Review* 755.

¹¹⁴⁶ *Dudgeon v United Kingdom* 7525/76 [1981] ECHR 5.

¹¹⁴⁷ Section 14 of the Constitution provides:

renders unconstitutional actions or attempts to conduct a search of a person's body, or home. Property is also beyond searching. The concept "property" may be broad in its application, as it may refer to one's movable possessions, and one's immovable possessions. However, "possessions" are also mentioned separately, and they may not be confiscated, or seized. Finally, communications are sacrosanct. They may not be intercepted.

It is necessary to point out at this stage, that the wording of section 14 indicates that the belongings that are protected by the right to privacy are not exhaustive. This becomes clear from the use of the word "includes". It is submitted that other interests may legitimately be the interests protected by section 14. Privilege, for instance, or the so-called attorney-and-client privilege, or legal professional privilege, may rightly be brought under the wing of the broad right to privacy.¹¹⁴⁸

Prior to the advent of the constitutional right to privacy, one's home was one's castle in name only. The Criminal Procedure Act¹¹⁴⁹ gave wide powers to police to enter property, sometimes without a warrant and

Everyone has the right to privacy, which includes the right not to have—

- (a) their person or home searched;
- (b) their property searched;
- (c) their possession seized; or
- (d) the privacy of of their communications infringed.

¹¹⁴⁸ More attention will be given to privilege towards the end of this Chapter.

¹¹⁴⁹ The Criminal Procedure Act 51 of 1977.

conduct a search, if it appeared, in the opinion of a police officer, that an item the possession whereof was illegal was inside a home, or premises.¹¹⁵⁰

A police was authorised to enter, and search premises, without a warrant, and seize articles if he or she was of the view that if applied for, a warrant would be issued, but the delay in bringing such an application would defeat the purpose of the search.¹¹⁵¹

The reality is that these criminal procedural provisions have survived the advent of the Constitution, and have passed constitutional muster.

It has been suggested¹¹⁵² that for search and seizures to be constitutional, there must be an authorising law which properly defines the scope of the power to search seize. Secondly, there must be prior authorisation by an independent authority. Thirdly, the independent authority must be persuaded by evidence on oath that there are reasonable grounds for conducting the search.

¹¹⁵⁰ Sections 19 to 36 contain provisions regarding search and seizure. Section 22 specifically authorises searches without a warrant under certain circumstances.

¹¹⁵¹ Section 22.

¹¹⁵² Currie I and de Waal J *The Bill of Rights Handbook* (2005) 5th ed at 325.

See also Mcquoid D "Invasion of privacy: common law v constitutional delict — does it make a difference? 2000 *Acta Juridica* 250.

These guidelines do have value, and have been used in practice.¹¹⁵³ However, the Constitution itself, in entrenching one's right to privacy by prohibiting searches and seizures, does not provide that national legislation should be enacted to regulate this matter, or to render what would otherwise be an unconstitutional search and seizure, constitutional. In entrenching other rights, such as the right to equality,¹¹⁵⁴ the right to just administrative action,¹¹⁵⁵ and the right to access to information,¹¹⁵⁶ the Constitution expressly provides that national legislation *must be enacted* to give effect to these rights.

In the matter of police traps, courts were loath to convict on the basis of evidence obtained by police traps. In cases, where they convicted, their disinclination to convict would manifest itself in the resulting lighter sentences.¹¹⁵⁷

It was for this reason that section 252A was inserted to the Criminal Procedure Act. By enacting this provision, the legislature sought to authorise and to render lawful the use of traps and undercover operations in certain circumstances, and to regulate their use. It also sought to

¹¹⁵³ For example, in *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹¹⁵⁴ Section 9(3) of the Constitution.

¹¹⁵⁵ Section 33(3) of the Constitution.

¹¹⁵⁶ Section 32(2) of the Constitution.

¹¹⁵⁷ Du Toit E *et al* *Commentary on the Criminal Procedure Act* 2010 at 24–130.

avoid the conviction of people who are victims of unfair and improper trappings.¹¹⁵⁸

With regard to the first requirement for search and seizure mentioned by Currie and de Waal,¹¹⁵⁹ empowering statutes must clearly identify the purpose of the search and seizure, and provide clear guidelines within which the responsible agents must perform their duties. The correctness of this view was demonstrated in *Mistry v Medical Association*,¹¹⁶⁰ where the Constitutional Court of South Africa found the provisions of section 28(1) of the Medicines and Related Matters Substances Control Act¹¹⁶¹ to be overbroad, and giving inspectors *carte blanche* powers to enter any place, including private homes.

With regard to the third requirement of prior authorisation before a search and a seizure is carried out, the Cape Division of the High Court had occasion to deal with it in the case of *Park-Ross v Director, Office for Serious Economic Crimes*,¹¹⁶² where the offices of a company were entered and searched, and documents were confiscated in terms of the Investigation of Serious Economic Offences Act.¹¹⁶³ The Court threw light on the actual subject of the right to privacy, by holding that the

¹¹⁵⁸ Du Toit E *et al* *Commentary on the Criminal Procedure Act* 2010 at 24–131.

¹¹⁵⁹ Currie I and de Waal J *The Bill of Rights Handbook* (2005) 5th ed at 325.

¹¹⁶⁰ *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127.

¹¹⁶¹ Medicines and Related Substances Control Act 101 of 1965.

¹¹⁶² *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C).

¹¹⁶³ Investigation of Serious Economic Offences Act 117 of 1991.

interest protected by the search and seizure legislation, is privacy rather than property. In view of this holding, it was found by the Court that the relevant provision of the Act was not a justifiable limitation of the right to privacy, in terms of the limitation clause.¹¹⁶⁴

Parallels were drawn by the Court between South Africa and Canada by referring to *Hunter v Southam Inc*,¹¹⁶⁵ where the following guidelines crystallised, namely, that the authorising entity should be an independent judicial officer, evidence placed before the judicial officer must be to the satisfaction of the judicial officer that there are reasonable grounds for believing that an offence is about to be committed, the evidence before court must be to the satisfaction of the judicial officer that something that will constitute concrete evidence will be recovered.¹¹⁶⁶

In South Africa, this does not mean that searches without a warrant will always be unlawful. Section 22 of the Criminal Procedure Act specifically makes a search without a warrant lawful in certain circumstances. The position is the same in the United States of America, although courts prefer the obtaining of a warrant, if at all possible. Obviously, this is required in order to limit the possibility of frivolous searches, which may

¹¹⁶⁴ The interim Constitution was used at that time, and therefore the limitation clause was section 33.

¹¹⁶⁵ *Hunter v Southam Inc* (1985) 11 DLR (4th) 641 (SCC).

¹¹⁶⁶ *Park-Ross v Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) at 217I-J to 218A-B.

be motivated by malice, or other improper considerations. The Supreme Court of the United States held in *MacDonald v United States*,¹¹⁶⁷ that:

Power is a heady thing, and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.¹¹⁶⁸

The Constitutional Court of South Africa was presented with its first opportunity to interpret the right to privacy in *Bernstein v Bester*.¹¹⁶⁹ The matter was not dealing with search and seizure in its ordinary sense, but the litigant's interpretation of the statutory provision involved was that it dealt with search and seizure. The right of the directors of a company were in issue, in that the statutory provision¹¹⁷⁰ that was the subject matter enjoined the directors, during examination, to disclose information which, in their view, was protected by the constitutional right to privacy. The extracting of such private information constituted, in the belief of the directors, a search and seizure. As such, so they contended, it violated the right to privacy.¹¹⁷¹

¹¹⁶⁷ *MacDonald v United States* 335 U.S. 451 (1948).

¹¹⁶⁸ at 335 par. 456.

¹¹⁶⁹ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC).

¹¹⁷⁰ Sections 417 and 418 of the Companies Act 61 of 1973.

¹¹⁷¹ The interim Constitution was used at that time, and the relevant section in the interim Constitution was section 13. The right to privacy in the final Constitution has since become

In a previous decision,¹¹⁷² the Constitutional Court had held that the provisions of the Companies Act were unconstitutional only to the extent that the Act permitted compelled self-incriminating answers given at an examination authorised by sections 417 and 418, to be used against an examinee in subsequent criminal proceedings against him or her. The applicant's attack in *Bernstein v Bester* was broader, and was aimed at striking down the examination provision in its entirety on the grounds that it infringed an examinee's right to privacy, and freedom from seizure of private possessions.

The principle that was laid in *Bernstein v Bester* is a useful yardstick in determining whether the Court would be consistent in its future interpretation of the right to privacy where it involved search and seizure. The Court approached the matter from the angle that no right is to be considered absolute. The truism that no right is absolute implies, according to the Court, that from the outset of interpretation, each right is always already limited by every other right accruing to another citizen.¹¹⁷³

section 14.

¹¹⁷² *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (1996) (1) SA 984 (CC).

¹¹⁷³ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) at par. 67.

According to the Court, however, there is an exception, and this exception, it is submitted, is crucial for purposes of this discussion. It is that “it is only the inner sanctum of a person, such as his or her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community”.¹¹⁷⁴

The point of the Court is clear: No one may claim absolute privacy, because other citizens also have a claim to that right to a large or little extent. Nevertheless, as far as privacy in the inner sanctum of a person, such as family life, sexual preference, and home environment,” is concerned, these areas are beyond the reach of other citizens. The inviolability of this principle would in time be put to the test.

With regard to the absoluteness or otherwise of the right to privacy in the South African Constitution, one would do well to consider the wording thereof, and compare it with the wording of this right in article 8 of the European Convention on Human Rights and Fundamental Freedoms. Article 8(2) of the Convention makes it clear that the right is not absolute, but is subject to law, interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others.

¹¹⁷⁴ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) at par. 67.

By contrast, section 14¹¹⁷⁵ the South African Constitution attaches no factors to which the right is subjected, save for section 36 which would have to be taken into account in each case, as a limitation clause. The wording simply guarantees that *no one* may have his person, home, property searched, and no one may have his or her possessions seized, and no one may have the privacy of their communications infringed.

The Court laid a further guide to be used in future litigations surrounding the right to privacy, especially with regard to search and seizure. It drew from the United States jurisprudence, where the concept of “search” is understood to refer to an invasion by the government, as opposed to invasion by a private citizen.¹¹⁷⁶ In the United States jurisprudence, a two-part test is used to determine whether there has been a violation of privacy. There must be a subjective expectation of privacy by the individual who complains of a violation. Secondly, society must recognize that expectation as objectively reasonable. Finally, the United States Court, in determining whether the individual has lost his or her legitimate expectation of privacy, will consider such factors as whether the item was exposed to the public, abandoned, or obtained by consent.¹¹⁷⁷

¹¹⁷⁵ It was section 13 at the time of this constitutional challenge, in the interim Constitution.

¹¹⁷⁶ *Katz v US* 389 US 347 (1967) 361, *Abel v US* 217 (1960) 241.

¹¹⁷⁷ *Katz v US* 389 US 347 (1967) 361 at 361.

Later, the South African Constitutional Court had to deal with a real search-and-seizure case. The matter before the Court was not dealing with privacy in one's private home, nor was it political, but it dealt with privacy in one's business or profession offices, in the case of *Mistry v Interim National Medical and Dental Council and Others*.¹¹⁷⁸ The central issue was whether the powers of entry, examination and seizure given to inspectors by the Medicine and Related Substances Control Act¹¹⁷⁹ violate the right to privacy in terms of the Constitution.¹¹⁸⁰ The Act authorises inspectors to enter medical practitioners' rooms, and in fact, any premise, vehicle, or vessel, where inspectors reasonably believe that there are substances regulated by the Act.

The Court had laid a precedent principle in *Bernstein v Bester*¹¹⁸¹ that, whereas privacy in the inner sanctum of a person, in family life, and home environment, should be accorded the highest respect, one's entitlement to privacy shrinks gradually as one moves gradually into the outer sphere, such as in business activities, or in one's profession.¹¹⁸²

¹¹⁷⁸ *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127 (CC).

¹¹⁷⁹ Medicines and Related Substances Control Act 101 of 1965.

¹¹⁸⁰ The interim Constitution was used at the time the matter came before Court.

¹¹⁸¹ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC).

¹¹⁸² *Bernstein and Others v Bester and Others* 1996 (2) SA 751 (CC) at par. 67.

It was appropriate for the Court in *Mistry* to be guided by the principle it had laid down in *Bernstein v Bester*. In line with the principle, the Court held that in the case of any regulated enterprise, such as was the case in the medical doctor's profession in *Mistry*, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records, must be attenuated by the obligation to comply with reasonable regulations, and to put up with occasional inspections which may lawfully take place.¹¹⁸³

The principle laid in *Bernstein v Bester*¹¹⁸⁴ was augmented by holding that people who have dealings with communities in carrying out their professional or business obligations, and are licensed to function in a competitive atmosphere, acknowledge as a condition of their licence that they will adhere to the same reasonable controls as are applicable to their competitors.¹¹⁸⁵

However, if a statutory provision, while serving a noble purpose, goes beyond what is necessary in achieving that purpose, such a statutory provision may be at the risk of being struck down by courts. A closer consideration of the Medical and Related Substances Control Act reveals

¹¹⁸³ *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127 (CC) at par. 27.

¹¹⁸⁴ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC).

¹¹⁸⁵ *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127 (CC) at par. 27.

that it is such a statute. Section 28(1) of the Act does not restrict itself to regulating medical doctors' practices by way of inspections, but the section empowers inspectors to enter any "place, vehicle, vessel or aircraft". It was the Court's view that the word "place" was meant to have a wider meaning than "premises", otherwise there would have been no need to add the word.¹¹⁸⁶

In view of this, it was the Court's interpretation that the scope of the section is so broad that it authorises inspectors to enter private homes which, in *Bernstein v Bester*,¹¹⁸⁷ were held to be part of the inner sanctum of a person. A comparison in this regard is appropriate. In Canadian statutory law, Canadians had the Canadian Food and Drugs Act,¹¹⁸⁸ which authorised a peace officer, at any time, *without a warrant*, to enter and search any place *other than a dwelling house*.¹¹⁸⁹ Thus, the Canadian Act showed some respect for a private home by stipulating that only a structure that is not a dwelling house could be entered without a warrant. In the case of a dwelling house, however, the relevant section required that entry be sought and authorised by a judge. Once a warrant was issued by a judge, a peace officer could enter and search any dwelling

¹¹⁸⁶ *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127 (CC) at par. 28.

¹¹⁸⁷ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC).

¹¹⁸⁸ Food and Drugs Act, R.S.C. 1985, F-27.

¹¹⁸⁹ Section 42(1) of the Act [emphasis added].

house in which he or she believed on reasonable grounds that there was a statutorily controlled, or regulated, drug.

