INCONSISTENCY IN JUDICIAL DECISIONS: THE RIGHT TO LIFE IN PERSPECTIVE

by

KGOROHLO MICRO MOABELO

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DECLARATION

Student number: **34319506**

I declare that **Inconsistency In Judicial Decisions: The Right To Life In Perspective** 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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KM MOABELO **DATE**

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ABSTRACT

The dissertation critically examines and compares the decisions of the Constitutional Court and the High Courts in cases dealing with the right to life, as contained in section 11 of the Constitution of South Africa Act 108 of 1996. The dissertation analysis the issues of adjudication and the concept of justice in perspective. The main question is as follows: Are the Constitutional Court decisions objective, based on the interpretation of the constitutional text, or do they rather reflect the individual judge(s) personal perspective(s) or preference(s).

The purpose of this dissertation is to undertake a comparative study and analysis of the Constitutional Court decisions on the right to life, same aspect from different perspectives, and show that the right to life is not given proper effect to on account of the subjective approach to its interpretation undertaken by the judges.

The Dissertation examines and scrutinises the Constitutional Court's adjudication process. It found that the law is indeterminable, because the court's decisions are not based on the interpretation of the law, but on the individual judges' background and personal preferences. This is so because the court uses the majority rule principle in its decisions: The perception of the majority of the judges becomes the decision of the court. It is argued that when taking a decision a judge does not apply the law but instead uses the law to justify his predetermined decision on the matter. The conclusion supports the critical legal scholars' theory relating to the indeterminacy of the law. It tests the objectivity of the judges using their own previous decisions.

KEY WORDS

Life
Euthanasia
Death Penalty
Socio-Economic Rights
Indeterminacy
Abortion
Health Care
Justice
Adjudication
Judicial Decisions

TABLE OF ABBREVIATIONS

SALJ	South African Law Journal
SAJHR	South African Journal on Human Rights
AHRLJ	African Human Rights Law Journal
THRHR	Tydskrif Vir Hedendaagse Romein- Hollandse Reg/ Journal of Contemporary Roman Dutch Law
TSAR	Tydskrif vir die Suid Afrikaanse Reg/ Journal of South African Law
SAJBL	South African Journal of Bioethics and Law
SAPR/PL	Suid Afrikanse Publiekreg / South African Public Law
STEL LR	Stellenbosch Law Review
SPECULUM IURIS	Rhodes University Publication

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CHAPTER 1
INTRODUCTION

1.1. Introduction

Human behaviour by nature requires regulation and sanction so that human society can survive and avoid chaos. Human beings normally live in a community, in a society where various social mechanisms exist to help them to live together in an acceptable orderly fashion.[1] For this to happen there must be a legal system in place, and an impartial judiciary, whose function is to interpret the law. In both these applications, horizontal or vertical, an impartial judge adjudicates the dispute objectively without favour, fear or prejudice.[2] Ideally the end results of the adjudication process should yield justice, thus the courts administer justice in the democratic countries.[3] Democracy is a system of government based on regular elections where the electorate elects the public representatives; the political party that wins the majority votes establishes government in the state. The government of the state must then uphold the rule of law. In undemocratic countries governments disregard the rule of law so that it can hold on to power for as long as possible but in democratic countries the popular government will respect law and advance the

[1] Bekker PM, Geldenheyns T, Joubert JJ, Swanepoel JP, Terblanche SS, Van der Merwe SE, Van Rooyen JH (2001) *Criminal Procedure Hand Book* at 5; Ashworth A (2006) *Principles of Criminal Law* 5th ed Oxford University Press, New York at 1-4; Smith JC (2002) *Smith and Hogan Criminal Law* 10th ed Butterworths, Edinburg at 3 and 4; Molan M, Laser D, Bloy D (2000) *Principles of Criminal Law* 4th ed Cavendish Publishing Ltd, London at 7&8; Vorster WS (1988) *The Right To Life in Bioethics* at 70; see also Seleoane M (1996) *Death Penalty: Let the People Decide* Vivlia at 14; Hart HLA (1961) *The Concept of Law* Oxford University Press at 97-120, Berns S (1983) *Concise Jurisprudence* The Federation Press at 3; Meyerson D (2011) *Jurisprudence* Oxford Univ Press at 13; Kavanagh A, Oberdiek J (eds) (2009) *Arguing about Law* Routledge London New York at 1-9; Samar VJ (1998) *Justifying Judgement*: *Practising Law and Philosophy* Univ Press of Kansas at 137, Carney T, (1991) *Law at the Margin: Towards Social Participation,* Oxford University Press at 1, Campbell EL (1996) *The Science of Law*, Gaunt Inc, Chapter 1.

[2] Section 165(2) of the 1996 Constitution; see also section 10(1) (a) of the Supreme Court Act 59 of 1959, section 2(a) of the Magistrates' Court Act 32 of 1944.

[3] In South Africa the Constitution provides for universal adult suffrage, a common voter's roll, regular elections and multi-party system of democratic government see section 1(d) of the Constitution of South Africa, Act 108 of 1996, for connection between law and justice see Hutton C (2009) *Language, Meaning and the Law* Edinburgh Univ Press at 29; Samar *supra* n (1) at 62-64; for adjudication see Stone M *Focusing on the Law* in Marmor A (ed) (1995) *Law and Interpretation* Clarendon Press Oxford at 33; Frank J *"Legal Realism"* in Feinberg J, Coleman J (eds) (2004) *Philosophy of Law* 7th ed Thomson Wadsworth at 172; Meyerson *supra* n (1) at 194-197.

interests of the electorate.[4]

In South Africa the administration of justice is provided for in the Constitution.[5] Section 165 of the Constitution provides that the judicial authority of the Republic is vested in the courts, that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution sets out the hierarchy of courts.[6] The Constitutional Court is the highest court in all constitutional matters, it may decide only constitutional matters and issues connected with decisions on constitutional matters and make the final decision on whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.[7] The Supreme Court of Appeal is the highest court of appeal except in constitutional matters and may decide only appeals, issues connected with appeals and any other matter that may be referred to it in circumstances defined by an Act of Parliament.[8]

The High Courts and Magistrates Courts also play a role in the administration of justice. The High Courts may decide any constitutional matter except a matter that only the Constitutional Court may decide or is assigned by an Act of Parliament to another Court of a status similar to a High Court and, court may decide any other matter not assigned to another court by an Act of Parliament.[9] The Magistrates

[4] Robert Mugabe has been in power since 1980 and his government has ignored several court orders resulting in the rule of law not been respected, further reading on democracy see Feinberg J, Coleman J (eds) (2004) *Philosophy of Law* 7th ed Thomson Wadsworth at 182-185; Hattersley AF (1930) *A Short History of Democracy*, Cambridge Univ Press at 1-14; Stourzh G & Lerner R (1959) *Readings in American Democracy* Oxford Univ Press at 436-446 and Holland D, Nonini DM, Lutz C, Bartlett L, Frederick-McGlathery M, Guldbransen TC and Murillo EG Jr (2007) *Local Democracy Under Siege* New York University Press at 3-4 and Roederer C and Moelendorf D (2006) *Jurisprudence*, Juta at pp 406-407, Friedrich CJ and Chapman JW (eds) (1963) *Nomes VI Justice*, Atherton Press at pp 5, 7-8, Mhlaba MW "The Operation of Democracy and the Rule of the Judiciary in a Constitutional State", 2010(1) *Speculum Juris* 43; Botha H "Democracy and Rights: Constitutional Interpretation in a Post Realists World" (2000) 63 *THRHR* 561; Lenta P "Democracy, Rights, Disagreement and Judicial Review" (2004) 20 *SAJHR* 1 at 1, Engel Verlag NP (1990) *Democracy and Human Rights* Engel Publisher at 1-2, Davis DM (1999) *Democracy and Deliberation* Juta, Kenwyn at 23-24; King J (2012) *Judging Social Rights* Cambridge Univ Press, New York at 152-153; White J "Open Democracy: Has the Window of Opportunity Closed" (1998) 14 *SAJHR* 65 at 65; Davis DM "The Case Against the Inclusion of Socio-Economic Rights Demands in a Bill of Rights Except as Directive Principles" (1992) 8 *SAJHR* 475 at 488-490.

[5] 1996 Constitution ss 165-180.

[6] 1996 Constitution s 166.

[7] 1996 Constitution s 167(3), the Right to Life is the most important Constitutional matter in the Bill of Rights.

[8] 1996 Constitution s 168.

[9] 1996 Constitution s 169, see also High Court Act 59 of 1959.

Court, on the other hand may not inquire into or rule on the constitutionality of any legislation or any conduct of the President.[10]

The dispute that starts in the lowest court may end up at the Constitutional Court. Once the dispute is adjudicated by the Constitutional Court, there is no other opportunity for appeal or review, the Constitutional Court settles the legal disputes once and for all as it is the Court of final instance in all matters.

When deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.[11] The court may make any order that is just and equitable including an order suspending the retrospective effect of the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.[12] The President as the head of national executive does the appointment of judges, after consulting the Judicial Services Commission and the leaders of parties represented in the National Assembly.[13] Of course, the person so appointed must be appropriately qualified woman or man who is a fit and proper person.

The judiciary adjudicates disputes between parties and between state and parties in criminal matters in an open court without fear, prejudice or favour. The courts interpret the law and determine which behaviour warrants sanction, and they also determine the sanction itself, as prescribed by law. However, as the statutory law is created by elected representatives through Parliament, so is the adjudication process. Magistrates and judges, who are human, with all the strengths and weaknesses which this concept may entail, preside over the court proceedings and determine the outcome of the case before them. This is adjudication.[14] The presiding

[10] 1996 Constitution s 170, see also Magistrates Court Act 32 of 1944.
[11] 1996 Constitution s 172(1) (a).
[12] 1996 Constitution s 172(1)(b).
[13] 1996 Constitution s 174(3), see also Sarkin K "The Political Role of the South African Constitutional Court" (1997) 114 *SALJ* 134 at 136-137, Currie I, De Waal J (2001) *The New Constitutional and Administrative Law: Vol 1. Constitutional Law*, Juta at 301-302, Van Blerk AE "Judicial Appointment: Some Reflections" (1992) 55 *THRHR* 559 at 563-574, Cameroon E "Legal Chauvinism, Executive Mindness and Justice-LC Steyn's Impact on South African Law" (1982) 99 *SALJ* 38 at 40, Sarkin J "Problems and Challenges Facing South African Constitutional Court: An Evaluation of Its Decisions on Capital and Corporal Punishment" (1996) *113 SALJ* 71 at 79.
[14] Adjudication is defined and dealt with extensively in chapter two below. See Davis DM "Duncan Kennedy's Critique of Adjudication" (2000) *SALJ* 697 at 697; Hutchinson AC (2000) *It is All in the*

officer interprets the relevant statute, common law principles and/ or customary law rules applicable in order to arrive at his decision, the verdict.

1.2. Problem Statement

As mentioned above, human beings, the magistrates and judges preside over the proceedings in their respective courts. The decision of the court in fact refers to the decision of the presiding officer. The presiding officer personifies the court. The presiding officer is supposed to be objective in adjudicating issues before him or her. If he or she has any vested interests in the matter before him or her, he or she must, in order to avoid prejudice to the parties before him or her, recuse himself or herself.[15] The decisions of the courts affect our lives profoundly from various angles, an innocent man may be sent to jail or guilty one acquitted due to the decision of the court, or in litigation matters involving the enforcement of the right to life, someone may lose his or her life as a result of the court's decision. Therefore the decision of the court can mean life or death in most instances: *Soobramoney,*[16] *Treatment Action Campaign*[17] *and Makwanyane*[18] are some of the examples of such cases. In the first case, a terminally ill patient who needed dialysis to keep him alive lost the case in both the High Court and the Constitutional Court, and subsequently lost his life due to the court decision ruling against his prayers; in the second case pregnant mothers required ARV's to prevent transmission of HI Virus to their unborn children – they won the case against the government and forced

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Game at 3.

[15]Tarrant J (2012) *Disqualification For Bias* Federation Press at 1-8 and 11; see also Thomas PHJ, van der Merwe CG, Stoop BC (2000) *Historical Foundations of SA Law* 2nd ed at 196; also *Pretoria News* and *Citizen* of 28 October 2009 wherein former SA Police Commissioner applied for the recusal of Judge Joffe on ground of bias, the judge has since ruled against the Commissioner and he continues to preside over the matter in Gauteng South High Court; see also *Bernert v Absa bank Ltd* 2011 (3) SA 92 (CC) and *Hlope v Premier of the Western cape Province, Hlope v Freedom Under Law* [2012] ZACC 4, Juma L, International Dimension of Rules of Impartiality and Judicial Independence: Exploring the Structural Impartiality Paradigm' 2011 (2) *Speculum Juris* 17, Makiwane PN "Balancing Victims' Rights Against those of Accused Persons: Challenges Posed by the Adversarial Criminal Justice System" (2011) 2 *Speculum Juris* 66 at 75, *President of Republic of South Africa v South African Rugby Football Union* 1999 (7) BCLR 725 on recusal of a judge.

[16]*Soobramoney v Minister of Health Kwazulu Natal* 1998 (1) SA 430 (CC); see also Dworkin RM (1986) *Laws Empire* Havard University Press at 1-3; Pennock JR, Chapman JW (eds) (1974) *The Limits of Law* New York at 39, Campbell T (2010) *The Legal Protection of Human Rights: Sceptical Essays* Oxford University Press at 297-311 and Kaarthikeyan DR (2005) *Human Rights: Problems and Solutions* Gyan Publishing House at 177-182.

[17]*Treatment Action Campaign v Minister of Health* 2002 (5) SA 721 (CC).

[18] *Makwanyane and Others v State* 1995 (3) SA 391 (CC).

government to make available lifesaving tablets, this resulted in the saving of thousands of lives of innocent unborn children; in contrast, in the last case, prisoners who were on death row had their lives saved by the court.

This brings us back to the main theme of the dissertation, the adjudication of the right to life as enshrined in the 1993 and 1996 Constitutions. The problem emanates from the fact the decision of the court is based on majority rule, the decision of majority of judges becoming the decision of the court. This means that the decision of the court is constituted by what the majority of judges say, meaning the law is what the court says rather than what the law actually is. This is so because majority of the judges in any particular case may be wrong, the minority may be right. The judges do not beforehand agree on the rule of interpretation to be used in any matter, every judge may decide to use the other rule of interpretation while another judge may use a different rule of interpretation and therefore may result in the two judges arriving at different conclusions due to the method used to interpret the law. In any matter where the decision of the court is not unanimous, the court agreed with both the winning and losing litigant to a certain extent.

The majority judgment agrees with the winning litigant and the minority says to the losing party you had a case just that more of our colleagues did not agree with you. In other words the losing party failed to garner more votes in his or her favour. Adjudication then is a game of numbers more than anything else. At the end the judges hearing the matter do not agree on correct interpretation of the law and arrive at conflicting decisions called majority and minority judgments, or to put it in clear perspective, dissenting judgment.

This dissenting judgment and judgment of the court may result in inconsistency in judicial decisions over a period of time. Different judges at different times in the life of the court may hand down different judgments on the same subject matter and result in what is called ‘‘overturning” of the previous judgments. This is so because judges understand and interpret law differently resulting in different decisions on the same subject matter.

The Constitutional Court and the High Courts have so far not been consistent in

adjudicating the sacred fundamental human right, the right to life. The challenge is the consistency of courts judgments on the same or similar legal question. The courts have not been consistent in handing down judgments on the same subjects matter in different times and places. The judges hand down different or conflicting decision due to their different understanding and interpretation of the law. The High Court judge who heard the matter and finalized it grants the leave to appeal only when he or she believes that another judge may come to a different conclusion. This may be so because law in itself is indeterminable.

Judges are human beings with characters and different understandings of law and adjudication. With this in mind, the question is whether the law is indeterminate, or whether the judges are not being objective. The answer to these questions is unfortunately not in affirmative and this dissertation will show that the High Courts and Constitutional Court have not been consistent when adjudicating the right to life.[19]

The Constitutional Court and the High Courts adjudicated on the right life issues such as death penalty, euthanasia, the right to medical treatment and abortion and handed down conflicting decisions. These institutions affect the right to life negatively and positively as will become clear when they are discussed in the body of this dissertation.

The indeterminacy of legal rules and regulations allow the judges to use their discretion resulting in different interpretation methods being used, this is evident in most Constitutional Court cases where the eleven judges had different understandings of what the relevant provisions of Constitution meant, and reached different conclusions on the matter before them. This is one of the reasons why

[19] The Constitutional Court issued conflicting decisions on the right to life: in *Soobramoney supra* n (16) the Court allowed the Department's budgetary constraints as good reason for excluding critically ill patients from treatment at the state's expense. The Court reasoned that it would be better to spend the scarce resources on more patients than on one chronic patient and for this reason the Court concluded that the admission policy was reasonable, par [25] 775C-D. In contrast, in *Minister of Health v Treatment Action Campaign* the same Court interpreted section 27(1)(a) widely - to protect and preserve the life of the unborn babies of HIV positive mothers. In this case the Court was not concerned about the chronic nature of HIV; for different predictions based on same facts see also D'Amato A (1984) *Jurisprudence*: *A Descriptive and Normative Analysis of Law* at 33-35; MacAdam A & Pyke J (1998) *Judicial Reasoning and the Doctrine of Precedent in Australia* Butterworths at 314-

there are minority and majority judgments.[20] The rules of the Constitutional Court allow for concurring judgments and dissenting judgments. The concurring and dissenting judgments indicate that the Judges interpreted the law differently and hence there are different judgments emanating from the same set of facts before the court. Therefore, the question of determinacy is discussed in this dissertation. This is the point of the dissertation, the inconsistency of judicial decisions. In some cases involving the right to life, the Constitutional Court affirmed the right to life[21] and in other cases it did not.[22] In all these cases life was at stake. The research is focused on the High Court and the Constitutional Court's decisions, especially on the decisions on the right to life, contained in section 11 of the Constitution. The right to life is used to indicate or expose the indeterminacy and inconsistency of judicial decisions. The right to life is chosen as it is considered the most fundamental and important right of all the rights enshrined in the Bill of Rights.

1.3. Purpose of this Dissertation

The purpose of this research is to undertake a comparative study and to critically analyse the Constitutional Court and High Court's decisions on the right to life from two perspectives: namely, the protection and preservation of life, using the enforcement of socio-economic rights. The adjudication process is explored in this dissertation, and previous decisions of both the Constitutional Court and High Court on the right to life from medical, social and legal perspective are critically analysed. Their judgments are analysed and their interpretation of the provisions of the Constitution is criticised, amongst others.

Adjudication and justice are explored to show the inconsistency in judicial decisions on the right to life in that different courts and different judges interpret the right to life differently. This is so because in split decisions cases, there are concurring and

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[20] Some judgements are handed down unanimously and others not, see *S v Mhlungu and Others* 1995 (3) SA 867(CC) where the judgment was taken on 5-4, four judges dissenting. However in *S v Makwanyane* 1995 (3) SA 391(CC) the judgement was taken unanimously; on minority and majority judgments see also MacAdam *supra* n (19) at 314-316.

[21] *Government of RSA v Grootboom and Another* 2000 (11) BCLR 1169 (CC); *S v Makwanyane and Another* 1995 (3) SA 642 (CC) *and Treatment Action Campaign supra* n (17).

[22] *Soobramoney supra* n (16).

dissenting judgments which means that some of the judges agreed with the losing litigant and while others agreed with the winning litigant. I conclude that the perspectives of the various courts and judges differ on the right to life – therefore, they give the right to life different measures especially if the right is inferred from associated rights or protected indirectly by other rights in the Bill of Rights. The Constitutional Court, the High Court and the Supreme Court of Appeal have over a period of time interpreted the right to life differently and used different interpretation methods to arrive at their decisions.

In this dissertation the courts' adjudication process is scrutinised. It would be shown that since law is partially indeterminable, the Court's decisions are not really based on the correct interpretation of the law but on the individual judge's perception and understanding of the law. [23] This is so because these courts use the majority rule principle in taking a decision on issues before the court, where each judge indicates whether he or she agrees with the plaintiff or the defendant. The perception or the understanding of the law of the majority of the judges becomes a decision of the court. What if the majority of the judges were wrong on the issue before them at that time? The majority interprets the same legal rules differently from the minority, and thus the critical legal scholar's theory that law is indeterminable as it allows judges a room for discretion may be the case and therefore it would appear that in some cases the legal rules do not decide the outcome of a case as they (rules of interpretation) are applied and understood differently by different judges.

1.4. Hypothesis

The right to life is the most fundamental of human rights and should be respected and protected.

The correct and objective interpretation of the constitutional text on the same aspect - the right to life - should yield the same results. The judges must not arrive at different

[23] Dworkin (1986) *Laws Empire* at 2 argues that law becomes what judges say it is. See also Hart HLA (1961) *The Concept of Law* at 1-6; see also Weinred CC "Law as Order" (1978) 91 *Harvard Law Review* 909; Burton SJ (1992) *Judging in Good Faith* Cambridge University Press at 35-37; Meyerson D (2011) *Jurisprudence* Oxford University Press at 188 where he argues that the law found in books has little influence on judicial decisions.

decisions when adjudicating the same subject matter, interpreting same text and the legal dispute arises from the same set of facts. If they arrive at different decisions this means that the outcome is not determined by the law, but rather by the judges' different personal interpretation thereof. While a lower court decision may be overturned by a higher court, and the reversing of a very old judgment may be justified by the passing of time and the change in societal needs and circumstances, it is still troubling to contemplate the implications of a situation where the different interpretations of the law are postulated by judges sitting on the same bench: the possibility that the majority may have reached the wrong decision, which will stand as the judgment of the court, is disconcerting.

1.5. Summary of Chapters

Chapter One is the present chapter, which aims to introduce this dissertation.

Chapter Two: Concepts and Theoretical Framework

Chapter Two focuses on definitions of concepts and theoretical framework. The concept adjudication is discussed and explored with reference to various theories of well-known philosophers in this Chapter. The concepts law, justice, and public interest are also briefly defined and interrelated.

Chapter Three: The Right to Life Defined

The right to life as enshrined in the Constitution and other international documents is defined and discussed extensively in this chapter. The right to life as reflected in International and Regional Instruments is discussed with reference to case laws decided by the Regional Courts. The concept justiciability is discussed in relation to the socio-economic rights.

Chapter Four: The Right to Life: Medical Treatment

The right to medical treatment and the right to life in Chapter Three are linked in this Chapter. It is argue that the right to life should not be qualified by any other condition

such as whether there are available resources or not, but it is still subject to the limitation clause as enshrined in the Constitution. The availability of resources for the realisation of the socio-economic rights is inevitably a budgetary matter and should therefore be left to policy makers as it would be difficult for the courts to assess whether the resources have been allocated appropriately or not. If such a condition should be taken into consideration then the state should be forced to make resources available for the progressive realisation of all the fundamental rights in the Bill of Rights. Extensive reference is made to socio-economic rights as rights supporting the right to life, without which the right to life becomes meaningless and unenforceable as far as the preservation of life and survival are concerned. All of the above shall be preceded by an extensive discussion of landmark case law such as *Soobramoney* [24] and *Van Biljon,*[25] as well as other cases involving the right to life.

The discussion of the right to medical treatment in another context continues in Chapter Four. The right to life of an unborn child where the mother is HIV positive is discussed. This discussion will be set against the argument that, though not legally protected until birth, life starts at conception – an issue, which I delve into in the following chapter. The case *Treatment Action Campaign*[26] will also discussed extensively in this chapter. I contrast this decision with that of *Soobramoney* on the preservation and protection of the right life, thus the enforcement of the right to life.

Chapter Five: Right To Life: Death Penalty, Euthanasia and Abortion

The right to life is explored in the context of abortion, euthanasia and the death penalty in Chapter Five. The analysis the right to life of people who have reached different and often contrasting stages of their lives is conducted. In the first case the person is not born yet but killed during the developmental phase of life. In the second case, the patient is in a medically vegetative state and another decides to end his suffering by ending his life. Finally, in the death penalty matter, the question as to whether a convicted person who has taken the life of another, should have his protected by the outlawing of the death penalty, will be discussed. Reference is

[24] *TAC supra* n (17).
[25] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C).
[26] *TAC supra* n (17).

made to various case laws on these aspects. The issue to be considered is whether, in each case, it is logical to preserve and protect this life in the prevailing circumstances.

Chapter 6: Inconsistency in Judicial Decisions: The Right to Life in Perspective

This is the epilogue chapter. Here all the decisions are compared and contrasted to show that law is indeterminable and that the Constitutional Court and the High Court's decisions are not consistent because they are not based on the correct interpretation of the law, rather those decisions are based on the different understanding of the law shown by the individual judges. The recommendation is that the majority principle of adjudication should be abolished. It is suggested further that, if that principle cannot be done away with, then the rehearing of the same matter be mandatory when two-thirds of the Judges who heard the matter have retired or are no longer serving. Alternatively, section 11 of the Constitution should be redrafted so as to clarify the extent to which life is protected. The section may also have to make exceptions such as in the case of the death penalty, following the example of the European Convention of Human Rights[27] (for instance), as well as the constitutions of other jurisdictions such as Namibia.

[27] Article 1 of The European Convention for the Protection of Human Rights and Fundamental Freedoms provides for an exception to the general rule: for example a person's right to life may be waived in cases where the Court decision provides otherwise (imprinted in Clayton R & Tomlison T *The Law of Human Rights* at 55). See also Article 2 of the American Convention on Human Rights, Article 4 of African Charter on Human and Peoples' Rights, the last two documents are imprinted in Patel EM and Watters C (2004) *Human Rights Fundamental Instruments and Documents* Butterworths at 94 and 141 respectively. See also section 2 of the Lesotho Constitution, section 4 of Botswana Constitution, section 4 of Swaziland Constitution and section 12 of Zimbabwean Constitution, these constitutions made the exceptions clear and they qualify the right to life. See also the Namibian Constitution, section 6 thereof is very clear on the death penalty, it stipulates that the right to life shall be respected and protected and that no law may prescribe death as a competent sentence. This provision articulates its intention clearly.

CHAPTER 2
CONCEPTS AND THEORETICAL FRAMEWORK

2.1. General Introduction

The most important question when dealing with the administration of justice is always: What is law? It is also common cause that law has a special or certain relationship with adjudication and interpretation. Is there any kind of relationship between law and other concepts such as adjudication, justice and public interests? Can any of these concepts exist independently of the law? These are pertinent questions, which will be discussed in this chapter.

Most importantly the concept "law" is discussed and defined in this Chapter. The relationship between law and adjudication is explored followed by discussion of the concept "adjudication" with reference to theories of some jurists and philosophers.[1] I will also define and interrelate the concepts "law", "justice" and "public interests". The main focus is on two aspects of the right to life, namely the preservation and protection of life. Are the various courts' decisions on the right to life consistent? Do they accord the right to life the full protection it deserves? The dissertation tries to answer these questions. Finally, this chapter would end with a discussion of the theories of the Critical Legal Scholars and my conclusion on the matter. I will first discuss the concepts of law, justice and public interests.

2.2. Law, Justice and Public Interests

2.2.1. Introduction: Law

The purpose of this research is to show the prevalence of inconsistency in judicial decisions, that of the Constitutional Court and the High Courts using the right to life

[1] Hutchinson AC (2000) *It's All in the Game* Irwin Law at 3; Roederer C and Moellendorf D (2006) *Jurisprudence* Butterworths at 215; see also Davis DM "Kennedy's Critique of Adjudication: A Challenge to the Business as Usual Approach of South African Lawyers (2000) *SALJ* 701*,* Hutchinson AC "The Reasoning Game: Some Pragmatic Suggestions"(1998) 61(2) *The Modern Law Review* 263; Thomas Ph.J, van Der Merwe CG, Stoop BC (2000) *Historical Foundations of SA Law* Butterworths at 1, Smith JC, Weisstub DN (1983) *The Western Idea of Law* vii; MacAdam, A & Pyke J (1998) *Judicial Reasoning and the Doctrine of Precedent in Australia* at 3-4, Gruberg M,

cases. There is no better way of doing that than by defining what is law first and explore the adjudication process thereafter. In ancient human societies, there were unwritten laws followed and obeyed for generations.[2] As the law was unwritten, the source of law was custom only. The law developed from the repeated practice by members of the society. Today, the law has sources, namely, legislation, common law, court decisions, custom and African indigenous law. Today we can proudly add the supreme law of the Republic, the Constitution. Generally, it may be said that the law is a set of rules governing society in a just and fair manner. It controls and regulates human beings and their behaviour to the benefit of society as a whole. However, this view may not always be pertinent, the law might not be just and fair: apartheid legislation advocating the policy of social reconstruction is a classical example.