Appropriately, then, the wide scope of section 28(1) of the Medical and Related Substances Control Act, and having regard to the relevant comparable Canadian statute, led the Court to believe and to hold that the section gave inspectors *carte blanche* powers. With such powers they could enter any place, including private dwellings, where they suspected medicines to be, and inspect documents which may be of the most intimate kind. Accordingly, the Court held that section 28(1) was disproportionate to its public purpose, and was overbroad in its reach. As such, the section failed to pass the proportionality test that was laid down in *S v Makwanyane*.¹¹⁹⁰

In *S v Makwanyane*, the Constitutional Court of South Africa held that proportionality calls for the balancing of different interests. It held that in the balancing process, the relevant considerations will include the nature of the right that is being restricted and its importance to society. Regard should also be had to the purpose for which the right is restricted and the importance of that purpose to society. Further, a court entrusted with the interpretation of a right should look at the extent of the limitation, its efficacy, and particularly where the limitation has to be

¹¹⁹⁰ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at par, 104.

necessary, it should consider whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

For purposes of the permeating theme of this thesis, namely, the desirability of consistency in constitutional interpretation, it is necessary at this stage to make special reference to the words of the Court when it emphasised the need to accord private dwellings more privacy than business or profession structures. The Court emphasised that in entering any dwelling and conducting a search and seizure, inspectors were running the risk of inspecting “documents which may be of the most intimate nature”.¹¹⁹¹

In view of the seriousness in which the Court viewed the inspection of “documents which may be of the most intimate nature”, the Court was prepared to go beyond the text of the Constitution, and made what it called “assumptions”¹¹⁹² in favour of the applicant. In so doing, the Court, was reading into the text of the Constitution what was not provided for by the drafters. Perhaps the Court was endeavouring to adopt the generous approach to interpretation. The first assumption that the Court was prepared to make was that a right to informational privacy

¹¹⁹¹ *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127 (CC) at par. 30.

¹¹⁹² *Mistry v Interim National Medical and Dental Council and Others* 1998 (4) SA 1127 (CC) at par. 48.

is covered by the protection of privacy guaranteed by section 13.¹¹⁹³ The second was that the respondent was at all material times fulfilling state functions and, as such, obliged to respect the provisions of the Bill of Rights, including the right to privacy.

The relevance of these two assumptions, and of the Court's emphasis that there was a possibility that the applicant's documents were of an intimate nature, will be clear in the light of the discussion that follows immediately after this paragraph.

It would appear that when a court deals with a matter which borders on politics, or is outright political, its line of reasoning changes from what it would be had the matter been an ordinary one. It will be recalled that Chapter 2 of this thesis touched on the possibility, and indeed, on the admission by some judges, that complete neutrality, or objectivity, in controversial, or political, matters, is a challenge to maintain.¹¹⁹⁴

In 2008, in *Thint v National Director of Public Prosecutions*,¹¹⁹⁵ the Constitutional Court of South Africa had an opportunity to adjudicate upon a political, high profile case, which challenged the constitutionality of section 29 of the National Prosecuting Authority Act.¹¹⁹⁶ The subject

¹¹⁹³ of the then interim Constitution. The section in the final Constitution is now section 14.

¹¹⁹⁴ See Chapter 2, under the subheading "Neutrality in interpretation", pages 82–86.

¹¹⁹⁵ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹¹⁹⁶ National Prosecuting Authority Act 32 of 1998.

matter of the case was the lawfulness or otherwise of a number of search and seizure warrants issued by a judge in chambers, purportedly in terms of section 29 of the Act. The matter concerned the validity of the terms of the warrants and the lawfulness of the manner in which they were executed. Among other places, the search and seizure warrants were executed at two private places of residence of one of the applicants. Some of the warrants were executed at the offices of the applicants.

The High Court, which was the Court of first instance in hearing the application for the warrants to be declared invalid, had ruled in favour of the applicants. It found that the warrants were invalid in that they were vague and overbroad in that they did not describe the suspected offences with sufficient particularity, and so they did not convey intelligibly to the suspect the ambit of the search they authorised. It was found to be essential by the Court *a quo* that the warrants should have specified the suspected offences exactly, as well as when and by whom they were allegedly committed. Further, the search and seizure warrants should have been issued with due regard being had to the attorney–client privilege which could be compromised during the course of the search of the attorney’s offices.¹¹⁹⁷

¹¹⁹⁷ *Zuma and Another v National Director of Public Prosecutions and Others* 2006 (1) SACR 468 (D) at 494; *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA (CC) at 94D–E.

Commendably, it was out of regard for the doctrine of *stare decisis* that the Court *a quo* found that the search and seizure warrants were invalid, as they did not comply with principles laid down in the body of case law¹¹⁹⁸ guiding the South African Courts.

It has become settled law in South Africa, which should not be disturbed, that warrants should meet certain requisites. It is interesting to note that these requisites became part of our law even before the advent of the Constitution.¹¹⁹⁹ It is submitted that if these requisites could not be compromised in an era when no rights were protected by the Constitution, they now weigh even more heavily under the authority of the Constitution.

The principle of legality is another authority in deciding the validity of search and seizure warrants. This principle was relied upon by the Supreme Court of Appeal in *Powell v Van der Merwe*,¹²⁰⁰ and indeed by the Court *a quo*. The principle of legality does not specifically deal with search and seizures, but it broadly deals with the requirements which our

¹¹⁹⁸ *Ex parte Hull* 1891 4 SAR 134; *Hertzfelder v Attorney-General* 1907 TS 403; *Ho Si v Vernon* 1909 TS 1074; *Pullen NO and Others v Waja* 1929 TPD 838; *Minister of Justice and Others v Desai NO* 1948 (3) SA 395 (A); *Divisional Commissioner of SA Police, Witwatersrand Area and Others v SA Associated Newspapers Ltd and Another* 1966 (2) SA 503 (A).

¹¹⁹⁹ *Ex parte Hull* 1891 4 SAR 134; *Hertzfelder v Attorney-General* 1907 TS 403; *Ho Si v Vernon* 1909 TS 1074; *Pullen NO and Others v Waja* 1929 TPD 838; *Minister of Justice and Others v Desai NO* 1948 (3) SA 395 (A); *Divisional Commissioner of SA Police, Witwatersrand Area and Others v SA Associated Newspapers Ltd and Another* 1966 (2) SA 503 (A).

¹²⁰⁰ *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA).

law must comply with in order for it to be fair. For example, it is a requirement of the principle of legality that the definition of common law and statutory crimes should be precise and settled.¹²⁰¹ The statement of prohibited conduct should be in clear and unambiguous language. Vaguely conceived proscriptions and imprecisely described elements of conduct are objectionable, since they insufficiently guide an ordinary citizen.¹²⁰²

The spirit of the principle of legality has been absorbed into the text of the Constitution of South Africa. This can be seen from section 35(3)(a) of the Constitution, which makes it a requirement for a fair trial that an accused person be informed of the charge with sufficient detail so as to be able to answer it.

Applying this principle to search and seizures, the Supreme Court of Appeal in *Powell* correctly held that the principle of legality required the state to confine itself in the exercise of powers permitted by statute.¹²⁰³

As already pointed out, South Africa has a long history of requiring that search and seizures adhere to certain rules. It is not clear why the Constitutional Court, in handling the *Thint v National Director of Public*

¹²⁰¹ Burchell J *Principles of Criminal Law* (2008) 3ed at 100.

¹²⁰² *Ibid.*

¹²⁰³ *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) at par. 22.

*Prosecutions*¹²⁰⁴ case elected to act with disregard of settled law. As far back as the nineteenth century, in *Ex Parte Hull*,¹²⁰⁵ a search warrant was set aside for vagueness and overbreadth. The Court, per Kotze CJ, held that the warrant was too general and too vague. It was the Court's firm view that if warrants were allowed to be issued under a loose and arbitrary exercise of a general power, no one would be safe:

The secrets of private friendship, relationship, trade and politics, communicated under the seal of privacy and confidence would become public, and the greatest trouble, unpleasantness and injury caused to private persons, . . . The secrecy and sanctity of private dwellings might be violated, . . . if the private citizen did not feel safe against what may be nothing more than the curious eye of the police agent, sheltering itself behind the authority of a search warrant.¹²⁰⁶

It is submitted that the Constitutional Court of South Africa is bound by precedent established over the years as long as the decisions arrived at over the years are in harmony with the spirit of the Bill of Rights. It is only in those instances where the decisions of earlier courts, when weighed against the spirit of the Bill of Rights are found to be out of harmony, that the Constitutional Court may deviate, and establish its own precedent. It is necessary to add, however, as a matter of fairness, that the Constitutional Court, as the highest court in constitutional matters, has the power to overrule its own prior decisions where they become

¹²⁰⁴ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA (1) (CC).

¹²⁰⁵ *Ex parte Hull* 1891 4 SAR 134.

¹²⁰⁶ *Ex parte Hull* 1891 4 SAR 134 at 141.

manifestly incorrect. However, in doing so, the doctrine of *stare decisis* would necessitate that such intention be stated clearly and reasons given.

With the line of precedent faithfully continuing in those early years, the Supreme Court of South Africa, in *Hertzfelder v Attorney-General*,¹²⁰⁷ was consistent in holding to a principle it had laid down in *Hull*. In *Hertzfelder*, the applicant was charged with fraud, and police seized his documents and effects which were not the property in respect of which the offence was alleged to have been committed. Police had relied on section 45 of the Criminal Procedure Code, which provided that if there was any property in regard to which there was a reasonable ground for believing, upon sworn information, laid before a magistrate, that the property might afford evidence as to the commission of a crime, a warrant could be obtained to search the premises containing the property. The property could be seized and taken before a magistrate to be dealt with in accordance with the law.

The warrant of search and seizure which the police were relying on was on a printed form dealing with stolen property, and authorising the proper officer to search premises and seize property. But all the words relating to stolen property had been struck out. Thus, the warrant did not specify the crime alleged to have been committed, and was, in the

¹²⁰⁷ *Hertzfelder v Attorney-General* 1907 TS 403.

opinion of the Court, “irregular in form” and “in fact quite unintelligible”.¹²⁰⁸ This judgment echoed the principle that search and seizure warrants should not be vague and overbroad, as was correctly required by the Court *a quo* in *Zuma and Another v National Director of Public Prosecutions*.¹²⁰⁹

The unbroken chain of consistency established by South African courts continued in *Ho Si v Vernon*,¹²¹⁰ where, again, it became necessary to reiterate the need for warrants not to be vague and overbroad. The warrant in question was described by the Court as “a very remarkable document”,¹²¹¹ a form of search warrant which was intended to be used for searching premises in which stolen goods were suspected to be concealed. Three-fourths of the warrant had been left blank. The document did not show upon whose information it was issued, and none of the blank spaces were filled in. The reference to goods had been deleted, and across the face of the document, the following words were written:

Asiatics illegally in this colony or wanted on warrant, or not in possession of registration certificates, in houses or rooms to be pointed out.¹²¹²

¹²⁰⁸ *Hertzfelder v Attorney-General* 1907 TS 403 at 405.

¹²⁰⁹ *Zuma and Another v National Director of Public Prosecutions and Others* 2006 (1) SACR 468 (D) at 486H–I.

¹²¹⁰ *Ho Si v Vernon* 1909 TS 1074.

¹²¹¹ *Ho Si v Vernon* 1909 TS 1074 at 1078.

¹²¹² *Ibid.*

Below these words, the document continued thus:

These are therefore in the name of our Lord the King to authorise and require you, with necessary and proper assistants, to enter in the daytime or nighttime into the said dwelling-house of the said Asiatics at Johannesburg, and there diligently search for the said Asiatics; and if the same, or any part thereof, shall be found upon such search, that you bring the bodies of the said Asiatics before me to be disposed of and dealt withal according to law.¹²¹³

Assessing the validity of the document which purported to be a search warrant, the Court described the terms of the document as being grammatically unintelligible. The Court held that “to say that such a document had any validity in law, or conferred authority upon its holder to enter private houses forcibly and as of right, would be to state an alarming proposition, *and one subversive of the most elementary rights of freedom*”.¹²¹⁴

It is necessary at this stage to briefly pause, and highlight the requirements established by the South African courts: warrants must state what precisely is to be seized, and must state the offence which the search is intended to prove. Stated differently, the warrant must not be vague or overbroad, a fact correctly stated by the Court *a quo* in *Zuma and Another v Director of Public Prosecutions*,¹²¹⁵ based on consistency

¹²¹³ *Ho Si v Vernon* 1909 TS 1074 at 1078.

¹²¹⁴ *Ho Si v Vernon* 1909 TS 1074 at 1078 [emphasis added].

¹²¹⁵ *Zuma and Another v National Director of Public Prosecutions and Others* 2006 (1) SACR 468

required by judicial precedence, confirmed by the Supreme Court of Appeal.¹²¹⁶

In confirming the judgment of the Court *a quo*, the Supreme Court of Appeal continued the line of precedent established for warrants, by requiring that warrants should violate the right to privacy to as little extent as possible. The Supreme Court of Appeal drew attention to *Pullen v Waja*,¹²¹⁷ wherein a warrant authorised the seizure of “*certain* books and documents and *other* papers of A. E. Waja and or M. A. Waja & Co.”¹²¹⁸ Again, the Court in *Pullen* reiterated the established pattern by holding that these words were quite general and did not identify the things to be seized. The words were so vague, held the Court, “that it is impossible to say what they include”.¹²¹⁹ It was argued on behalf of the State that Waja must have understood what books were wanted and the nature of the offence in connection with which their seizure was authorised. However, even this submission was not weighty enough to persuade the Court from the established pattern. Rejecting the submission, the Court held that “even if he had an inkling on these points, this cannot cure the defect in the warrant itself”.¹²²⁰

(D).

¹²¹⁶ *National Director of Public Prosecutions and Others v Zuma and Another* 2007 SA 137 (SCA) at par. 70.

¹²¹⁷ *Pullen NO and Others v Waja* 1929 TPD 838.

¹²¹⁸ *Ibid* at 851 [emphasis added].

¹²¹⁹ *Ibid*.

¹²²⁰ *Ibid*.

True, the Court in *Pullen* relaxed the requirement that a warrant should state the offence in connection with which a search is sought. Having made this compromise, the Court nevertheless was of the view that the conclusion it had arrived at made no inroad on the doctrine that a warrant must not be in general terms.

The Court acknowledged that as we have a specific statutory provision on the subject, it is obvious that the English decisions do not govern in South Africa, but they are useful because they emphasise certain general principles, namely, that courts ought to examine the validity of warrants with a jealous regard for the liberty of the subject, and his rights to his property, and refuse to recognise as valid a warrant the terms of which are too general.¹²²¹

Further precedent was established in our case law. Twenty years after the Court decided *Pullen v Waja*,¹²²² the Supreme Court of Appeal,¹²²³ then the Appellate Division, overruled the decision of a provincial division which authorised seizure of documents for purposes of being used in evidence. A lesson to be learned from the Court's judgment is the value it attached to the common law right to privacy even when the litigant

¹²²¹ *Pullen NO and Others v Waja* 1929 TPD 838 at 846 – 847.

¹²²² *Pullen NO and Others v Waja* 1929 TPD 838.

¹²²³ *Minister of Justice and Others v Desai NO* 1948 (3) SA 395 (A).

claiming the right was a juristic person. The litigant claiming the right to privacy by challenging the validity of a warrant of search and seizure was what was referred to in the warrant as “non-European Trade Unions” and the “Council for non-European Trade Unions”¹²²⁴. The fact that the litigant was a juristic person did not compromise the requirement that warrants must not be vague and overbroad. The Court declared the warrant bad on its face¹²²⁵ because it gave the officer executing it a wider field of choice as to the documents to be seized than the statute authorised.¹²²⁶

Eighteen years later, when a newspaper sought to expose prison conditions under apartheid, part of a warrant authorised seizure of “all other documents including statements of whatsoever nature concerning reports in connection with the conditions in gaol and experience of prisoners in gaols throughout the Republic of South Africa”.¹²²⁷ The Appellate Division ruled this portion of the warrant to be too general. It was the Court’s view that it was couched in such wide terms as to justify the inference that the justice of the peace who had issued it had not properly applied his mind to it. In holding thus, the Court referred to the

¹²²⁴ *Minister of Justice and Others v Desai* NO 1948 (3) SA 395 (A) at 397.

¹²²⁵ *Minister of Justice and Others v Desai* NO 1948 (3) SA 395 at (A) 397.

¹²²⁶ *Minister of Justice and Others v Desai* NO 1948 (3) SA 395 at 397; Section 49(1)(b) of Act 31 of 1917.

¹²²⁷ *Divisional Commissioner of S.A. Police, Witwatersrand Area and Others v S.A. Associated Newspapers Ltd and another* 1966 (2) SA 503 (A) at 509.

long chain of precedent that the South African judicial system had established over decades.

The final word in the long chain of precedent was heard in *Cine Films v Commissioner of Police*,¹²²⁸ where the warrant was supposedly intended to bring about the seizure of films. The warrant, however, went beyond that, and authorised the seizure also of all stock books, stock sheets, invoices, invoice books, consignment notes, all correspondence, and all documents.¹²²⁹ Even the suggestion to bring the understanding of the word “document” in line with what was intended to be seized was rejected by the Appellate Division. The warrant had been drawn too widely. The documents to be seized had to be identified.

The purpose of this review of the South African case law surrounding the question of search and seizure warrants is to show the desirability of consistency in constitutional interpretation, and indeed in the interpretation of our law as a whole. The purpose is further to show that such an established pattern of how our courts understand the importance of the right to privacy should not suddenly be broken simply because the case before court is a political one.

¹²²⁸ *Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1972 (2) SA 254 (A).

¹²²⁹ *Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1972 (2) SA 254 (A) at 503, 504.

In the opinion of the Supreme Court of Appeal, this long chain of judicial precedent establishes the following:

- that because of the inherent risk of misuse in the issuing of search and seizure warrants, courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy, and property;
- that this applies to both the authority under which a warrant is issued, and the ambit of its terms;
- that the terms of a search must be construed with reasonable strictness;
- that a warrant must convey intelligibly to both searcher and the searched the ambit of the search it authorises;
- that if a warrant is too general, or its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid, and it will be set aside;
- that it is no cure for an overbroad warrant to say that the subject of the search knew, or ought to have known what was being looked for.¹²³⁰

The Supreme Court of Appeal added that it set out these authorities because they appeared to have been overlooked when the warrant was granted, since the judge in the Court *a quo* had not referred to any of

¹²³⁰ *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) at par. 59.

them, or to the principles they establish.¹²³¹ The warrants, in the Court's view, were riddled with imprecision and vagueness, and they had to be set aside on this ground alone. Those carrying out the searches were given untrammelled power to carry out what amounted to a general ransacking of the subject's premises. The Supreme Court of Appeal emphasised¹²³² that this has not been the law in this country since at least 1891, and it is not the law under our Constitution, which preserved and enhanced what was best in our legal traditions. The warrants were set aside as unlawful.

Against this background, attention is now focused on the judgment of the Constitutional Court in *Thint v National Director of Public Prosecutions*.¹²³³ Two of the applicants complain that the search and seizure warrants were too vague and overbroad, and their execution amounted to a gross violation of their right to privacy, protected by section 14 of the Constitution. Indeed, the High Court as the Court of first instance, finds them to be so, relying in so doing on the requirements set out by the Supreme Court of Appeal in *Powell NO and Others v Van der Merwe NO and Others*.¹²³⁴ The Supreme Court of Appeal confirms the finding of the High Court, relying in so doing on the

¹²³¹ *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) at par. 60.

¹²³² *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) at par. 62.

¹²³³ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹²³⁴ *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA).

long chain of precedents in the history of the South African judicial system.

An examination of the search and seizure warrants supports the finding of the High Court that they were vague and overbroad. The warrant covers six pages, and contains phrases such as “in general, any . . .”, “any other correspondence”, and “documentation relating to any allegation”.

The Constitutional Court itself leaves no doubt in any one’s mind that it is aware of the legal principles that have crystallised over the decades in the South African jurisprudence regarding search and seizure warrants. This awareness on the part of the Constitutional Court can be gleaned from its own judgment that a proper balance should be struck between the need to combat serious crimes and the obligation to respect privacy and dignity in the context of a search and seizure operation.¹²³⁵ The Court reasons, correctly so, that investigators should always have a clear idea of what items might have a bearing on their investigation. For this reason, they should, at the very least, always limit their search to avoid examining items that are irrelevant to the investigation. They are never entitled simply to search through everything present in the hope that

¹²³⁵ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at par. 144.

something relevant might be found.¹²³⁶ Searching through everything would amount to having what the Supreme Court of Appeal referred to as “untrammelled power” to carry out a “general ransacking” of premises.¹²³⁷

This knowledge, however, did not dissuade the Constitutional Court from making a finding that is consistent with its knowledge.

It is necessary to combat crime, such as was suspected in *Thint v National Director of Public Prosecutions*,¹²³⁸ but the principle of legality cannot be sacrificed in the state’s endeavour to combat crime.¹²³⁹ One of the aspects of the principle of legality is that a narrow interpretation should always be preferred over a broad one. A narrow interpretation will always operate in favour of an individual, as opposed to the state.¹²⁴⁰

Accordingly, it is submitted that a proper interpretation of section 29 of the National Prosecuting Authority Act, authorising search and seizures, would not allow warrants to be overbroad.

¹²³⁶ *Ibid.*

¹²³⁷ *Powell NO and Others v Van der Merwe NO and Others* 2005 (5) SA 62 (SCA) at par. 62.

¹²³⁸ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹²³⁹ Basdeo V “A constitutional perspective of police powers of search and seizure: The legal dilemma of warrantless searches and seizures” 2009 403 *SACJ* 417.

¹²⁴⁰ Shaik-Peremanov N “Basel II — The right to privacy: A South African perspective” 2009 *SA Mercantile Law Journal* 550.

7.8 In the United States law

In the United States jurisprudence, the right to privacy with regard to search and seizure is protected by the Fourth Amendment of the United States Constitution. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

Thus, the prohibition of searches and seizures authorised by warrants that are vague and overbroad is based on the Constitution in the United States.¹²⁴¹ In addition, the United States Supreme Court¹²⁴² has developed a legal test aimed at determining whether one's claim to privacy may be upheld. The test is twofold. The first leg of the test is whether the person had a subjective expectation of privacy. Once the first leg of the test has been determined, the second leg is considered, namely, whether objectively, the person had expectation of privacy.¹²⁴³ For example, the Supreme Court has recognised that in the context of the government workplace, employees may have a reasonable expectation of privacy against certain intrusions.¹²⁴⁴ However, public employees'

¹²⁴¹ Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 48–3.

¹²⁴² *Katz v United States* 389 U.S. 347 1967.

¹²⁴³ *United States v Sarkisian* 197 F.3d 966, 986 (9th Cir. 1999).

¹²⁴⁴ *Minnesota v Olson* 495 U.S. 91 (1990).

expectations of privacy in their offices, desks, and file cabinets may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.¹²⁴⁵

Further, it appears that the right to privacy in the United States applies only vertically, and not horizontally. This means that the respect to be shown for the right to privacy is expected from the state towards its citizens, and not so much from private citizens towards other citizens. This becomes clear from the understanding of the concept “search and seizure”. In the United States, “search and seizure” is understood to mean a government or state invasion of a person’s privacy.¹²⁴⁶

As regards warrants for search and seizure, the law in the United States is that they must have particularity. This concept is the South African equivalent of “not vague”. In the context of the United States jurisprudence, particularity means that “the warrant must make clear to the executing officer exactly what it is that he or she is authorised to search for and seize”.¹²⁴⁷

Further, like in South Africa, it is a requirement in the United States as regards warrants for search and seizure that they must not be overbroad.

¹²⁴⁵ *Minnesota v Olson* 495 U. S. 91 (1990) at 95, 96.

¹²⁴⁶ Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 144.

¹²⁴⁷ *In Re Grand Jury Subpoenas* 1987, 926 F.2d 847, 856 – 857.

In the context of the United States jurisprudence, this means that “there must be probable cause to seize the particular things named in the warrant”.¹²⁴⁸

In a United States court case of *United States v SDI Future Health Inc*,¹²⁴⁹ resembling the South African case of *Thint v National Director of Public Prosecutions*,¹²⁵⁰ after a nearly two-year investigation spearheaded by the Internal Revenue Service with the participation of some state agencies, investigators concluded that SDI Health Inc, a California corporation, had engaged in wide ranging Medicare fraud. In addition, they believed that SDI Health Inc had committed extensive tax fraud. On the basis of information obtained during investigation, investigators applied for a warrant to search SDI Health Inc premises. The warrant relied on an affidavit.

In terms of an annexure to the warrant, the premises to be searched were SDI’s corporate headquarters, principal business offices, and computers. In terms of an additional annexure, twenty-four categories of items had to be seized. The annexure also gave specific instructions about the retrieving and handling of electronic data and other technical equipment.

¹²⁴⁸ *In Re Grand Jury Subpoenas* 1987, 926 F.2d 847 at 857.

¹²⁴⁹ *United States v SDI Future Health Inc et al* 491 F.Supp 2d 975 (2007).

¹²⁵⁰ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

A magistrate concluded that a probable cause existed for the search, and granted the warrant, on condition, however, that both the affidavit and the warrant be amended to guarantee protection, or privilege, for patients' medical information.

The legality of the warrant was impugned on the ground of vagueness and overbreadth. On this basis, it was submitted that the evidence thus obtained be ruled inadmissible. The Court of first instance¹²⁵¹ granted the motion, not only in part, as was requested, but in full. On appeal by the State, the United States Court of Appeals concluded that five of the twenty-four categories of materials listed in the search warrant were unconstitutionally overbroad, and that no exception rescued them from being rejected.¹²⁵²

There is a striking similarity between the United States case and the South African case. In both cases the warrants were extensive. The South African counterpart was six pages long. The United States counterpart took the court two hours to review.¹²⁵³ About both warrants it was complained that they were vague and overbroad.

¹²⁵¹ *United States v SDI Future Health Inc et al* 491 F.Supp 2d 975 (2007).

¹²⁵² *United States v SDI Future Health Inc*, 568 F.3d 684 (2009) at 14.

¹²⁵³ *United States v SDI Future Health Inc*, United States Court of Appeals, Ninth Circuit 1 (2009) at 2.

Admittedly, South African courts are not enjoined to follow foreign law, but are constitutionally advised to at least consider it.¹²⁵⁴ Foreign law may, and in fact does, provide insight into how to adjudicate upon certain matters where there are striking resemblances between South Africa and the particular foreign jurisdiction in respect of our case facts, law, and perhaps the constitutional text. As a matter of fact, the Constitutional Court of South Africa has often relied on the jurisprudence of the United States of America, Canada, India and Germany for insight into the interpretation of some rights in the Bill of Rights.¹²⁵⁵ By comparison, however, the Court has made reference to only six African countries, namely, Botswana, Lesotho, Malawi, Nigeria, Tanzania and Zambia.¹²⁵⁶

7.9 In Canadian law

In Canadian law, the right to privacy in respect of searches and seizures, is constitutionally protected by section 8 of the Charter of Rights and Freedoms.¹²⁵⁷ Section 8 of the Charter provides:

Everyone has the right to be secure against unreasonable search or seizure.

¹²⁵⁴ In terms of Section 39(1)(c) of the Constitution.

¹²⁵⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); *S v Jordan and Others* 2002 (6) SA 642 (CC).

¹²⁵⁶ Church J Schulze C Strydom H *et al Human Rights from a Comparative and International Law Perspective* (2007) at 80.

¹²⁵⁷ Canadian Charter of Rights and Freedoms, 1982.

Like in the United States law, the right to privacy in Canada is understood to apply vertically. It is the protection of citizens against searches and seizures by the state.¹²⁵⁸

In Canada, the regulation of searches and seizures has been primarily the responsibility of the legislature, and its regulations have been enforced by the Supreme Court of Canada.¹²⁵⁹ The relevant piece of legislation which dealt specifically with searches and seizures was the Combines Investigation Act.¹²⁶⁰ In terms of the Act, the requirement for searches and seizures was reasonableness. The Act stipulated conditions which, if met, would enable a court of law to declare a search reasonable: A search warrant had to be obtained prior to the search. The warrant had to be issued by a person who was capable of acting judicially, that is, who must not be involved in the investigation. The warrant had to be issued only after it had been established upon oath that reasonable and probable grounds existed to believe that an offence had been committed, and that evidence was to be found in the place to be searched.¹²⁶¹

The Combines Investigation Act has since been repealed and replaced by the Competition Act.¹²⁶² It is remarkable that the Competition Act of

¹²⁵⁸ Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 48-4.

¹²⁵⁹ *Hunter v Southam* [1984] 2 S.C.R. 145.

¹²⁶⁰ Combines Investigation Act of 1969, as amended.

¹²⁶¹ Hogg P W *Constitutional Law of Canada* Vol 2 (2007) at 48-23.

¹²⁶² Competition Act of 1985.

Canada echoes the legal position in South Africa, the consistency of which has already been shown in this Chapter,¹²⁶³ and in the United States, namely, that a warrant must not be vague and overbroad. Section 15(2) of the Competition Act succinctly provides that:

*A warrant issued under this section shall identify the matter in respect of which it is issued, the premises to be searched and the record or other thing, or the class of records or other things, to be searched.*¹²⁶⁴

In South Africa, authors¹²⁶⁵ have expressed themselves in an almost self-contradictory manner regarding the issue of whether corporate entities have a claim to the right to privacy. Neethling,¹²⁶⁶ for example, writes that contrary to a natural person, a juristic person does not have a body, and that any other view would be unrealistic. He then expresses the view that since a juristic person does not have a body, it does not have feelings which can be infringed. For this reason, he draws the conclusion that a juristic person has no claim to the right to dignity and feelings. It is submitted that this view is correct.

The same author, however, then considers the right to privacy and identity. The author reasons that since privacy and identity may be

¹²⁶³ Pages 410–438.

¹²⁶⁴ Emphasis added.

¹²⁶⁵ Neethling J *et al Law of Delict* (2006) 5th ed 299 – 301; Neethling J *et al Law of Personality* (2005) 2nd ed 71.