Apartheid laws did not keep order in society, nor did they benefit the whole community; they were applied against African communities and to the benefit of the white communities. Therefore, the concept of 'law' needs to be explored further. Few questions concerning anything in society have been asked from different angles and in so many ways as the question of what the law is. Hart argues that even if we confine our attention to legal theory of at least 150 years and neglect classical and medieval speculations about the "nature of law" we shall find a situation not paralleled in any other subject systematically studied as a separate academic discipline.[3] There are other academic disciplines that are studied and comprehended much better than law as a science, disciplines such physics, mathematics, accounting, medicines, agricultural science, chemistry, astrology and

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Introduction to Law, University Press of America at 1-54.

[2] Hahlo HR and Kahn E (1968) *The SA Legal System and its Background* Juta at 302 and 303; Edwards AB (1996) *The History of SA Law* at 73; Willie G (1961) *The Principles of SA Law* 5th ed Juta 17-21; Zimmermann R & Visser D (1996) *Civil Law and Common Law in SA* Juta 12-15; Emanuel SL (2011) *Civil Procedure* 20th ed Wolters Kluwer at 1-6; Geldenhuys T (1991) *Introduction to Security Law* Juta at 2.

[3] Hart (1961) *The Concept of Law* at 1. The concept has been widely written about in literature, see also Geldenhuys T (1991) *Introduction to Security Law* Juta at 2; Hahlo HR and Kahn E (1968) *The SA Legal System and Its Background* Juta 3-6; Wille G (1961) *Principles of SA Law* 5th ed Juta at 1; Vorster WS (ed) *The Right to Life in Bioethics* at 70; D' Amato (1984) *Jurisprudence*: *A Descriptive and Normative Analysis of Law* Martinus Nijhoff at 224; Feibleman JK (1985) *Law*, *Justice and Culture* Martinus Nijhoff at 39, Wells WAN (1991) *Law, Judges and Justice* Butterworths at 1-6; Douzinas C & Gearey A (2005) *Critical Jurisprudence: The Political Philosophy of Justice* Hart Portland Oregan at 76, Read W (1986) *Legal Thinking* Univ of Pennsylvania Press, Philadelphia at 10-12.

many more similar disciplines. The literature with regard to these disciplines deals with the content of the disciplines more than defining the discipline itself. Law, on the other hand, has so much literature focusing on defining the concept "law".

It is true that no vast literature is dedicated to answering the question what is chemistry? The reason is that chemistry, unlike law, is a science that can be determined with absolute certainty using various experimental methods. It would not be hard to determine, for an example, that two hydrogen molecules plus oxygen molecule equals to water. You rarely find that one scientist's chemical equations result in different by-products than the other using the same chemicals. The same cannot be said about what is right in law; different judges reached different decisions interpreting the same text on several occasions, the Constitutional Court with the concurrent and dissenting judgments.

Chemistry is a science dealing with tangible things while law is an abstract theory of social science. Chemistry is determinable, whilst law is not. Law is somehow an abstract theory of human mental discipline, law may be our inner policeman; it sets limits to our behaviour. Law punishes bad behaviour and sometimes does not reward good one. In criminal cases the perpetrator of crime may be sent to jail or fined certain amount of money on conviction, but the victim of crime comes out of the court with just the mental satisfaction that the perpetrator has been jailed or fined. However, the sad thing about the law is that the perpetrator, once incarcerated will enjoy more rights than his victim. An example, which may be mentioned at this point, although it will be analysed in detail at a later stage, is *Van Biljon v Minister of Correctional Services*, where – for all practical purposes - the Court delineated the rights of prisoners as reaching further than those of people outside prison, because of the wording of the relevant Constitutional provisions, namely section 35(2) (e).[4] Section 35(2) (e) of the Constitution is dedicated exclusively to the arrested, detained and accused persons.

[4] In *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C) Cape High Court said that the state owed higher duty to prisoners than to the general citizens and that the Constitution itself provide for the differentiation (par 50), on treatment of prisoners, see Kaarthikeyan DR (2005) *Human Rights: Problems and Solutions* at 231-273, Rudulph HG "Man's Inhumanity to Man Makes Countless Thousands Mourn! Do Prisoners Have Rights? (1979) 96 *SALJ* 640.

The rights in section 35 of the Constitution are not qualified the way in which the rights contained in sections 26 and 27 are (the latter provisions being applicable to the general public). On the other hand, there is no section or provision in the Constitution dedicated exclusively to the rights of the victims of crime (or victims of section 35 persons). The socio-economic rights of people outside prison are qualified by the provision of available resources in subsections (2) of both sections 26 and 27 of the Constitution. Hence the argument that the law does not always benefit everyone in society, in some cases it benefits the people who contravene it.

Law should be a combination of both rules and conscience. Conscience is the inner policeman of every human being which constantly guides human behaviour without external enforcement. However, some people have different understanding of the nature of the law, thus their definitions of law differ from mine. Below I consider the theories of Schlag, White, Austin, Hart, Dworkin, the Realists and Critical Legal Scholars.

2.2.2 Schlag

Schlag differentiates between the normative law, and the law in practice. He explains that the law is not as it is in the statute books or university textbooks, but it is rather a network of bureaucratic power arrangements that can be manipulated by the practicing lawyer.[5] He refers to these two scenarios of law, respectively, as the "ideal'' of legal academy and the "realities" of practice. For Schlag, therefore, law is nothing more than a power game. Schlag creates hypothetical theatre of law to show how the bureaucratic power arrangements work in practice.

In "The Normative and Politics of Form" Schlag presents a bureaucratic power arrangements by using the incident involving the practicing attorney, Stuart.[6] In this play he indicates that a person can be arrested for contravening the law[7] and enlist

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[5] Schlag P "The Normative and Politics of Form" (1991) 139 *University of Pennsylvania Law Review* at 801-804.
[6] *Id* at 852.
[7] California's DWI statute imprinted in Schlag P "The Normative and Politics of Form" *supra* n (5) at 853 states that it is unlawful for any person who has 0,08% or more, by weight of alcohol in his or her blood to drive the vehicle.

the best witness for himself at the hearing and have the best attorney to represent him in court.[8] The attorney will adduce only evidence he wants to present to court in the best interests of his client.[9] The evidence so presented in court will determine the outcome of the case.[10] The outcome is determined by the performance of the attorney and the witnesses.[11]

In the end, the favour bank, the shadow law and the attorney's performance have done their work: the charges would be dropped even though the accused was in fact guilty.[12]

Schlag presents a manipulative formation of facts, which define exactly what the law is all about in the real sense. From the case of Stuart, one can deduce that law is not exactly the one written in the statute books or textbooks but it depends on the quality of the performances by various actors within the legal community. The lawyers elicit the precise testimony they would like the witnesses to give in court. The image of law presented here is "the performance of the impressive moves within scripted, stylized roles that can be used by various actors to invoke or suppress institutional power".[13] The professional friendship between actors is called shadow law, the network of law within law.[14] There is also a favour bank, hierarchical in structure and operated on principles of loyalty and honour, and on ties of professional friendship.[15] Schlag says that the real law is like playing the power ratios and manipulating the performance to get the right results. Thus law is a game of power and manipulation. According to Schlag, "law is a stabilized proposition, rational arrangements of ideas and theories".

Lawyers tend to see their professional powers as resting not on rules but on local knowledge, insider access, connections and reputation, the favour bank and shadow law, more than the reason of the better argument is the stuff of law.[16] There is no

[8] Schlag *supra* n (5) at 853.
[9] *Ibid* at 854.
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid* 857.
[13] *Id* at 855.
[14] *Ibid*.
[15] *Id* at 856.
[16] *Ibid* at 859.

better way of describing law than Schlag's way. It is true that law taught at law schools, found in statute books, and the law in practice, are not the same.

The facts of the case do not necessarily indicate which way the case may go, but the legal practitioner representing the litigant may play an important role in the outcome of the case. The real law is the one in practice where the skills and diligence of the lawyer may determine the outcome of the case. The performance of the lawyer and to a certain degree his connections in the legal profession may swing most cases in his favour.

2.2.3. White

Roederer and Moellendorf argue that law is in a full sense a language, for it is a way of reading and writing and speaking, it is way of maintaining a culture, largely a culture of argument, which has a character of its own.[17] For White, law can more properly be seen not as a set of commands or rules or even with a set of restateable principles or values behind them, but as the culture of arguments and interpretation through the operation of which the rules acquire their life and ultimate meaning. If law is about culture of argument, then I would find it difficult to determine which one develops first, the rules or the arguments? If the arguments precede the rules then what would you be arguing about? White says that rules acquire their meaning and life from the culture of arguments, which would mean the culture of arguments, exists before the rules.[18]

It is true that language forms part of law, but many disciplines, such as Sociology, and Economics rely on language in order to be understood. Yet, different conclusions or theories within these disciplines are rarer than the dissents or concurrences in judgments of law.

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[17] Roederer C, Moellendorf *supra* n (1) at 217, see also Levi JN and Walker AG (eds) (1990) *Language in Judicial Process*, Plenium Press London, at 4 and 5, Burger AJ (2001) *A Guide To Legislative Drafting in South Africa*, Juta at 1-3 on language and law see, Hlope JM "Official Languages and Courts" (2000) 117 *SALJ* 690, Hoffmann L "The Intolerable Wrestling with Words and Meanings" (1997) 114 *SALJ* 656 at 656-657.

[18] *Ibid* at 217.

2.2.4. Austin

Austin, like other philosophers of his time, tried to define the term "law". He developed a theory known as the "Command Theory of Law" or (the imperative theory of law).[19] For Austin, law is a command given by a determinate common superior to whom the bulk of society is in the habit of obedience and who is not in the habit of obedience to a determinate human superior, enforced by a sanction.[20] Austin distinguishes commands of two kinds. Austin avers that where a command obliges generally to a specific act or forbearances, a command is occasional or particular.[21] Thus commands are neither general nor particular. A command of general kind is a law; a command of occasional kind is an order, according to Austin.

Austin distinguished two kinds of laws, laws "properly so called'' and laws "not properly so called".[22] Every law "properly so called" consists of a rule laid down for guidance of an intelligent being by an intelligent being having power. Laws "not properly so called'' are of two kinds: laws by analogy and laws by metaphor. Under laws by analogy Austin places such matter as the dictates of fashion, of honour, the laws or rules imposed upon gentlemen by opinions current amongst gentlemen and also international law. Laws "not properly so called" are also of two kinds: laws set by God to human creatures and laws set by men to men. Human laws are of two kinds, laws "strictly so called" and laws "not strictly so called''. Laws "not strictly so called'' comprised laws set by men not as political superior: "These are the commands of the sovereign not supported by legal sanctions and administered by the state". Laws "strictly so called" comprise law set by men as political superiors to political inferiors and laws set by men as private individuals in pursuance of legal rights".

By laws by metaphor Austin refers to "laws regulating the growth or decay of vegetables….laws determining the movements of inanimate bodies or masses".[23] To

[19] Austin (1970) *The Province of Jurisprudence Determined* 2nd ed (Preface at v).
[20] *Id* at 15.
[21] *Id* at 27.
[22] *Ibid* at 15.
[23] Riddal (1991) *Jurisprudence* 2nd ed at 19.

amplify his definition of law Austin goes on to examine the nature of sovereignty.[24] Sovereignty exists, Austin explains, where the bulk of given political society are in habit of obeying a determinable common superior and that the command is backed by threats. Although Austin's analysis of the nature of law is sufficient, it is not inescapably applicable in all circumstances. Obeisance to an Act of Parliament which has a set date of operation will not necessarily have been driven by force of habit. The command element must also fail in some circumstances, since there are legislative provisions which are not peremptory and could not be commands, if elements of discretion are present. The 1996 Constitution requires that the Court 'must' consider international law and 39(1) (c) requires that the Court 'may' consider foreign law.[25] The former provision is peremptory and the latter not.

Law is not a command. Commandment, according to the English concise dictionary refers to giving an authoritative order or peremptory order. Law is not always peremptory and it is not always given by superior but in most by the elected body such as the Provincial Legislatures or the Parliament.[26] The Provincial Legislature and Parliament are also subject to the Constitution.[27] So Austin's theory of obedience must fail. It must also be noted that not every law is followed by sanction. The Appropriation Act by the Minister of Finance appropriates funds only in that financial year.[28] The Acts appropriate funds for that particular financial year and it would not be applicable in the next financial year, it is difficult to see how this kind of legislation would have a chance to be applied and enforced through sanctions considering its short spell.

2.2.5. Hart

Professor HLA Hart launched a scathing attack on Austin's command theory of law.

[24] Hart *supra* n (3) at 16.
[25] Section 39(1) (b) and (c) of the Constitution; see also s15 of Military Ombud Act 4 of 2012.
[26] The use of the word "may" in the provision of the legislation indicates it is not peremptory provision and the person applying the law has a measure of discretion, unlike the provision of the Statute that uses the word "shall" or "must". The latter gives the administrator no discretionary at all; he must comply with the provisions of the Act.
[27] Section 8 of the Constitution.
[28] Appropriation Act 2 of 2006; See also the Division of Revenue Act 2 of 2006: this Act provides for the equitable division of revenue anticipated to be raised nationally among the National, Provincial and Local spheres of Government for the 2006/07 financial year.

Hart says that laws as we know them are not command backed by threats.[29] Some laws, Hart concedes, do resemble orders backed by threats, for example – in the case of criminal law. But there are many types of laws that do not resemble orders backed by threats, for example laws that prescribe the way in which valid contracts, wills or marriages are made do not compel people to behave in a certain way, Hart contends.[30] Hart refers to the laws not backed by threat or sanction as the power conferring rules, for these are like orders of courts and enactments of law-making bodies, just consist in valid exercise of legal powers.[31] Hart contends that the range of application of law is not the same as the range of application of order backed by threats.[32]

In Austin's scheme the lawmaker is not himself bound by the command he gives, the order is directed to others, not to himself. It is true, Hart concedes, that in some systems of government this is what may occur. But in many systems of law legislation has a force that is binding on the body that makes it. So as the lawmaker can be bound by the law he has enacted, the Austinian concept of sovereign-command-obedience-sanction theory cannot be of universal application.[33]

Hart, on the command and threat aspects, argues that the mode of origin of law is different from the mode of origin of an order backed by threats.[34] Hart says that an order backed by threats originates from a deliberate act performed at a specific time. But not all laws can be said to have their origin in a deliberate datable act. Hart cites custom. Customs that are recognised as law within a particular society do not stem from any deliberate acts, but have gained status of law by continuous and common usage in those communities over a period of time. Command may have to be obeyed immediately not over a period of time.

Hart says that the notion of habit of obedience is deficient where sovereignty succession is involved.[35] Hart argues that where a leader succeeds another, there

[29] Hart *supra* n (3) at 27.
[30] *Ibid* at 32.
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid* at 25.
[34] *Ibid* at 44.
[35] *Ibid* at 53-54.

would be no habit of obedience to his orders immediately, and as such the habit would have to be established over a period of time. The last reason why, according to Hart, the Austinian theory of command should fail, is that Austin's notion of sovereignty is also deficient.[36] In Austin's theory of law, while there may be political limits on sovereign's power, there can be no legal power on sovereign's power, since, if he is sovereign, he does not obey any other legislator. Thus according to Austin, if law exists within a state, there must exist a sovereign with unlimited power. The competence of a legislature may be limited by written constitutions under which certain matters are excluded from the scope of its competence to legislate upon.[37]

After these descriptions on Hart's scathing attack on Austin's theory of law, let us now consider Hart's own theory of law. In his book *The Concept of Law* [38] Hart avoids to define "law". Hart says, definition, as the word suggests, is primarily a matter of drawing lines or distinguishing between one kind of thing and another, which marks off by a separate word. [39] The need for such a drawing of lines is often felt by those who are perfectly at home with the day-to-day use of the word in question, but cannot state or explain the distinctions which, they sense, divide one kind of a thing from another.[40] Hart wanted to analyse the concept of law and not define or deal with the question of what law is. Hart's main concern was what constitutes a legal system.

For Hart, a legal system is a complex union of primary and secondary rules.[41] Hart distinguishes between primary and secondary rules. The former being rules imposing duties and concern actions involving physical movement or changes, and the latter rules confer powers and provide for operations, which create, or variate obligations.[42] For Hart law is all about a matter of rules.

In conclusion, law is not only about rules, but about rules, customs and traditions and morals as well. Furthermore, Hart's theory of law seems to fit very well in

[36] *Ibid* at 69.
[37] *Ibid* at 67.
[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid* at 13.
[41] *Ibid* at 111.
[42] *Ibid* at 79.

modern legal systems: today we have the Constitution that prescribes how to amend it. The Constitution provides for a national legislative process. Section 73 provides that any Bill may be introduced in the National Assembly. Section 74 provides for the procedure of amending the Constitution. This section provides that section 1 and this subsection may be amended by a bill passed by the National Assembly with a supporting vote of at least 75% of its members; and the National Council of Provinces, with a supporting vote of at least six provinces.

2.2.6. Dworkin

In direct contrast with Hart, Dworkin argues that law is all about principles and not rules. Dworkin says that when lawyers reason or dispute about rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules but operate differently as principles, policies and other sorts of standards.[43] Dworkin differentiates between the principles and the rules. He defines "principle" as the standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice and fairness or some other dimension of morality.[44] On the other hand Dworkin says that rules are applicable in an "all-or-nothing" fashion.[45]

According to Dworkin, the difference between legal principles and legal rules is a logical distinction. Both set standards point to particular decisions about legal obligation in particular circumstances, but they differ in character of the direction they give.[46] The principle, unlike the rule, does not have an exception. It is all or nothing. Dworkin argues that the rule does not exist before the case is determined: the court cites principles as its justification for adopting and applying a new rule.[47] Dworkin is of the opinion that law is not a system of rules but of principles. Dworkin linked law and politics as well.

[43] Dworkin RM (1977) *The Philosophy of Law* at 43.
[44] *Ibid*.
[45] *Ibid* at 45.
[46] *Ibid*.
[47] *Ibid* at 49.

Dworkin concedes that lawyers and judges cannot avoid politics in the broad sense of political theory.[48] But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance.[49]

Dworkin continues in this article and poses a question: what sense should be given to propositions of law?[50] Dworkin refers to various statements lawyers make reporting what law is on some questions or another.[51] Dworkin thinks that propositions of law can be very abstract and general. What are propositions of law all about? What in the world could make them true or false, Dworkin questions?[52] Dworkin seems to argue that the puzzle arises because propositions of law seem to be descriptive, they are how things are in law, not about how they should be - and yet it has proved extremely difficult to say exactly what it is they describe.[53]

In conclusion, Dworkin's theory of law that law is not a system of rules but of principles does not fit the modern flexible and liberal Constitutions. Dworkin's principle of "all or nothing" would not stand the test of most Constitutions, legislations and International Conventions. Most legal systems or legislations provide for exceptions to almost every rule. The exception is in the form of limitation of particular right in those legislations. The limitation clause found in the 1996 Constitution limits the extent of the rights in the Bill of Rights.[54] Some of the sections in the Bill of Rights have limitation immediately after conferring a right, namely sections 26 and 27 thereof. Section 16(2) also contains an internal qualifier: Section 16 of the Constitution confers a right to individuals to freely express themselves but still prohibits them from doing or saying anything clearly mentioned in subsection (2). Subsection (2) is the exception to rule that very individual has the right to freedom of expression. I therefore do not agree with Dworkin's theory that law is a system of

[48] Dworkin RM (1982) *"The Interpretation of Politics: Law as Interpretation"* The University of Chicago Press LWE407 at 249, see also Sachs A, (2009) The Strange Alchemy of Life and Law, Oxford University Press at 9, Mnyongani FD "The Judiciary as a Site of the Struggle for Political Power: A South African Perspective" (2011) 2 *Speculus Juris* 1.
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*.
[52] *Ibid*.
[53] *Ibid*.
[54] Section 36 of the 1996 Constitution of the Republic of South Africa.

principles. Law is a system of rules interpreted by the courts of law, and so doing they develop legal principles.

2.3. Adjudication

2.3.1. Adjudication: General

Adjudication in simple terms refers to the formalistic process in terms of which the presiding officer, in the court of law, interprets the relevant statute, common law principles and/or applicable customary law rules in arriving at his decision, the verdict. This verdict may have an adverse effect on one's exercises of his or her rights.

It is through this process that judges and magistrates make their decision known. The focus will be on various approaches or theories of interpretation used by the courts in adjudicating matters before them and on how the same theories of interpretation are used to interpret the law. I am in fact not dealing with theories of interpretation *per* se, but with adjudication using these theories.

The resultant usage of the theories of interpretation is adjudication; the result of adjudication process is the court decisions or judgments which has profound effect on the lives of the people concerned.[55] Five methods or theories of constitutional interpretation are recognized in South Africa, the first one being the literal or grammatical method which requires that words used in the statute must be given their ordinary grammatical meaning, and if the meaning is clear then it should be put into effect. This approach focuses on the literal meaning of the words to be interpreted.[56] The deviation is allowed from the literal method where the plain meaning of the words used are ambiguous to avoid absurdity.[57]

[55] Axam T (Jr) "A Model for Learning and Teaching-Rights and Responsibilities in the New Legal Order" (2001) 17 *SAJHR* 404 at 405; Campbell T, Ewing KD, Tomkins A (eds) (2010) *The Legal Protection of Human Rights: Sceptical Essays* Oxford University Press at 297-311; Kaarthikeyan DR (2005) *Human Rights: Problems and Solutions* Gyan Publishing at 177-182.
[56] Corcoran S, Bottomley S (eds) (2005*) Interpreting Statutes* The Federation Press, Sydney at 16 and 29.
[57] Ibid at 27.

The second method of interpretation recognized is systematic interpretation, this methods sought to clarify the meaning of particular constitutional provision in conjunction with the constitution as a whole; the constitutional provisions are therefore interpreted collectively, not in isolation.[58]

Teleological or purposive method aims to ascertain the objects or intention and purpose of the provision taking into account the constitutional values.[59] The court must find out what was the intention of the legislature when enacting the provision and therefore the object the provision intends to achieve, nothing else. The fourth theory of interpretation is historical interpretation. This method of interpretation uses the historical context; that is looking into the history of the text by situating a provision within the tradition from which it emerged.[60]

The last and fifth method of constitutional interpretation is comparative method. This method allows the court to look at foreign court decisions and international human rights law to assist it to arrive at a decision on cases similar in facts.[61] The court look at the decided cases of foreign jurisdiction as a yardstick to guide it to arrive at a decision, this is in fact sanctioned by the constitution.[62] The utilization of the interpretative methods yields in court judgments which affects the persons involved differently.

D'Amato refers to the effect of law by saying that "law affects our lives profoundly, it channels our behaviour, it gives us incentives, and it provides for our punishment if we violate its prescribed norms".[63] Dworkin discusses the effects of law more clearly when he concludes that the civil suits, in which one person asks compensation or protection from another for some past or threatened harm, are sometimes more than

[58] Corcoran *supra* n (56) at 16.
[59] Corcoran *supra* n (56) at 16; see also Burger AJ (2001) *A Guide to Legislative Drafting in South Africa*, Juta at 25-26, Cockram GM (1983) *The Interpretation of Statutes*, 2nd ed Juta at 60-68, Du Plessis L, "The (re)Systematisation of the Cannons of and Aids to Statutory Interpretation" (2005) 122 *SALJ* 591 at 607; see also *S v Makwanyane and Others* 1995(3) SA 391 (CC) 404H.
[60] Du Plessis *supra* n (59) at 609-610, Corcoran *supra* n (56) at 116.
[61] Du Plessis *supra* n (59) at 142.
[62] Section 39(1) of the 1996 Constitution, see also *Makwanyane* 405E-F.
[63] D'Amato A *supra* n (3) at 2; see also Feibleman JK (1985) *Justice, Law and Culture* at 39; Cameroon E "When Judges Fail Justice" (2004) 121 *SALJ* 580 at 587.

all the most momentous criminal trials.[64] Dworking asserts rightfully that the argument by one's council in court may seal or determine whether he or she loses the case for as long the argument can influence the judge in one direction or another.[65] The decisions of the Courts have, in some instances such as the death penalty, the right of access to health care services and abortion, tremendous effect on the lives of the people.[66] The Constitutional Court's decisions have momentous effects on our lives; life may be saved or even lost due the Constitutional Court's decision.[67]

The effect of the decision of the courts in civil or criminal matters may not be measurable as the rights lost may, in some cases, not be humanly quantified or measured.[68] There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice.[69] There are different effects of law on parties and their families. Law effectively controls and regulates our lives in our societies. The courts as manned by human beings are the interpreters and enforcers of law in the state; the judiciary adjudicates legal disputes and hands down judgments. Can we really trust that judges will be objective and consistent? The constant scrutiny of the adjudication process by the academics, lawyers, legal philosophers, the media and the society at large may stand guard against the wrong decision, but we do not have any remedy against the wrong decisions by the Constitutional Court as its decisions are final and not subject to any other review or appeal. Then the question would still be: How does the court decide or reach a decision, how do they adjudicate matters before them, and what is adjudication?

According to the Oxford Concise English Dictionary, "adjudication" is defined as a

[64] Dworkin RM (1962) *Laws Empire* at 39.
[65] *Ibid.*
[66] *Ibid.*
[67] In *S v Makwanayane and Others* 1995 (3) SA 391 (CC) the Constitutional Court ruled that death penalty was unconstitutional thereby effectively doing away with this type of punishment, and the lives of all people who were on death row were saved. However in *Soobramoney v Minister of Health KZN* the Constitutional Court ruled against the patient who wanted government to provide him with renal dialysis to save his life. The patient died later after the Court's momentous decision on life, see also *Mohamed and Another v President of the Republic of SA and Others 2001 (3) SA 893 (CC)* where the Court held that a person may not be surrendered to a country where he or she may face death penalty, on surrender to foreign country that may impose death penalty see also *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (2) SA 467 (CC); Axam *supra* n (55) at 405-406.
[68] Dworkin *Supra* n (64) at 1.

formal judgment made by a judge on a disputed matter after considering all the facts and evidence before the court.[70] One may say that adjudication refers to the whole process of using the various interpretation theories and methods by the courts of law in determining or reaching their decisions on disputed matters.

Hutchinson likens adjudication with the game of soccer.[71] Hutchinson insists that adjudication, like much of life itself, is best understood as a game-as playful, yet serious attempt by the Judges to engage in law's language of politics, which helps to constitute and regulate social life. Hutchinson continues in his hypothetical analogy of law and the game of life by saying that:

> law is not a site that is located aside or away from ordinary life and that adjudication is not an activity that can be appreciated as separate from ordinary living: law and adjudication are part of, not apart from life and represent one site and one way of playing the game of life[72]

The jurisprudential account Hutchinson offers here is a theory about the relation between law and life.[73]

Hutchinson's theory is correct. Adjudication itself is like a stage play, the one who knows the stage very well will play very well and consequently win the match. He must at least know the rules to be able to play within their ambit on the stage. One cannot really escape the fact that interpretation and adjudication and sanction are inherent part of law or the courts. The inevitable result of interpreting the law is the verdict: someone is found guilty or not guilty, or the court finds in favour of one party

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[69] *Ibid*

[70] Oxford Concise English Dictionary 10th Ed at 16. Fiss argues that adjudication is simply interpretation in Fiss OM "Objectivity and interpretation" (1982) 34 *Stanford Law Review* 739; see also Brest P "Interpretation and Interests" (1982) 34 *Stanford Law Review* 765; Fish S *"Fish v Fiss"* (1984) 34 *Stanford Law Review* 1325; see also Carter LH (1998) *Reason in Law* Addison-Wesley Educational Publishers, 5th ed at 21 and 119; Bix B (1993) *Law, Language and Legal Determinacy*, Oxford at 4; Hutchinson supra *n* (1) at 2, 9 and 84, see also McCormic P and Greene I, (1990) *Inside the Canadian Judicial System: Judges and Judging*, James Lorimer and Co at 4, Wacks R "Judges and Injustice" (1984) 101 *SALJ* 266 at 270-272.

[71] Hutchinson *supra* n (1) at 2; see also Hlope J "The Role of Judges In A Transformed South Africa - Problems, Challenges and Prospects" (1995) 112 *SALJ* 22 at 31; Corder H (1984) *Judges at Work: The Role and Attitude of South African Appellate Division Judges 1910-1950* Juta at 23, see also Mahesh K & Bhattacharyya B (eds) (1999) *Judging the Judges*, Gyan Publishing House at 183.

[72] Hutchinson *supra* n (1) at 2.

[73] *Ibid.*

over the other. The verdict may result in punishment or freedom in the case of a criminal matter; in the case of a civil matter the plaintiff may secure his prayers and the defendant may lose some rights or even money, if the judgment involves credit.

Hutchinson completes his analogy of adjudication and sports game by saying that adjudication is a language game in that it is played both through and with language: "judges shape and are shaped by the discursive regimes that comprise law and the reality that it helps to make possible".[74] The second feature Hutchinson explores is the fact that the language game of adjudication is:

> played within a social and historical context that is never static, but is always moving, while judges are never not in the game, there is no one game of games". The true nature of adjudication is its interpretive element, thereby making the language the tool to be used in this game. The judges cannot leave out the historical and social aspects of life in interpreting the law. "The law itself is in most cases reactive to the society's historic events and social ills, these social and historical events are reflected in the court judgments disguised somehow by the language of the court.[75]

Language is a human science that is dynamic, constantly evolving differently across different societies and communities, even for those who reside in the same territory speaking similar language.[76] Adjudication can be thought of as a particular language game that takes place within the larger language games of law and society.[77] Hutchinson argues further that because convention and context are never historically stable and always socially contestable, the meaning and application of legal rules cannot be put beyond the possibility of disputation or need for defense; as such the practice of adjudication becomes incorrigibly indeterminate and political

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[74] *Id* at 52.
[75] *Ibid.*
[76] *Id* at 54.
[77] *Ibid*, on law and language see also Sarkin J "The Political Role of the South African Constitutional Court" (1997) 114 SALJ 134 at 137, Hlope JM " Official Languages and the Courts" (2000) 117 *SALJ* 690 at 690, De Villiers J "Meaning and Statutory Interpretation" (1999) 62 *THRHR* 373 at 387, Devenish G "Interpretation From The Bowels Of The Act- An Essential Methodology For Unqualified Contextual Interpretation" (1989) 106 *SALJ* 68 at 81, Kerr AJ "The Interpretation of Contracts: Some Persistent Problems" (1994) 57 *THRHR* 87 at 88, Viljoen F "Look Who's Talking, In the Courtroom, Too!" (1992)109 *SALJ* 64; Cameroon E "Lawyers, Languages and Politics-In Memory of JC De Wet and WA Joubert" (1993) 110 *SALJ* 51 and Posner RA (1990) *The Problems of Jurisprudence*,

exercise.[78]

Language is part of human society's existence; there would be no communication without language. Because law is interpretive naturally, language plays a crucial role in adjudication. As it is said above, adjudication is a language game in that is played through and with language. The language of law is different from the languages of the other social sciences. Law differentiates between murder and culpable homicide, between robbery and theft. It is possible in law, for the defence attorney, where one human being has killed another, to contextualise the act of killing to mean self-defence, and the act will be considered no longer murder depending on how the defense attorney present the argument or case in law's language of adjudication. This is where the elements of ambiguity and indeterminacy in law emerge.

Because language is the tool used to communicate by both human beings in their society, the historical and social events find their way to court judgments through an interpretation process. Language is a tool used in interpreting the law. Crimes in South Africa have become contextualised or titled according to the nation's recent past, by political and social practices. We have seen the emergence of the so-called domestic violence cases, racially motivated crimes and the apartheid cases.[79] In South Africa there is a tendency of labeling cases one way or another, being sensitive to sex and gender inequalities[80] or race.[81]

Different people from the same ethnic group may understand the same language

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Harvard University Press at 101-105.

[78] Hutchinson *supra* n (1) at 54, on law and politics see also Van Marle K "Jurisprudence, Friendship and the University as Heterogeneous Public Space" (2010) 127 *SALJ* 628 at 638-639, Du Plessis M "Between Apology and Utopia-The Constitutional Court and Public Opinion" (2002) 18 *SAJHR* 1 at 7-11, Hayson N "Constitutionalism, Majoritarian, Democracy and Socio-Economic Rights" (1992) 8 *SAJHR* 451 at 453, Van Wyk D, Dugard J, de Villiers B, Davis D (eds) (1994) *Rights and Constitutionalism: The New South African Legal Order*, Juta at 599-601 and 622-623 and Classen CJ" The Functioning and Structure of the Constitutional Court" (1994) 57 *THRHR* 412 at 414-417.

[79] *S v Basson* 2005 (1) SA 171 (CC): Dr Basson was charged with crimes ranging from murder to kidnapping during the reign of apartheid. He is known to be the apartheid chemical warfare spin-doctor where liberation movement or anti-apartheid activists would be killed using chemicals.

[80] In *Hugo v President of the Republic of South Africa* 1997 (4) SA 1 (CC) single women parents with children 12 years and younger were granted Presidential pardon but Mr. Hugo, who was also a single parent was not pardoned and he could not convince the Constitutional Court that he had been unfairly discriminated against. It may be argued that this case testifies as to the extent to which law is influenced by history – in this instance – the inequality which women have been subjected to in the past.

[81] See *S v Scott-Crossly* 2004 (3) SA 436 (T).

differently. This inevitably brings in the element of ambiguity, and uncertainty. Do judges, when using the language as tool of interpretation, understand the law differently? Judges are part of our community, but they are also individuals with unique characteristics and different backgrounds and therefore – different understandings of the law. Thus, they may reach different conclusions while interpreting the same legal text; their perspective on the subject matter before them may differ.

The perspective of a judge is determined by his understanding of the text before him. This in turn results in certain attitude towards the issue in question. According to Gadamar,[82] the individual (judge) approaches a text with a set of prejudices, from a perspective one cannot escape coming to a text with prejudices and that there is no neutral, non-prejudiced place from which to approach everything. If this is the case, then the court's decisions will not be consistent. Different judges would come with different prejudices and the result would be different conclusions even where the judges interpret the same text with the same facts before them. This was shown by the Constitutional Court decisions where some judges concurred and others differed with the majority.[83] The Constitutional Court Justices reached different conclusions in the matter before them: In practical terms this means that there has been an acknowledgement that both litigants' arguments have merits, but only one will benefit by the judgment of the court – the one whose argument is favoured by the majority.

Judge Davis examines Kennedy's *Critique of Adjudication* critically. In this subsection Judge Davis' opinion on adjudication is discussed, which has been underlined by first-hand practical experience. The perspective of a judge on adjudication is vitally important in defining the concept adjudication. The most important concession Judge Davis makes in his analysis of Kennedy's critique of

[82] Roederer & Moellendorf *supra* n (1) at 215; see also Swart M "The Carfininan Curse: The Attitude of South African Judges Towards Women Between 1900 and 1920" (2003) 120 *SALJ* 540.
[83] In *Hugo v President of the Republic of South Africa* 1997 (4) SA 1 (CC) Judge Kriegler wrote the dissenting judgment. The question is: why did Judge Kriegler differ with other judges - was it because he understood the text differently, or was it because he wanted to protect men and remove the societal stereotype that women can take better care of the children than men? See *also Du Plessis and Others v De Klerk and Another* 1996 (4) 331 (CC), *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), *Key v Attorney-General Cape Provincial Division and Another* 1996 (4) SA 187 (CC).

adjudication is that law is a highly political activity*:*

> Adjudication is thus highly political activity, for judges, whether acting in good faith or not, are, involved in a political practice as they engage with the legal materials and make different choices from the available range of materials, and the application thereof, in the particular context within which the judge is operating at that time. Not only does she work within and with the materials but also within a community of which she is the member and for whom, in addition to the litigating parties and their lawyers, she is writing to persuade.[84]

Adjudication is a highly political activity because it is inevitably part and parcel of law and law is shaped by political ideologies of the political party in power in the territory of the state. The enactments of legislation reflect the policies and practices, the culture of political party in power in any government. The South African legal system has undergone tremendous changes with the change of political masters in Cape Town and Pretoria. We have witnessed the transition from apartheid to democracy and the change in government after the 1994 general election in which the African National Congress led by Dr Nelson Mandela emerged victorious. The African National Congress government enacted the people's Constitution that replaced the National Party's parliamentary sovereignty with the Supreme Constitution.[85] Although the 1996 Constitution was drafted by the Constitutional Assembly formed by members of various political parties represented in Parliament, the Assembly itself was a political institution headed by a politician who would be assumed to have advanced the interests and political ideologies of his party. The interests of the African National Congress would be to reverse the terrible effects of apartheid quickly through legislative and other measures. The ruling African National Congress' Black Economic Empowerment and Affirmative Action policies are aimed

[84] Davis DM "Duncan Kennedy's Crititique of Adjudication: A Challenge To The Business As Usual Approach Of The South African Lawyers" (2000) 117 *SALJ* 697 at 701; see also Dlamini M "The Political Nature Of Judicial Function" (1992) 55 *THRHR* 411 at 411; Davis DM "Integrity And Ideology Towards A Critical Theory Of Judicial Function" (1995) 112 *SALJ* 104; see also Plaatjes D "We Need a Way to Judge the Judges" *The Sunday Independent* 17 February 2013: Mr. Plaatjies argues that judges' ideological perspective and preferences on law and political governance, whether conservative, liberal or progressive, influence their behaviour and decisions.

[85] The 1996 Constitution is the supreme law of the Republic, Courts now can test the validity of the Parliamentary legislation and can declare the legislation invalid on account of its unconstitutionality; see s 2 of the 1996 Constitution.

at reversing the legacy created by National Party's policy of social reconstruction.[86] Lastly the contents of the 1996 Constitution reflect the African National Congress Freedom Charter of 1955.[87]

Adjudication is a political activity; the judges interpret statutes, which are political documents; the judges are performers in the political arena, whether or not they are aware of that fact, and ultimately we have to accept that we are political beings and we live in a political village.[88] The ideas contained in Kennedy's *Critique of Adjudication* are described below.

Kennedy examines and discusses in detail the account of adjudication that employs a variety of methodologies.[89] Kennedy rightfully contents that law making activity takes place in the context of a structure of legal rules, in the face of a particular gap, conflict, or ambiguity in the structure.[90] Kennedy thinks that judges resolve interpretive questions through a form of work that consists in restating some part of this structure and then use their legal arguments to justify the decision they have taken.[91] The most important mode of influence of ideology in adjudication comes from the interpenetration of this specific, technical rhetoric of legal justification and the general rhetoric of the time.[92]

Kennedy's introduction to our subject theme, adjudication tells us that he associates adjudication with ideologies. Kennedy argues that adjudication functions both "to

[86] See s 9(2) of the 1996 Constitution, it provides for the implementation of affirmative action to redress the imbalances created by apartheid.
[87] See the section titled *'All National Groups Shall have Equal Rights'* of the ANC Freedom Charter, the aspects of culture and language are covered here, and the same aspects are covered in similar tone in s 30 of the1996 Constitution. Protection of law is also covered in the ANC Charter and the same is found in section 9 of the 1996 Constitution. The ANC Freedom Charter is available at www.anc.org.za (site last visited on 15 January 2014).
[88] The electorate vote for political representative to represent them in Parliament which makes the laws for the whole country based on certain policies of the ruling party. Plaatjies *supra* n (77) argues that Courts are political agencies and judges are their political actors, and winning elections grants the winner the right to control only two branches of government, the legislature and the executive, see also Hutchinson *supra* n (62)at 109-114; Dworkin RM (1986) *A Matter of Principle* at 1 argues that the judiciary exercises a veto over political decisions; see also Berns S (1998) *Concise Jurisprudence* The Federation Press at 2; Carter LH (1998) *Reason in Law* 5th ed Addison-Wesley at 3 and 22; Botha H "Democracy and Rights: Constitutional Interpretation In A Post Realist World" (2000) 63 *THRHR* 561 at 561; Fieldman D (ed) (2013) *Law in Politics, Politics in Law* Hart, Oxford at 1-3;
[89] Kennedy D (1997) *A Critique of Adjudication* at 1.
[90] *Ibid* at 1.
[91] *Ibid* at 2.

secure particular ideological and general class interests of the intelligentsia in the social and economic status quo".[93] Kennedy continues his ideological path of adjudication, and says that adjudication functions in a politics through its relationship to the general idea of rights, the belief that rights exists is both sustained and threatened by their role in legal discourse.[94] Kennedy's take here is that without rights to enforce, they would be no need for adjudication. He links adjudication with the idea of rights.

Adjudication itself emanates from the discourse of law making: the 1996 Constitution stipulates how it (and other statutes) should be interpreted.[95] Law making, being political in nature, has political ideologies from the outset. The legislation enacted by governments all over the world reflects their political ideologies reflected in Acts of Parliament. The National Party government adopted the policy of social reconstruction, the philosophy of apartheid to implement their discriminatory ideologies in legislation such as the Group Areas Act and the Prohibition of Mixed Marriages Act, to name few.[96] The African National Congress government came to power with different political ideologies, the ideology of an open and democratic society based on human dignity, equality and freedom. The African National Congress' ideologies are reflected in the 1996 Constitution, the supreme law of the Republic.[97]

Kennedy is right when he argues that ideologies influence the adjudication by structuring the "legal discourse and through strategic choice in interpretation".[98] I also concur with Kennedy that the denial of presence of ideologies in adjudication leads to political results different from those that would occur in a situation of transparency.[99] Judges come with individual ideologies; the decision of two or more

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[92] Kennedy *supra* n (89).
[93] *Ibid*.
[94] *Ibid*.
[95] Sections 39 and 233 of the 1996 Constitution.
[96] The Group Areas Act 77 of 1950 prohibited Black people from staying in cities and towns and condemned them to rural areas only. Prohibition of Mixed Marriages Act 55 of 1949 prohibited interracial marriages amongst citizens; see also Black Administration Act 38 of 1927, Native Building Workers Act 27 of 1951, Population Registration Act 30 of 1950, Reservation of Separate Amenities Act 49 of 1953 and Native Labour (Settlement of Disputes) Act 48 of 1952.
[97] African National Congress' Freedom Charter *Supra* n (87).
[98] Kennedy *Supra* n (89) at 19.
[99] *Ibid*.

judges would differ even when interpreting the same text. As I have pointed out, this is evidenced by the existence of minority and majority judgments in some of our Constitutional Court cases.[100] The inherent personal and political ideologies in adjudication make the law indeterminate. Kennedy argues that we must get rid of the idea that there is an objective boundary line we can draw between questions of law that have correct determinate answers and questions that can be resolved only through ideological choice.[101] Be that as it may, the courts must decide cases in terms of the law of the land and the Constitution.

The Constitutional Court decides cases before it by majority vote. The Constitution requires that a matter be heard by quorum of at least eight judges.[102] In ordinary practice all eleven judges hear every case. Each judge sitting in a case must indicate his or her decision; the ruling is then determined by majority vote.[103] The reasons are published in a written judgment. If there are disagreements about the decision or the route taken in reaching it, the judge who disagrees with the main writer will prepare to write a concurrence or dissent.

To conclude my discussion on adjudication, it is conceded that people, who are both individual and social beings, will understand things differently, because human beings are unique as individual human beings. Unfortunately, law as a social science is not an exception and the consequent varying conclusions lead to inconsistency in judicial decisions. There are various factors, such as cultural, political and educational backgrounds which influence both societal interaction and understanding. In the context of adjudication this difference in perception and perspective, leads to differences of opinion on the same issue before the court.

Adjudication therefore is an ideological process carried out through the individual's interpretation of the law. The socialist or communist judge would be sympathetic to

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[100] See *President of RSA and Another v Hugo* 1997(4) SA 1 (CC); *Executive Council, Western Cape Legislature and Others v President of RSA and Others* 1995(4) SA 877 (CC); *Ferreira v Levin NO and Others* 1996(1) SA 984 (CC): Judge Kriegler dissented in the first and the last cases, Madala J and Ngoepe J dissented in the second case; see also Zelermyer W (1960) *Legal Reasoning* Hail Inc. at 29.

[101] Kennedy s*upra* n (89) at 19.

[102] Section 167(2) of the 1996 Constitution.

[103] www.constitutionalcourt.org.za (site last visited on 15 January 2014).

the poor in the socio-economic cases. The female judge is more likely to look at feminist theories in interpreting the law especially where the victim is a woman. They are therefore influenced by what they used to interpret the law and they look at the particular prescripts because of who they are.

The Constitutional Court and the High Court judges are appointed by the Head of State, who is a politician, in consultation with the Judicial Services Commission.[104] This is where the political element inherent in the law is nurtured and grows into the courtrooms when the judges interpret the law. This brings me to Judge Davis' concession that adjudication is a highly political activity; [105] it is true that adjudication, being an interpretation of law, is a political activity in a real sense. Hutchinson endorsed the idea of adjudication being a political activity when he said that adjudication, like much of life itself, is best understood as a game-as playful, but yet serious attempt by judges to engage in law's language of politics, which helps to constitute and regulate social life.[106]

Although Hutchinson and judge Davis' theories on adjudication are correct, it can also be argued that adjudication is just the way the judges interpret the political documents called statutes in such a way that the end results reflect the judge's preference embodied in the court's decision. Adjudication is the process of legal interpretation and application of the law, which has been undertaken with the aim of resolving a dispute. The law is enacted by Parliament, elected by the people and therefore mandated by them to pass that same law on their behalf. The law is therefore – ideally – the people's own. People do understand the concept law differently and amongst people emerged different schools of thought to which a particular group of thinkers may belong. Amongst the many who belong to different schools of thought are the realists.

2.4. The Realists: General

The term "realist" refers to the movement of writers who first assembled in the

[104] Section 174 of the 1996 Constitution of the Republic of South Africa.
[105] Davis, *supra* n (84) at 701.
[106] Hutchinson *supra* n (1) at 2; see also Dworkin *supra* n (88) at 2, 10 and 33.

United States in the earlier part of the twentieth century.[107] This group of scholars came to be known as the realist and their theory realism.[108] Realism means relating to the real world, the world as it actually operates, in this sense it carries the idea of being practical, down to earth and pragmatic.[109]

The realists are skeptical of the law. They say that since the rules allow judges considerable free play, the judge can in fact decide the case in a variety of ways, and the way that is in fact adopted will be more of a function of such factors as the judge's psychological temperament, social class and values than anything written down called "rules''[110] The realists took aim at dominant mechanical jurisprudence or formalism of the day, which held that judges decide cases on the basis of distinctively legal rules and reason that justify a unique result of each case. The realists argue that judgments are not primarily based on the law but rather on the judges' sense of what would be "fair" on the facts of the case.[111] Realists wanted the law in the books to be applied and seen in practice, in observable way. They could not find the link between the law on paper and the law in real life, which is legal practice.

2.4.1. Holmes

One of the prominent realists was Holmes. Holmes said that the prophecies of what the court will in fact do were what he called law.[112] Holmes was therefore skeptical of the ability of general rules to provide the solutions to particular cases, "and readily gave credence to the role of extra-legal factors in judicial decision making".[113] Holmes thinks that the real nature of law cannot be explained by formal deductive logic. Judges make their decision based on their own sense of what is right, and in

[107] Van Blerk AE (1996) *Jurisprudence: An Introduction'* Butterworths pp 55, 58 and 59, Roederer and Moelendorf *supra* n (1) 160 and 161, see also De Been W (2008) *Legal Realism Regained*, Standford University Press at 2, Johnson D, Pete S, and du Plessis M (2000) *Jurisprudence: A South African Perspective,* Butterworths at 159-162, and Dugard J "Some Realism About the Judicial Process and Positivism- A Reply" (1981) 98 *SALJ* 372 at 380-382.
[108] Van Blerk *supra* n (107) at 65.
[109] *Ibid* at 58.
[110] Roederer & Moelendorf s*upra* n (1) at 158.
[111] *Ibid* at 159.
[112] Riddal *supra* n (23) at 223.
[113] Roederer and Moellendorf *supra* n (1) at 164.

particular, on what they think is best for the interest of the community.[114] For Holmes law is nothing more than how the courts would react to particular behaviour. As long as one could predict what the court would do about a particular behaviour that would be law.

Holmes' theory of what the law is not correct. Why do we have to wait for a particular behaviour to manifest before law can exist, in fact the very conduct of identifying a particular act to be unlawful is law itself. Why do we have statutes if people can simply predict the outcome of the case, and that prediction simply becomes the law? The predictive exercise has nothing to do with the nature of law but something to do with dearth of knowledge at that time. However, Holmes is right when he says that the life of law has not been logic, it has been an experience. The South African legal history is testimony to the life of law being an experience, and not logic.

Prior to 1994 and the democratic dispensation, the judges applied and enforced law that was immoral and unjust. They applied and enforced the unjust laws consciously. They were fully aware of the detrimental repercussions of their judicial decisions on the majority African people in the country. In the new dispensation, some of the apartheid judges are enforcing the new law that outlawed the apartheid laws and policies.[115] What an experience on the bench.

2.4.2. Frank

Like Holmes, Frank was skeptical of legal rules providing solutions to legal disputes. While Holmes thought that the prophecies of what the court will do was in fact law, Frank thought that what the court has done is law, thus he said:

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[114] *Ibid* at 165.

[115] Most of judges that were appointed during apartheid stayed after 1994 - see article by former Chief Justice - Chaskalson A "Without Fear, Favour or Prejudice: The Courts, the Constitution and Transformation" (2012) 25 *Advocate* at 34-38; Mandela NR "The Bar's Contribution to Search for Justice" (2000) *Advocate* at 3, where he argues that the "legal profession and the judiciary in South Africa have no perfect past, there have been failures and lost opportunities, institutions and individuals," Geady P & Kgalema, "Magistrates Under Apartheid: A case Study of Politicisation of Justice and Complicity in Human Rights Abuse" (2003) 19 *SAJHR* 141 at 142, Newman DG "Institutional Monitoring of Social and Economic Rights: A South African Case Study and a New Research Agenda (2003) 19 *SAHRJ* 189 at 190, Heyns C "Taking Socio Economic Rights Seriously: The Domestic Reporting Procedure and the Role of South African Human Rights Commission in Terms of New Constitution" (1999) 2 *De Jure* 195 at 196.

> As Copernicus caused men to drop a geocentric notion of the universe and take up a heliocentric notion, so Holmes' bad man will, sooner or later compel all intelligent persons to acknowledge that the center of the legal world is not in the rules but in a specific court decisions in a specific law suit.[116]

It is difficult to digest Frank's theory. Do we have to wait for a court to decide on a dispute before the law on any matter can exist? The courts can develop the existing law. [117] In the modern society people are proactive; they can legislate on a matter that was never heard in the court of law before. The statute can deal with a potential legal dispute and therefore law would exist on the dispute before the dispute materialises. The law relating to that dispute may precede the legal dispute. Frank wrongfully thought that the courts created law through their decisions.

Frank stated that the rules of law are not the basis of a judge's decision. Instead, the decisions are influenced by emotions, intuitive hunches, prejudices and other irrational factors. [118] The knowledge of legal rules therefore is of little assistance in predicting the decision of a particular judge, Frank contends; hence the law is in essence uncertain. Frank thinks that until a court decided on a particular issue, there would be no law on that subject in existence. Essentially judges would be law-makers and presiding officer at the same time, if we were to embrace Frank's theory.

2.5. Critical Legal Scholars

The Critical Legal Scholars succeeded the Realists. The Critical Legal Movement was built on the insight of the Realists. The main impulse of the movement is to challenge liberal theory by debunking its claims to determinacy, coherence and objectivity.[119] Critical Legal Studies Scholars see liberal legalism as an ideology whose underserved air of legitimacy falsely persuades society that the prevailing social arrangements are necessary and natural, in their First Annual Conference on

[116] Roederer and Moelendorf *supra* n (1) at 168.
[117] Section 173 of the Constitution empowers the Constitutional Court, High Courts and the Supreme Court of Appeal to develop common law, taking into account the interests of justice.
[118] Roedererer and Moelendorf *supra* n (1) at 168, see also Meyerson D (2011) *Jurisprudence* at 60 and 189.

critical legal studies, the crits stated:

> If there is a single theme, it is that law is an instrument of social, economic and political domination, both in the sense of furthering the concrete interests of the dominators and in that of legitimating the existing order.[120]

Crits continue on the critical path and say that if law is ideologically based; all scholarship premised on the law blends into political and ideological debate. The Critical Legal Studies averments that law is an instrument of social, economic and political domination are valid. South Africa is a good example of the law as an instrument of domination. The National Party government used the policies of social reconstruction to oppress the poor Africans through legislations such as Group Areas Act 77 of 1957, Prohibition of Mixed Marriages Act 55 of 1949 and many more regulations to systematically exclude Blacks from the mainstream economic participation. The National Party government used the law, in the form of discriminatory legislation, to enhance their political ideology of apartheid for nearly five decades. The Courts, including the Appellate Division in Bloemfontein found nothing wrong in applying and enforcing the discriminatory apartheid laws. Various cases heard in the 1960's bear testimony to the courts turning a blind eye on justice.[121]

The more vigorous Critical Legal Studies' claim is that "every case reveals mirror-image contradictory norms-principles and counter principles, which permit and support competing possible decisions".[122] The Crits argue that the choice reflects the political or ideological preference.[123] On this aspect Van Blerk gives an example of the plural society like South Africa, and says that the interpretation of the notion of reasonableness according to the Western standards of behaviour is a political

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[119] Van Blerk AE (1998) *Jurisprudence an Introduction* Revised 1st ed at 147.
[120] *Ibid*.
[121] *S v Nsindane and Another* 1964 (1) SA 413 NPD the so called Bantu were charged for failing to produce reference book in contravention of section 15(1)(a)(ii) of Act 67 of 1962, the law was discriminatory, see Currie I & De Waal J (2013) *The Bill of Rights Hand Book* at 169 *et seq* on the definition of the concept. See also *R v Majoni* 1963 (2) SA 310 S.R Salisbury, Zimbabwe; *Duddley v Minister of Justice* 1963 (2) SA 464 AD; *S v Parmissar* 1963 (1) SA 176 NPD; *Mine Stores (Natal) Ltd and Booysens v Magistrates Danhauser* 1966 (3) SA 745 NPD, *S v Wyngaard and Another* 1964 (2) SA 372 CPD: in all the above cases, the Courts applied and enforced the unjust laws of the Republic.
[122] Roederer and Moelendorf *supra* n (1) at 151.
[123] *Ibid*.

choice, which favours the *status quo*.[124]

In conclusion, the theories of the abovementioned authors and philosophers are neither wrong nor right. These different understandings of the nature of the law, or what exactly the word "law" means exist because law is indeterminate. It depends on the way in which law is interpreted. It is the same in the courtroom: the individual judges' personal interpretations of the law result in indifferent verdicts. Because the law regulates our lives, so our lives are indirectly determined by the judges' perception of the law rather than the law itself. The law may be a political instrument that allows the ruling party in the country to impose their political ideologies and policies. The elusive concept of law must at least serve public interests and justice.

2.6. Public Interests

The term "public interest" features in almost all statutes passed by legislatures worldwide.[125] "Public interest" may simply refer to that which is in the interest of the public. It is that which is understood or perceived by the people within a society as being good for them, as convenient for them. Public interests represent the collective good of the community or the country. The Constitution of 1996 also contains a provision that can be linked to public interests, the oath of office of the President.[126] The President takes an oath that he will advance the interests of the Republic– "Republic" in this context representing the people of South Africa.[127] Thus it is possible that the law may serve the public interests.

2.7. Justice

This is the last discussion of three concepts, the other two being "Law" and "Public

[124] See also Heyns C "Reasonableness in a Divided Society'' (1990) 107 *SALJ* at 279.
[125] There are several judgments which dealt with public interests, see, *The Citizen (1978)(Pty) Ltd v McBride* 2011 (4) 191 CC; *Albut v Center for the Study of Violence and Reconciliation and Others* 2010 (6) SA 232 CC; *Van Rhyn NO v Namibian NHCA36/06*; *SABC v National Director of Public Prosecution* 2007 (1) ALL SA 384 (SCA).
[126] Schedule 2 of the 1996 Constitution provides amongst others that the President must promote all that will advance the Republic and oppose all that may harm, do justice to all and devote himself or herself to the well-being of the Republic and all its People. See also Holland D, Nonini DM, Lutz C, Bartlett L, Frederick-McGlathery M, Guldbransen TC and Murillo EG Jr (2007) *Local Democracy Under Siege* New York Univ Press at 97-100.