¹²⁶⁶ Neethling J *et al Law of Personality* (2005) 2nd ed at 71.

analysed in the same way as with the right of a juristic person to a good name, *fama*, the same conclusion may be drawn as in the case of the right to a good name, namely, that there may be an infringement of personality without injured feelings. The author comes to the final conclusion that, from a dogmatic point of view, a juristic person should be able to claim satisfaction for invasion of privacy even though it cannot suffer hurt to its feelings.¹²⁶⁷

It is a non-understandable contradiction that a juristic person cannot claim the right to dignity and feelings, but can claim the right to privacy and identity.

As far as South African courts are concerned, the Court in *Financial Mail v Sage Holdings*¹²⁶⁸ was prepared to accept Neethling's view that a juristic person does have a claim to the right to privacy notwithstanding the fact that it cannot have injured feelings.

On the other hand, the Constitutional Court of South Africa has held that the privacy of a corporate entity is attenuated when compared to that of an individual.¹²⁶⁹ In this respect only, the Court is to be commended for holding to consistency in the South African judicial precedent. This has

¹²⁶⁷ at 71.

¹²⁶⁸ *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451.

¹²⁶⁹ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at par. 77.

been the view since the early decision in *Bernstein v Bester*,¹²⁷⁰ followed by *Investigating Directorate v Hyundai Motor Distributors*.¹²⁷¹

It is submitted that this view is correct, since it accords with the text of the Constitution. Section 8(2) of the Constitution provides that:

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

The condition created by the words “if”, “to the extent that”, “taking into account the nature” makes it clear that a juristic person may be *entitled to* a right, or may be *bound to respect and grant*, a right, depending on the nature of the right. Accordingly, the interpretation of the Constitutional Court in respect of the right a juristic person may have to privacy, that it is not as uncompromising as that of a natural person, is correct.

However, the Court’s interpretation of the right to privacy left something to be desired. The premises of applicants which were the subject of the warrants of search and seizure were not only the premises of a juristic person, namely, the Thint Company. The warrants also authorised

¹²⁷⁰ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) at par. 67.

¹²⁷¹ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors and Others* 2001 (1) SA 545 (CC) at par. 18.

searches in the private dwellings of one of the applicants, a natural person. These premises were listed clearly in paragraph 15 of the Court's judgment. These were private dwellings at the applicant's flat in Killarney, Johannesburg, and at the applicant's residence at the Nkandla Traditional village, KwaZulu-Natal.

The Court expressed itself clearly on the right to privacy of the juristic person in these words:

It must be borne in mind, however, that in *Thint's* case we are concerned with the search of the offices of a company. As a corporate entity, *Thint* does not bear human dignity and thus its rights of privacy are much attenuated compared with those of human beings.¹²⁷²

However, the Court said nothing on the search conducted at the dwellings premises, which were of a private nature. Whether this silence was by sheer oversight is not known, but the search of the offices was thoroughly analysed by the Court.

The fact that the Court addressed itself to the right to privacy of a juristic person, to the neglect of the right in respect of the natural person, is not consistent with its precedent. The Court had established in no uncertain

¹²⁷² *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at par. 76.

terms the right of a natural person to privacy in *Bernstein v Bester*,¹²⁷³ where the Court had held that:

*A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place.*¹²⁷⁴

Despite the high respect the Court had shown for the privacy of an individual in his or her personal sphere in *Bernstein v Bester*,¹²⁷⁵ it elected to be silent thereon in *Thint v National Director of Public Prosecutions*.¹²⁷⁶

7.10 Privacy arising from privilege

It was a bone of contention in *Thint* that the search and the subsequent seizure of personal belongings belonging to the applicants violated the attorney–client privilege, or legal profession privilege. In order to assess the consistency of interpretation in this regard, it is essential first to set out what the law provides in the statutes, in case law, and at common law.

¹²⁷³ *Bernstein and Others v Bester and Others NO* 1996 (2) SA 751 (CC).

¹²⁷⁴ at par. 15 [emphasis added].

¹²⁷⁵ *Bernstein and Others v Bester and Others NO* 1996 (2) SA 751 (CC).

¹²⁷⁶ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

Communication between a legal practitioner and his or her client enjoy protection, to enable unfettered communication without fear on the part of the client that what he or she told the legal practitioner in confidence would be divulged. Privilege may be waived only by the client.¹²⁷⁷

In South Africa, legal professional privilege, or attorney–client privilege, is so important that its importance has been acknowledged by the legislature. Section 201 of the Criminal Procedure Act¹²⁷⁸ protects legal professional privilege in criminal cases as follows:

“No legal practitioner qualified to practice in any court, whether within the Republic or elsewhere, shall be competent, without the consent of the person concerned, to give evidence at criminal proceedings against any person by whom he is professionally employed or consulted as to any fact, matter or thing with regard to which such practitioner would not on the thirtieth day of May, 1961, by reason of such employment or consultation, have been competent to give evidence without such consent: Provided that such legal practitioner shall be competent and compellable to give evidence as to any fact, matter or thing which relates to or is connected with the commission of any offence with which the person by whom such legal practitioner is professionally employed or consulted, is charged, if such fact, matter or thing came to the knowledge of such legal practitioner before he was professionally employed or consulted with reference to the defence of the person concerned”.¹²⁷⁹

The essence of the statutory provision is that a legal practitioner is bound to keep confidential what was communicated to him or her by the client,

¹²⁷⁷ Schwikkard P J *et al Principles of Evidence* (2009) 3rd ed at 149.

¹²⁷⁸ Act 51 of 1977.

¹²⁷⁹ Section 201 of the Act.

if it was communicated to the legal practitioner while the relationship between the legal practitioner and the client was that of a client consulting with the legal practitioner. There are only two exceptions to the rule: only if the client has given consent to the communication being disclosed, and if the legal practitioner came to have the information before he or she was consulted by the client.

When writing about this kind of privilege, authors¹²⁸⁰ have a common denominator, that legal professional privilege requires the following: that the legal practitioner must have been acting in a professional capacity; the communication must have been made in confidence; it must have been for the purpose of obtaining legal advice; and it is the client who must claim the privilege.¹²⁸¹

The requirement that the legal practitioner must have been acting in his or her professional capacity has been strengthened by courts, both in England¹²⁸² and in South Africa,¹²⁸³ by holding that it is not necessary that the legal practitioner be a private practitioner; consultations of a salaried practitioner employed by a private company or by the State are also privileged. The rationale for this view, according to the South

¹²⁸⁰ Schwikkard P J *et al Principles of Evidence* (2009) 3rd ed; Cross R *Cross on Evidence* (1979) 5th ed; Hoffman L H and Zeffert D *The South African Law of Evidence* (1988) 4th ed.

¹²⁸¹ Schwikkard P J *Principles of Evidence* 3rd ed (2009) at 147 –149.

¹²⁸² *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB All ER 353.

¹²⁸³ *Mohamed v President of the Republic of South Africa* 2001 2 SA 1145 (C).

African Court in *Mohamed v President of the Republic of South Africa*,¹²⁸⁴ is that if the legal professional privilege applied only in the case of lawyers in private practice, that would force government departments, statutory bodies, and private companies with in-house legal advisers to reorganise — at great cost to themselves — their *modus operandi*, so that all legal advice required is received from independent legal advisers, rather than from their salaried legal staff.

There is one recognised reason which would preclude a client from claiming privilege, namely, if the client consulted with a legal practitioner for the purpose of discussing a possible settlement.¹²⁸⁵ The rationale behind this exclusion is that the communication between the client and the legal practitioner is intended, in any event, to be communicated to a third party, that is, the opponent of the client in litigation.

Another area of law where privilege features, is in civil procedure. Civil procedure requires discovery of documents which either party relies on for its case. This step should take place after close of pleadings, before the matter is argued in court. Rule 35 of the High Court Rules was designed for this very purpose. Discovery is such a crucial stage of proceedings that if a party, having been duly served with notice to discover, fails to do so within the time allowed, the party requiring

¹²⁸⁴ *Ibid.*

¹²⁸⁵ Dugdale A M *Professional Negligence* 2nd ed (1989) at 490.

discovery may apply to court for an order to comply. Failure to comply may result in the court dismissing the claim, or striking out the defence, at the instance of the party requiring discovery.¹²⁸⁶

Having set out the seriousness with which discovery is viewed in civil procedure, it is now appropriate to show the parallel importance of privilege. While Rule 35 makes provision for compelling discovery, it exempts certain documents from discovery. Subrule (2) relaxes the rigid requirement of discovery by allowing documents which are deemed to be privileged to be excluded from discovery. Documents of this nature are those which contain “communications between attorney and client and between attorney and advocate”.¹²⁸⁷

Commenting on the weight to be attached to privileged documents which exist between a client and a legal adviser, Erasmus *et al*¹²⁸⁸ remark that documents which fall into this category must be omitted from schedules by the party making discovery. The subrule gives effect to the general principle that a litigant is not obliged, either before or during a trial, to disclose any document which was brought into existence for the purpose of litigation. The subrule also underscores the fact that communication made in confidence to counsel, attorneys, and even to their clerks, that

¹²⁸⁶ Rule 35(7) of the High Court Uniform Rules.

¹²⁸⁷ Erasmus H J *et al Superior Court Practice* (2005) at 247.

¹²⁸⁸ *Ibid.*

is, professional assistants acting under the control and direction of the principal, is privileged. The learned authors add that such communication is privileged even if it is made through an interpreter. Finally, they make a point, not made by other authors, that such communication is “privileged *permanently*”.¹²⁸⁹

Discovery may be resisted even where a litigant is conducting his or her own case.¹²⁹⁰

Having outlined the position in law as regards privilege, it is now convenient to assess the consistency in the South African jurisprudence. The South African judicial precedent in respect of privilege was established at a time when there was still no special court entrusted with the adjudication of constitutional questions only. The fact of the matter is that there was no Constitution that was elevated to the status of being the supreme law of the land, against which the validity of all laws would be tested. The Appellate Division of the Supreme Court of South Africa was the highest and final judicial authority in settling any questions of law. Thus, the body of precedents established by that authority should be respected.

¹²⁸⁹ Erasmus H J *et al Superior Court Practice* (2005) at 255 [emphasis added].

¹²⁹⁰ Hoffmann L H and Zeffertt D *The South African Law of Evidence* (1988) 4th ed at 267.

The Constitution of the Republic of South Africa, 1996 is now the supreme law of the land, and the validity of every law, and of every conduct of the executive, is measured against it. Interpretation of laws must also be consistent with the Bill of Rights contained in the Constitution.

The question arises, then, as to what the position should be with regard to judicial precedent established by higher courts, and especially by the Appellate Division, or the now Supreme Court of Appeal, now that there is the Constitutional Court.

The answer lies in the text of the Constitution itself. Section 39(2) of the Constitution answers:

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.

This means that the test is whether the existing body of precedent is in harmony with the spirit of the Bill of Rights. The Constitutional Court is the highest court in constitutional matters. As such, it has the jurisdiction to overturn precedent established by other higher courts where their decisions are inconsistent with the spirit of the Bill of Rights. Conversely, this also means that the Constitutional Court would have no

basis for disturbing what has become settled law, if that law is consistent with the Bill of Rights. If any court were to do so, it would be showing disregard for the internationally recognised doctrine of *stare decisis*.

It is convenient, first, to look at the way the right to privacy was drafted. Section 14 of the Constitution does not mention privilege. However, the wording of the section indicates that the four listed aspects of privacy are merely the four among other aspects. The section says that the right “*includes*”¹²⁹¹ the four listed aspects. The section does not limit the right to privacy to the few specified areas. It is submitted that privilege, for example, is an aspect of privacy. However, under privilege alone, there are several other aspects falling under privilege. For example, communication between the following persons is privileged: between husband and wife; doctor and patient; and between a legal practitioner and a client.¹²⁹²

In view of the wording of the section, it is abundantly clear that in interpreting the section, a court may not adopt a narrow approach. A generous approach is called for. Thus, if a litigant claimed the right to privacy under one of its aspects, namely, privilege, and more specifically attorney–client privilege, a court would have to accept the claim as being covered by the Bill of Rights.

¹²⁹¹ Emphasis added.

¹²⁹² Erasmus H J *et al Superior Court Practice* (2005) at 247.

The correctness of this view is backed up by the Supreme Court of Canada in its interpretation of the right to privacy. In *Lavelle v Canada*,¹²⁹³ the Court held:

Solicitor–client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor–client relationship. *Confidential communications to a lawyer represent an important exercise of the right to privacy*, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public’s confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences.¹²⁹⁴

Thus, the Supreme Court of Canada did not hesitate to interpret the right to privacy as encapsulating the legal professional privilege. By comparison, the Constitutional Court of South Africa eschewed the question whether the right to privacy covers privilege, and explained its avoidance by stating that the applicants did not assert that the Constitution itself protects legal professional privilege, and therefore there was no need for the Court to explore that question.¹²⁹⁵

¹²⁹³ *Lavellee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink* 2002 3 S.C.R. 209.

¹²⁹⁴ *Ibid* at par. 49.

¹²⁹⁵ *Lavellee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink* 2002 3 S. C. R. 209 at par. 82.

A long chain of judicial precedent in South Africa dealing with privacy has already been outlined in this Chapter. However, for purposes of privilege, it is necessary to look at the groundwork that was laid by the South African courts even before the coming into effect of the final Constitution. While the interim Constitution was still the provisional Constitution, the Cape Provincial Division of the High Court in *Park-Ross v Director: Office for Serious Economic Offences*,¹²⁹⁶ dealt with search and seizure, which was said to be out of harmony with the right to privacy, as it was then entrenched in section 13 of the interim Constitution.

The constitutionality of section 6 of the Investigation of Serious Economic Offences Act¹²⁹⁷ was impugned. The section provided for search and seizure, and was worded as follows:

(1) The Director or any person authorised thereto by him in writing may for the purposes of an inquiry at any reasonable time and without prior notice or with such notice as he may deem appropriate, enter any premises on or in which anything connected with that inquiry is or suspected to be.

The Court acknowledged that, like any other right, the right protecting citizens against search and seizure was subject to limitations. However,

¹²⁹⁶ *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C).

¹²⁹⁷ Act 117 of 1991.

a law limiting the right would have to meet certain requirements, namely, (a) that the law must pursue an objective which is sufficiently important to justify limiting the right; (b) the law must rationally be connected to the objective; (c) it must impair the right no more than is necessary to accomplish the objective; and (d) it must not have a disproportionately severe effect on the persons to whom it applies.¹²⁹⁸ It was the Court's view that section 6 of the Act, while meeting the requirements (a) and (b), did not meet the requirements (c) and (d).

However, a strong precedent in respect of legal professional privilege was set by the Supreme Court of Appeal in *Bogoshi v Van Vuuren NO and Others*,¹²⁹⁹ where similarities can be found in almost all material respects between the *Thint v National Director of Public Prosecutions*¹³⁰⁰ case of the Constitutional Court and the *Bogoshi v Van Vuuren*¹³⁰¹ case of the Supreme Court of Appeal: in both cases attorneys and their offices were involved; in both cases the offices of the attorneys were searched and documents seized; in both cases privilege was claimed; in both cases a request was made that the documents be kept at the Registrar's office until the lawfulness of the search and seizure was determined.

¹²⁹⁸ *Park-Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) at 152.

¹²⁹⁹ *Bogoshi v Van Vuuren NO and Others* 1996 (1) SA 785 (SCA).

¹³⁰⁰ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹³⁰¹ *Bogoshi v Van Vuuren NO and Others* 1996 (1) SA 785 (SCA).

Crucial principles were laid down in *Bogoshi* as to how attorney–client privilege should be viewed in cases of search and seizure. It is submitted that these principles are not in conflict with the spirit of the Bill of Rights. As such, they are constitutionally valid, and should serve as precedent to any court that is seized with the adjudication of the question of legal professional privilege, as it relates to searches of attorneys’ offices.

The principles, or guidelines, which crystallised in *Bogoshi* were that: (a) only confidential communications, and material integral thereto, between attorney and client, made for the purpose of obtaining legal advice, are privileged¹³⁰²; (b) in the multitude of documents contained in an attorney’s office, there would be documents and information which, in the ordinary course of events, may not be privileged¹³⁰³; (c) privilege does not arise automatically, it must be claimed.¹³⁰⁴ This may be done not only by the client, but by the attorney as well. As a matter of fact, an attorney is under a duty to claim privilege. The Court found it necessary to qualify this third principle by stating that in claiming privilege on behalf of client, an attorney must be acting, not for his own interests, but on behalf of the client, otherwise the attorney’s claim to privilege may be regarded as not genuine.¹³⁰⁵ In such a case, a court would be entitled to

¹³⁰² *Bogoshi v Van Vuuren NO and Others* 1996 (1) SA 785 (SCA) at 792J to 793A.

¹³⁰³ *Ibid* at 793A–B.

¹³⁰⁴ *Ibid* at 793H–I.

¹³⁰⁵ *Ibid* at 793J; see *In re Impounded Case (Law Firm)* 879 F 2d 1211 (3rd Cir 1989) where an attorney ostensibly claimed privilege on behalf of his client, whereas his intention was to

disregard the claim to privilege, and admit the document in question as evidence, or permit its seizure, as the case may be; (d) privileged documents may not be seized under a search warrant¹³⁰⁶; and (e) it is the task of courts to vigilantly safeguard legal professional privilege, and therefore, the right of governmental authorities to enter upon an attorney's office and to seize a client's documents must be critically examined.¹³⁰⁷

Attention is now given to applying the first principle laid down by the Court, that only confidential communications, and material integral thereto, between attorney and client, for the purpose of obtaining legal advice, are privileged. Applying this principle to the case of *Thint v National Director of Public Prosecutions*,¹³⁰⁸ it is reasonable to conclude that the applicant had no expectation that his legal profession offices were to be searched. In a situation where a search is sudden, it is only natural that an attorney will not be able to say with certainty which document, lying where precisely in his or her office, contains confidential communication. Therefore, a court judgment which is in the spirit of the Bill of Rights will take this human inability into account, and will not be

frustrate investigation against him.

¹³⁰⁶ This principle was repeated with approval by the Constitutional Court in *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹³⁰⁷ *Bogoshi v Van Vuuren NO and Others* 1996 (1) SA 785 (SCA) at 795D.

¹³⁰⁸ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

rigid in its demand that documents or information claimed to be privileged be specified with unmistakable accuracy.

Indeed, it is submitted that it would be safer for any court to err on the side of caution, by assuming that most of what is to be found in an attorney's office is privileged. The Constitutional Court made this important observation,¹³⁰⁹ but was not guided by it. An attorney's profession is that of consulting and providing legal advice to clients. Our law, in all its manifestations in criminal proceedings, is careful to make presumptions that are favourable to the accused, than to the State.¹³¹⁰ This is because the onus of proving the guilt of an accused rests on the shoulders of the State. An example of this presumption is the admissibility of confessions in criminal proceedings.¹³¹¹ The admissibility of confessions as evidence of the guilt of the accused is not presumed in

¹³⁰⁹ In *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC), at paragraph 12, the Constitutional Court acknowledged that: "there is always the risk that privileged documents may be discovered during a search, wherever the search takes place, and any judge who issues a search warrant will appreciate this". At paragraph 96 the same acknowledgment was made: "It is undeniable that, where a search of an attorney's offices is undertaken in circumstances where his or her client is under investigation, such searches may raise a danger that items protected by legal professional privilege will be discovered. Of course, searching the home or office of a person under investigation will also bear the risk of the discovery of privileged items, as it will be likely that any letters or documents prepared for legal advice to that person will also have been sent to the person under investigation. But when attorneys' offices are searched, there is the additional risk that the privileged documents of other clients of an attorney may be found. I agree therefore that there is a greater risk of the invasion of legal professional privilege when the search of attorneys; offices is undertaken".

¹³¹⁰ See, for example, *S v Bhulwana* 1996 (1) SA 388.

¹³¹¹ Cross R *Cross on Evidence* (1979) 5th ed at 541; Hoffmann L H and Zeffertt D *The South African Law of Evidence* (1988) 4th ed 207 – 235; Schwikkard P J *Principles of Evidence* (2009) 3rd ed 335 – 358.

favour of the State. The presumption is in favour of the accused; it is that the confession is inadmissible. For the confession to be admissible, it must meet certain requirements,¹³¹² which are proved by means of a trial within a trial.¹³¹³

The above view finds support in Canadian law. In Canada, the State has been regarded as a “singular antagonist”¹³¹⁴ against an individual; the State is in a position of power when compared to the accused person. For this reason, the failure on the part of a court to balance up the unequal positions by demanding less of the State, while demanding too much of the accused, who is in a weaker position, would be a failure of justice.

This view was reinforced in connection with criminal proceedings by the Supreme Court of Canada in *Lavallee v Canada*,¹³¹⁵ where the Court emphasised that in the context of a criminal investigation, legal professional privilege acquires an additional dimension. The individual privilege holder is facing the state as a “singular antagonist”, and for this reason he or she requires an arsenal of constitutionally guaranteed

¹³¹² Section 217(1) of the Criminal Procedure Act 51 of 1977; Schwikkard P J *et al Principles of Evidence* (2009) 3rd ed at 337–338; Cross R *Cross on Evidence* (1979) 5th ed at 534–536.

For a confession to be admissible as evidence against the accused, it must have been made voluntarily by the accused, in his or her sober senses, and without undue influence.

¹³¹³ Schwikkard P J *Principles of Evidence* (2009) 3rd ed at 347.

¹³¹⁴ *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 S.C.R. 927 at 994.

¹³¹⁵ *Lavallee, Rackel & Heintz v Canada (Attorney General)*; *White, Ottenheimer & Baker v Canada (Attorney General)* *R v Fink* 2002 3 S.C.R 209 at par. 23.

rights. The Supreme Court of Canada added that it is when a person is the target of a criminal investigation that the need for the full protection of the privilege is activated. It is therefore incumbent on courts to ensure that the privilege delivers on the promise of confidentiality that it holds.¹³¹⁶

The second guideline that was laid down by the Court in *Bogoshi* was that, in the multitude of documents found in an attorney's office, there would be documents and information which, in the course of events, may not be privileged.¹³¹⁷ The use of the word "may" opens the way for the guideline to be applicable both in favour of the State or the attorney. This means that, because some documents in the office of an attorney may *not* be privileged, by the same token, some documents *may* be privileged. The latter understanding is in consonant with the principle of legality, which requires that if a law is open to more than one interpretation, the interpretation favourable to the accused must be preferred over the one prejudicial to the accused.¹³¹⁸

¹³¹⁶ *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink* 2002 3 S. C. R. 209 at par. 23.

¹³¹⁷ *Bogoshi v Van Vuuren NO and Others* 1996 (1) SA 785 (SCA) at 793A.

¹³¹⁸ Burchell J *Principles of Criminal Law* (2005) 3rd ed at 101; *S v Maweke and Others* 1971 (2) SA 327 (A) at 329; *Nkopane and Others v Independent Electoral Commission* (2007) 28 ILJ 670 (LC) at 671; Terblanche S "Aspects of minimum sentence legislation: judicial comment and the court's jurisdiction" 2001 *SACJ* 7; Van der Walt A J "Transformative constitutionalism and the development of South African Property of Law (part 2)" 2006 *TSAR* 9.

The Constitution itself favours such an understanding. Section 39(2) of the Constitution enjoins courts which perform the task of interpreting legislation, developing common law, or customary law, to promote the spirit, purport, and objects of the Bill of Rights. The Bill of Rights, while placing some limitation to rights under section 36, was designed, particularly in criminal proceedings, to protect accused persons from being victimised by the State. An example of this fact is section 35 of the Constitution, which protects the rights of arrested, detained, and trial-undergoing accused persons.

Further, section 39(3) provides that the Bill of Rights does not deny the existence of any other rights, or freedoms, that are recognised, or conferred by common law, customary law, or legislation, to the extent that those rights are consistent with the Bill. This section means that there may be other rights which are not specifically mentioned in the text of the Constitution which may be a creature of common law, customary law, or legislation. Such rights, though not mentioned by the text of the Constitution, are still protected by the Constitution. It is submitted that among such rights is privilege, which arises from common law, in particular the legal professional privilege. Privilege is not specifically mentioned in the text of the Constitution, but it falls under the right to privacy, which was drafted in an open-ended style so as to include other rights, which section 39(3) says are also protected.

Applying this guideline and the interpretation attached to the case of *Thint v National Director of Public Prosecutions*,¹³¹⁹ it is submitted that the Court was supposed to lean towards the assumption that there were documents or information in the applicant's office which could be privileged. Indeed, the applicant requested that documents seized be taken for safekeeping to the Registrar's offices, until the lawfulness or constitutionality of their seizure was determined. The fact that the applicant could not, at the stage of the seizure, state with certainty that the documents seized were privileged or not, should have, in the assessment of a reasonable court, been understandable. In view of this uncertainty as to which documents were privileged, and which were not, the applicant only claimed a blanket privilege. It is submitted that the approach which the Court should have adopted is: in any legal practitioner's office, privileged documents are bound to be found. It is, therefore, only prudent to err on the safe side, by assuming that there are, rather than the opposite assumption. An opposite assumption flies in the face of the principle of legality and the spirit of the Bill of Rights.

The third principle, or guideline, laid down in *Bogoshi v Van Vuuren*¹³²⁰ was that privilege does not arise automatically, but must be claimed.

¹³¹⁹ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹³²⁰ *Bogoshi v Van Vuuren NO and Others* 1996 (1) SA 785 (SCA).

Academic writers¹³²¹ and courts¹³²² have repeatedly stated that privilege is the right of the client, and therefore it can only be waived by the client. However, privilege can also be claimed by a legal practitioner on behalf of his or her client. The only reason why in *Bogoshi* the claim to privilege was not sustained is that it was not raised *bona fide*.

Applying further the principles established in *Bogoshi* to the case of *Thint v National Director of Public Prosecutions*,¹³²³ it is best to outline first the background to the argument that was finally endorsed by the Constitutional Court, that the applicants did not raise privilege.

The search warrants were executed both at the offices of the juristic person, Thint (Pty) Ltd, and at the offices of an attorney. Investigators seized various items from Thint's offices, including documents and computers. An employee of the Company was present during the search. The employee stated in unambiguous terms in her affidavit that she was aware that certain correspondence between the Company, Thint, and its lawyers, was confidential and privileged. She stated that she had been informed by her superior which documents were in this class. She

¹³²¹ Dugdale A M *et al Professional Negligence* (1989) 2nd ed 490; Schwikkard P J *Principles of Evidence* (2009) 3rd ed 149; Cross R *Cross on Evidence* (1979) 5th ed 286; Hoffmann L H and Zeffertt D *The South African Law of Evidence* (1988) 4th ed 254.

¹³²² *Waterhouse v Shields* 1924 CPD 155; *Watts v Goodman* 1929 WLD 199; *Bogoshi v Van Vuuren NO and Another* 1996 (1) SA 785 (SCA) 793D.

¹³²³ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

claimed privileged in respect of certain documents in a filing room, while calling in the assistance of the Company's attorneys.¹³²⁴

As regards the search in the offices of the attorney, the issue was whether the applicant had claimed privilege at the time that the search was conducted. It was argued that the applicant did not claim privilege at the time of the search and seizure, and that if he did, he did so later, and the claim was a mere suggestion that there might be privileged documents in the items that were seized by the State.

If the import of section 39(2) of the Constitution was clear, there should have been no doubt as to what the correct view should have been. The section favours a court ruling that inclines itself towards the promotion of the spirit, purport, and objects of the Bill of Rights. A ruling that inclines itself away from the overall spirit of the Bill of Rights is, accordingly, discouraged by the section.

In the light of the above submission, therefore, the Court was supposed to be prepared to develop the common law principle of privilege which requires that privilege be raised at the time of the search. The Court was supposed to develop the principle to cover the situation where privilege is claimed later, rather than at the time of the search. Such a development

¹³²⁴ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at par. 20.

of the common law principle would be in terms of section 39(2) of the Constitution. Indeed, section 173 of the Constitution puts the responsibility squarely on the Constitutional Court¹³²⁵ “to develop the common law, taking into account the interests of justice”.

It is interesting to note that the Constitutional Court acknowledged the fact, either without being aware of it, or without intending to rely on its own acknowledgement, that it is immaterial when privilege is claimed. What is material is that it should be raised. The Court acknowledged the import of section 29(11) of the National Prosecuting Authority Act¹³²⁶ :

Section 29(11) in no way undermines the ordinary common-law accorded to privileged documents. *Should investigators seize documents that are privileged, but no claim of privilege is made at the time of the search so that section 29(11) does not come into operation, the ordinary rules governing privileged documents will continue to apply.* The state therefore will not be able to use the privileged documents in any criminal proceedings, and any derivative evidence obtained as a result may also be excluded (depending on the application of section 35(5) of the Constitution by the trial court). There may also be the risk that the unlawful seizure of privileged documents in egregious circumstances could result in

¹³²⁵ and the Supreme Court of Appeal, and the High Courts.

¹³²⁶ Act 32 of 1998. Section 29(11) of the Act provides:

If during the execution of a warrant or the conducting of a search in terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the inquiry and that such information is necessary for the inquiry, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for sake custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.

the trial court ruling that the trial itself is unfair.¹³²⁷

In *casu*, the attorney did not raise the question of privilege immediately, but later after the searchers had left his office.

The second stronger precedent in South Africa, on the question of the extent of protection to be afforded attorney–client communications, was established in *S v Sefatsa*,¹³²⁸ where, during cross examination of a state witness, defence counsel brought to the attention of the trial judge that the defence was in possession of a statement made by the state witness which was *prima facie* a privileged statement. The statement had been made by the state witness to an attorney for the purpose of obtaining legal advice. Defence counsel argued that he was nevertheless entitled to cross–examine the state witness on the contents of the statement. If allowed by the trial judge to cross–examine the state witness, the cross–examination would show the innocence of the accused represented by counsel. It was counsel’s argument that the trial judge had the power to order that the state witness be cross–examined on his privileged statement. Defence counsel relied on *R v Barton*,¹³²⁹ where Caulfield J held that if there are documents in the possession of counsel which, on

¹³²⁷ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at 56G–I [emphasis added].