Interests" discussed above. Justice has two elements, namely, equality and fairness. It is about equality in the context of law treating subjects equally. It is about fairness in the context of balancing the scale between two competing interests. We often hear people say that is only fair and just that criminals are sent to jail for their crimes. Here justice would be seen to be done if criminals are punished for what they have done. The victim of crime would be happy that the perpetrator is sent to jail. Justice has an element of balancing the scale of fairness in law, although the victim would not receive any material benefit from the offender's punishment, but he would be mentally satisfied that law has served justice to him therefore justice is an abstract theory of psychological satisfaction. Different people attach different meaning to justice, for example White people would, during the apartheid period in South Africa, have thought that they had the right to enjoy the benefit of apartheid because their forefathers fought for it; the Africans would think that law was not just as it treated them unfairly on their ancestral land. Whatever the case might be, justice is a purely subjective theory. I discuss Rawls and Perelman's theories of justice briefly in the paragraphs below.

2.8. Rawls

According to Rawls "justice" is that which prevails in a just society. A just society is the one that people would agree to be members if they had a choice.[128] Rawls thinks that justice is fairness. Justice as fairness is intended as a political concept on justice.[129] Rawls says that justice, as fairness is a political conception in part because it starts from within a certain political tradition.[130]

Rawls creates a hypothetical situation where people have entered into a contract. Rawls' theory is concerned with what people would agree to if they had a choice, the choice of what laws are to prevail, what system of government must be made "behind the veil of ignorance" since only if people make the choice with no knowledge of where they would stand can they be counted on to decide on system

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[127] *Ibid*.
[128] Rawls J (1971) "A Theory of Justice" in White, TI (ed) (1993) *Business Ethics: a Philosophical Reader* at 91; see also Feibleman *supra* n (3) at 23; D' Amato *supra* n (3) at 259-276, Nielson K, (1985) *Equality and Liberty* at 27.
[129] Morawetz T (1991) *Justice* Dartmouth at 4.

that is just for all. Rawls termed people behind the veil of ignorance as being "people in the original position".[131]

With respect to justice as fairness, it is explained that:

> People in the original position understand the factors that influence the rationale choice and the laws and principles that regulate human affairs, but they do not know where they would find themselves in the society when the veil of ignorance is lifted, The person in the original position would choose the body of principles that would be fair however he finds himself when the veil of ignorance is lifted.[132]

These principles are to regulate all further agreements; they specify the kind of social cooperation that can be entered into and forms of government that can be established.[133] In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contracts.[134] Justice as fairness conveys an idea that the principles of justice are agreed to in an initial situation that is fair.[135]

Rawls formulated two fundamental principles of justice argues that people in the original position could not fail to adopt, principles that are inescapable *sine qua non* if justice as fairness is to exist. The first of these principles is that each person is to have an equal right to the most extensive total system equal basic liberties compatible with a similar system of liberty for all.[136] The basic liberties are to include the right to vote and to be eligible for public office, freedom of speech, freedom of assembly, liberty of conscience, freedom of thought, freedom of person, the right to hold property and freedom from arbitrary arrest and seizure, as defined by the rule of law.[137]

The second fundamental principle of justice is that social and economic inequality are to be arranged so that they are both reasonably expected to be to everyone's

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[130] Morawetz *supra* n (129) at 91.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*.
[134] *Ibid*.
[135] *Ibid* at 91.
[136] *Ibid* at 94.

advantage and attached to offices and positions open to all.[138] As a result the distribution of wealth does not have to be equal, provided that the unequal distribution is for everyone's advantage.[139]

Rawls' fundamental principles of justice are applicable to the modern South African democracy. The first principle is satisfied entirely in the context of South Africa in that we live in a constitutional democracy. Our Constitution is one of the best in the world. Chapter Two of the Constitution entrenched the fundamental human rights, thus the political and civil rights enunciated in Rawls' first principle of justice are covered in our Bill of Rights.

The second principle is also relevant to South Africa. Although we have one of the finest Constitutions in the world, the policies such as Affirmative Action and Black Economic Empowerment favour one race group over the other, the favoured races are the ones who were disadvantaged by apartheid policies for almost four decades of National Party rule. Today we see white youths, not benefiting from the existing social and economic arrangements due to the previous government's system. Is this justice? Is the prevailing system justifiable? This is justified injustice. It is justified in the eyes of the law, by the constitutional provisions and the substantiation therein.

Section 9(2) of the Constitution provides that:

> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

It is *prima facie* injustice because someone is adversely affected by the application of such measures as affirmative action; however, on the other hand the same measures are put in place to redress the imbalances of the past. The 1996 Constitution allows affirmative action to be implemented (although it does not set a target date). Some may argue that this justified injustice is presumptuous as it is presumed that White people benefited from apartheid and Black people suffered

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[137] *Ibid* at 95.
[138] *Ibid*.

injustice at the hand of the discriminatory laws, while it is possible that not all Whites benefited from apartheid and not all Black people suffered injustice under apartheid. However, the measures of unequal distribution are necessary and reasonably expected, aimed to obliterate the societal and economic legacy of previous apartheid discrimination.

2.9. Perelman

Perelman enumerates six possible meanings of the idea of justice. Perelman enumerated six; he termed them the conceptions of justice,[140] namely:

- From stand point justice is done if what people receive is determined according to what contribution they make, whether in the local sphere as at the work place or in the wider social sphere, to each according to his work;

- To each according to his needs, for some people justice is served if what people receive is determined according to their needs. The needs measured according to varying degrees of financial or social need;

- For some justice means that the benefits and burdens are distributed according to personal merit ascertained according to some ethical code, the good receiving the benefits and the bad the burdens of life, to each according to his merit;

- To each according to his rank, the higher the rank the greater the benefits; this formula divides men into various categories which will treated differently;

- To each according to his legal entitlements; this refers to the notion that to be just means to accord each person what the law entitled them to;

- To each the same thing; according to this conception, all people taken into account must be treated in the same way, without regard to any of their distinguishing particulars. Young or old, well or sick, rich or poor, virtuous or criminal, aristocrat or boor, white or black, guilty or innocent, is just that all

[139] *Ibid* at 92.

> should be treated in the same way, without any discrimination or differentiation.

Among all the evocative ideas, that of justice appears to be one of the most eminent and most hopelessly confused.[141] Many people consider "justice" to be the principal virtue, the source of all others.[142] Perelman admits that defining the concept "justice" does not come easily and that it is defined subjectively rather than objectively. Different people attach different meaning to the word "justice". There will always be contradictory affirmation, each of the antagonists can be sincere and believe that his cause alone is just.[143] Perelman says that no one would be wrong, for each is speaking of a different justice.[144] Each would defend a conception of justice that puts him in the right and his opponents in the wrong.[145]

Perelman states:

> one has only to remind oneself that for the thousands of years protagonists, in public and private conflicts, in wars, in revolutions, in lawsuits, in clashes of interests, have always done their best to prove that justice is on their side.[146]

Perelman paints a picture of subjectivity in defining the concept of "justice". However, while Perelman deals with justice in the context of distribution of wealth, burdens of life and social standing of people in their communities, he does not expressly link justice and law. He covers the element of equal treatment of people in the same position in life irrespective of their social standings. I do concur with his six principles of justice.

2.10. Hart

Hart links the idea of justice with distribution or compensation. Thus for Hart the

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[140] Perelman CH (1993) *The Idea of Justice and Problem of Argument* at 6-10.
[141] *Ibid* at 5.
[142] *Ibid*.
[143] *Ibid* at 6.
[144] *Ibid*.
[145] *Ibid*.
[146] *Ibid*.

derivatives of justice are just or unjust and fair and unfair.[147] These derivatives are applications of notion of justice, which are explicable once the primary applications of justice to matters of distribution and compensation are understood.[148] The general principle latent in these diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality.[149]

For Hart justice involves fairness. Thus he emphasises the 'treat like cases alike' element.[150] However, Hart concedes that, though, 'treat like cases alike' and different cases differently, is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinate guide to a conduct.[151] The main element in Hart's theory of justice is to treat like cases alike to ensure that just laws are applied fairly in dealing with similar cases. The unjust laws would be laws such as the Group Areas Act 77 of 1950 and Suppression of Communist Act 44 of 1950.[152] I do concur with Hart's theory of justice; justice inherently involves the elements of fairness and equality in law's dealings with the disputes in a society.[153]

2.11. Hahlo and Kahn

The law has two great objects: to preserve order and to do justice and the two do not always coincide, Hahlo said.[154] Hahlo and Kahn think that the first and foremost purpose of law is to maintain peace and order in the community.[155] Justice is the chief instrument through which law fulfils its purpose of maintaining peace and order in the society.[156] The closer the legal system comes to being 'just' the more willingly

[147] Roederer & Moellendorf *supra* n (1) at 154-155.
[148] *Ibid* at 155.
[149] *Ibid*.
[150] *Ibid*.
[151] *Ibid*.
[152] See also Native Building Workers Act 27 of 1951, Population Registration Act 30 of 1950, Reservation of Separate Amenities Act 49 of 1953, Native Labour (settlement of Disputes) Act 48 of 1953 and Black Administration Act 38 of 1927.
[153] It is about the law treating people in the same position equally, e.g. prisoners in the same prison must be treated equally, or foreigners must be treated equally as human beings.
[154] Hahlo HR & Kahn E (1968) *The SA Legal System and its Background* Juta at 25.
[155] *Ibid* at 29.
[156] *Ibid*.

it will be obeyed.[157] An unjust system of law, on the other hand, can only be enforced by strong sanctions, and sooner or later rebellion will break out, upsetting the established order.[158]

Hahlo and Kahn concede that it is almost impossible to define justice. They say that the nearest one can get to defining justice is by considering it to be the prevailing sense of men or goodwill as to what is fair and right-the contemporary value system.[159] According to Hahlo and Kahn, law must be reasonable, and from this follow the second criteria of generality and equality, which give rise to the criteria of certainty.[160] The individual must be ensured fair process in dispute with other individuals and with the community itself.[161] The law must be based on reason, and interpreted by an impartial judge.[162]

Hahlo and Kahn link justice and law. It is right that justice is the result of the interpretation of just laws by an impartial judge. Just laws are laws that are reasonable, laws of general application and equal treatment of all subjects in the territory of the state. Justice is about fairness, transparency, equality, generality and just law. For this reason, justice is inevitably the offspring of the application of the just laws.

2.12. Denning

Denning, like Hahlo and Kahn, links law and justice. He says that if people are to feel a sense of obligation to the law, then the law must correspond with what they consider to be right and just, or at any rate, must not unduly diverge from it, in other words, law must correspond, as near as may be, with justice.[163]

Like Hahlo and Kahn, Denning concedes that no satisfactory answer could be found

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[157] *Ibid*.
[158] *Ibid*.
[159] *Ibid* at 31.
[160] *Ibid*.
[161] *Ibid.*
[162] *Ibid.*
[163] Denning A (1955) *The Road to Justice* at 3, see also Rembe NS "Conceptions and Misconceptions of Justice in the Administration of Law: A Reflection on Contextual Procedural and Substantive Issues" (2007) 2 *Speculum juris* 184 at 184-192.

to the question of what 'justice' is.[164] Denning says that all he would suggest is that 'justice is something one could see, it is not temporal but eternal, and it is not a product of man's intellect but of his spirit.[165] Denning continues to conclude that the nearest we can get to defining justice is to say that it is "what the right-minded members of the community-those who have the right spirit within them-believe to be fair".[166] The right-minded members of the community are, according to Denning, the lawyers.[167] He says that the lawyers represent the right-minded members of the community in seeking to do what is fair between man and man and between man and the state, and they can only do this by means of just laws justly administered.[168]

This conception of the task of the lawyer finds its finest expression in the words of judicial oaths taken by every judge in the land of his appointment.[169] According to Denning, these right-minded members of the community would do justice because they have taken an oath on assumption of the judicial duty. Denning's discourse of justice is premised on the wrong assumption that lawyers are the only right-minded members of the community. Lawyers are not the only role players in the administration of justice, other professions play vital roles as well. Other professions are invited as expert witnesses in their areas of specialisation. Justice is not about how the members of the society think, but it is about how the law is applied in dispute resolution in the community. Justice is the fair application of just laws in dispute resolutions in the State.

Justice itself is administered by the courts of law, which are manned mainly by lawyers and other officials supporting the courts. The miscarriage of justice occurs in the courts of law simply because the courts dispense justice. So Denning's theory must fail because miscarriage of justice occurs in courts manned by lawyers, it is not necessarily correct that right-minded people are lawyers and we simply believe that what they think is just is justice. We learned from history that lawyers enforced the unjust laws, in South Africa the courts, including the former Appellate Division in

[164] *Ibid* at 4.
[165] *Ibid*.
[166] *Ibid*.
[167] *Ibid*.
[168] *Ibid.*
[169] *Ibid*.

Bloemfontein, applied and enforced the unjust laws in cases such *Nsindane,*[170] Duddley[171] *and Wyngaard.*[172] The judges who heard these cases were lawyers but turned a blind eye on the unjust and very immoral apartheid laws. How can these judges be the right-minded members of our community? Justice should not be defined in terms of what the lawyers believe to be fair. Justice is justice whether or not lawyers believe it to be fair or not. As indicated above, justice has elements of equality and fairness, which emanate from the application and enforcement of just laws. Justice is the resultant application of the just laws applied fairly without fear and prejudice. Justice comes from the application of law and the application of just law in a fair manner is justice.

To conclude the discussion on justice, it is conceded that defining 'justice' is a rather difficult and subjective exercise in most cases. The ideas and theories of various authors on the subject varied slightly. In most cases the elements of equality and fairness in law featured prominently. Inherently justice is linked with law, which - if applied equally and fairly - results in justice. Since the theme of this dissertation is "Inconsistency in judicial decision, the right to life in perspective", the aim is to show how and when the cherished value of justice may have been undermined during the process of adjudication. Overall, it may be said that justice is the result of the application of just laws. As the courts are the main dispensers of justice,[173] the question is whether justice will be served by the inconsistent judicial decisions on the right to life discussed in the following chapters.

Since the link between law and justice has been established, it is necessary at this juncture to investigate their relationship with the concept of public interest.

2.13. The Interactions of Justice, Public Interests and the Law

The interaction between justice and law begins when someone is arrested for being suspected of committing a crime, throughout the trial process and if convicted the interaction continues in the correctional facility where he serves the sentence, and if

[170] 1964(1) SA 413 (NPD).
[171] 1963 (2) SA 464 (AD).
[172] 1964 (2) SA 373 (CPD).

acquitted he goes free.[174] In civil matters the interaction begins when someone receives the letter of demand to kick start the civil proceedings. The relationship between law and justice is inevitably an interdependent one in that the fair application of just laws result in justice,[175] and injustice is always failure on part of law.[176] In the same vein fair application of unjust laws will not result in justice.[177]

Justice refers to the quality or fact of being just, or the principle of fairness that like cases should be treated alike, or a particular distribution of benefits and burdens fairly in accordance with a particular concept of what are to count as like cases, or the principle that punishment should be proportional to the offence.[178] This definition of Justice sums up elements of justice that must emanate from the link with the law. The elements of justice referred to here are equality and fairness in the application and outcome of the application of the law.[179] In short, the few types of justices balance the scale, namely, the retributive justice, restorative justice, corrective justice and distributive justice.[180]

The three concepts, namely justice, law and public interests are linked to the process of adjudication. Law is fundamentally the interpretation of the rules governing these relationships. Justice must, in a constitutional democracy, be the end result of the process of adjudication. Adjudication is the process of interpretation and application of the law, thus the link between justice and law.

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[173] See sections 165-180 of the 1996 Constitution.
[174] Section 35 of 1996 Constitution, see also Singh D "The Constitutional Right To A Fair Trial: Understanding Section 35(3)(D) Through Cases" (2000) 63 *THRHR* 121, at 121-133, Axam HS "If the Interests of Justice Permit: Individual Liberty, the Limitation Clause and the Qualified Constitutional Rights to Bail" (2000) 17 *SAJHR* 320 at 320-340, Van Zyl DH "The Significance of the Concepts 'Justice and Equality' in The Law and legal Thought" (1988) 105 *SALJ* 272, Corder H "Administrative Justice: A Cornerstone of South Africa's Democracy" (1998) 14 *SAJHR* 38.
[175] Van Zyl *supra* n (174) at 274 where he argues that justice relates to law and judicial functioning and the outcome thereof, Wacks R "Judging Judges: A Brief Rejoinder to Professor Dugard" (1984) 101 *SALJ* 295 at 295 where he argues that law is a means of attaining justice, see also Dugard J "Should Judges Resign?: A Reply to Professor Wacks" (1984) 101 *SALJ* 286, and Wilson S "The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty" (2001) 17 *SAJHR* 531 at 524-543, Remblay LB (1997) *The Rule of Law, Justice and Interpretation*, McGill-Queens University Press at 166.
[176] Dyzenhaus D "Judges, Equity and Truth" (1995) 102 *SALJ* 295 at 309.
[177] On application of unjust laws, see Classen *supra* n (78) at 413, Wacks *supra* n (70) at 266-270, Irving R (2001) *The Law is A Ass*, Duckbacks at 6 and 12.
[178] Collins English Dictionary 9th ed, 2007, Harper Collins at 880, see also Irving *supra* n (177) at 3.
[179] Weisheit R, Morn F (2004) *Pursuing Justice*, Thomson Wadsworth at 1-2.
[180] See Roeder CJ "Wrongfully Conceiving Wrongful Conception: Distributive vs Corrective Justices" (2001) 18 *SALJ* 347 at 347-360, and Wilson *supra* n (175) at 543-546.

The three concepts are so closely interrelated that one may not exist without the other, and the other is the result of the fair execution of another. Justice is not law and law is not justice. Justice is the product of fair and objective application of law, the adjudication process. So justice needs law and law is needed by justice.

The end result of what the courts do right is justice, the absence of justice amount to injustice[181] The combination of law and justice serves the public interests, thus resulting in an orderly and harmonious society. But for all these to happen, judges must interpret the law. Will there be justice if judges interpret the law differently? Or is it that law itself is not determinable and judges use their own discretion or intuition? Is it fair and just for the litigants with the same legal problem to be handed down different judgements?[182] These are the questions to be to analysed and discussed to show that law and legal rules are indeterminable. The investigation is on why our Constitutional text and other pieces of legislation are interpreted differently; why the judges reach different conclusions on the same issue of the right to life. The right to life is discussed in detail in the next chapter.

[181] Riddal *supra* n (23) at 196, see also Jackson P (1973) *Modern Legal studies: Natural Justice*, Sweet and Maxwell 1-10, Singh K.J, (1995) *Distributive Justice in India: A Socio-Legal Study*, Reliance Publishing House at 1, Friedrich CJ and Chapman JW (eds) (1963) *Nomes VI Justice*, Atherton Press at 1-5.

[182] Wagner A and S Cacciaguldi-Fahy (eds) (2008) *Obscurity and Clarity in Law: Prospects and Challenges*, Ashgate at 24 and 25.

CHAPTER 3
THE RIGHT TO LIFE DEFINED

3.1. The Right to Life in the South African Bill of Rights

The purpose of this chapter is to define the right to life as enshrined in the South African Bill of Rights and other regional and international documents. The right to life is the most important of all the fundamental human rights found in any legal instruments. It is therefore important to determine what exactly the right to life entails, and whether the courts have bestowed the right to life with a correct and adequate meaning. In the next section, the right to life is defined and discussed both on national and international level.

The most precious of all the human rights is the right to life. The right to life means the right to live, which is the right not to die if we put it differently. The right to life also means someone's right not to have his life ended, to have his life protected, preserved and promoted.

The right to life is one the fundamental rights listed in Chapter Two of the Constitution.[1] The rights in the Bill of Rights are accorded special protection because they apply to persons directly. Most of the rights in the Bill of Rights are for the benefit of everyone. Section 7 of the Constitution provides that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. Section 7(2) provides that the State must respect, promote and fulfil the rights in the Bill of Rights and section 7(3) qualifies the above by saying that the rights in the Bill of Rights are subject to the limitation contained in or referred to in section 36 or elsewhere in the Bill. Of all the rights in the Bill of Rights the right to life is the most sacred one.[2]

[1] Section 11 of the 1996 Constitution, section 9 of 1993 Constitution.
[2] Menghistu F in Ramcharan BG (1985) *The Right to Life in International Law* at 63; Ramcharan BG in Ramcharan BG (1985) *The Right to Life in International Law* at 12; see also Vorster's, definition of human life in Vorster WS (1988) *The Right To Life: Issues in Bioethics* Unisa at 89; Du Plessis LM and De Villiers JR in *Rights and Constitutionalism The New SA Legal Order* at 213.

The right to life is the primary right in the Bill of Rights. One cannot exercise any of the rights in the Bill of Rights unless he can exercise the right to life first. In *S v Makwanyane*, the Constitutional Court described the right to life and dignity as the most important of all human rights, and the source of all the other personal right in the Bill of Rights.[3]

According to O'Regan:

> the right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life as was included in the Constitution not simply to enshrine the right to existence. It is not a mere organic matter the Constitution cherishes, but the right to human life, the right to share in the experience of humanity. This concept of human life is at the center of our Constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporate the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence; it is the right to be treasured as human being with dignity, without such dignity, human life is substantially diminished. Without life, there cannot be dignity.[4]

Life is a unique and different phenomenon; it is the quality that distinguishes organic and inorganic material and it is not measurable in any particular units.[5] Currie and De Waal are of the view that the right to life means the right not to be killed and vests in every person.[6] It means the right not to die from preventable disease, actions, and omissions by another, including medical preservation of life in order to prolong it. The South African Constitution grants everyone the right to life in an unqualified manner.[7] This unqualified formulation of section 11 creates problems, as

[3] *S v Makwanyane* 1995 (3) SA 391 (CC).
[4] *Ibid* par 326-7.
[5] *Ibid* par 351.
[6] Currie I & De Waal J (2013) *The Bill of Rights Hand Book* 6th ed Juta at 260.
[7] Section 11 of 1996 Constitution provides that "Everyone has the right to life". The provisions of other Constitutions and instruments do qualify the right to life, see Article 6 of the Namibian constitution, Article 12(1) of Zimbabwean constitution, Section 2 of Lesotho constitution, section of 4(1) of Botswana constitution, section 4(1) of Swaziland constitution, Article 3 of Universal Declaration of Human Rights, Article 6 of International Covenant on Civil and Political Rights, Article 1 of American

it will be showed in subsequent chapters, the Constitutional Court has, at times, actually avoided associating the right to life with other secondary rights in the Bill of Rights.

Section 7(2) of the Constitution obliges the State to respect, protect, promote and fulfil the rights in the Bill of Rights. In this context, the State must prevent one from unlawfully taking another's life and it must protect the life, which is at risk: In *Carmichele,*[8] the State was ordered to put in place effective criminal law provisions to deter the commission of offences and had to sanction the breaches of such provisions by anyone. The right to life has been interpreted widely by the South African courts, especially the Supreme Court of Appeal and the Constitutional Court.

As the right to life in our Constitution is not textually qualified, the Constitutional Court has a wide discretion to decide on the vital issue of the meaning and content of right to life and any other right associated with it. Therefore, the courts have given the right to life what would be called 'wide margins': meaning they have read the right to life into other rights that supplement or complement the right to life. This interpretation of the right to life in a non-restrictive or wide manner indicates the degree to which the courts are willing to accept the interconnectedness and interdependence of all fundamental human rights with one another, especially the right to life.[9] The right to life is the most essential right that a human being can enjoy

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declaration of the Rights and Duties of Man, Article 2 of European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4 of the African Charter on Human Rights and People's Rights, and Article 2(a) of the Declaration of the Basic Rights of Asean Peoples and Governments.

[8] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938(CC); see also *Carmichele v Minister of Safety and Security* 2003 (3) SA 656 (SCA) *and Minister of Safety and Security v. Hamilton* 2001 (3) SA 50 (SCA), In *Hamilton v Minister of Safety and Security* Court held that police have duty to exercise reasonable care in considering, investigating and recommending application for fire arm licence and are liable for shooting by unfit person to whom the fire licence was issued, in *Minister of Safety and Security v Van Duivenoden* 2002 (6) SA 431 (SCA) Court held that police were liable for damages arising from their negligent failure to prevent dangerous criminals from escaping from custody; see also *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA), in *Mohamed v President of RSA* 2001 (3) SA 893 (CC), Court decided that there was a positive duty on state for the deportation of individuals to jurisdiction where they may face death penalty, see also *Kaunda v President of RSA* 2004 (10) BCLR 1009 (CC) *and Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (2) SA 467 (CC).

[9] Menghistu *supra* n (2) at 78, that human rights are indivisible and interrelated, and as such the protection of the right to life is therefore essential prerequisite to the full enjoyment of all other human rights, see also UN General Assembly Resolution 421(v) of 4 December 1950 and World Conference on Human Rights: Vienna Declaration and programme of Action, UN doc. A/conf.157/23 part I, par 5;

and it is the only right that may not be taken and granted any time or thereafter. The right to life is the mother of all human rights, without which one cannot exist. The protection, preservation and promotion of the right to life are therefore crucial if we are to sustain life.[10] However, the right to life - like any other fundamental right - is not immune to threat and contravention.[11]

There are institutions and processes such as abortion, euthanasia, death penalty and disease, which may affect the right to life and bring about death.

Death terminates life, thus the right to life comes to an end. Medically, a person is dead when his blood circulation and respiration have ceased to function and there is associated loss of function in the central nervous system.[12] Schwar explains: "Everyone understands the inevitability of death. They know that one day they, their loved ones, in fact all mankind must die".[13] Death may be classified as natural or unnatural. Death as a result of human conduct such as murder and accidents are unnatural. Death as result of illness is natural death. The right to life is not complied with in cases where the state fails to protect, preserve and promote life. State protects life by preventing murders and where life had been ended, punishing the perpetrator. The state has an obligation to deploy the police to prevent crime.[14]

Human life can also be preserved by other measures such as medical treatment. Failure to provide medical treatment where the medical intervention would save life, is inconsistent with the right to life. What is critically important here is 'life'. If a

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Viljoen F "The Charter on Human Rights and Peoples' Rights/The Travaux Preparatoirs in the Light of Subsequent Practice" (2001) 25 *HRLJ* 313 at 320; Hayson N "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 8 *SAJHR* 451 at 451-452; Mureinik E "Beyond A Charter of Luxuries: Economic Rights in the New Constitution" (1992) 8 *SAJHR* 464 at 465; Asmal K "Victims, Survivors and Citizens-Human Rights, Reparations and Reconciliation" (1992) 8 *SAJHR* 491 at 509; Blackbeard M "HIV/AIDS: The Right to Privacy v The Right to Life" (2002) 65 *THRHR* 232 at 232, Goldman RK Grossman CM, Martin C (2001) *The International Dimension of Human Rights, A Guide for Application in Domestic Law* IDB Publication at 532-534, Ramlogan R (2011) *Sustainable Developments: Towards a Judicial Interpretation*, Martinus Nijhoff, Leiden at 148-152, Johnson BR (ed) (2011) *"Life and Death Matters"* Walnut Creek, CA at 9.

[10] Currie and de Waal *supra* n (6) at 267 argue that life is a guarantee of physical existence, see also Van Wyk D, Dugard J, and de Villiers B (eds) (1994) *Rights and Constitutionalism* at 213-215.

[11] To be discussed below.

[12] Schwar TG, Loubser JD, Olivier JA (1998) *The Forensic ABC in Medical Practice, a Practical Guide*, at 397.

[13] *Ibid* at 396.

[14] South African Police Services Act 68 of 2005; see also *Rail Commuters Action Group and Others v Transnet Ltd t/a Metro Rail* 2005 (2) SA 359 (CC).

person is allowed to die due to failure on the part of the state to provide necessary medical intervention to keep that person alive, then the right to life in the Constitution would have no purpose at all. The purpose of the right to life is to preserve, promote and protect life, no other.

The South African law recognises the right to life only after birth and legal subjectivity of a person also begins at birth.[15] The life of an unborn child does not enjoy any legal protection except in some instances where the interests of the unborn child are protected, the *nasciturus* fiction.[16] The scope of the right to life in law is therefore limited or restricted to after birth with the exception of his or her interests in some cases. The law protects only the interests of the unborn child but does not recognise the life in the unborn child herself or himself.[17] The scope of the right to life is not constitutionally defined which left the extent of this vitally important right to the judiciary to interpret the provisions of the Constitution in order to determine the extent of the right. The Constitutional Court has given the right to life narrow interpretation thereby narrowing its scope and protection.[18]

Let us now consider the international instruments and see how the right to life is treated internationally. This is necessary, because section 39 of the Constitution requires the courts to consider international law when they interpret the Bill of Rights.