¹³²⁸ *S v Sefatsa and Others* 1988 (1) SA 868.

¹³²⁹ *R v Barton* [1972] 2 QB All ER 1192.

production, help to further the defence of an accused person, no privilege attaches.¹³³⁰

The trial judge in *S v Sefatsa* leaned towards the view that he had no power to override privilege. After conviction and sentence, the trial judge, having heard an application for leave to appeal, granted the application for leave to appeal on the basis, among others, that he could have erred in law by disallowing cross-examination of the state witness on grounds of the inviolability of privilege.

When the matter came before the Appellate Division, as it then was, the Court, per Botha JA, held that any claim to a relaxation of privilege must be approached with the greatest circumspection.¹³³¹ Accordingly, the Appeal Court found that the trial judge did not err in law in disallowing the cross-examination of the state witness on a privileged statement.

Thus, the view taken in *Thint v National Director of Public Prosecutions*¹³³² regarding the legal professional privilege does not take into account the precedent established in the South African jurisprudence. The acknowledgement¹³³³ that precedent was set in

¹³³⁰ *R v Barton* [1972] 2 QB All ER 1192 at 1192D.

¹³³¹ *S v Sefatsa and Others* 1988 (1) SA 868 at 886G.

¹³³² *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹³³³ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA

*Bogoshi v Van Vuuren NO and Others*¹³³⁴ that privileged documents may not be seized under search warrant should have prevented the seizure of privileged documents in *Thint v National Director of Public Prosecutions*.¹³³⁵

It is not a prerequisite of common law, nor of any statute, that a person claiming privilege be precise as to what document or information is privileged, at least at the time of the unexpected search. It is common knowledge that when a search is sudden and unexpected, confusion and anxiety may set in, and at that moment of confusion and anxiety a precise recollection of what is privileged and what is not, is not always humanly possible. It is these considerations that a court should always be prepared to grant in criminal proceedings in favour of the accused.

The Supreme Court of Canada has been exemplary in this regard. It was precisely for this reason, the failure of taking into account possible confusion and anxiety on the part of an attorney, that a statutory provision was declared constitutionally invalid by the Supreme Court of Canada. In *Lavallee v Canada*,¹³³⁶ section 488.1 of the Criminal Code of

1 (CC) at par. 84.

¹³³⁴ *Bogoshi v Van Vuuren NO and Others* 1996 (1) SA 785 (SCA).

¹³³⁵ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹³³⁶ *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Otternheimer & Baker v Canada (Attorney General); R v Fink* 2003 3 S. C. R. 209.

Canada¹³³⁷ was impugned for violating attorney–client privilege. The challenge was based on section 8 of the Canadian Charter of Rights and Freedoms,¹³³⁸ which guarantees protection against search and seizure. As in the South African case of *Thint v National Director*,¹³³⁹ the applicant was an attorney whose offices had been searched on the authority of a warrant.

The impugned section 488.1(2) provided that seized items may be sealed and kept safe only if a “lawyer . . . claims that a named client of his has a solicitor–client privilege”¹³⁴⁰ in respect of the documents. In terms of the impugned section 488.1(8), if the attorney is present at the time and place of the search, the officers conducting the search had to give the attorney a reasonable opportunity to claim privilege. If no claim was made, the searching officers could seize the documents and freely examine their contents, which had the effect of the privilege being lost. Most importantly, however, the statutory provision was struck down because of allowing privilege to be lost if the attorney, though present, failed to claim privilege for whatever reason, such as sickness, or out of sheer nervousness arising out of having his or her office searched.¹³⁴¹

¹³³⁷ Criminal Code of Canada R.S.C. 1985.

¹³³⁸ Canadian Charter of Rights and Freedoms, 1982.

¹³³⁹ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹³⁴⁰ Emphasis added.

¹³⁴¹ *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink* 2002 3 S. C. R. 209 at par. 27.

Thus, the Supreme Court of Canada was exemplary in taking human nature and weaknesses into account, and in not allowing these to compromise the protection afforded by attorney–client privilege.

The applicants in the South African case of *Thint v National Director of Public Prosecutions*¹³⁴² had relied on the Canadian case of *Lavellee v Canada*¹³⁴³ in claiming privilege, but the Constitutional Court dismissed their reliance by pointing out that the attorney in *Lavellee* had claimed privilege, whereas in *Thint* he had not, that is, in the Court's view. It is submitted that the judicial practice of comparing foreign law, and the doctrine of judicial precedent in the court's own jurisdiction, does not require blindly that there be exactly identical parallels between the case before the court and the case relied upon as precedent, or the case relied upon in another jurisdiction. It is sufficient that there be some major similarities, and the underlying principles be the same. For a court to reject being bound, or at least being persuaded, by the judgment of another court simply because the cases do not correspond in every minor detail, betrays a disregard for wisdom and insight already displayed in its own jurisdiction, or in comparable foreign case law.

¹³⁴² *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC).

¹³⁴³ *Lavellee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink* 2003 3 S. C. R. 209.

Canada has a long history of treating legal professional privilege with respect. Indeed, the case of *Lavellee* was the culmination of a trend which had its start from the 1970s. Before the 1970s, the searching of law offices, according to the Court in *Lavellee*, was seldom heard of in criminal investigations. But since the 1970s the Court¹³⁴⁴ observed that there had been an increasing trend in Canada towards more aggressive investigatory methods which included the issuing of warrants to search law offices for evidence of crime.

Canadian courts¹³⁴⁵ expressed concern about the dangers of searching law offices in view of the attorney–client privilege, and urged Parliament to create protective measures. Thus, section 488.1 of the Criminal Code of Canada was designed to allay the concerns of the Court with regard to attorney–client privilege. Unfortunately, however, section 488.1 fell short

¹³⁴⁴ at par. 10.

¹³⁴⁵ In *R v Colvin, ex parte Merrick* (1970) 1 C.C.C. (2d) 8 (Ont. H.C., the Court held:

“The question of solicitor–privilege is, in this connection, a troublesome one. On the one hand, no authority should be given *carte blanche* to search through the files in a solicitor’s office in hopes of discovering material prepared for the purpose of advising the client in the normal and legitimate course of professional practice. The privilege, however, is exclusively that of the client and does not extend to correspondence, memoranda or documents prepared for the purpose of assisting a client to commit a crime nor to material in no way related to the giving of proper advice but stored with the solicitor purely for the purpose of avoiding seizure in the hands of the client” at 13.

See also *Re Borden & Elliott and The Queen* (1975) 30 C.C.C. (2d) 337 (Ont. C.A.).

In *Descôteaux v Mierzwinski* [1982] 1 S.C.R. 860, the Court expressed the view that:

“If the privilege could not be invoked to prevent the seizure and examination of documents under a search warrant, the Crown would be free in any case to seize and examine the files and brief of defence counsel in a criminal prosecution. It would be small comfort indeed to the accused and to his counsel to discover that his only protection in such a case was to prevent the introduction into evidence of the documents that had been seized and examined. Such a result, in my view, would be absurd”.

of being the desired legislative protection, but instead the section itself unconstitutionally jeopardised attorney–client privilege.¹³⁴⁶

At the time of the search in the attorney’s offices in *Thint v National Director of Public Prosecutions*, the attorney raised the concern that some documents seized might be privileged. In view of this concern, the attorney requested the seizing officers to place the seized items with the Registrar of the High Court for safe custody until the question of which items were privileged was settled by a court of law. The seizing officers denied the attorney this indulgence, retorting that “the law did not make provision for the documents to be lodged with registrar for that purpose”.¹³⁴⁷ It turned out that the statutory law which the seizing officers were a creature of, in fact authorised the proposal made by the attorney — lodging the seized documents with the registrar of the High Court until the question of privilege is determined by a court of law.¹³⁴⁸

Notwithstanding the fact that the law was in favour of the applicant’s side of the issue in this regard, the Court did not attach much weight to this aspect in its order.

¹³⁴⁶ *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink* 2003 3 S. C. R. 209 at par. 11.

¹³⁴⁷ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) at par. 27.

¹³⁴⁸ Section 29(11) of the National Prosecuting Authority Act 32 of 1998.

7.11 The absolute or relative nature of privilege

7.11.1 In South African law

The final issue worth exploring is the extent to which legal professional privilege should be protected by courts — whether it is absolute or not. It is convenient to consider first the view adopted by the Constitutional Court of South Africa in deciding the political case of *Thint v National Director of Prosecutions*.¹³⁴⁹ The Court took the view that legal professional privilege is not absolute.¹³⁵⁰

In establishing the extent of protection to be afforded privileged material, it is enlightening to peer into Canadian, Australian, and English law. It is convenient to consider, first, what the Supreme Court of Canada has held.

7.11.2 In Canadian law

In *Lavelle v Canada*,¹³⁵¹ the facts were similar to the facts in *Thint v National Director of Public Prosecutions*. The Supreme Court of Canada acknowledged that despite its importance, legal professional privilege is not absolute. However, the Court added that legal professional privilege

¹³⁴⁹ *Thint (Pty) Ltd and Others v National Director of Public Prosecutions* 2009 (1) SA 1 (CC).

¹³⁵⁰ *Ibid* at par. 84.

¹³⁵¹ *Lavelle, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink* 2002 3 S.C.R. 209.

“must be as close to absolute as possible to ensure public confidence and retain relevance. As such it will only yield in certain clearly defined circumstances”.¹³⁵²

Thus, the clear view held by the Canadian Supreme Court is that, while legal professional privilege cannot be said to be absolute, it should nevertheless be treated as close to absolute as possible.

7.11.3 In Australian law

In Australia, as was the position in *Thint*, the High Court of Australia had to deal with the seizure of attorney–client privileged documents.¹³⁵³ The seizure was authorised by legislation.¹³⁵⁴ The wording of section 10 of the Australian Crimes Act did not exempt a lawyer’s office from being

¹³⁵² *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Otteheimer & Baker v Canada (Attorney General); R v Fink* 2002 3 S. C. R. 209 at par. 36.

¹³⁵³ In *Baker v Campbell* [1983] HCA 39; (1983) 153 CLR 52.

¹³⁵⁴ Section 10 of the Australian Crimes Act of 1914 provided:

If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in any house, vessel, or place—

- (a) anything with respect to which any offence against any law of the Commonwealth or of a territory has been, or is suspected on reasonable grounds to have been, committed;
- (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or

(c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence, he may grant a search warrant authorising any constable therein, with such assistance as he thinks necessary, to enter at any time any house, vessel, or place named or described in the warrant, if necessary by force, and to seize any such thing which he may find in the house, vessel or place”.

searched and from having documents found therein seized, notwithstanding the fact that privilege was raised.

It was contended on behalf of the law firm that was involved that if section 10 was allowed to operate to include law firms, it would operate to extinguish a privilege which had existed for many centuries and which was recognised to be in the public interest.¹³⁵⁵ For this reason, it was argued that Parliament could not have intended such a result, otherwise such an intention would have been expressed in unambiguous terms.

The majority judgment held that section 10 of the Crimes Act did not entitle the seizing of privilege-protected documents under a search warrant, as that would extinguish a right which was essential for communication between lawyers and their clients.

7.11.4 In English law

Finally, the position in England is being considered. In England, legal professional privilege enjoys such protection that it is absolute. In *R v Derby Magistrate's Court*,¹³⁵⁶ the Court referred to an earlier decision in *R v Ataou*,¹³⁵⁷ in which a principle was stated that a judge is required to approach an application for production of documents protected by

¹³⁵⁵ *Commissioner of Inland Revenue v West-Walker* (1954) NZLR 191 at 211.

¹³⁵⁶ *R v Derby Magistrates' Court, ex parte B and another appeal* [1995] 4 QB All ER 526.

legal documents in two stages. First, the judge must ask whether the client continues to have any recognisable interest in asserting the privilege and, secondly, whether, if so, his or her interest outweighs the public interest. In considering this principle, the Court in *R v Derby Magistrates' Court* declared that principle as being in conflict with the long established rule that a document protected by privilege continues to be protected so long as the privilege is not waived by the client. The Court interpreted this rule to mean that "once privileged, always privileged".¹³⁵⁸ Further, the principle that was established in *R v Ataou*¹³⁵⁹ was found fault with by the Court in *R v Derby Magistrates' Court* as it went against the view that the privilege is the same whether documents are sought for civil or criminal proceedings, and whether by the prosecution or defence, and that the refusal of the client to waive his or her privilege, for whatever reason, or even for no reason, cannot be questioned or investigated by a court.¹³⁶⁰

Unlike the way in which the Constitutional Court of South Africa has treated legal professional privilege, the holding of privilege as being sacrosanct in England has been consistent. This becomes evident in the

¹³⁵⁷ *R v Ataou* [1988] 2 QB All ER 321.

¹³⁵⁸ *R v Derby Magistrate's Court, ex parte B and another appeal* [1995] 4 All ER 526 HL at 537F-G.

¹³⁵⁹ *R v Ataou* [1988] 2 All ER 321.

¹³⁶⁰ *R v Derby Magistrate's Court, ex parte B and another appeal* [1995] 4 All ER 526 HL at 537G.

consideration of an earlier case, *Southwark v Quick*,¹³⁶¹ where Cockburn CJ compared the benefits and the damage that would result if the protection given to attorney–client communications could be removed. The Chief Justice found that “though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk”.¹³⁶²

Even Parliament of England had, in the opinion of the Court in *R v Derby v Magistrates’ Court*, left legal professional privilege untouched, while it had made inroads in other areas.¹³⁶³

With regard to the balancing up of public interests with the interests of the client, the Court further demonstrated the absolute nature of privilege by holding that the drawback to allowing the balancing of interests is that once any exception to the absoluteness of privilege is allowed, the client’s confidence is necessarily lost. The lawyer, instead of being able to tell his or her client that anything which the client might say would never in any circumstances be revealed without his or her consent, the lawyer would have to qualify his or her assurance.¹³⁶⁴

¹³⁶¹ *Southwark and Vauxhall Water Co v Quick* (1878) 3 QB 315.

¹³⁶² *Southwark and Vauxhall Water Co v Quick* (1878) 3 QB 315 at 317 – 318.

¹³⁶³ *R v Derby Magistrate’s Court, ex parte B and another appeal* [1995] 4 All ER 526 at par.541E.

¹³⁶⁴ *R v Derby Magistrate’s Court, ex parte B and another appeal* [1995] 4 All ER 526 at 541G.

Finally driving home the absolute nature of legal professional privilege, the Court of England held in *R v Derby Magistrate's Court*.

It is not for the sake of the appellant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established. It follows that *R v Barton* [1972] 2 All ER 1192, [1973] 1 WLR 115 and *R v Ataou* [1988] 2 All ER 321, [1988] QB 798 were wrongly decided, and ought to be overruled.¹³⁶⁵

Pazes¹³⁶⁶ favours a broader balancing of interests where a court has to decide whether public interests should yield to legal professional privilege. In favouring broader balancing of interests, he is, however, not unmindful of Botha JA's caveat¹³⁶⁷ that any claim to a relaxation of the principles underlying the privilege must be approached with the greatest circumspection.¹³⁶⁸ Paizes draws a comparison between Canadian and South African courts, and finds that Canadian courts will stretch privilege as long as some evidentiary connection remains apparent, while South African courts do not seem, in his view, to apply privilege outside legal proceedings. In thus drawing the comparison, he is of the view that the South African approach is to be preferred in that it "restricts the privilege to its intended historical proportions and allows the courts the freedom

¹³⁶⁵ *R v Derby Magistrate's Court, ex parte B and another appeal* [1995] 4 All ER 526 at 542D.

¹³⁶⁶ Paizes A "Towards a broader balancing of interests: Exploring the theoretical foundations of the legal professional privilege" 1989 109 *SALJ* 142-143.

¹³⁶⁷ In *S v Sefatsa and Others* 1988 (1) SA 868.

¹³⁶⁸ *S v Sefatsa and Others* (1988) 1 SA 868 at 886G.

and flexibility to give effect to the spirit of the privilege rather than its form".¹³⁶⁹

It is submitted that while Paizes' view may be correct, it is rendered incorrect by the fact that the Constitutional Court of South Africa allows itself to depart from legally sound precedent when the matter before it is political in nature. For this reason, it is submitted that the position in Canada, Australia, and especially the position in England, is to be preferred since, due to the absolute protection given to legal professional privilege, any change of opinion by a court when the matter before it is political in nature becomes impossible.

The discussion in this Chapter demonstrates that the doctrine of *stare decisis* has not been a constant feature in the adjudication of constitutional rights in the South African jurisprudence. In making this point, one does not lose sight of the fact that courts are not bound by foreign law, but may consider it and be persuaded thereby.

¹³⁶⁹ Paizes A "Towards a broader balancing of interests: Exploring the theoretical foundations of the legal professional privilege" 1989 *SALJ* at 143.

CHAPTER 8

How consistency should affect the right to one's culture

8.1 Introduction

The Constitutional Assembly saw fit to include, in the Bill of Rights, the right to practise one's culture. With this right, the Constitutional Assembly entwined the right to practise one's religion and to speak one's language of choice.¹³⁷⁰

A comparison of the Constitutions of the jurisdictions which the Constitutional Court of South Africa usually relies upon for insight, reveals that these jurisdictions do not have the right to practice one's culture in their Bill of Rights. These are the Constitutions of the United States and its Amendments, and the Canadian Charter of Rights and Freedoms.¹³⁷¹

One may be inclined to think that the silence of these Constitutions on the right to practice one's culture is due to the population of these countries being largely of the Western civilisation. That is indeed so. However, this justification falls away when one realises that even the

¹³⁷⁰ Section 31 of the Constitution.

¹³⁷¹ Canadian Charter of Rights and Freedoms, 1982.

Constitutions of South Africa's neighbouring states, Lesotho and Botswana, whose population is not of Western civilisation, do not contain the right to culture. They do, however, contain the right to practise one's religion,¹³⁷² a right closely associated with the right to practise one's culture in the Constitution of South Africa.

It becomes clear, therefore, that something is amiss with the inclusion of the right to culture in the Constitution of South Africa. This naturally leads to the conclusion that if courts have been inconsistent in their interpretation of the right to practise one's culture, their problematic interpretations are merely the corollary of mixing two conflicting civilisations in the text of the Constitution.

8.2 The nature of customary law

The Constitution provides no definition of any concept contained in its text, save for the definition of the organ of state provided in section of 239. Thus, customary law and culture are not defined by the Constitution. Customary law is, however, generally understood to be oral traditions, because the outstanding characteristic of customary law is that

¹³⁷² Section 13(1) of the Constitution of Lesotho, and section 11(1) of the Constitution of Botswana.

in its original form, it is unwritten, but understood and believed by the society of people practicing it.¹³⁷³

Since customary law is a system of a deeply entrenched way of life, and is unwritten, it cannot be amended, or repealed, as is the case with statutory law. Neither can it be developed by courts, as is the case with common law. Customary law evolves on its own from generation to generation. If courts attempt to develop it, the imposed development becomes an exercise in futility, since traditional communities simply continue to live their life in the traditional way.¹³⁷⁴ Thus, court judgments aimed at altering the position in a customary way of life become abstract, as they fail to alter the thinking in the minds of the staunch traditional communities. Interestingly, Pienaar¹³⁷⁵ reasons similarly. He writes that women who were interviewed and were married under civil law testified that even though they were married under civil law, and even though they had formal equal status since 1993, customary law continued to rule their lives. Pienaar concludes from this that law in

¹³⁷³ Bennett T W *Customary Law in South Africa* (2004) at 84.

¹³⁷⁴ Lehnert W holds the same view in his article: "The role of the courts in the conflict between African customary law and human rights" 2005 *SAJHR* at 251. He writes that: "One has to bear in mind that the courts do not create customary law in the same way as they do common law. Instead, customary law consists of unwritten rules created by a community which regards them as binding. The changing views of the community consequently influence the content of the living customary law so that rules can adapt in response to changing social and economic circumstances. Thus, customary law is in a constant process of development".

¹³⁷⁵ Pienaar J M "African customary wives in South Africa: Is there spousal equality after the commencement of the Recognition of Customary Marriages Act?" 2003 *Stell LR* 256.

itself is unable to transform power relations on a private level. Law has a very limited effect on the prevailing mindsets of people. In his view, this shows that formal, legalistic equality can only be effective if it is backed up by social and economic developments.¹³⁷⁶

8.3 The conflict between the Bill of Rights and customary law

In view of the nature of customary law set out above, the development of customary law by courts adulterates customary law. The regulation of customary law by legislation imposes Western civilisation to highly esteemed customs and traditions. The application of the Bill of Rights by courts on customary law amounts to imposing a foreign way of life on a society of people who are content with their customs and traditions.

Traditional communities who find delight in, and are proud of, their way of life, do not view certain seeming restrictions as slavery. They find delight in conscientiously observing the tenets of their culture. To be sure, some urbanised individuals whose lives are now torn between the rural customary life and the urban civilised way of life may find some aspects of their culture burdensome, or bordering on slavery, because of the influence of urban life. Such individuals are an exception. They are

¹³⁷⁶ Pienaar J M "African customary wives in South Africa: Is there spousal equality after the commencement of the Recognition of Customary Marriages Act?" 2003 *Stell LR* at 270.

the few individuals who will approach courts whenever they find some aspects of their culture to be undesirable, and obsolete.

The conflict between the Bill of Rights and customary law is confirmed by Bennett.¹³⁷⁷ He takes the view that once the application of customary law is regarded as a constitutional right, and not a precarious freedom, it is thrown into competition with the other fundamental rights in Chapter 2 of the Constitution.¹³⁷⁸ According to Bennett, the result will be a series of conflicts, especially between the right to equal treatment and the many rules of customary law which subordinate the interests of women and children to senior males.¹³⁷⁹

Lehnert¹³⁸⁰ also sees the simultaneous recognition of African customary law and human rights in the Constitution of South Africa as resulting in a complex conflict between two different value systems. Proponents of customary law, according to Lehnert, describe the Constitution, and particularly the Bill of Rights, as a largely Western document which is foreign to Africans, and threatening the continued existence of customary law.

¹³⁷⁷ Bennett T W *Human Rights and African Customary Law Under the South African Constitution* (1995) at 28.

¹³⁷⁸ At the time of his writing, Bennett was referring to Chapter 3 of the interim Constitution, since the final Constitution was not yet finalised. Chapter 3 of the interim Constitution has since become Chapter 2 of the final Constitution. Chapter 2 contains the Bill of Rights.

¹³⁷⁹ at 28.

¹³⁸⁰ Lehnert W "The role of the courts in the conflict between African customary law and human rights" 2005 *SAJHR* 241.

This raises the question whether the Bill of Rights was meant to apply horizontally, that is, between citizens, or vertically, that is, between the state and its citizens.¹³⁸¹ It is submitted that the application of the Bill of Rights was meant to be enforced by courts vertically, that is, between the state and its citizens. If the Bill of Rights was meant to be enforced horizontally, it is submitted that its enforcement was meant to be more vigorous between the state and its citizens, and less vigorous between citizens. The correctness of this view is confirmed by the wording of section 7(2) of the Constitution. The section provides that *the state* must respect, protect, promote, and fulfil the rights in the Bill of Rights. Thus, great store is set on the state. Further clarity is provided by section 8(1), which provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state. It must be noted that, again, the private citizen is left out. The view that if the Bill of Rights is enforceable between private citizens, it is enforceable less vigorously, is supported by the wording of section 8(2) which provides that:

A provision of the Bill of Rights binds *a natural person* or a juristic person *if, and to the*

¹³⁸¹ Currie I and de Waal J *the Bill of Rights Handbook* (2005) 5th ed at 43 write that, traditionally, the Bill of Rights confines itself to regulating the 'vertical' relationship between the individual and the state, since this is not a relationship of equality. However, the Bill of Rights recognises that private abuse of human rights may be as pernicious as violations perpetrated by the state. See also Devenish G E *A Commentary on the South African Bill of Rights* (1999) at 24.

*extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*¹³⁸²

The wording of the section makes it abundantly clear that when the Bill of Rights becomes enforceable between natural persons, that is, private citizens, its enforcement is qualified; it becomes dependent on whether it is applicable or not, and on the extent of its applicability. Its enforcement will also have to take into account the nature of the right, and the nature of the duty imposed by the right.

That this view is correct is confirmed by Bennett,¹³⁸³ who holds that “human rights were originally devised to protect the citizen from arbitrary and oppressive treatment by the state; they were not conceived to be a ground of action by citizens *inter se*.”¹³⁸⁴ Accordingly, Bennett holds that whether constitutional rights override customary law or, conversely, whether customary law may limit constitutional rights, depends on a positive answer being given to an antecedent question whether the Constitution regulates private relationships.¹³⁸⁵

¹³⁸² Emphasis added.

¹³⁸³ Bennett T W *Human Rights and African Customary Law Under the South African Constitution* (1995) at 29.

¹³⁸⁴ Bennett T W *Human Rights and African Customary Law Under the South African Constitution* (1995) at 29.

¹³⁸⁵ Bennett T W *Human Rights and African Customary Law Under the South African Constitution* (1995) at 29.

The United States Supreme Court has leaned towards the approach of confining the Bill of Rights of the United States to the relationship they were intended to protect, that is, the relationship between the state and citizens. In the nineteenth century *Civil Rights Cases*,¹³⁸⁶ the Supreme Court had to adjudicate upon the validity of an enactment which sought to compel innkeepers, owners of public transport, and placement of amusement, not to discriminate against members of the public. The Court struck down the enactment because it held the view that the invasion of the rights of a private citizen by another private citizen is not a matter covered by the Fourteenth Amendment of the United States Bill of Rights.¹³⁸⁷

Also, relatively recently, in *DeShaney v Winnebago*,¹³⁸⁸ the Supreme Court of Canada reiterated its nineteenth century position that the objective of the Fourteenth Amendment of the United States Bill of Rights was to protect citizens against the abuse by the state, and not to ensure that private citizens are protected against one another.

Indeed, the South African Constitutional Court itself has, in its early years of existence, inclined itself towards the view that Chapter 2¹³⁸⁹ of the

¹³⁸⁶ *Civil Rights Cases* 109 US 3 (1883).

¹³⁸⁷ *Civil Rights Cases* 109 US 3 (1883) at 11. See also Bennett T W *Human Rights and African Customary Law* (1995) at 31, footnote 19.

¹³⁸⁸ *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989).

¹³⁸⁹ Chapter 2 was Chapter 3 in the interim Constitution.

Constitution, containing the Bill of Rights, was intended to apply vertically. In *Du Plessis v De Klerk*,¹³⁹⁰ the Constitutional Court held that constitutional rights under Chapter 2 may be invoked against an organ of government, but not by one private litigant against another.¹³⁹¹ This holding, it is submitted, was correct, especially in view of the right to equality between husband and wife, as will be analysed briefly below.

Against this background, attention is now given to section 9 of the South African Constitution. The section provides that:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

This provision was relied upon in *Mthembu v Letsela*¹³⁹² in challenging the customary law principle of primogeniture. The principle of primogeniture favours a senior male descendant in the matter of inheriting after the death of the family head. Female descendants may not inherit. What further disqualified the applicant *in casu*, was that not only was she female, but she was an illegitimate female. In terms of customary law, an illegitimate child does not belong to the family of his or her father, but to the mother's family.

¹³⁹⁰ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

¹³⁹¹ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at 879A. See also Kerr A J "The Bill of Rights in the new Constitution and customary law" 1997 *SALJ* 346.

¹³⁹² *Mthembu v Letsela and Another* 1997 (2) SA 936 (T).

The constitutional challenge of the principle was brought before the Transvaal Provincial Division of the High Court, as it then was. It was argued that the principle of primogeniture violates the right to equality, as protected by the Bill of Rights. The Court found,¹³⁹³ as already pointed out, that the applicant was an illegitimate female, while customary law attaches great value to the institution of marriage, and the birth of children within the marriage arrangement. Further, the Court found that in challenging the principle, the applicant had lost sight of one beneficial aspect of the principle of primogeniture, namely, that while the principle favoured male descendants in the matter of inheriting, the seeming favour came with responsibility. The male descendant had the concomitant responsibility of providing for the family of the deceased from the inheritance. The Court held that, viewed in this light, the principle of primogeniture did not constitute an unfair discrimination against female descendants, and did not violate the right to equality. The result of the seeming discrimination was that the overlooked females were lovingly provided for by the male descendant.¹³⁹⁴

On appeal, the reasoning of the court *a quo* was sustained.¹³⁹⁵ In fact, the Supreme Court of Appeal showed profound respect for the customary way of life by holding that to strike down the principle of primogeniture

¹³⁹³ *Mthembu v Letsela and Another* 1997 (2) SA 936 (T) at 945.

¹³⁹⁴ *Mthembu v Letsela and Another* 1997 (2) SA 936 (T) at at 945H–946C.

¹³⁹⁵ *Mthembu v Letsela and Another* 2000 (3) SA 867 SCA 876.

would be to summarily dismiss an African institution without examining its essential purpose and content.¹³⁹⁶

It is submitted that the reasoning of the High Court and the Supreme Court of Appeal was correct. However, some twelve years later, in *Gumede v President*,¹³⁹⁷ the Constitutional Court was approached to decide on the constitutionality of statutory provisions governing matrimonial property regime of customary marriages in KwaZulu-Natal.¹³⁹⁸ Section 20 of the KwaZulu Act on the Code of Zulu Law provided that the family head was the owner of and had control over all family property in the family home.