3.2. The Right to Life in International Human Rights Instruments

All human rights are part of both national and international law, nationally the Bill of Rights in the Constitutions of nations contain detailed scope of the fundamental

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[15] Kruger H(ed), Skelton A (ed), Carnelly M, Human S, Kruuse H, Mofokeng L and Robinson JA (2010) *The Law of Persons in South Africa*, Oxford University Press at 23-25, and Van Heerden B, Cockrell A, Keightley R, Heaton J, Clark B, Sinclair J and Mosikatsana T (1999) *Bober's Law of Persons and Family Law*, Juta at 30-42.

[16] *Ibid* at 12 and-13, see also *Ex parte Boedel Steenkamp* 1962 3 SA 954 (O), *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297, *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W), *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O) and *Masiya v Director of Public Prosecution* 2007 2 SACR 435 (CC).

[17] *S v Mashumpa* 2008 1 SACR 126 (E).

[18] *Christian Lawyers Association v Minister of Health and Others* 1998 4 SA 1113T, *Soobramoney v Minister of Health Kwa Zulu Natal* 1998 1 SA 756.

human rights.[19] The right to life features in almost all the instruments, be it regional or international document.[20] The right to life is therefore a universal right which must be enforced by national courts and international courts as contained in both national law and international law.[21] The South African courts must also apply and enforce international law.[22] Section 233 of 1996 Constitution allows the courts to indirectly apply international law when interpreting legislation, that every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. The courts must also consider international law when interpreting the Bill of Rights.[23] The most important document containing the right to life on international level is the Universal Declaration of Human Rights.

In addition to the United Nations Universal Declaration of Human Rights, there are several conventions and regional organisations that seek to protect human rights in different areas of the world. The Organisation of American States (OAS) has human rights treaties and declarations that apply to North, Central and South America. The Organisation of African Unity (now called the AU) established the African Charter on Human and People's Rights. The Council of Europe oversees human rights issues in Europe.[24]

3.2.1. Europe

The right to life in the European Community is covered in the Convention for the Protection of Human Rights and Fundamental Freedoms.[25] Article 2 of the

[19] In South Africa the Bill of Rights in contained in Chapter Two of the 1996 Constitution.
[20] Section 11 of the 1996 constitution, see also section 9 of the 1993 constitution, article 6(1) of ICCPR, article 3 of UDHR, article I of American Declaration of Rights and Duties of Man, article 4(1) of American Convention on Human Rights, article 2(1) of the European Convention for the Protection of Fundamental Freedoms, article 4 of the African Charter on Human and Peoples' Rights and article 1(2)(a) of the Declaration of the Basic Rights of Asean Peoples and Government.
[21] Implementation of Geneva Conventions Act 4 of 2012, Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, Prohibition or Restriction of Certain Weapons Act 18 of 2008 and Geneva Conventions of August 1949.
[22] Section 231(5) states that the Republic is bound by international agreements which are binding on the Republic when the constitution took effect. Most importantly section 232 says that customary international law is law in the Republic unless it is inconsistent with the Constitution or Act of Parliament.
[23] Section 39 of the 1996 Constitution.
[24] Redman N and Whalen L (1988) *Human Rights* 2nd ed at xiv.
[25] Convention imprinted in Clayton R & Tomlison H (1954) *The Law of Human Rights* Oxford

Convention provides that:

> 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 court following his conviction of a crime for which this penalty is provided by law.[26]

The European Court of Human Rights sits in Strasbourg and hears matters emanating from the European Community. It has heard several cases from different European nations involving the right to life and other fundamental rights. The court interpreted the Convention for the protection of human rights and fundamental freedoms widely. In *Khalidova et al. v Russia,*[27] the court held that the failure by the Russian government to effectively investigate the disappearance of family members of the plaintiff was a violation of the right to life and right not to be treated inhumanly. The court's reason for the decision was that Article 2, which safeguards the right to life and set out the circumstances when deprivation of life may be justified, ranked as one of the most fundamental provisions in the Convention, from which no derogation is permitted. The court further indicated that in the light of the importance of the protection afforded by Article 2, the court must subject the deprivation of life to the most careful scrutiny, taking into account consideration not only the actions of the State but surrounding circumstances.[28] The court reached this important decision because it rated the right to life as the most important of all fundamental rights. The court interpreted the right to life as widely as possible to provide for much wider protection when it comes to the right to life. The European Court of Human Rights prefers the wider protection of life as evidenced in *Kemaloglu's* case where the failure by school principal to inform municipality that classes would be dismissed early resulted in the death of a pupil who tried to walk home and froze to death on the way, the court found that the State had a positive duty to protect the right to life

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University Press at 55.

[26] Article 1(2) provides that the "deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is more than:(a) In defence of any person from unlawful violence (b) In order to effect lawful arrest or to prevent escape of a person lawfully detained and (c) In action lawfully taken for the purpose of quelling a riot or insurrection".

[27] 2008 (29) HRLJ 279 and *Open Door & Dublin Well Women v Ireland* 467 ECHR Series A Vol.246. On inhuman treatment see also *Gafgen v Germany* 2008 (29) HRLJ 56, *M.S.S v. Belgium and Greece* 2011 (31) HRLJ 121, *N v UK* 2008 (29) HRLJ 289 and *Giszczak v Poland* 2011 (31) HRLJ 424; *Buntuv v Russia* (2012) 32 HRLJ 69 and *A, B and C v. Ireland* (GC) 2011 (31) HRLJ 344 on restriction on obtaining abortion in Ireland.

[28] Par [88] 284; on right to life see also *Kemaloglu v Turkey* (2012) 32 HRLJ 122; *European Court R.R and Others v Hungary* (2012) 32 HRLJ 419.

and that the conduct violated Article 2 of the Convention.[29]

Unlike the South African Constitution, the right to life in the European Convention is textually qualified. The death penalty is still permitted in those European countries where the law provides for it as a form of punishment. The European Court of Human Rights is given the mammoth task of interpreting the provisions of this Convention, but it has a somewhat easier task in interpreting the right to life because the latter has been textually qualified by the state parties. However, it seems that the right to life is protected against the state only. This Convention does not expressly protect human life against the threat by another human being or against a threat arising from the failure to enforce other rights such as the right to medical treatment, right to nutrition, right to accommodation. These are the secondary rights supporting the primary right to life. The right to life on its own is meaningless unless buttressed by these rights.

3.2.2. America

In the American Human Rights System, the right to life is covered in two instruments, namely, the American Declaration of Rights and Duties of Man and the American Convention on Human Rights.[30] In the American Declaration of the Rights and Duties of Man, the right to life is covered in article 1, which reads: "Every human being has the right to life, liberty and security of his person".

As Patel *et al* state:

> The right to life in this convention is not textually qualified. The distinctive feature of this convention is that it also provides for or imposes duties on everyone or individuals in that member state or country or the community in which the person lives.[31]

The second instrument, the American Convention on Human Rights also imposes

[29] Par 32-38.
[30] Both Instruments imprinted in Patel E & Watters C (1994) *Human Rights Fundamental Instruments and Documents* at 89 and 94 respectively.
[31] See Chapter Two of the American Declaration of Rights and Duties of Man, in Patel *supra* n (30) at 93.

responsibilities on everyone.[32] The right to life in this convention is covered in Article 4.[33]

The Inter-American Commission on Human Rights, hereinafter referred to as IACHR, heard the matter brought before by Gretel Artavia Murillo against Costa Rica.[34] The applicants lodged several petitions with the IACHR in which they contended that the ruling by a Costa Rican Court (in which the practice of in vitro fertilisation in the country was prohibited) violated the right to private life and to found a family, as included in the Convention. The IACHR referred the matter to the Inter-American Court of Human Rights and recommended that Costa Rica lift the ban on in vitro fertilisation through necessary legal procedures. This judgment supports the right to life as it allows legal measures to be put in place to assist in production of human life through artificial and scientific means. In vitro fertilisation would assist couples who would not or could not conceive through the natural means. The prohibition of in vitro fertilisation as indeed the violation of private life of individuals who chose or are forced to use the method to conceive and have children and family.

The right to life in the American Convention is linked to the death penalty and more importantly it recognises the life of a person not yet born. The death penalty is allowed in those states in which their respective laws provide for it as a punishment for a particular crime. The tone of Article 4(2) of the Convention tells us that the death penalty is not preferred; the States would rather have it abolished. The Convention still does not *expressly* protect life against threat imposed by other human beings, but stipulates that the punishment for taking someone's life may be

[32] *Ibid* at 94.
[33] Article 4 reads: "1. Everyone has the right to have his right to 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. 2. In Countries that have not abolished death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgement rendered by a competent Court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not apply and 3. The death penalty shall not be re-established in states that have abolished it."
[34] *Gretel Artavia Murillo et al. v Costa Rica* 2011 (31) HRLJ 295, see also *Carcazo v Venezuela*, available at www.corteidh.or.cr/docs/casos/articulus/series-58-ing;*The Last Temptation of Christ v Chile* available at www.corteidh.or.cr/docs/casos/articulus/seriec-73-ing; *Barrios Altos v Peru*, available at www.corteidh.or.cr/docs/casos/articulus/seriec-75-ing*; Plan de Sanchez Massacre v Guatemala* available at www.corteidh.or.cr/docs/casos/articulus/seriec-105-ing (all sites last visited on 15 January 2014).

the death penalty. Still, the Convention does not link the right to life to socio-economic rights such as the right to medical treatment. However, it clearly protects the life of the unborn foetus against the decision of its mother to abort it. Abortion is thus not allowed in terms of this Convention.[35]

3.2.3. Africa

The African Human Right instrument is called the African Charter on Human and Peoples' Rights.[36] The right to life in this Convention is covered in article 4, which reads:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his life.

The right to life in this Charter is textually qualified by implication. The last sentence in article 4 reads: "No one may be arbitrarily deprived of his life", meaning that a person may be divested of his right to life where substantial and procedural fairness is followed. The institution tasked with the implementation of the Charter is the African Court on Human and Peoples' Rights established by member states of the African Union to ensure protection of Human and Peoples' Rights in Africa. The court was established by Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on The Establishment of an African Court on Human and Peoples' Rights, the Protocol.[37] The judgment of the court is decided by majority and is final not subject to appeal.[38] The court is yet to decide a case involving the right to life directly.

3.2.4. Asia

The Declaration of Basic Rights of Asian Peoples and Government was adopted by

[35] The Right to life is protected from moment of conception: see Article 4 of the American Convention on Human Rights in *supra* n (29), see also section 1841 of the United States Unborn Victims of Violence Act 2004 alternatively cited as "Laci and Conner's law".
[36] Charter imprinted in Patel *supra* n (30) at 142, see also Protocol to the African Charter on Human and People's Rights on the Rights to Women and Children, Article 4.
[37] Protocol available at www.african-court/images/documents/court/establishment/africancourt-humanrights.pdf site visited on 15 January 2015.
[38] See Article 28(2) of the Protocol.

the Asian countries to deal with human rights in Asia.[39] Article 1 of the Declaration provides that it is the duty of every government to ensure and protect basic rights of all persons to life, a decent standard of living, security, dignity, sovereignty, independence, self-determination, autonomous, cultural, social, economic and political development. The Convention covers both political and socio-economic rights by placing an obligation on the government to ensure a decent standard of living. The right to life is not singled out as a right on its own as it is in other regional instruments. The right to life is complemented by other civil and political rights. The right to life is also not textually qualified. The linkage of the right to life to socio-economic rights will encourage the courts to enforce the right to medical treatment as the right to life. The right to medical treatment is the right to life because if a patient does not get medical attention quickly when sick, his life may end. The protection and preservation of life means the right not to die where death is preventable. However, the Convention does not place any obligations on the individual members to respect, promote and preserve life.

3.3. The Right to Life in Domestic Bills of Rights

Most of the Southern African countries' Bills of Rights textually qualify the right to life. Lesotho, Swaziland, Botswana and Zimbabwe have similar provision on the right to life or the protection of life.[40] These countries are chosen because of their proximity to South Africa which, in my view, may result in similar socio-political and socio-economic environment. These countries experienced almost similar political struggle as South Africa prior to their independence from the colonial masters. Section 39(1) of the 1996 Constitution obliges the court or tribunal to consider foreign law when interpreting the Bill of Rights, thus the reference to these countries' constitutional provisions on the right to life is important.

The provisions on the right to life or protection of life in these four countries are identical and read as follows:

> No one shall be deprived of his life intentionally save in execution of a sentence of a

[39] Patel *supra* n (30) at 149.
[40] Patel *supra* n (30), the respective instruments.

court in respect of which a criminal offence of which he has been convicted. A person shall not be regarded as having been deprived of his life in contravention of subsection (1) if he dies as a result of the use of, to such an extent and such circumstances as are permitted by law, of such force as is reasonably justifiable in the circumstances of the case:

For the defence of any person from violence or for the defence of property.

In order to effect a lawful arrest or to prevent escape of a person lawfully detained.

For the purposes of suppressing a riot, insurrection or mutiny of or dispersing an unlawful gathering; or in order to prevent the commission by that person of criminal offence or if he dies as a result of a lawful act of war.[41]

It is clear that the four countries drafted the provision on the right to life or protection of life in such a manner that it would allow the imposition of the death penalty. On the other hand, the South African and Namibian Bills of Rights differ with that of Lesotho, Botswana, Swaziland and Zimbabwe in that both South Africa and Namibia have abolished the death penalty. Article 6 of the Namibian Constitution provides that:

> The right to life shall be respected and protected. No law may prescribe death penalty as competent sentence. No Court or Tribunal shall have the power to impose sentence of death upon any person. No execution shall take place in Namibia.[42]

The Namibian Constitution is very clear on the death penalty issue, but still it does not distinctly indicate how the right to life is to be protected and respected. It is very clear on death penalty - the judiciary need not dwell much thereon as the legislature did not leave this policy issue to the judiciary. The legislature determined it in the interests of the electorate.

In conclusion, the right to life is dealt with extensively in international, regional and domestic human rights instruments. In all these human rights instruments there seems to be a linkage between the right to life and the death penalty only, and not to the other causes of death. Anything that causes or prevents someone from

[41] Section 8 of Lesotho Constitution, section 4 of Botswana Constitution, section 4 of Swaziland Constitution and section 12 of Zimbabwe Constitution. All these Constitutions are imprinted in Patel *supra* n (30) 433-504.

exercising the right to life should be covered in the provisions of these human rights instruments.

Death terminates the right to life - death from starvation or illness; death inflicted as punishment, or death caused by other human conduct (such as murder and culpable homicide) - they all signal the end of life and therefore infringe on the constitutionally enshrined right to life. A human being has to be alive in order to be able to exercise the right to life, and anything that ends life unnaturally, may contravene the right to life. Thus, it is the responsibility of the state to put measures in place to prevent the demise of life. Such measures may include: the provision of medical treatment where the right to life is threatened by illness, the provision of food where the right to life is threatened by starvation, or adequate policing where the right to life is endangered by criminal activities. Therefore, the last question is: How enforceable are the rights in the Bill of Rights, especially the right to life. Our penultimate discussion is the aspect of justiciability of the rights in the Bill of Rights.

3.4. Justiciability

Justiciability simply refers to the ability to bring a matter to court, in which a person will have an interest, and which can be heard by the court. Widely justiciability in relation to any issue refers to the ability of the court to adjudicate the dispute, whether the solution to the problem requires judicial intervention or not.[43] Justiciablity as an ability of both the court and the litigant to entertain the dispute has not experienced a smooth existence, as a legal concept with no fixed content and not susceptible to scientific verification, is incapable of accurate definition.[44] Justiciablity therefore has several factors inhibiting it and by extension inhibiting enforcement of rights by courts.

Factors inhibiting justiciablity include jurisdiction of the court on the subject matter before the court, the subject matter, the standing of the party initiating the litigation,

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[42] Patel s*upra* n (30) at 505.
[43] Okpaluba C "Justiciability and Constitutional Adjudication in Commonwealth: The Problem of Definition (1)" (2003) 66 *THRHR* 424 at 428; see also The Justiciability Doctrines, Barriers to Constitutional Adjudication at www.law.lmu.edu.manheim/c11 site visited on 06 Nov 2014.
[44] *Ibid* at 430.

the constitutional provisions limiting jurisdiction, or excluding judicial review.

The court can only hear the matter before it if it has jurisdiction to do so. The provisions of the Constitution or Act of Parliament or the Convention or Treaty may expressly limit the jurisdiction of a court.[44] The lack of jurisdiction by a court results in non-enforceability of a right which has an adverse impact on the enjoyment of the right claimed. The African Court on Human and Peoples' Rights could not hear many cases because it lacked jurisdiction to hear the cases which resulted in people not being able to enforce the provisions of the African Charter on Human and Peoples' Right. Article 3(1) of the Protocol provided that:

> Jurisdiction of the court shall extent to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights Instrument ratified by the States concerned.[45]

Article 3(1) makes it almost impossible to enforce the rights of the African Charter as the Court can only hear cases against States that ratified the Protocol, many cases by individuals submitted to the Court could not be adjudicated because the of lack of jurisdiction by court due to non-ratification of the Protocol by states complained of.[46]

Standing of the person initiating the litigation process plays crucial role in determining justiciability of the matter. The person initiating the legal action must have standing in that he can approach the court acting in his own interests, acting on behalf of another person who cannot act in their own name, acting as a member of or in the interests of a group or class of persons; acting in public interests or an

[44] In South Africa the Constitution sets out the powers of all court, sections 167-170; see also Chapter 11 of the Namibian Constitution which exclude judicial enforcement of state policy; see also Okpaluba C "Justiciability and Constitutional Adjudication: Problem of Definition (2)" (2003) 66 *THRHR* 610 at 611-612; De Villiers B "The Socio-Economic Consequences of Directive Principles of State Policy. Limitations on Fundamental Rights" (1992) 8 *SAJHR* 188 at 188-199; De Villiers B "Directive Principles of State Policy and Fundamental Rights: Indian Experience" (1992) *8 SAJHR* 29; Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on Establishment of an African Court on Human and Peoples' Rights.

[45] African Protocol *supra* n (37).

[46] African Court on Human and Peoples' Rights lacked jurisdiction in the following cases, *Frank David Omary and Others v The United Republic of Tanzania, Delta International Investments v Republic of South Africa; Peter Joseph Chacha v The United Republic of Tanzania; Emmanuel Uko v Republic of South Africa; Amir Adam Timan v Republic of Sudan; Baghdadi Ali v Republic of Tunisia; Femi Fana v African Union* these cases are available at www.african-court/en/images/documents/court/cases/judgment, site visited on 06 November 2014.

association acting in the interests of its members.[47] The person cannot obtain the enforcement and enjoyment of a right unless he or she has interests in the outcome of the matter, which means he or she stands to gain or lose should the matter go either way.

Justiciability is not only affected by the standing of the person initiating the legal case, the nature of the disputes may also affect justiciability of the legal matter before court. The dispute must be of legal nature, emanating from or has a root in law, disputes that do not have roots in law constitutional, statutory or common law are not justiciable and therefore not adjudicable by court of law.[48]

The timing of when to bring the matter to court plays important role in the justiciability of any dispute. The dispute must be ready for adjudication, that means the dispute must be ripe for court to entertain it.[49] This ensures courts do not entertain legal disputes prematurely. Directly related to ripeness is the concept of mootness, mootness refers to a situation where the issue before court has become irrelevant, overtaken by events and longer a disputes, the dispute disappeared and the issue at hand has become academic and therefore no longer justiciable.[50]

3.5 Conclusion

The right to life is the most important right of all the rights enshrined in various instruments including the regional and international documents. The right to life is the mother of all rights and as such cannot exist in isolation of other rights. Although the right to life is a civil and political right, its enforceability is inevitably through socio-economic rights. Non-enforceability of social economic rights such as the right to health care may result in death which may infringe the right to life. Thus the fundamental rights in the Bill of Rights and other instruments are indivisible, they complement each other. The direct infringement of socio-economic rights may result in an indirect infringement of civil and political rights, which is an infringement of

[47] Section 38 of 1996 SA Constitution; see also Article 5 of the Protocol *supra* n (37), Okpaluba *supra* n (43) at 453-436.
[48] Okpaluba *supra* n (43) at 437.
[49] Currie I & De Waal J (2013) The Bill of Rights Hand Book 6th ed Juta at 85; see also Okpaluba *supra* n (43) at 437.

constitutional right. The infringement of socio-economic rights is therefore an infringement of the right to life.

[50] Okpaluba *supra* n (43) at 442.

CHAPTER 4
THE RIGHT TO LIFE: MEDICAL TREATMENT

4.1. Introduction

The purpose of this Chapter is to discuss the dimension of the right to life in the context of the socio-economic rights, the right to access health care services.

In this Chapter the decision of the Constitutional Court in *Soobramoney* is scrutinised.[1] It is argued that the right to medical treatment in section 27 of the Constitution is indirectly the right to life as the failure to enforce the right to medical treatment may result in death, thus failure to enforce the right to health care indirectly infringes the right to life.

The right to life has been described as the mother of all the rights in the Bill of Rights by Kriegler J.[2] All the fundamental human rights are linked to the right to life, for them (fundamental rights) to be exercised there must be life, thus the right to life. Other rights in the Bill of Rights complement the right to life. These rights, such as the right to access to medical treatment, are essential if life is to be preserved and protected by the State.

Although the right to life is not absolute, it is argued that the right to life should not be qualified by means such as whether there are enough resources or not. If such factors should be taken into account then the state should be forced to make the resources available in its budgetary planning to meet its constitutional duties to protect, promote, preserve and fulfill the right to life. Alternatively it is further argued

[1] *Soobramoney v Minister of Health KZN* 1998 1 SA 430 (CC).
[2] *S v Makwanyane* 1995 (3) SA 391 par 214; see also Langa J par 217, see also Menghistu F "The Satisfaction of Survival Requirements" in Ramcharan BG (1985)*The Right to Life in International Law* at 63; on survival interests see Bilchitz D "Towards A Reasonable Approach to the Minimum Core: Laying Foundation for Future Socio-Economic Rights Jurisprudence" (2003) 19 *SAJHR* 1 at 12, 14 &15 Vorster WS (1988) *The Right To Life: Issues in Bioethics* Unisa at 89, *Tellis & Others v Bombay Municipality Corporation & Others* and *Kuppusami & Others vs State of Maharasha & Others* AIR 1987 LRC 351, Law Reform Commission of Canada: "*Working Paper 28, Euthanasia, Aiding Suicide and Cessation of Treatment"* at 2-4 where it was argued that protection of human life is a fundamental value of all legal systems.

that socio- economic enforcement such as the right to access to health care services should be interpreted to mean the right to survival. The Constitutional Court, when interpreting the right to access to medical treatment clause of the Constitution, does not give the right to life the value it deserves. The right to life in the Court's perspective is not really the right to life as enshrined in the 1996 Constitution as the Court did not consider the consequences of its decision as it will become clear in my discussion of *Soobramoney* below.

4.2. Socio-Economic Rights

Section 27 of the Constitution enshrines the socio-economic rights of access to health care, food, water and social security in the Bill of Rights. The right to health care services is provided for in the Constitution, section 27. This section provides as follows:

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

Other socio-economic rights are also enshrined in the Bill of Rights, such as education in section 29 and housing in section 26. Socio economic rights are second-generation rights. The first generation rights are civil and political rights.[3] The close relationship between human rights is described as the indivisibility and interdependence of human rights.[4]

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[3] Liebenberg S & Pillay K (2000) *Socio-Economic Rights in South Africa* University of the Western Cape at 15.

[4] *Grootboom v Government of RSA* 2000 (11) SA 1169 (CC). Chenwi argues that socio-economic rights should be treated on the same footing as civil and political rights, see Chenwi L "Correcting the Historical Asymmetry Between Rights: The Optical Protocol to the International Covenant on Economic, Social and Cultural Rights" (2009) 9 *AHRLJ* 23 at 23. See also Mbazira C "A Path to Realising Economic, Social and Cultural Rights in Africa: A Critique of the New Partnership for

The right to life on its own might be meaningless or redundant unless other fundamental rights complement it, hence my argument that the right to medical treatment is in fact indirectly the right to life. The right to life is inevitably linked to or dependent on the successful exercise of the other rights in the Bill of Rights, such as the right to health care in instances where life is threatened by diseases or illness or even emergency catastrophe such an accidents and natural disasters. The infringement of the right to health care in section 27(1) (a) of the Constitution will ultimately lead to infringement of the right to life in section 11 of the Constitution. Human rights are interdependent, indivisible and symbolic.[5] Civil and political rights cannot be effectively protected without adequate enjoyment of basic social and economic entitlements.[6]

The main reason why people seek medical intervention when they are sick is that they want to avert the negative consequences of the disease; they want to be cured of the threatening disease and thus to prolong their lives. In this context the right to medical treatment is the right to preserve, to protect and to prolong life. The preservation of life can be achieved by means of medical treatment where the disease threatens the health of a person. The state must then provide medical treatment to such people to avert the possible harm. The state has obligations to respect, promote, protect and fulfill the rights in the Bill of Rights.[7] In the case of the right to life, this translates into both negative and positive duties.[8]

The socio-economic rights in the Bill of Rights give the right to life, "life" and

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Africa's Development" (2004) 4 *AHRLJ* 34, Bollyky TJ "R if C>P+B: A Paradigm for Judicial Remedies of Socio Economic Rights Violations" (2002) 18 *SAJHR* 161.

[5] Pieterse M "A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa" (1999) 15 *SAJHR* at 372; see also Liebenberg S "Interpretation of socio-economic rights" in Woolman S *et al* (eds) (2006) *Constitutional law of South Africa* at 33-1; Proclamation of Tehnran 1968, Final Act of International Conference on Human Rights, Tehran, UN Doc A/Conf 32/41, art 13; Du Plessis LM & De Villiers JR "Personal Rights: Life, Freedom and Security of the Person, Privacy and Freedom of Movement" in Van Wyk D, Dugard J, De Villiers B and Davis DM (eds)(1994) *Rights and Constitutionalism* Juta, at 213; article 6 of ICCPR.

[6] Menghistu *supra* n (2), "The Satisfaction of Survival Requirements" in Ramcharan BG (1985) (ed) *The Right to Life in International Law* at 63; see also Indian Supreme Court in *Tellis & Others v Bombay Municipality Corporation & Others and Kuppusami & Others v State of Maharasha & Others* AIR 1987LRC 351 and *Himachel Pradesh & Another v Umed Ram Sharma & Others* AIR 1986 SC 847, Iles K "Limiting Socio-Economic Rights: Beyond Internal limitation Clauses (2004) 20 *SAJHR* 448.

[7] Section 7(2) of the 1996 Constitution; see also Currie I and De Waal J (2013) *The Bill of Rights Handbook* 6th ed at 262.

[8] *Ibid*.

meaning. The socio-economic right of access health care in this context means access to survival medical treatment to protect and preserve life. The right to life is indirectly enforced through the access to health care services by patients, including patients who cannot afford the costly medical treatment in both private and public health sector in South Africa. The denial or failure to provide medical treatment to sick person that lead to his death is in fact failure to preserve his life through medical intervention.