In granting relief to the applicant, the Constitutional Court declared unconstitutional and invalid the impugned section 20, on the basis that it made the family head the owner, and granted him control, of all family property in the property home, The Court also declared unconstitutional and invalid section 22, on the basis that it placed family members under the headship of the family head, and required family members to be obedient to him. By thus holding, the Constitutional Court abolished the deep-rooted aspect of customary law, namely, the headship of a man

¹³⁹⁶ *Mthembu v Letsela and Another* 2000 (3) SA 885 (SCA) at 885A.

¹³⁹⁷ *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC).

¹³⁹⁸ Section 20 of the KwaZulu Act on Code of Zulu Law 16 of 1985, and sections 20 and 22 of the Natal Code of Zulu Law Proc R151 of 1987.

over his family. Indeed, in a related case, *Bhe*,¹³⁹⁹ while dealing with the principle of primogeniture as the subject matter of the case, the Constitutional Court pronounced itself on the case of *Mthembu v Letsela*,¹⁴⁰⁰ that served before the Supreme Court of Appeal some twelve years back. The Constitutional Court, per Langa DCJ, as he then was, held:

I have held that section 23 is inconsistent with the Constitution and invalid. As a result, reg 2 (e) falls away. I have also found that the customary-law rule of primogeniture, in its application to intestate succession, is not consistent with the equality protection under the Constitution. It follows therefore that any finding in *Mthembu* which is at odds with this judgment cannot stand”.¹⁴⁰¹

The abolishing of headship in the customary law family arrangement was not in harmony with the reality in the practice of customary law. Headship is the cornerstone of the family institution. This is the position, not only in customary law, but in all civilisations. A family is a unit, and like any other unit, someone must be responsible for taking the lead, providing guidance, and making decisions after necessary of consultation, in order for the family unit to function in a smooth and organised manner. Wives are inclined to need and appreciate having a

¹³⁹⁹ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

¹⁴⁰⁰ *Mthembu v Letsela and Another* 2000 (3) SA 885 (SCA).

¹⁴⁰¹ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at 624 [emphasis added].

family head. It is only when headship is abused and is arbitrary that wives chafe under the authority of their husbands.¹⁴⁰²

The provision of section 9 of the Constitution cannot be used to abolish headship in the family arrangement. The section provides expressly that everyone is equal *before the law*. The equality envisaged by the text of the Constitution is equality of private citizens in the eyes of the law. The Constitution does not say that husband and wife are equal in the eyes of each other, but in the eyes of the law. It is submitted that the Constitution does not attempt to interfere in, and regulate, private relationships.¹⁴⁰³ This view is consistent with the interpretation of the Constitutional Court in *Du Plessis v De Klerk*,¹⁴⁰⁴ that the Bill of Rights may be invoked against an organ of state, and not by a private litigant against another.

¹⁴⁰² Bojosi K N "Botswana abolishes marital power: A commentary on some interesting aspects of the Abolition of Marital Power Act" 2006 *SALJ* 13. In this article, the writer discusses section 8 of the Botswana Abolition of Marital Power Act, which bestows on a spouse the right to perform any juristic act without the consent of the other. The writer's view is that section 8 only applies in those instances where a marriage is showing signs of strain, because where there is peace and tranquility in a marriage, it is unlikely that a party would perform juristic acts without obtaining the consent of the other. This view is correct.

¹⁴⁰³ In her article, "Botswana abolishes marital power: A commentary on some interesting aspects of the Abolition of Marital Power Act" 2006 *SALJ* 13, Bojosi K N points out that the abolition of marital power and its consequences is perceived by many as an unwarranted intrusion into matters which are essentially private in nature, and are therefore best left to self-regulation by the parties to a marriage.

¹⁴⁰⁴ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC).

Cronjé and Heaton¹⁴⁰⁵ share the above view, that headship is not something that can be abolished by a court by its interpretation of the right to equality. They state that in terms of our common law, the husband is the head of the family. They refer to the attempt that was made by the legislature in 1984 when the rule that the husband is the head of the family was expressly incorporated into section 13 of the Matrimonial Property Act.¹⁴⁰⁶ In 1993, the legislature attempted to remove the husband's headship from our law by deleting the reference to it from section 13 of the Matrimonial Property Act. The two authors then point out that since the true source of the rule is the common law, and not section 13 of the Matrimonial Property Act, the deletion did not achieve what the legislature intended. The two authors conclude that as a result of this, the husband's headship still forms part of our law.¹⁴⁰⁷ Van Heerden *et al*¹⁴⁰⁸ share the same view. In addition, Hahlo¹⁴⁰⁹ writes that the powers of the husband as head of the family cannot be excluded by contract. He adds that an agreement that he is not to be the head of the family, or that the wife is to be the head, would be ineffective as being against public policy.¹⁴¹⁰

¹⁴⁰⁵ Cronje DSP and Heaton J *South African Family Law* (2004) 2nd ed 67–68.

¹⁴⁰⁶ Act 88 of 1984.

¹⁴⁰⁷ Cronje DSP and Heaton J *South African Family Law* (2004) 2nd ed at 67, 68.

¹⁴⁰⁸ Van Heerden B *et al Boberg's Law of Persons and the Family* (1999) 2nd ed at 172.

¹⁴⁰⁹ Hahlo H R *The South African Law of Husband and Wife* (1985) 5th ed.

¹⁴¹⁰ *Ibid* at 13.

There are aspects of customary law, and indeed of common law as well,¹⁴¹¹ which indicate the inherent nature of the husband's headship in the marriage institution. One such aspect is the traditional assumption of the husband's surname by women upon marriage. This is the norm rather than an exception. Were a husband to assume the wife's surname upon marriage, that would be viewed as an exception, indeed as against public policy.¹⁴¹² This aspect of marriage alone underscores the position of a husband as head of the family.

It is true that statutory law does not make it peremptory that a wife should assume the husband's surname when they get married. The Births and Deaths Registration Act¹⁴¹³ leaves the matter to her personal decision. But the Act suggests it as a matter of course that she will assume her husband's surname. What is noteworthy is that the Act does not suggest the reverse, thus entrenching the headship of the husband.

It is for this reason that, when in Namibia a husband approached the Supreme Court in order to be allowed to assume the surname of his wife, he was viewed as acting in a manner contrary to tradition. In *Müller v*

¹⁴¹¹ In Roman–Dutch common law, the husband was the head of the family. See Hahlo H R *The South African Law of Husband and Wife* 5th ed (1985) 13.

¹⁴¹² McConnachie C “With such changes as may be required by the context’: The legal consequences of marriage through the lens of section 13 of the Civil Union Act” 2010 *SALJ* 424, 426; *Müller v President of the Republic of Namibia and Another* 2000 (6) BCLR 655 (Nms).

¹⁴¹³ Section 26(1) of Act 51 of 1992.

President of the Republic of Namibia,¹⁴¹⁴ a husband of German nationality challenged the Aliens Act¹⁴¹⁵ on the basis that it discriminated against men, and was violating the right to equality. The Act, originating from South Africa, allowed a married woman to assume her husband's name, and to assume, after the dissolution of the marriage, any surname she may have previously had. The Act did not allow this for the husband. The applicant, *in casu*, averred that in his country of birth, Germany, husbands may adopt the their wives' surname, if they so wish.¹⁴¹⁶

In settling the challenge to the Act, the Supreme Court of Namibia held that the challenge must be seen against the background that the Aliens Act gave effect to a tradition of long standing, namely, that the wife normally assumes the surname of the husband. Further, evidence remained uncontested that not one husband was known in Namibia who assumed, or wanted to assume, the surname of his wife. More important, however, was the Court's holding that the seeming discriminating effect of the Act served a legitimate governmental purpose, that of establishing certainty as to the surname by which married couples are called.¹⁴¹⁷

¹⁴¹⁴ *Müller v President of the Republic of Namibia and Another* 2000 (6) BCLR 655 (Nms).

¹⁴¹⁵ Act 1 of 1937.

¹⁴¹⁶ Bonthuys E "Deny thy father and refuse thy name': Namibian equality jurisprudence and married women's surnames" 2000 *SALJ* 464.

¹⁴¹⁷ *Müller v President of the Republic of Namibia and Another* 2000 (6) BCLR 655 (Nms) at 668D-G.

Establishing the headship of a husband in a family is sections 9(2) and 10(1)(a) of the Births and Deaths Registration Act. Section 9(2) stipulates that the birth of a child born in wedlock is to be registered under the father's surname. The only exception is where, in terms of section 10(1)(a), the child is illegitimate, in which case the child's birth is to be registered under the mother's surname.

The second aspect of marriage which points to the inherent nature of the husband's headship, particularly in the African customary way of life, is the payment of lobola. It invariably is paid by the man, for the woman.¹⁴¹⁸

Lobola has been defined as a transfer of property, preferably livestock, by a husband to his wife's family as part of the process of constituting a marriage.¹⁴¹⁹ Goldin and Gelfand,¹⁴²⁰ however, mention a situation where marriage may take place without lobola being paid. It is where a man takes as a wife the widow or widows of a deceased relative.

The futility of court judgments imposed as law to communities living in terms of customary law is further illustrated in the situation of polygamy. There are more than one wife to one husband. For the arrangement to

¹⁴¹⁸ Bennett T W *Customary Law in South Africa* (2004) at 220.

¹⁴¹⁹ *Ibid.*

¹⁴²⁰ Goldin B and Gelfand M *African Law and Custom in Rhodesia* (1975) at 130; See also Khumalo J A M *The Civil Practice of All Courts for Blacks in Southern Africa* (1969) 3rd ed 20.

work, there must be a head, exercising headship. If a court judgment were to declare that all the wives are equal to the husband, and the headship, and the marital power of the husband are taken away, complying with such a judgment would be impractical.

It would appear, though, that the Constitutional Assembly and the Constitution drafters were uncertain as to the position to take regarding customary law. This becomes manifest in the text of the Constitution which is inconsistent in the development and regulation of customary law. For example, section 30 guarantees citizens the right to practise the cultural life of their choice, but this right is governed by the Bill of Rights. Section 31 further guarantees the right to live one's life according to one's culture, but with the proviso that the Bill of Rights is recognised as the regulating force. Once customary law is made subject to the Bill of Rights, the freedom to practise one's culture is restricted, and is westernised.

A comparison of sections 8(3) and 39(2) with section 173 creates uncertainty. Section 8(3) excludes customary law as a law that may be developed by courts, but includes common law. Section 39(2) includes both customary law and common law as laws that may be developed by courts. Section 173 excludes customary law, but includes common law instead. Based on this uncertainty caused by the Constitutional Assembly

and the drafters, there is an academic view that “the drafters of the Constitution did not intend to give customary law special protection”.¹⁴²¹ An opposite view¹⁴²² is that customary law, or at least much of it, is exempt from the application of the Bill of Rights. According to this view, neither the central legislature nor the provincial legislatures, nor the courts, should attempt to alter any one small area of customary law of succession or of marriage.¹⁴²³

This Chapter has endeavoured to show the desirability of consistency in the adjudication of constitutional rights which, initially, leaned towards vertical application, but in later years towards an enforced horizontal application. However, a contributing factor in the lack of consistency has been the inclusion of customary law in some constitutional provisions and its exclusion in others as a law which may be developed by higher courts.

¹⁴²¹ Lehnert W “The role of the courts in the conflict between African customary law and human rights” 2005 241 *SAJHR* 245.

¹⁴²² Kerr A J “The Bill of Rights in the new Constitution and customary law” 1997 *SALJ* 354.

¹⁴²³ Kerr A J “The Bill of Rights in the new Constitution and customary law” 1997 *SALJ* at 354.

CHAPTER 9

Conclusion and recommendations

The foregoing has established the need for courts to always have, at least at the back of the mind, the guiding principle of judicial precedent in construing provisions of the Constitution. A careful examination of all sources of law available for examination in the international sphere of legal practice points to the direction to be followed in constitutional interpretation.

Undoubtedly, setting an example in the matter of consistency in constitutional interpretation takes a balanced combination of insight in the application of domestic and international laws, practicality of the judgment, and being conscious of possible future developments.

Some judgments¹⁴²⁴ which involved constitutional interpretation were prepared and delivered in a climate different from the obviously unforeseen climate prevailing in the country today. The question arises whether the interpretation arrived at in those judgments has passed the test of time with regard to their practicality. With the Bench of the

¹⁴²⁴ *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC); *Case v Minister of Safety and Security and Others* 1996 (3) (CC) 617; *Du Plessis and Others v De Klerk and Another* 1999 (3) SA 850 (CC).

Constitutional Court being constituted differently by a new generation of judges, one wonders whether the interpretation and views held by the previous generation will remain sacrosanct.

The interpretation of the right to life has been just a small-scale demonstration of the need for consistency in the interpretation of other constitutional rights, and other constitutional provisions which are not in the Bill of Rights. It is perhaps the right to life, however, that is the loudest among the rights which cry out for the observing of the principle of *stare decisis*, since the enjoyment of other rights is entirely dependent on life.

It is also this right that should not be subject to the limitation clause. The constitutional guideline that the rights in the Bill of Rights may be limited only in terms of a law of general application cannot justifiably be applied in limiting the right to life. This is because in the process of limiting the right to life, other rights are automatically brought to a sudden end. It is perhaps in this area also that we may, in the future, see the overruling of some of the judgments of the Constitutional Court that were profoundly respected previously, being overruled by the same Court.

In the light of the presented arguments, based on what research has yielded, it is recommended that courts which have the jurisdiction of interpreting the Constitution, do so with due regard for their own precedent, and the precedent set by the Court that serves as the final arbiter in constitutional interpretation. It is recommended further, that in setting judicial precedent, courts should have the future in mind, by handing down judgments that are not only practical for the present generation in the currently prevailing climate, but will continue to be so for posterity.

It has been shown in Chapter 2,¹⁴²⁵ through the admission of some judges, that it is not easy to pretend in their judgments that they are apathetic to controversial issues in their country, and that they may be tempted to allow personal views or beliefs to influence their judgments. For example, in *S v Zuma and Others*,¹⁴²⁶ Kentridge AJ admitted that it is not “easy to avoid the influence of one’s personal intellectual and moral preconceptions”. In *S v Makwanyane*,¹⁴²⁷ Kriegler J admitted that in constitutional matters, “extra-legal considerations may loom large”. In *President of the RSA v SA Rugby Union*,¹⁴²⁸ the Constitutional Court, all the judges endorsing the judgment, admitted that “absolute neutrality on the part of a judicial officer can hardly if ever be achieved”. This is

¹⁴²⁵ Pages 82–86.

¹⁴²⁶ *S v Zuma and Others* 1995 (2) SA (CC) at par. 17.

¹⁴²⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 476B.

¹⁴²⁸ *President of the RSA v SA Rugby Union* 1999 (4) SA 147 (CC) at par. 42.

made difficult by the fact that they are part of the community in which they live.

It is nevertheless recommended that in adjudicating on controversial matters, judges should resolve to be guided by the law. In being guided by the law, they should strive to resist the temptation to allow extra-legal considerations to interfere with interpretation. Keeping these points in mind will contribute largely toward consistency in constitutional interpretation.

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