The infringement of section 27 of the Constitution may eventually infringe section 11. The main objective of the right to life is to preserve, protect and prolong life through interpretation or reading it together with other provisions in the Bill of Rights. The real life experience shows that the two groups of rights cannot be separated. Each depends on the other to be real and meaningful. I do concur with the viewpoint that human rights depend on each other. The exercise of the socio economic rights depends largely on the existence of the civil and political rights, the right to life in particular.[9]

4.3. *Sobramoney v Minister of Health KZN*

The appellant was 41 years old unemployed diabetic man who suffered from ischemic heart disease, cerebro-vascaular disease which caused him to have stroke during 1996.[10] His life could be prolonged by means of regular dialysis treatment.[11] He approached the Addington Hospital with a view of receiving the ongoing dialysis treatment in its renal unit.[12] The Hospital refused him admission to its renal unit due to limited facilities that are available for kidney dialysis[13]. Department's decision was based on a policy with regard to the use of dialysis resources of the hospital.[14] The Hospital did not to admit the patient due to shortage of resources and had adopted a set of guidelines to determine which persons with chronic renal failure would be given dialysis treatment.[15] According to the guidelines the primary requirement for

[9] Makwanayane *supra* n (2) par 217, Chenwi *supra* n (4) at 23.
[10] *Soobramoney supra* n (1), at 769D.
[11] *Ibid* at 769D-E.
[12] *Ibid* par [1] 769D-E.
[13] *Ibid* par [1] 769E-F.
[14] *Ibid* par [3] 769 I.
[15] *Ibid* par [3] 770A-B.

admission to dialysis was eligibility for kidney transplant.[16] Such persons would be provided with dialysis until the donor was found and kidney transplant performed.[17] The guidelines provided that an applicant is not eligible for a transplant unless he or she is free of significant vascular or cardiac disease.[18] The appellant suffered from other conditions including heart disease and consequently failed to be eligible for kidney transplant.[19]

The appellant had unsuccessfully approached the Durban High Court for an order directing the Hospital to provide him with the treatment he desired and interdicted the respondent from refusing him admission to the renal unit of the Hospital.[20] The application was dismissed.[21] The appellant thereafter appealed to the Constitutional Court against the judgment of the local division of the High Court. The appellant based his claim on section 27(3) of the Constitution, which provides that:

> No one may be refused emergency medical treatment' and also on section 11, which provides that 'Everyone has the right to life.

The Constitutional Court found unanimously that the appeal had to fail because it had not been shown that the State's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of the obligation imposed by section 27.[22] The appellant contended that the patients who suffered from terminal illness and required treatment in order to prolong their lives were entitled in terms of section 27(3) of the Constitution to be provided with such treatment by the State. He argued that the State was obliged to provide funding and resources necessary to discharge that obligation. Section 27(3) of the Constitution, so it was argued, should be construed consistently with the right to life entrenched in section 11 of the Constitution.[23] This required section 27(3) to be read as meaning everyone requiring lifesaving treatment and was unable to pay for such treatment be

[16] *Ibid.*
[17] *Ibid*.
[18] *Ibid* par [4] 770C.
[19] *Ibid* par [1] 769D-EC.
[20] *Ibid* par [5] 770E.
[21] *Ibid* par [5] 770F.
[22] *Ibid* par [36] 778A-CS.
[23] *Ibid* par [14] 772C.

entitled to have the treatment at the State Hospital free of charge.[24] The Constitutional Court observed the words 'emergency medical treatment' and concluded that they did not bear the meaning contended for as their ordinary meaning.[25] The Court held that the words might possibly be open to a broad construction, which would include the ongoing treatment of chronic illness for the purpose of prolonging life, but remarked that this was not their ordinary meaning and if this had been the purpose which section 27(3) was intended to serve, one would have expect it to have been expressed in positive and more specific terms.[26] The Court observed that the purpose of the right in section 27(3) seems to ensure that treatment is given in emergency and that the right should not be frustrated by other formalities. The Court thought that the section requires the remedial treatment that is necessary and available be given immediately to avert harm.[27] The Constitutional Court therefore came to the conclusion that, since the appellant required dialysis treatment two to three times a week, that was not an emergency which called for remedial treatment but an ongoing state of affairs resulting from the deterioration of the appellant's renal failure which was incurable.[28]

4.3.1. Critical analysis of Court's decision and the reasoning

The Constitutional Court interpreted section 27(3) to refer to sudden catastrophic incidents such as accidents, natural disasters and sudden illness only.[29] The Court did not specifically refer to the element of preservation of human life, as part of the right to life nor did it consider what would be the effect of not admitting the patient to the kidney dialysis programme. Therefore the definition is found wanting. The phrase "emergency medical treatment" in section 27(3) of the Constitution should have been defined as follows: medical treatment which must be administered within a short period of time on an urgent basis in order to preserve the human life which has been threatened by the circumstances existing at the time. Emergency treatment is only called for in situations, in which life has been threatened. Yet, this was exactly the position in *Soobramoney's* case; his life was at risk due to the

[24] *Ibid*.
[25] *Ibid* par [13] 772B.
[26] *Ibid*.
[27] *Ibid* par [20] 774B-E.
[28] *Ibid* par [21] 774D-F.

kidney disease he suffered from. The Court should have interpreted "emergency" widely enough to include all situations, not only the types of emergency enumerated by the Court, in which there is a high risk that human life will be lost if medical treatment is not provided immediately. The Court should always consider whether the irreparable damage would result if the relief sought is not granted and in this case the consequences of not granting the relief was death, the permanent loss of human life.

It should be noted that most medical conditions are emergencies when viewed from the patient's perspective.[30] Indeed Mubangizi is correct, what would have been the case if the appellant were brought to the hospital causality on the brink of death; would the hospital refuse him admission because he had other diseases and not attend to him? Let us say they admit him and later realise that it was the appellant and he was suffering from an incurable renal disease, would they discontinue treatment? The immediate threat to human life is the factor that makes a situation an emergency.

The rapid deterioration of life due to an incurable illness should have been the Court's main focus. Thus, the Court would have had the opportunity to stop such deterioration and preserve the life that has been threatened. The threat to human life seemed not to have been the focus of the Court but rather the availability of resources. The Court did not satisfy itself that indeed resources were not available; it just believed what was presented by the state. The obligation entrenched in section 27(2) is not applicable to the situation of emergency medical treatment the patient was facing. The threat to his life was real and imminent. The Court should have considered the threat to human life and then pronounced on the state affordability of maintaining such chronic life.

Although the case before the Court involved the right to access to health care services and the Court based its decision on the availability of resources, the

[29] *Ibid* par [20] 774C-D.
[30] Mubangizi JC "Public Health, SA Bill of Rights and Socio-Economic Polemic" (2002) 2 *TSAR* at 345; see also Twinomugisha BK "Exploring Judicial Strategies to Protect the Right of Access to Emergency Obstetric Care in Uganda" (2007) 7 *AHRLJ* 283 at 299.

message, which the Court appears to be sending, is that the quality of life determines whether or not that life is worth saving. The availability of resources should have been the second phase of the inquiry, the first phase being whether human life was being threatened or not. The express reference to "available resources" and "progressive realization" automatically qualifies the right to the extent of making it almost untenable.[31]

By deciding that Mr. Soobramoney was not entitled to medical treatment at the state expense due to lack of resources, the Constitutional Court played the role of administrator and judiciary at the same time: it rationalised health care services. Rationing entails denying individuals some measure of health care that otherwise would benefit them.[32] Rationing is felt to be unfair, unethical and potentially discriminatory.[33]

The Addington Hospital's admission guidelines amounted to rationing policy, rationing health care services. Califano argues that rationing of health care services may decide who should suffer how much pain, how long, who should walk and who should limp, and who will live, who die and when.[34] I concur with Califano that rationing health care is an unnecessary solution especially in South Africa where there is massive underspending by Government departments.[35] It is ironic that the government fails to use resources on the one hand and claims lack of the same on the other hand. Budgets and accompanying resource limitation that shapes the context of rationing decisions are political, rather than natural.[36] Rather than the

[31] Mubangizi JC *supra* n (35) at 345.
[32] Lamm RD "Rationing Health Care: Inevitable and Desirable" (1992) 140 *University of Pennsylvania Law Review* at 511; see also Pieterse M "Health Care Rights, Resources and Rationing" (2007) 124 *SALJ* 514 at 515, 517-520, and Moellendorf D 'Reasoning about Resources: *Soobramoney* and the Future Socio-Economic Rights Claim*"* (1998) 14 *SAJHR* 327 at 332; Callahan D "Setting Limits in Health Care" at 55-64; Glick S "Rationing and Priority Setting" at 77-86, both in Allebeck P & Jansson B (eds) (1990) *Health Care Limits: Ethics in Medicine Individual Intergrity versus Demands of Society* Raven Press.
[33] Lamm RD *supra* n (32) at 511. In SA sec 9(1) of 1996 Constitution provides that "Everyone is equal before the law and has equal protection and benefit of the law", the Court did not protect the patient in this case. See also sec 7(2).
[34] Califano JA Jr "Rationing Health Care: The Unnecessary Solution" (1992) 140 *University of Pennsylvania Law Review* at 525-526.
[35] *Business Day* of 08 and 28 March 2000 reported that Government rolled out over R582.6 million from 1997/98 and 1998/99 financial years after National and Provincial Departments failed to spend their budget allocations. Unspent money was earmarked for poverty relief program and fighting HIV/AIDS.
[36] Pieterse M "Health Care Rights, Resources and Rationing" *supra* n (32) at 516.

'inevitable consequence of tragic reality' of resource scarcity, rationing of resources available for medical treatment is 'inescapably' a political process, therefore the judiciary is not an appropriate forum to decide on rationing for medical resources,[37] but should decide whether or not the rationing of resources would contravene the constitutionally protected right.

The Constitutional Court was supposed to rule on whether or not the right to life, would, as a result of rationing be contravened or threatened. The Court avoided the real issue of threat to human life and dealt with the case as if the hospital or department was forced to make an inevitable and tragic choice.[38] The Court interpreted 'available resources' as if it referred to the hospital or department's resources only, and not state resources. The available resources refer to the real resources of the country, and are not to be equated with the budgetary appropriations.[39] The Court did not inquire whether resources could be available from other state organs but concluded that life could be lost on account of lack of resources. The Court's main concern was whether the admission guidelines were rational or not, not the effect of the guidelines.

The Court ignored the real reason the matter was before it, the survival of a human being. The socio-economic judicial enforcement is the last resort for the poor to survive; indeed it was the last resort for Mr. Soobramoney.[40] The Court, in adopting the particular approach to adjudicating socio-economic rights, has succeeded in removing itself one step away from the concrete realities of hunger, homelessness, disease and illiteracy that socio-economic rights are meant to deal with.[41] Brand suggests that the Constitutional Court has effectively proceduralised its socio-economic rights in the sense that its first concern in adjudicating socio-economic rights are structural principles of good governance, rather than deprivation and the

[37] *Ibid* at 517.
[38] *Ibid* at 518, see also *Soobramoney* par 29.
[39] Liebenberg S "The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa" (1995) 11 *SAJHR* 359 at 366.
[40] Menghistu *supra* n (2) "The Satisfaction of Survival Requirements" in Ramcharan BG (ed) (1985) *The Right to Life in International Law* at 63, see also Bilchitz D "Is the Constitutional Court Wasting Away the Rights of the Poor: *Nokotyana v Ekurhuleni Metropolitan Municipality"* (2010) 127 *SALJ* 591; Kelton S "*Girls' Socio-Economic Rights in SA*" (2010) 26 *SALJ* 141.
[41] Brand D in Botha H, van Der Walt A, & van Der Walt J (eds) (2002) *The Right and Democracy* at 36.

need and its alleviation.[42] The Court was concerned more about the reasonableness of the policy than with the content of the right in question.[43] The reasonableness standard seems an appropriate yardstick for financial and budgetary measures that shape the context of rationing decisions, since it allows the courts to establish whether such measures comply with constitutional directives without the courts engaging in financial or budgeting policy making.[44]

The Court should have focused on the constitutional interests protected by the access to health care and the reasonableness adopted by the state must also involve inquiry into the content of rights in section 26 and 27 of the Constitution.[45] The Court's approach attempted to sidestep the need to give content to the rights in section 27(1) of the Constitution.[46] Should the Court find that a constitutional right has been infringed or threatened, it could then determine whether such an infringement is justifiable in terms of section 36 of the Constitution.[47] The court could not be in a position to adjudicate the infringement properly, because its focus was whether the policy and the procedures followed in making the policy, were reasonable. The Hospital Policy in *Soobramoney*, would not have passed the provision of section 36 of the Constitution as the Policy was not of general application. The Policy also unfairly discriminated against patients who suffered from renal failure on the basis of additional disease. The implementation of the Policy as rationing measure was also not the less restrictive means available to achieve the purpose of rationing as the State could have appropriated funds from other not so urgent items, or overspent or overcommitted funds, and save life. All these were overlooked because the Constitutional Court was only concerned with the reasonableness of the policy and not the content of the right in question.

Brand is right that the Constitutional Court's concern, in adjudicating socio-economic

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[42] *Ibid* at 43.
[43] *Soobramoney supra* n (1) par [25] 775D; on reasonableness see Kruus H "The Art of the Possible in Realising Socio-Economic Rights: The SCA Decision in *City of JHB Metro Municipality v Blue Moonlight Properties 39 (Pty) Ltd"* (2011) 128 *SALJ* 620; Steinberg C "Can Reasonableness Protects the Poor: A Review of SA's Socio-Economic Rights Jurisprudence" (2006) 123 *SALJ* 264; Ray B *"Proceduralisation's and Engagement's Promise in Socio-Economic Litigation"* (2011) 27 *SALJ* 107.
[44] Pieterse *supra* n (32) at 534.
[45] Bilchitz *supra* n (2) at 6; Pillay A "Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction' (2005) 122 *SALJ* 419 at 429-432.
[46] *Ibid*.

rights, seems not to be with the possible outcome of the government's policies; its main concern is whether government acts in a manner consistent with procedural good governance standards in its attempt to realise socio-economic rights.[48] Brand's reaction to the Constitutional Court's decision in *Soobramoney* is right in that the Court confined its review to the manner in which the hospital's admission guidelines were conceived and applied, rather than to the question what they were likely to achieve.[49]

The Court did not see beyond the application of the hospital's guidelines, what would happen if the guidelines were to be applied. That would have given the court an opportunity to go beyond the reasonableness of the guidelines and looked at why the resources were not sufficient. The court failed to link the exercise of the right to life and the availability of resources and its management. The issue on hand was the right to life and how to interpret or read section 27(3) into section 11, the right to life.

On the question of whether section 27(3) should be interpreted consistently with the right to life and that everyone who required lifesaving treatment and who was unable to pay for it was entitled to have treatment provided by the State without charge, the Constitutional Court said that the right to medical treatment is directly dealt with in section 27, so there was no need to make any inferences on the right to medical treatment.[50] The Court held that if the appellant's constructions were to be accepted, it would make it difficult for the State to provide health services to everyone within its available resources.[51] However, not everybody was in the appellant's position at that time. There were no statistics to show whether there were many people in the appellant's position who had applied to court for similar relief. The Court's argument was therefore moot.

The obligations imposed on the State by sections 26 and 27 of the Constitution in

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[47] De Waal & Curie *supra* n (7) at 164-165.
[48] Brand D *supra* n (41) at 49; see *Soobramoney* par [25] 775 C-D. The Court said that it had not been suggested that the guidelines were unreasonable or that they were not applied fairly and rationally when the decision was taken that the appellant did not qualify for dialysis.
[49] *Soobramoney supra* n (1); par [25] 775D.
[50] *Ibid* par [19] 773H.
[51] *Ibid*.

respect of access to health care, housing, water, food and social security are qualified by the provisions of subsections two in both sections to the effect that 'the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. The qualification brings the issue of availability of resources, which is an integral part of the realisation of all socio-economic rights. The progressive realisation used in these subsections mean the realisation is over a period of time, which was definitely not referring to emergency situations or cases where life may be lost. The emergency situation, by its nature, would not exist over a period of time since the unpleasant event that brought the emergency would eventuate into catastrophic results. The Constitutional Court was not correct when it said that the appellant's situation was not an emergency, for as long as there was a need to avert harm to human life, there was an emergency.

The other aspect the Court considered was the guidelines, which were established by the Department to deal with the issue of admitting chronic patients in the Province. The Court found that by using the machines according to the guidelines more patients would benefit than would be the case if they used the machines to keep alive persons with chronic renal failure.[52] The Constitutional Court said that the outcome of the treatment was more likely to be beneficial because it would be aimed at curing patients rather than maintaining them in a chronic ill state.[53] The Court held that the appellant's case must be seen in the context of needs that the health services have to meet, for if treatment had to be provided to the appellant, it would also have to be provided to everyone in similar circumstances.[54] The Court considered the costs to the state of treating the chronically ill patients by means of dialysis provided twice a week and held that if persons suffering from renal failure were to be provided with renal dialysis, the costs of doing so would make substantial inroads into the health budget.[55] On these premises the Constitutional Court held that it had not been shown that the state's failure to provide renal dialysis facilities to all persons suffering from chronic renal failure constituted a breach of its obligation

[52] *Ibid* par [25] 775 C-D.
[53] *Ibid*.
[54] *Ibid* par [28] 775H.
[55] *Ibid* par [28] 775J-776A.

under sections 27 of the Constitution.[56] Shortly after the Court's disappointing decision, the appellant died.

Chaskalson P, with Madala J and Sachs J concurring, in this case wrote the judgment. Essentially, in practical terms, the Court decided that persons suffering from chronic illness must die so as not to waste money on the dying.[57] To me the Court indirectly said to Mr. Soobramoney 'it is too late' and it would serve no purpose at all to fight the losing battle anyway. Sachs J said:

> however the right to life may come to be defined in South Africa, there is in reality no meaningful way in which it can constitutionally be extended to encompass the right indefinitely to evade death.[58]

There was no logic in this statement; it is known that death is inevitably part of any living human society. This statement was correct but irrelevant to the case before the Court, as the appellant was not requesting the court to indefinitely extend his life, and the Court would not have been able to do so, even if the appellant so wished. The appellant was requesting the Court to force the State to preserve his life. The statement showed that the Judge was pre-empting the appellant's death, the very same thing the appellant wanted to avoid for a few more years through medical intervention as his life was threatened by the disease with the end of life imminent.

The honourable Judge Sachs supports his view on life further by referring to Stevens J and said 'dying is part of life, its completion rather than its opposite'.[59] Justice Sachs continued and said*:*

> we can, however, influence the manner in which we come to terms with our mortality, it is precisely here where scarce artificial life prolonging resources have to be called upon, that tragic medical choices have to be made*.*[60]

Sachs J's statement is not relevant in this case; the Court was not requested to

[56] *Ibid* par [36] 778B-C.
[57] *Ibid* par [25] 775C-D, the Court emphasised the number of patients being cured rather than the life to be lost, see also Shandu S "Prisoners Waiting to Die with Dignity" (2004) November *De Rebus* 18.
[58] *Ibid* par [57] 784 B-C.
[59] *Ibid.*
[60] *Ibid*.

make a medical choice, but to confirm or dismiss the decision of the High Court. The Constitutional Court was not supposed to entertain the medical choice issue, but to tell us whether the appellant was entitled to medical treatment at the state's expense or not. The most important issue before the Constitutional Court was whether or not the appellant's constitutional right to life was infringed or threatened. The infringement or threat to constitutional right would probably be determined by what would happen if the order sought was not granted. Then the Constitutional Court must have considered what would happen to the patient if his prayer was not granted.

The Constitutional Court's decision in this matter may effectively be interpreted to mean that the life of any patient who suffers from incurable disease and in chronic stage is not worth saving. It indirectly said that the quality of life left in the person, and the life itself, determined whether or not the patient was worth living or dying. In the circumstances this decision, it is presumed, may affect people with HIV/AIDS, because they are suffering from a chronic incurable disease. It is further presumed the Constitutional Court would not want lots of money used to maintain or prolong lives of HIV/AIDS sufferers while that money could be used to buy drugs for patient suffering from curable diseases.[61] It seems to me that is what the Constitutional Court was concerned with in this decision, was certainly not the threat to life posed by the chronic incurable disease, but with the usage of resources and the resultant benefits thereof.

4.3.2. Interpretation of Section 11 of the 1996 Constitution

The Constitutional Court should have interpreted section 11 and section 27 of the Constitution generously. If the Court used the purposive interpretation, then it ignored the purpose of section 11 of the Constitution. Section 11 of the Constitution provides that 'Everyone has the right to life'. The word 'everyone' in this section means or refers to every human being. It is submitted that 'everyone' refers to

[61] In par [25] 775C-D the Court stresses the number of patients benefiting, that it would have been the case of keeping chronic ill patients and in par [57] 784 B-C the Court admits that policy was a tragic medical choice.

anybody including convicted murderers,[62] chronically ill patients,[63] vegetative patients[64] and unborn babies.[65]

The South African law recognises both statutory and common law methods of interpreting the law.[66] Our law recognises two broad theories of interpretations, namely, the literal and purposive methods. The literal method requires the courts and other *fora* to look at the ordinary grammatical words used in the statute, where the words used are clear and unambiguous, the meaning that flows therefrom can be adopted.[67] The intention of the legislature can then be deduced from the wording of the statute.

The second common law theory on interpreting statutes is the purposive method or golden rule. Purposive method requires the court to ascertain the purpose of which the legislation was promulgated, that is the intention of the legislature.[68] By using the literal method of interpretation, the court can ascertain the intention of the legislature and deduce the purpose for promulgating the statute using the purposive method. The two methods of interpretation should be used interdependently. However, the theories should be used in such a way that they do not conflict with the Constitution.[69]

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[62] *S v Makwanyane and Others supra* n (2).
[63] *Soobramoney supra* n (1).
[64] *S v Hartman* 1975 3 SA 532.
[65] *Minister of Health v Treatment Action Campaign* 2002(5) SA 721(CC) or 2002 (10) BCLR 1033 (CC).
[66] Interpretation Act 33 of 1957 was enacted to assist the Court in interpreting statutes; section 39 of the 1996 Constitution determines how the Bill of Rights should be interpreted, common law methods of interpretation include the literal method and the purposive method, see also Du Plessis A "SA's Environmental Constitutional Right (generously) Interpreted: What is in it for the Poor" (2011) 27 *SALJ* 279 at 304-307 for generous interpretation of statute; see also Motala Z. "The Constitution is Not Anything the Court Wants It to Be: The *Mhlungu* Decision and the Need for Disciplining Rules" (1998) 115 *SALJ* 141.
[67] Burger AJ (2001) *A Guide to Legislative Drafting in South Africa* Juta at 25; see also Kellaway EA (1995) *Principles of Legal Interpretation Statues Contracts and Wills* 1 Butterworths at 49-50; Du Plessis L (2004) *Re-Interpretation of Statutes* Butterworths at 93; Cockram GM (1983) *Interpretation of Statutes* 2nd ed Juta at 49; Bloom LH Jr (2009) *Methods of Interpretation* Oxford Univ Press at 1-5, 10-14 and 31-36.
[68] *Ibid*; Du Plessis L *supra* n (67) at 96; Cockram *supra* n (67) at 60-68, Kellaway EA *supra* n (67) at 57 and Andrews AJ at 25-26; see also De Waal and Currie *supra* n (7) at 148-150.
[69] If they are inconsistent with the Constitution they will be declared invalid section 2 of the Constitution.

The interpretation of the Bill of Rights is clearly set out in the Constitution itself.[70] The wording of section 39 of the Constitution indicates the framers of the Constitution preferred the purposive method of interpretation. This constitutional clause requires the court or tribunal to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. Section 39 deals specifically with the interpretation of the Bill of Rights. It requires the court to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Section 7(1) lists the democratic values as human dignity, equality and freedom.

In *Soobramoney* the court used the purposive method of interpretation and said that the purpose of section 27(3) of the constitution was to ensure that treatment was given in an emergency and treatment was not frustrated by bureaucracy and other formalities.[71] Yet, the Court still interpreted section 27(3) narrowly and restrictively and as such missed the purpose thereof, which is to avert harm, whether immediate or potential. The Court conceded that the section required that remedial treatment that is necessary and available be given immediately to avert harm.[72] It is submitted that the applicant's situation was an "emergency" as the harm would materialise if treatment was not given immediately. The purpose of section 27(3) is to ensure that people are not denied emergency treatment simply because they would die if not treated urgently. The harm the patients wanted to avoid in any emergency medical situation is the resultant death due to late or lack of medical intervention. The applicant's life was threatened by an incurable kidney disease, which can be averted by kidney dialysis.[73] The purpose of section 27(3) read together with section 11 of the Constitution is to preserve life. Section 27(3) seeks to ensure that persons receive emergency treatment to preserve life, while section 11 gives the right content, which is life. The Court therefore must, in the process of interpreting these interrelated rights, look at the text of the document as a whole, and not compartmentalise the individual rights.

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[70] Sections 39 and 233 of the Constitution. See also Ka Mdumbe F "Socio-Economic Rights: *Van Biljon v Soobramoney"* (1998) 13 *SAPR/PL* 461 at 465.
[71] *Soobramoney supra* n (1) par 20 at 774C-D.
[72] *Ibid* par 20 at 774D.
[73] *Ibid* par 1 at 769D-E.

The second method of interpretation used by the Court is the literal method. This method requires the Court to interpret the words in the statute in their ordinary, literal meaning. The Court looked at the negative wording of section 27(3) and concluded that the section was not applicable to the applicant's situation.[74] The Court effectively decided that the applicant's situation was not an emergency as required by section 27(3). Section 27(3) provides that 'No one may be refused emergency medical treatment' and does not classify or categorise the types of emergencies. This is an open text, which needs both the literal and intention theories to interpret and give it meaning. The literal method alone is not sufficient, because the text is open to various interpretations.[75]

The Court had to ascertain the intention of the framers of the constitution which, it is submitted would not have been to let people die simply because their cases were not considered to be emergencies irrespective of the threat to their lives. This decision did not promote the value of human dignity, as the Court did not consider the threat to the applicant's life to be a paramount factor; Soobramoney had to lose his life because his situation was not medically classified as being an 'emergency' by the Court.[76]

4.3.3. Comparative and International Law Dimension of Socio-Economic Rights

The Constitutional Court referred extensively to foreign law to make an analogy with Soobramoney's case.[77] The court was within its right, in terms of section 39(1) (c) of

[74] *Soobramoney supra* n 1 par 21 at 774E.
[75] Cockram *supra* n (67) at 60 where he says that if the literal interpretation does not lead to the intention of the legislature the Court may reject literal interpretation and use the Golden rule to ascertain the intention of the legislature. See also De Vos P "A Bridge Too Far? History As Context in the Interpretation of the SA Constitution" (2001) 17 *SAJHR* at 5-12; Lenta P "A Neat Trick If You Can Do It: Legal Interpretation as Literary Reading" (2004) 121 *SALJ* 216, 218, 237-238.On common law compliance and constitutional compliance, see Hopkins K 'Constitutional Values and the Rule of Law: They Don't Mean Whatever You Want Them to Mean' (2004) 19 *SAPR/PL* 432, 432-437; Kriel RR "On How to Deal with Textual Ambiguity' (1997) 13 *SAJHR* 311, 311-315; see also; Currie and De Waal *supra* n (7) at 147-148 where they argue that constitutional interpretation unavoidably involves more than the determination of the literal meaning of particular provisions, for various methodologies of interpretation; see also Brown LN & Kennedy T (1994) *The Court of Justice of the European Communities* at 323- 343.
[76] See Liebenberg S "The Value of Human Dignity in Interpreting Socio-Economic Rights" (2005) 21 *SAJHR* 1 at 2-5.
[77] *Soobramoney supra* n (1) par [18] at 773B-I.

the Constitution to consider the foreign law in interpreting the Bill of Rights. The Court was also obliged to consider international law.[78] The Court did not see any reason why international law should have been used in interpreting the Bill of Rights. Had the court considered international law it would have reached a different conclusion because of the international law concept of minimum core obligations in the context of socio-economic rights.[79]

The obligation to consider international law, in the context of human rights interpretation, is enshrined in the Constitution.[80] The international law, which must be considered, includes both binding and non-binding international instruments.[81]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) deals with socio-economic issues on the international plane, while political and civil rights are covered, on international level by the International Covenant on Civil and Political Rights (ICCPR).[82] When interpreting provisions of the constitution, which have a socio-economic dimension, the Court must consider the provisions of the ICESCR.

The ICESCR requires states to recognise the right of everyone to the enjoyment of the highest attainable standard of mental and physical health.[83] Article 2 of ICESCR requires member states to take reasonable steps to the maximum of their resources

[78] Section 39 (1) (b) of the 1996 Constitution.
[79] Bilchitz D "Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights" *SAHRJ* at 139-141, Bilchitz *supra* n (2) at 1; Russel S 'Minimum State Obligations: International Dimensions" in Brand D, Russel S (eds) (2002) *Exploring the Core Content of Socio-Economic Rights: SA and International Perspective* at 1-11; Chapman AR '*Core Obligations Related to the Right to Health and their Relevance to South Africa*' 35-60; Pillay K *South Africa's Commitment on the Right to Health in the Spotlight: Do We Meet the International standard* at 61-70, Pieterse M *supra* n (32) at 522 and 523.
[80] Section 39(1) (b) and (c) of the Constitution; see De Waal and Curries *supra* n (68) *The Bill of Rights Handbook* at 160.
[81] Only those treaties that South Africa ratified, and which have become parts of South African law in terms of section 231(4) may be applied directly by the Court. However, both binding and non-binding international law may be used as a tool of interpretation: see *Makwanyane supra* n (2) paras 36-7; see section 231(4) of the Constitution, for applicability of international law in Africa; See Dugard J (2010) *International Law: A South African Perspective* 4th ed; Dugard J "The Role of International Law in Interpreting the Bill of Rights" (1994) 10 *SAHR* 208, 208-215 and Dugard J "International Law and the Final Constitution" (1995) 11 *SAJHR* 239 at 239-242.
[82] Both these articles are imprinted in Patel EM & Watters C (1994) *Human Rights Fundamental Instruments and Documents* Butterworths at 16 and 21 respectively.
[83] ICESCR article 12.

with the view of achieving progressive realisation of the rights in the Covenant.[84] It is therefore submitted that the provisions of ICESCR were applicable in the *Soobramoney* case as it involved the survival requirement and – therefore - a minimum core. The minimum core is the nature or essence of a right, without which the right would lose its substantive significance as a human right.[85] The minimum right in the Bill of Rights is the right to life without which one cannot exercise any of the fundamental rights. The right to access health care is therefore a survival requirements which cannot be divorced from the right to life as a core minimum right of all the rights in the constitution.[86] The content of the right to access health care or the threshold thereof can only be exercised if the person is alive; therefore the Constitutional Court's failure to recognise the minimum core in interpreting socio-economic rights is unfortunate.[87]

The interest protected by the provisions of section 26 and 27 of the Constitution is survival, which may not necessarily be achievable progressively.[88] The Constitutional Court avoided the provisions of section 11 of the Constitution, the right to life, of which should have been the main focus, not the interpretation of section 27, or rather the interplay between the two rights. If section 27 were to be interpreted

[84] *Ibid* Article 2.

[85] Russel S *supra* n (79) at 15. See also the General Comment 3 of the Committee on Economic, Social and Cultural Rights (CESCR) on interpretation of minimum core or threshold imprinted in Dowel-Jones M (2004) *Contextualising ICESCR: Assessing the Economic Deficit* Martinus Nijhoff at 21, See also Liebenberg *supra* n (39) at 366; see also Kapindu RE "Social Protection for Malawian Migrants in Johannesburg: Access, Exclusion and Survival Strategies" (2011) *AHRLJ* 93; Yeeshanew SA "Approaches to Justiciability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples Rights: Progress and Perspectives" (2011) 11 *AHRLJ* 317.

[86] On survival requirements see Menghistu *supra* n (2) pp 63-83; see also Bilchitz *supra* n (2) at 12-13, Ramlogan R (2011) *Sustainable Developments: Towards a Judicial Interpretation* Martinus Nijhoff Leiden Boston at 148-152; Johnson BR (2011) (Ed) *Life and Death Matters* 2nd Ed at 9.

[87] See Scott C & Macklem P 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *Univ of Pennsylvania* LR1 at 77; Liebenberg S "Socio-Economic Rights" in Chalskalson M et al (1996) *Constitutional law of South Africa* at 41-43, and De Vos P '*Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution* (1997) 13 *SAJHR* at 67, 97, and Scott C & Alston P "Adjudicating Constitutional Priorities in a Transformational Context: A Comment on Soobramoney's legacy and Grootboom's Promise" (2000) 16 *SAJHR* 206, 250.

[88] The Right to Life cannot be achieved progressively as human being die once, but right to housing can be achieved over a period of time as people can be sheltered in community halls or temporary structures but the same cannot be said about the outbreak of deadly disease, in the latter instance the state must act quickly as the immediate threat is to human life. See also Du Plessis LM and De Villiers JR "The Personal Rights: Life, Freedom, and Security of the Person, Privacy, and Freedom of Movement" in Van Wyk, Dugard, De Villiers and Davis *supra* n (5) at 215.

narrowly, then section 11 of the Constitution would not be important anymore. Its main objective, the right to life, would be valueless if not enforceable.

In this context, section 7(2) of the Constitution means the State must protect, respect and promote the right to life of everyone. The State protects the right to life by, amongst others, providing necessary medical treatment to preserve and prolong life. The State respects the right to life by enforcing the civil and political rights such as the right to privacy, the right not to be subjected to inhuman punishment. The State protects life by providing drugs to those whose lives are under threat, such as the unborn babies of HIV positive mothers to avoid pre-natal mother-to-baby transmission. So in our case here, the appellant's life was threatened by chronic incurable renal disease, but his life could have been prolonged artificially by dialysis had the Constitutional Court realised that the consequences of not granting the order would be death.

The whole idea of a person being admitted to hospital and treated so as to preserve life, without any further interpretation, is the idea behind section 11 of the Constitution: the right not to die or the right to continue living.[89] Thus, the right to life is a constitutional right. The right in section 11 of the Constitution is preservable by medical treatment in case of illness. The medicals treat life that is in danger of fading to comply with the provisions of this section. This section is concerned with the protection and preservation of life, no matter the conditions surrounding that life. The Constitutional Court avoided the provisions of this section and used section 27 to narrow the right to life[90].

The reasoning by the Constitutional Court that the right to have access to health care services is subject to section 27(2) of the Constitution poses a perpetual avoidance of implementing the rights in this section. How would an ordinary person know if the state has available resources to meet its Constitutional obligations? What if the State deliberately allocates small resources to health, would the Court be in a position to know if the State allocated insufficient resources to health? The Court

[89] See Ramcharan B.C in Ramcharan (1985) *The Right to Life in International Law*, Martinus Nijhoff Publishers, on the concept and dimensions of the right to life, at 6-7.
[90] *Ibid* at 6, Ramcharan correctly argues that "narrow approaches to life are no longer adequate and

could have considered that there would be funds from other budgeted items rather than to allow government to use lack of resources as an excuse for its failure to plan properly.[91] The KZN Health overspent their budget in 1996/1997 and anticipated the same in 1998/99, a clear sign of incompetence on the part of government in its financial management and planning.

The other disturbing reasoning by the Constitutional Court and the respondent was that only patients waiting for kidney transplant were eligible to be treated in the renal unit. There was no difference at all between the appellant, and patients waiting for kidney transplant, and the donor. Such patients are received in the renal unit to have kidney transplant later when they have found the donor simply because they would die if not on dialysis treatment. This is what the appellant sought, not to die. The appellant's life was in danger just like that of the patients waiting for kidney transplant. The appellant's disease was chronic and incurable, but this is also true of patients waiting for a kidney donor: In cases where a donor is not found for a very long time, they would remain on kidney dialysis and that would definitely have serious cost implications. For as long as the donor is not found for patients waiting kidney transplant, they were in chronic incurable disease and that would cost substantial amounts of money. If the cost element was the deciding factor, as the Constitutional Court wants us to believe, then the law treated Mr. Soobramoney unfairly. Patients who wait for a donor for a very long time are in the same position as Mr. Soobramoney, as costs for dialysis would be wasteful expenditure if a donor is not found. Section 9 of the Constitution 1996 provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law'; section 11 provides that 'everyone has the right to life'. The availability of resources should not have been the deciding factor as it has been shown that the state was prepared to allocate funds for patients waiting for a kidney donor for an indefinite period of time.

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that indeed the right to life as a modern concept goes considerably beyond the traditional view".

[91] Section 27(2) of the Constitution provides that state must make reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these rights, so resources referred to here is the state's resources not the hospital or provinces' resources, therefore the Court misinterpreted the constitution. On available resources see Liebenberg *supra* n (39) at 366 and General Comment 3 of CESCR imprinted in Dugard J (2011) *International Law: A SA Perspective* 4th ed Juta Leiden at 331.

This was an incorrect interpretation, because the right to life (viewed on its own) was rendered meaningless on this occasion. The situation may be slightly different in cases such as the death penalty, euthanasia and abortion, because in these instances the right to life can be applied and enforced directly without relying on the enforcement of other associated socio-economic rights.

In conclusion, the Constitutional Court did not value human life, as it preferred a restrictive or narrow interpretation of the right to life. The Court did not want to link the right to life to other associated rights in the Bill of Right and only checked the reasonableness of the hospital policy. The Court did not also determine whether the constitutional right was infringed or threatened, instead it only focused its attention on the proceduralisation of socio-economic rights enforcement, and thus it restricted its interpretation of the right concerned. Had the Court used the two-stage approach to the dispute in the case, it would have determined whether the alleged infringement of threat to human life was justifiable or not. The threat to life would not have been justifiable in terms of section 36 of the Constitution. The Court would have realised that the Hospital Admission Policy would not have been of general application as other chronic patients were treated because they were waiting for a kidney donor. The Court would also not be able to point the less restrictive way of limiting the right to life. While the appellant's right to medical treatment was denied in *Soobramoney* due to a lack of resources, the same right was not denied to prisoners suffering from a chronic disease, HIV/AIDS.

4.4. *Van Biljon v Minister of Correctional Services*

Other people whose right to life may be threatened by the limitation of the right to access to medical treatment, are those infected by HIV/AIDS. In *Van Biljon* [92] HIV positive inmates at Pollsmoor prison in the Cape sought an order compelling the Department of Correctional Services, the Prison Authorities and the Western Cape Government to provide them and other HIV positive prisoners with anti-viral drugs.[93] The anti-viral medication had been prescribed for the first and the second applicants

[92] *Van Biljon v Minister of Correctional Services* 1997(4) SA 441 (C).
[93] *Ibid* par [1] 443J-444A-E.

but had not been provided to them by the Prison Authorities.[94] The applicants relied on the provisions of section 35(2) (e) of the Constitution. The relevant part of the section provides that:

> everyone who is detained, including the sentenced prisoner, has the right to…conditions of detention that are consistent with human dignity, including the at least exercise and the provision, at the state expense, of adequate accommodation, nutrition, reading material and medical treatment.

The respondents' case was argued on the basis that 'adequate medical treatment for the prisoners' had to be determined by, or had to be of a similar standard to, the treatment provided to patients outside prison at the Provincial Hospital.[95] Evidence tendered by their expert witness was that patients at Provincial Hospitals in a condition similar to that of the applicants were not provided with anti-viral medication at the state's expense, mainly because of budgetary constraints.[96]

It was the applicants' case that, since the right to adequate medical treatment was guaranteed to prisoners in terms of section 35(2)(e) of the Constitution, prison authorities could never be heard to say that they were unable to provide such treatment as a result of budgetary constraints or lack of funds.[97] It further argued that it was the Department of Correctional Services and not the provincial hospitals, which was responsible for providing health services to the prisoners, and that the respondents had not made out a proper case that the treatment claimed by the applicants was unaffordable to the Department.[98]

Lack of funds could not be an answer to a prisoner's constitutional claim to adequate medical treatment,[99] and that therefore, once it was established that anything less than a particular form of medical treatment would not be adequate, the prisoner would have the constitutional right to that form of treatment.[100]

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[94] *Ibid* par [18] 447F.
[95] *Ibid* par [43] 453F.
[96] *Ibid* par [44] 453G.
[97] *Ibid* par [48] 455B.
[98] *Ibid* par [50] 455G.
[99] *Ibid* par [49} 455C.
[100] *Ibid* par [49] 455D.

The Court concluded that the applicants had established that anti-viral therapy was, at present, the only prophylactic and that the benefits of such treatment, in the form of extended life expectation, and enhanced quality of life, were such that treatment claimed by first and second applicants had to be regarded as no more than adequate medical treatment to which they were entitled in terms of section 35(2) (e) of the Constitution.[101] The respondents were accordingly ordered to provide the first and the second applicants with the anti-viral medication, which had been prescribed for them for as long as it was prescribed for them on medical grounds.[102]

4.4.1. Analysis of Court's Decision and Reasoning

The Cape High Court interpreted the Constitutional text correctly in this matter. The Court referred on several occasions to the right to life inherent in the right protected.[103] However, there were a number of other issues raised during the proceedings, which the court misinterpreted. The first example of incorrect interpretation on the part of the learned judge was the court's concurrence with the applicants' argument that it was the Department of Correctional Services and not the provincial hospital that was responsible for providing health services to all prisoners. Although the Department of Correctional Services was responsible for providing health services to the prisoners in prisons, the funding is from one national revenue fund.[104] The section the applicants relied on to claim their constitutional right to adequate medical treatment refers to the 'State expense' and not the Departmental expense. The Constitutional claim was against the State, not the Department. The issue of who provides services was irrelevant in interpreting the Constitution as the Constitution consistently refers to "State" not "Department". The Department of Correctional Services is an organ of state in terms of section 239 of the Constitution, the Court artificially differentiated between Provincial Hospitals and the Department of Correctional Services. The Constitution refers to State resources not to a particular Department; lack of resources should therefore be that of the state not a

[101] *Ibid* par [60] 458H.
[102] *Ibid* par [65] 459I-J.
[103] *Ibid* par [12] 446D Court said that treatment enhanced the patient's quality of life and extends the patient's life expectancy and par [28] 449F Court mentioned the survival and quality of life of the patients.

particular institution.[105]

On the contention that the State owes no higher duty to prisoners than to citizens in general,[106] the Court misinterpreted the Constitution. The Court agreed with the applicant's contention that indeed the state owed higher duty of care to HIV prisoners than to than to a citizen who suffers from the same infection. The reason for the Court to agree to this contention was that the Constitution itself creates a difference between prisoners and people outside prison. This interpretation is not correct. If section 35(2) (e) makes the distinction, then there is a conflict between section 9 and section 35(2)(e) of the Constitution.[107] The differentiation would not serve the purpose as the objective here is to preserve life, lives of people in prison and people outside should be treated the same.

The decision of the Cape High Court indirectly means that people outside prison who are HIV positive are subjected to the restriction of section 27(2) and the restriction of 'available resources' in section 27(2) would not apply to the prisoners by virtue of them being inside the prison.[108] Then the last question for this part is, would Mr. Soobramoney have won his case if he had appeared before the Cape High Court? Or would he have won his case if he had been a prisoner? Before the analyses and contrast the two cases, namely Van Biljon and *Soobramoney*, it is imperative that another case involving the provision of life-saving medication is discussed.

4.5. *TAC v Department of Health*: The Right to Life: Provision of Lifesaving Drug

Menghistu says that "there are two main ways of depriving the right to life, namely, by executing, disappearance, torture and various forms of cold-blooded murder, and secondly by starvation and lack of fulfillment of basic needs such as food, basic

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[104] S 213 of the Constitution.
[105] *Soobramoney supra* (n) 1 par 775H-J and 776A-B.
[106] *Van Biljon supra* (n) 92 at par [51] 456C.
[107] *Harksen v Lane NO and Others* 1998(1) SA 300 (CC).
[108] The restriction of 'available resources' in section 27(2) would not apply to them by virtue of being incarcerated in terms of section 35(2)(e) of the Constitution. Section 35(2)(e) would prima facie confer more rights to prisoners than to the other people in the community.

health facilities and medical care".[109] The right to life has been described by various authors as the most fundamental, the most primordial and supreme right of all human rights.[110] In 3.1 above, it was argued that the right to medical treatment should be interpreted to mean 'the right not to die' from treatable causes, mainly because it can only be enjoyed by a living human being. However, there is a situation where life in earnest (developmental stage) could be protected, that is the life of the unborn persons. Does the foetus have the right to life?

In 4.1 above it is further argued that the right to medical treatment was in fact an indirect right to life. People seek medical treatment when they are sick in order to preserve, protect and prolong their lives, thus the right to life. The socio-economic rights in the Constitution support the right to life. The right to access to health care services is a socio-economic right enshrined in the constitution, s 27(1) (a) reads "Everyone has the right to have access to health care services, including reproductive care…"

This right is immediately qualified by subsection (2) in that the State must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of the right.[111] However, there is a situation where the access to health care becomes a survival requirement, such as the case of HIV AIDS patients who need AZT to extend their life medically. The Constitutional Court had an opportunity to adjudicate on the access to health care issue in *Treatment Action Campaign (TAC) and Others*.[112]

This case dealt with the provision of life saving anti-retroviral drugs to pregnant mothers who did not have the means to afford these drugs themselves. This case was based on the above-mentioned section 27(1) (a) of the Constitution, which – as stated - is limited by the provisions contained in subsection (2), namely that the

[109] Menghistu *supra* n (2) at 63.
[110] *Ibid*; see also Bajwa DK (1994) *The Right to Life* at 1, Deshta S & Deshta K (2003) *Fundamental Human Rights: Right to Life and Personal Liberty* at 3, *Makwanyane supra* n (2) – see J O'Regan paras 326-7 or 506D-F.
[111] Section 27(2) of 1996 Constitution.
[112] *Treatment Action Campaign supra* n (65); see also Onyemelukwe C "Access to Anti-Retroviral Drugs as a Component of the Right to Health in International Law: Examining the Application of the Right in Nigerian Jurisprudence" (2007) *7 AHRLJ* 446.

State must take reasonable and legislative and other measures, within its available resources, to realise these rights progressively.

In this case the applicant claimed the right to have access to medical care services because they could not afford the drugs themselves. In brief, the case started as an application in Pretoria High Court on 21 August 2001.[113] The applicants were a number of associations and members of the civil society concerned with the treatment of HIV/AIDS and the prevention of new infections. The principal actor among them was the Treatment Action Campaign (TAC).[114] The Government had devised a programme to deal with the mother-to-child transmission of HIV at birth and identified Nevirapine as its drug of choice for this purpose.[115] However the programme imposed a restriction on the availability of Nevirapine in public health sector to 18 research and training sites only.[116] The drug was however readily available in the private health sector. Mothers who stayed outside the training and research sites could not access the drug even if the doctor so ordered.[117]

The applicants contended that measures adopted by Government to provide access to health care services to HIV positive pregnant women were deficient in two material aspects. Firstly, they prohibited the administration of Nevirapine at public hospitals and clinics outside the research and training sites. Secondly, they failed to implement a comprehensive programme for the prevention of mother-to-child-transmission of HIV.[118]

The legal question before the court, therefore, was not whether the socio-economic rights were justiciable, but whether the applicants had shown that the measures adopted by the government to provide access to health care services for HIV positive mothers and their babies fall short of its obligations under the Constitution.[119]

[113] *Ibid* par [3] at 728G and 729A.
[114] *Ibid* par [3] at 728G.
[115] *Ibid* par [4] 729B-C.
[116] *Ibid* par [11] 732H-I.
[117] *Ibid* par [17] 733H-I.
[118] *Ibid* par [44] 742C-D.
[119] *Ibid* par [25] 736H.

The High Court ordered the Government to make Nevirapine available to pregnant women with HIV who give birth in the public health sector, and to their babies in public health facilities to which the programme had not been extended. The Minister of Health appealed against this decision to the Constitutional Court.

The appeal to the Constitutional Court was directed at reversing the orders made in the High Court against the Government. The High Court had found that the Government had not acted reasonably in addressing the need to reduce the risk of HIV positive mothers transmitting the disease to their babies at birth. The Constitutional Court declared that government had to devise and implement (within its available resources) a comprehensive and co-coordinated programme, remove restrictions that prevent Nevirapine from being made available, take reasonable measures to extend testing and counselling facilities at hospitals and clinics throughout the public health sector.[120]

In this case resources were not an issue since the Nevirapine was offered free of charge by the manufacturer. What was important to the Court was whether the government programme, which restricted the provision of the lifesaving drug, was reasonable or not. The High Court and the Constitutional Court rightfully concluded that the policy was unreasonable and discriminatory. However, the crux of this case should not have been the reasonableness of the policy *only*, but should also been about the importance of life. The drugs sought by HIV pregnant women were to be used to save the lives of their unborn babies.[121]

4.5.1. Analysis of the Court's Decision and Reasoning

The right to medical treatment or health care supplements the right to life. When a disease threatens the right to life, the patient invokes the right to medical treatment or health care to save his life. So, effectively, the decision of the Court on the right to

[120] *Ibid* par [135] 764H-J and 765A-J.
[121] In par [72] 748I Court mentioned 'babies' lives' in passing in the context of policy evaluation; in paras [73] at 749A-b, [80] at 750C-D, [93] 754C-D and [131] 763I the Court's tone did not indicate concern about the lives to be lost but contextualised lives in passing dealing with the policy. It never mentioned the consequences of government policy, fearing that would remove its proceduralisation of adjudicating socio-economic rights.

access to health care services is a decision on the right to life. The legal question in this case should not have been only whether or not the policy was reasonable or not, but also what would happen to the children of HIV positive mothers outside the research and training sites if the policy were to continue to apply?

HIV/AIDS, like any other deadly disease of our times, results in death if medical treatment is not provided quickly. The HIV positive mothers and their new born children outside the research and training sites would perish if the policy continued unchanged. This would be the result of the policy, no other. The right of access to health care services and the right to medical treatment indirectly enforce the right to life.

The Constitutional Court impliedly acknowledged that this case was about life.[122] The Court rightfully confirmed the decision of the High Court but did not expressly state that the right to have access to health care services and the right to medical treatment were the rights to life. This is the reason the Constitutional Court arrived at the wrong decision in *Soobramoney*. The Constitutional Court does not, in its adjudication of the socio-economic rights cases, link the other rights in the Bill of Rights with the socio-economic rights. Socio-economic rights are in fact survival rights, unlike many other rights in the Bill of Rights.

The right to medical treatment in section 27 of the Constitution supplements the right to life. Section 11 of the Constitution should not be considered on its own, because for it to be infringed (except in the case of a direct infringement, such as murder) other rights in the Bill of Rights must be infringed as well, especially socio-economic rights. The infringement of the right to have access to health care services may lead to the infringement of the right to life. If those HIV positive mothers and their new born babies were not provided with Nevirapine they would definitely die, thus infringing their constitutional right to life.

[122] See *supra* n (121).

4.6. Inconsistency in Judicial Decisions

Inconsistency occurs when the courts of law, while interpreting the same text, reach different conclusions in adjudicating the same subject matter.[123] In the cases discussed above, two different courts interpreted the right to medical treatment of people in different positions in society. Although the courts were interpreting different provisions of the Constitution, in both cases the applicants could not afford medical costs, as a result which they would have died if the order was not granted. The Constitutional Court did not give the right to access medical treatment any measure of life, while the High Court did give the prisoner's right to medical treatment a certain measure of the right to life. The one was in prison and the other was outside the prison. The main feature of the cases was the provision of medical treatment at the State's expense. The decisions of the courts were inconsistent in that in both cases the patients wanted to preserve and extend their lives medically and were suffering from chronic incurable diseases. In both cases it was possible to extend or prolong the life of the patient medically but the treatment would be expensive, and if the medical treatment sought were not provided, the patients would die.

In my interpretation, the right to medical treatment should have been read into the right to life; the applicants begged the courts to force the State to prolong their lives medically. In Soobramoney's case the Constitutional Court found that the State, by refusing a patient admission to its renal unit for dialysis purposes to preserve his life, had not infringed his constitutional right to medical treatment,[124] notwithstanding the fact that the applicant will, if not admitted, die.

The Constitutional Court interpreted the Constitution narrowly so as to exclude the right to life. In *Makwanyane* the court held that whilst paying due regard to the language that has been used, an interpretation should be generous and purposive and give expression to the underlying values of the Constitution.[125] The generous

[123] Unreported Case *S v Zuma*, Pietermaritzburg High Court and the Supreme Court of Appeal on interpretation of section 179(5)(d)(i)-(ii) on whether the accused person had to be consulted or allowed representation when the NPA review its decision to prosecute. The High Court said the accused had to be offered an opportunity to make representation before he can be charged again, the Supreme Court of Appeals said he did not.
[124] *Soobramoney supra* n (1) pa [36] 778B.
[125] *Makwanyane supra* n (2) at par [9] 403D.

approach recognises that the supreme constitution cannot be interpreted in a narrow and legalistic way.

The purpose of section 11 of the Constitution is to preserve and promote life. Had the Constitutional Court interpreted sections 11 and 27 of the Constitution generously it would have reached a different conclusion. The purpose of the application to the Constitutional Court was to save life. The Constitutional Court incorrectly or artificially differentiated the quality of life in Mr. Soobramoney and the life of a healthy person. The Court was really not concerned with life, but with the quality of life. Its acceptance of lack of funds as being a good reason for not admitting the applicant and the Court's acceptance that it would be better to use the scarce resources on more lives than one, meant the Constitutional Court attached certain monetary value on life but did not quantify it.

On the other hand, in the *Van Biljon* case, the Cape High Court reached a different decision on the right to medical treatment. The applicants sought an order to force the State to provide the prescribed medical treatment at the State expense. The State raised a lack of funds as a defence and the court said that in principle lack of funds could not be an answer to a prisoner's constitutional claim. In *Soobramoney*, the Constitutional Court accepted lack of funds as a defence. The High Court concluded in *Van Biljon* that it was the Department of Correctional Services and not the provincial hospitals which was responsible for providing health services to prisoners, since no case had been made by the Department of Correctional Services that, as result of budgetary constraints, they could not afford to provide the prescribed anti-viral medication, failure to provide such treatment to the applicants amounted to the infringement of their constitutional right.

4.7. Conclusion: The Right to Access Health Care Services

It is submitted that the way in which the Constitutional Court interpreted the Constitution in *Soobramoney* may still effectively deter the taking away of life through an act of killing, but it does not seem to expressly deal with the taking of life

by the denial of the essential elements that sustain the life of human beings.[126] Access to medical treatment is a survival requirement. Lack of basic needs such as food, basic health facilities and medical care may deprive one of his life,[127] therefore socio-economic rights in the Bill of Rights should be seen as survival requirements in some instances. The Constitutional Court did not perceive the right to medical treatment as a survival requirement and this was unfortunate, because the issue before them was that the applicant would die if not admitted. The Cape High Court, on the other hand gave the socio-economic right of prisoners some measure of the right to life.[128]

The Constitutional Court and the High Court's perspective on the right to life differ; the former is too restrictive in interpreting the constitutional provisions with bearing on the right to life, while the latter is generous in interpreting the Constitution. The Constitutional Court's perspective on the right to life lacks the recognition of the magnitude of the interest protected by the right to life and socio-economic rights. Human life, the right protected and preserved indirectly by the socio-economic right of access to medical treatment, is the mother of all rights in the Constitution.[129] Therefore it is submitted that the courts when interpreting the Constitution have to take cognizance of the nature of the right protected. The Court could have interpreted the right to life generously and determined the ambit of the right.[130] Court failed to use International Law as required by section 39(1) (b) and consequently did not use the minimum core obligation recognised by the International Covenant on Economic, Social and Cultural Rights. By using the reasonableness tests to determine whether there had been compliance with the Constitution, the Court proceduralised the socio-economic right in question, and ignored the content of the right.[131]

Because of the Constitutional Court's restrictive interpretation of the provisions

[126] Menghistu F *supra* n (2) at 63.
[127] *Ibid*.
[128] *Van Biljon supra* n (92) par [12] 446D.
[129] Menghistu F *supra* n(2) at 63.
[130] Mdumbe *supra* n (70) at 467.
[131] Pieterse M "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 381 at 406-407.

relating to socio-economic rights, precious life was lost in *Soobramoney*. It is therefore imperative to repeat the words of Rautenbach:

> after all, the Constitution is supposed to be a living document, and unless one understands and accepts the indeterminacy and evolving nature of the constitutional interpretation and constitutional jurisprudence, there is the danger of falling back into another new stifling orthodoxy; not sovereignty of parliament, but pronouncement of constitutional oracle of Brammfontein.[132]

In conclusion, it is submitted that the Constitutional Court and High Courts, when adjudicating socio-economic rights, fail to consider the consequences of their decisions and they do not give socio-economic rights any measure of the right to life even though such denial may result in death. The perspective of the Court on the right to life is too narrow. However, the Court interpreted the right to life in *Makwanyane*, the death penalty matter, generously, purposively and contextually to give expression to the values underlying the Constitution, and to read the right to equality, the right to life and the right to dignity as together giving the meaning to the right to inhuman and degrading treatment or punishment.[133] The Court interpreted the provisions of the Bill of Rights widely to secure the prisoners the full measure of protection of the constitutional provisions relied upon.

Apart from the right to have access to health care services as survival requirement, the right to life can also be threatened directly by abortion, death penalty and euthanasia. The right to life in the context of abortion, euthanasia and death penalty is discussed and dealt with in the next chapter.

[132] Rauntebach C, Jansen van Rensburg L, Venter F *Politics* (2004) *Socio-Economic Issues and Culture in Constitutional Adjudication* North West University at 20.
[133] *Makwanyane supra* n (2) para [10] at 403 G-H and 404 A-B and note 11.

CHAPTER 5
THE RIGHT TO LIFE IN THE CONTEXT OF ABORTION, EUTHANASIA AND DEATH PENALTY

5.1. Introduction

Apart from the right to have access to health care services as survival requirements, the right to life can also be threatened directly by abortion, death penalty and euthanasia.[1]

These three institutions place people in different, contrasting and precarious positions in the course of their lives. In the first case the foetus is not born yet, but its development is terminated in the early stages of pregnancy by his mother. In the second case, euthanasia, the person is in a permanent coma or in a vegetative state, or is terminally ill with full capacity and he decides to request the others to assist him to die; or it may be that family members, or even the physician, may out of compassion let him die by disconnecting the life maintenance machine or ceasing the medication. In the last case, the death penalty, the convicted person is sentenced to death by a court of law whereby he is executed as a form of punishment. The discussion on death penalty is not about its validity in South Africa but the discussion is based on a decision taken in the context of the right to life and the consistency of the courts in this regard.

The question posed is a logical one: Why does the law protect the life of a person who has taken someone's life,[2] and yet it allows a pregnant woman to terminate the life of a developing, unborn, human being.[3] I discuss the three topics below whereby I contrast and compare the different positions of human life and its ultimate ending. There seems to be a contradiction as the law allows abortion which does not support the right to life; it also allows passive euthanasia which does not support life, and finally – it disallows the death penalty which (if allowed) would not support life.

[1] Jayapan defines the right to life to mean the duty to live, see Jayapan N (2000) *Human Rights*, New Delhi Publishers at 5-6; see also Van Oosten F "Financial Resources and Patients Right to Health Care: Myths and Reality" (1992) 32 *De Jure* 1 at 4.
[2] *Makwanyane and Others v State* 1995 3 SA 391 (CC).
[3] *Christian Lawyers Association v Minister of Health and Others* 1998 (4) SA 1113 T.

5.2. Abortion

Abortion has been the issue of controversy for a long time. Some have argued for and some have argued against abortion. Abortion is a method of terminating a developing life. Abortion ends life, thus it is, in my view, in conflict with the right to life enshrined in both the 1993 and 1996 Constitutions.[4] Some people argue that abortion is not in conflict with the right to life because the foetus does not enjoy the right to life until - at least - birth. Then, the question is: when does life begin, at conception or at birth? The exact moment when life begins would tell whether abortion terminates life or potential life.

The anti-abortionists argue that abortion terminates life; on the other hand the pro-abortionists argue that the foetus does not enjoy the right to life.[5] Clearly there are competing rights: those of the pregnant woman and that of the embryo. The focus of this dissertation is not the evaluation of pro-abortion and anti-abortion arguments; rather - the focus is on the right to life in perspective. It is the right to life in the court's perspective, the question of how the court interprets the right to life that is the right not to die unnaturally. The writer is neither pro- nor anti-abortion; abortion is used to argue the point that the courts seemingly fail to give the right to life full recognition and conclude that while there is life in an embryo; life can be limited by the application of section 36 of the 1996 Constitution.

5.2.1. Abortion Defined

Abortion, according to Dworkin, means deliberately killing a developing human embryo.[6] Abortion terminates life in earnest, Dworkin argues.[7] Dworkin acknowledged that there was life in an embryo. One may not kill something that is dead. What is important in Dworkin's definition of abortion is the usage of the word 'killing': in this context killing is associated with life. Therefore, according to

[4] Section 9 of 1993 Constitution and section 11 of 1996 Constitution.
[5] Judith J &Thomson A *"Defence of Abortion"* in Bennet, B (ed) (2004) *The International Library of Medicine, Ethics and the Law: Abortion* at 28, Biggers JD "Generation of the Human Rights" in Bondeson WB, Engelhardt TH Jr, Spicker SF & Winship DH (ed) (1983) *Abortion and the Status of the Foetus* at 31, see also Glantz L in the same book at 107.
[6] Dworkin RM (1993) Life's *Dominion: An Argument on Abortion and Euthanasia* Harper Collins at 3.
[7] *Ibid.*

Dworkin's definition of abortion, the embryo is alive, although it is still developing. Developing in this context means growth due to the natural cell division and elongation of the live organism.[8] Abortion stops the development of the embryo, taking life out of it. The question of when we begin to exist is much more philosophical, scientific and religious than real. It is more about the individual's perspective on life than reality.

McMahan has developed an interesting theory on the issue of the beginning of life.[9] MacMahan assumes that we are human organisms.[10] Human organisms begin to exist before they acquire a mental life sufficiently complex to allow them to qualify as persons, and it is equally clear that they may lose the capacity for self-consciousness and therefore cease to be persons, and yet not only continue to exist but also remain alive and conscious.[11] This may be the reason why Dworkin thinks both abortion and euthanasia are choices for death.[12]

Abortion is the waste of the start of human life; death intervenes before life in the earnest has even begun.[13] Dworkin was right, abortion is a waste of life; and the issue of when life begins or whether the foetus has the right to life or any interests in its potential for life, become irrelevant. Life begins when the embryo is formed, that is at conception. Regardless of whether the view that life begins at birth is correct or not, there will still be an inevitably linkage of abortion and life.[14] Abortion is in fact termination of an embryo which would have developed into a human being had it

[8] Jordaan DW "The Legal Status of the Pre-Embryo in the Context of Genetic Revolution" (2005) 122 *SALJ* 237 at 238. Jordaan admits that the pre-embryo is alive and human, but denies it human life, at 241, also Slabbert MN (2000) *The Human Embryo and Foetus: Constitutional and Other Issues* (LLD Thesis Unisa) at 210; Kaczor CR (1969) *The Edge of Life: Human Dignity and Contemporary Bioethics"* Springer, Dordrecht at 41-46; Gillon R "Is there a new ethics of abortion" (2001) 27 *Journal of Medical Ethics* , where he argues that human could not answer the question when does foetus acquire personhood at 3-7; see also Du Toit AP in Vorster WS (ed) 1988 *The Right To Life: Issues in Bioethics* Unisa at 1-5 on the origin and meaning of life,

[9] MacMahan J (2002) *The Ethics of Killing-The Problems at the Margins of Life* at 24-25; see also Biggers JD "Generation of Life" *supra* n (5) at 31 where he argues that life is a continuous cycle so defining the beginning and the end of life not necessary, see also Pillay R "The Beginning of Personhood: Is South African Law Outdated?" (2010) 2 *Stell Law Review* 230.

[10] *Ibid* at 24.

[11] *Ibid* at 25, see also Sarvis B & Rodman H (1974) *The Abortion Controversy* at 15.

[12] Dworkin *supra* n (6) at 13.

[13] *Ibid* at 179.

[14] Steinbock B (1992) *Life before Birth* explains that as potential persons, embryos and foetuses have 'symbolic values' at 41; see also Kruuse HJ "Fetal Rights? The Need for Unified Approach to the Fetus in the Context of Festicide (2009) 72 *THRHR* 126; Du Plessis LM "Jurisprudential Reflections

not been terminated at that particular phase in its development, so abortion terminates life that is not yet recognised legally, but it is life nonetheless. In South Africa abortion is regulated by the Choice on Termination of Pregnancy Act 92 of 1996.

5.2.2. Abortion Regulated

The Act defines termination of pregnancy as the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman.[15] The Act is silent on what constitutes the contents of the uterus. This Act allows the termination of pregnancy under certain circumstances listed in section 2. The Act allows termination of pregnancy, upon request by a woman during the first 12 weeks of the gestation period of her pregnancy. From the 13th week up to the 20th week of gestation period, the pregnancy may be terminated if the medical practitioner, after consultation with the pregnant woman, is of the opinion that the continued pregnancy would pose a risk of injury to the woman's physical or mental health, or there exists a substantial risk that the foetus would suffer from a severe physical or mental abnormality or, the continued pregnancy would significantly affect the social or economic circumstances of the woman or the pregnancy resulted from rape or incest.

After the 20th week of gestation, pregnancy may be terminated if a medical practitioner, after consulting with another medical practitioner or registered midwife, is of the opinion that continued pregnancy would endanger the woman's life, or would result in a severe malformation of the foetus or, would pose a risk of injury to the foetus.

Section 2(1) of the Act is the most controversial provision of the Act. It allows a woman to terminate pregnancy during the first 12 weeks on request. Effectively the Act allows a woman to fall pregnant, but if she decides that she does not want a baby, she can terminate the pregnancy for as long as it is still within the first 12

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on the Status of Unborn Life" 1990 *TSAR* 44.

[15] See section 1 of Choice on Termination of Pregnancy Act, Act No. 92 of 1996.

weeks. In Dworkin's definition of abortion,[16] this would amount to a deliberate killing of the developing human embryo on request. The issue of life and foetus came before the Transvaal Provincial Division in *Christian Lawyers Association v Minister of Health and Others*.[17]

5.2.3. *Christian Lawyers Association v Minister of Health*

In this case, the Court was called upon to declare the entire Act to be unconstitutional.[18] The plaintiffs contended that life begins at conception, that abortion terminates the life of a human being.[19] They contended further that section 11 of the Constitution applies to an unborn child from the moment of conception.[20] Therefore the Act is in conflict with section 11 of the Constitution in that it allows the termination of human life at any stage after conception and at any stage before birth.[21] The Act is consequently unconstitutional and must be struck down entirely, the plaintiffs argued.

The defendants noted an exception, in the notice of exception the defendants alleged that a foetus is not a bearer of rights in terms of section 11 of the Constitution, that section 11 of the Constitution does preclude the termination of pregnancy in the circumstances and manner contemplated by the Act and that the right of women to choose to have their pregnancy terminated in the circumstances and manner contemplated by the Act is protected under ss 9,10,11,12.14,15(1) and 27(1)(a) of the Constitution.[22]

The Court upheld the exception and dismissed the plaintiffs' claim.[23] The plaintiffs relied solely on section 11 of the Constitution, which provides that everyone has the right to life.[24] The Court said that there was no express provision in the Constitution

[16] Dworkin *supra* n (6) at 3.
[17] *Christian Lawyers Association supra* n (3).
[18] *Ibid* at 1116B-C.
[19] *Ibid* at 1116H.
[20] *Ibid*.
[21] *Ibid* at 1116I.
[22] *Ibid* at 1117A-B.
[23] *Ibid* at 1126G.
[24] *Ibid* at 1118C.

affording the foetus legal personality or protection;[25] consequently the word 'everyone' used in section 11 could not refer to a foetus or unborn child.

5.2.4. Analysis of the Court's Decision and Reasoning

The Court avoided answering the question whether abortion terminated human life or not.[26] The Court instead chose to deal with the issue of whether a foetus or embryo is afforded legal personality or protection;[27] however legal personality is not a prerequisite to possess life. Court could have acknowledged that abortion terminates life, however, that the right to life in such circumstances would be limited by section 36 of the Constitution. Whether or not a foetus has legal personality was irrelevant since the foetus is still in its mother's womb and shares personhood and any other rights with its mother. The question should have been about the foetus' life, potential or actual.

Meyerson explains that the court was correct in finding that the word "everyone" in section 11 of the Constitution did not apply to the foetus.[28] However, Meyerson disagrees with the judge's interpretation, as he believes that "everyone" is broader than "every person".[29] He generally agrees with the Court that a foetus does not have the right to life.[30] However, Meyerson gives the foetus a degree of value. It is the value of human dignity, which is most obviously under threat when abortion is permitted because it is hard to deny that the destruction of foetal life, although it violates no constitutionally protected subject's right, nevertheless undermines human dignity.[31] A foetus is not just like a bit of human tissue, comparable to something like appendix; it is a living human organism, whose destruction is not a morally trivial matter but something to be regretted.[32]

Meyerson acknowledges that there is life in the foetus, although the foetus itself is

[25] *Ibid*.
[26] *Ibid* at 1121H.
[27] *Ibid* at 1121H.
[28] Meyerson D "Abortion: Constitutional Issues" (1999)116 *SALJ* at 53.
[29] *Ibid* at 53.
[30] *Ibid* at 54.
[31] *Ibid* at 56.
[32] *Ibid*.

not constitutionally protected.[33] It is submitted that there is life in the foetus, which must be protected and not be terminated on request. Life starts at conception and as such it must be recognised from that moment. Life is a condition that distinguishes animals and plants from non-organic matter, including the capacity for growth, functional activity and continual change preceding death.[34] The fact that the foetus grows in the womb shows that there is life, a human life that is still developing, dependent and attached to its mother. After twelve weeks of gestation the foetus would have grown significantly compared to the tiny zygote at conception. Clearly there is life and that life is not protected constitutionally as the mother can still terminate it on request. The only time it is protected is at birth, if born alive.

The Court's decision was partially correct although it missed an opportunity to interpret the right to life generously and decide that abortion terminates life; that the Act is constitutional and that the foetus' potential right to life is outweighed by the woman's right of choice.[35] The woman has the right to make decisions concerning her reproduction and the right to security in and control of her body.[36] However, it must be pointed out that the foetus' right seems to be recognised gradually by the Act.[37]

5.2.5. Conclusion: Abortion

The Act seems to recognise the foetus' interest in its life gradually: during the first 12 weeks of gestation a woman can terminate her pregnancy on request; from the 13th week the Act takes away that unconditional right, since some restrictions on the termination are imposed. The interest of the foetus is directly proportional to the time period of gestation.[38] The Court acknowledged that the foetus was not the bearer of rights in terms of section 11 of the Constitution, while the Act imposed provisos on the termination of the pregnancy after the 12th week. Then the question is, would the

[33] *Supra* n (31).
[34] The Concise Oxford Dictionary 10th Ed at 820.
[35] Section 12(2) (a) and (b) of the Constitution 1996;
[36] Williams C (2010) *In the Words of Nelson Mandela* at 1 where Mandela is quoted as saying that women have the right to decide what they want to do with their bodies; for women's autonomy and right to respect for private life see *Llantoy Huaman v Peru* (2005) *HRLJ* 26, 348, *Tysiac v Poland* 2007 (28) HRLJ 228, *Pfeifer v Australia* 2007 (28) *HRLJ* 286.
[37] The longer the gestation the more strongly the interests of the foetus they become.
[38] Steinbock *supra* n (14) at 41.

woman be acting in contravention of the Act if she terminates her pregnancy after the first 12 weeks of gestation where the conditions listed in section 2 (1) are non-existent? If the answer is in the affirmative, it would mean that the foetus enjoys some kind recognition with some measure of protection.[39] If not, then it would mean that pregnant women could terminate pregnancy up until birth.[40]

In conclusion, the Court decision in this matter indicates that the Courts' perspective on the right to life is narrow; the Court failed to recognise the foetus' potential right to life during the first 12 weeks of the gestation period and beyond as it said that the foetus was not the bearer of rights.[41] Although the foetus might not enjoy constitutional protection, it is submitted that the foetus possesses life and its life starts at conception but that life can be limited by the application of other constitutional provisions.[42] The argument is not whether or not foetus enjoys legal protection as a human being, but whether the foetus possesses human life or not. It is further submitted that the foetus possesses life, and life does not begin at birth but at conception although it is only recognised legally at birth.[43]

Although the foetus possesses life, the value of the life in the foetus does not carry more weight than that of the pregnant woman, the pregnant woman should be allowed to terminate the foetal life on medical grounds,[44] and also she should be

[39] The Court should in fact recognise that there is life in the foetus, but that life is not constitutionally protected as against the pregnant woman.

[40] Even if a woman does not abort, it would still be problematic where the foetus is shot in the womb by someone else, would that someone not be guilty of murder as he would have taken a life, in this case see *S v Mshumpa* 2008 1 SACR 126(E) where the Court found that the act of killing the unborn baby was not an offence; see also *Masiya v Director of Public Prosecution* 2007 2 SACR 435 (CC); on the beginning of legal personality, see *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W); *Ex parte Administrator Estate Asmall* 1954 (1) PH G4 (N) and *Ex parte Boedel Steenkamp* 1962 (3) SA 953 (O).

[41] *Christian Lawyers Association supra* n (3*)* at 1121H; see also Slabbert MN (2000) *The Human Embryo and Foetus: Constitutional and other Issues* at 33 where she accepts that the foetus is not the bearer of the constitutional right to life.

[42] See section 36 of the Constitution.

[43] For recognition of personhood and the beginning of life, see Davel CJ & Jordaan RA (1998) The *Law of Persons* at 10-18; Kruuse *supra* n (14) at 136; see also Du Plessis LM *Jurisprudential Reflections on the Status of Unborn Life* (1990) TSAR 4; Van Niekerk (ed) (1991)*The Status of Pre Natal Life*; Kahn (ed) (1983) *The Sanctity of Life;* Meyerson D "Abortion: The Constitutional Issues" (1999) *SALJ* 50; Williams G "The Foetus and the Right to Life" (1994) 53 *Cambridge LJ* 71; Reeder JP Jr (1992) *Killing and Saving: Abortion, Hunger and War* 41-46, Judith and Thomson *supra* n (5) at 91 where he argues that very early abortion is the killing of a person; Moreland JP and Geisler NL (1990) *The Life and Death Debate: Moral Issues of Our Time* Praeger Publishers New York at 34-35.

[44] In *Llantoy Huaman v Peru* (2005) *HRLJ* 26, 348, a pregnant woman with an anencephalic foetus was refused permission to abort the foetus, she approach the UN Human Rights Committee. The

allowed to decide whether she would like to have the baby or not, it is entirely her private decision and should be given that autonomy.[45]

The point is that abortion terminates life; my argument therefore is not whether or not the foetus enjoys legal protection as a human being, but whether the foetus possesses life or not. It is therefore not relevant at what stage of the gestation period the pregnancy is terminated, what count is that life is terminated. Abortion terminates life that is not constitutionally recognised or protected. The Court's decision of recognising abortion does not support the right to life. The other institution which does not support the right to life is euthanasia.

5.3. Euthanasia

5.3.1. Euthanasia Defined

The second controversial institution that may have negative impact on life is euthanasia. Euthanasia means deliberately killing a person out of kindness.[46]

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committee was of the view that Article 17 of ICCPR was violated since the Article protects woman from interference in decisions affecting their bodies and their lives. See also *Tyslac v Poland* (2007) *HRLJ* 28, 228 where a pregnant woman intended to terminate her pregnancy on medical grounds but the hospital refused, the woman gave birth and her health deteriorated after birth. She took the matter to European Court Of Human Rights. She complained that her right to due respect for her private life and her physical and moral integrity had been violated. The Court concluded by six votes to one that there had been a violation of Article 8 of the Convention in that the state failed to comply with its positive obligation to secure to the woman the effective respect for her private life. On the value of life, see Hall RE and Jones CI "The value of life and the rise of health care spending" (2007) 122 (1) *The Quarterly Journal of Economics* at 39-72; Yorke J (2012) *The Right to Life and Value of Life* at 1; Viscusi WK "The value of life and health" (1993) 31 *Journal of Economic Literature* 1912-1946; Feldman AM "The value of life" available at www.econ.brown.edu/fac/fallen-feldman/files (site last visited 31 Oct 2012); Brannon I "What is a life worth?" available at www.cato.org/pubs/regulation/regu27n4/v27n4 (site last visited 15 Jan 2014) .

[45] *Roe v Wade* 410 US 113 (1973), District Attorney of Dallas County, where the Texas statutes prohibited abortion and were challenged constitutionally by Ms Roe in Texas on the basis that the statutes were vague and abridged her personal privacy. The Court decided that a woman's privacy allows her to terminate pregnancy within a regulated environment. see *also Doe v Bolton 410 US 179 (1973), Planned Parenthood of Central Missouri v Danforth Attorney General of Missouri* 505 US 833 (1992).

[46] Dworkin RM *supra* n (6), at 3, See also Glick HR (1992)*The Right to Die: Policy Innovations and its Consequences* at 98; Schwar TG, Loubser JD, Olivier JA (1988) *Forensic ABC in Medical Practice* at 24; Wennberg RN (1989) *Terminal Choices: Euthanasia, Suicide and the Right To Die* at 7-8; M Somerville MA (2001) *Death Talk, the Case against Euthanasia and Physician Assisted Suicide* 13-23; Humphrey D (1992) *Dying with Dignity: Understanding Euthanasia* at 111; Berger AS (ed) 1990 *To Die or Not to Die: Cross –disciplinary, Cultural and Legal Perspective on the Right to Choose Death* at 25, 31-34; Moreland JP (1990) *The Life and Death Debate: Moral Issues of Our Time* Praeger Publishers New York at 63-65.

Euthanasia can also be described as the action of bringing about a seriously suffering person's death by at least one person, where the motive for ending the life is merciful and the means chosen is as painless as possible.[47] Euthanasia amounts to the patient's right to die when he wishes to. The right to die in this context means the right not to continue living a miserable life, a life which is no longer as valuable as it used to be in the eyes of the suffering patient. Patients who want to die should not be kept alive against their will if they are terminally ill and in a permanent vegetative stage.[48] Persistence or permanent vegetative stage refers to the stage where a vegetative patient's cerebral cortex - the thinking, feeling part of brain is out of action.[49] The question to be answered when dealing with euthanasia cases is: Do terminally ill patients with no prospect of recovery enjoy the right to life or should we alleviate them of their suffering by letting them die, or should we actively assist them to die?

Active euthanasia occurs when one, whether on request or not, terminates the life of someone for mercy, on the other hand passive euthanasia occurs when a terminally ill person is let to die.[50] Active euthanasia and assisted suicide are still not lawful but passive euthanasia, just letting a person die, is lawful. There are a few cases of euthanasia decided by our courts; the legality of euthanasia in South Africa is discussed below and the landmark cases on euthanasia in South Africa and abroad are also discussed. The common feature in the South African cases, and the cases heard and decided elsewhere in the world, is the remarkable leniency accompanying the convictions therein.

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[47] Beauchamp TL & Perlin S (1978) *Ethical Issues in Death and Dying* at 218 and 219; see also Egan A "Should the State Support the Right to Die?" (2008) 2 *SAJBL* 47; Gula RM (1994) *Euthanasia: Moral and Pastoral Perspectives* Paulist Press New York at 21-22; Humphrey D (1992) *Dying with Dignity*: *Understanding Euthanasia* Carol Publishing Group at 21, 191-196; Miley LD (1981) *Euthanasia: Mercy or Murder*, Randal House at 14; Momeyer RW (1988) *Confronting Death*, Indiana Univ Press at 121-122 and Paterson C (2008) *Assisted Suicide and Euthanasia* Ashgate at 11-12.

[48] Berger AS (1920) *Dying and Death in Law and Medicine: A Forensic Premier for Health and Legal Professionals* at 45.

[49] Bryan Jennet in Sheila ED & McLean AM (eds) (1996) *Death, Dying and the Law* at 19.

[50] On differences between active and passive euthanasia see *supra* n (43), Schwar TG *et al* (1998) *Forensic ABC in Medical Practice* at 24, James Rachel in Baird RM & Rosenbaum SE (eds) (1989) *Euthanasia The Moral Issues* at 45; Thomas D. Sullivan *ibid* at 53-59, Yount L *The Library in a Book: The Right to Die and Euthanasia* at 4-5, Moreland JP & Geiser NL (1990) *The Life and Death Debate: Moral Issues of Our Time* at 65-66, The New York State Task Force on Life and the Law (1994) *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* at 63-64, Young R (2007) *Medically Assisted Death* at 85-97 and Gomez FG (1991) *Regulating Death* at 14-15.

5.3.2. *Clark v Hurst* and Others

In *Clark v Hurst and Others*,[51] the patient went into cardiac arrest and suffered serious and irreversible brain damage due to the prolonged deprivation of oxygen to the brain. He had become deeply comatose and had remained in that condition since 1988 until the trial date, 30 July 1992. The patient had lost all bodily functions; he was fed artificially by means of a naso-gastric tube. There was no prospect of improvement and no possibility of recovery. The patient was in a persistent vegetative stage.[52] The patient's wife applied to the Court to be appointed as *curatrix* to the patient's person with the capacity to agree or withhold agreement to any medical or surgical treatment for the patient, to authorise any discontinuance of any treatment to which the patient was subjected or to which the patient may in future be subjected, including the discontinuance of any naso-gastric or other non-natural feeding regime and to act likewise despite that the implementation of her decision may hasten the death of the patient.[53]

The applicant argued that the discontinuance of artificial feeding or the removal of the tube would not cause death and that what would cause the patient's death was the cardiac arrest that occurred five years earlier. All that the various medical attendants have been able to do was to suspend the process of death, not to save the patient's life, the applicant argued.[54]

The patient was a qualified medical doctor and a life member of the SA Voluntary Euthanasia Society. The patient had signed a living will in which he had directed his family, physician and any hospital not to be kept alive by artificial means should he suffer irreversible damage with no prospect of recovery.[55] The patient did not want to be kept alive artificially.

The Attorney General of Natal opposed the application and filed an affidavit in which

[51] *Clark v Hurst and Other* 1992(4) SA 630 NDP, see also *S v Nkwanyana* 2003 (1) SA 303 (W), *S v Smorenberg* 1992 (2) SACR 289 (C), *S v Robinson* 1968 (1) SA 666 (A) and *S v Grotjon* 1970 (2) SA 355 (A).
[52] *Ibid* at 632C-E.
[53] *Ibid* at H-J.
[54] *Ibid* at 633B-D.
[55] *Ibid* at 633G.

he said that he was not prepared to undertake in advance not to prosecute should the steps be taken to terminate the patient's life and that he was not prepared to declare in advance what his decision would be in the event of such steps being taken.[56]

The Court said that the decision whether the discontinuance of artificial nutritioning of the patient and the resultant death would be wrong, depended on the society's *boni mores.*[57] The *boni mores* decision depends on the quality of life which remained to the patient, the physical and mental status of the patient's life.[58] After careful consideration of all facts and the expertise of various role players,[59] Court concluded that the patient's brain had permanently lost the capacity to induce a physical and mental existence at the level which qualified as human life, and that the feeding of the patient did not serve the purpose of supporting human life as it was commonly known, and the applicant, if appointed as *curatrix*, would act reasonably and would be justified in discontinuing the artificial feeding and would therefore not be acting wrongfully if she were to do so.[60]

The Court's decision in this matter was correct. What would be the purpose of postponing the inevitable death of a person who would not even recognise he or she is alive. The patient had potentially lost the right to life when he slipped into coma with no prospect of recovering. The right to life, like any other fundamental human right, should be exercises consciously. The permanent vegetative stage patients cannot exercise, nor will they ever exercise or enforce any right, as they cannot even recognize that they are alive. Although this matter was decided before the new constitutional dispensation in South Africa, it would probably have been constitutional. The limitation of the right to life in this scenario would be reasonable and justifiable. It would be reasonable in that that right in question is no longer being enjoyed by the bearer to the fullest, that the bearer of the right no longer wants to enjoy it, and must be given the freedom to choose how he or she dies. So the nature of the right in question plays an important role. The limitation, that is the taking away

[56] *Ibid* at 634B-D.
[57] *Ibid* at 653B.
[58] *Ibid* at 653C, see also Gay-Williams J "The Wrongfulness' of Euthanasia" in Baird RM & Rosenbaum SE (eds) (1989) *Euthanasia The Moral Issues* at 97-98.
[59] *Ibid*: see various reports of experts at 641C-F, 642I-J and 634A.

the right to life, serves the purpose intended by the bearer of the right, that is to relieve him of pain and suffering.[61]

5.3.3. *State v Hartman*

In *Hartman*,[62] the medical practitioner was accused of killing his father out of compassion.[63] The deceased, aged 87 when he died, had for a number of years been suffering from a carcinoma of the prostate. The condition had spread and secondary cancer had manifested itself in his bones. The deceased had been living in Pretoria with the accused's brother. The accused visited on occasion and during the earlier part of 1974 found his father bedridden and suffering in great pain.[64]

The accused convinced his father to visit him in Cape Town where the father later entered the Ceres Hospital as the private patient of the accused on 22 August 1974. At that stage the deceased was on symptomatic treatment, and there was no longer any question of cure.[65] The deceased was, on admission, completely bedridden, very emaciated, incontinent and on pain-killing drugs. The accused, seeing his father in great pain instructed the nursing sister to give his father half-a-gram of morphine, which she did.[66] The accused administered another dose of morphine and injected Pentothal into the drip and within seconds of his doing so, his father died.[67]

The witnesses testified that the immediate cause of the deceased's death was the administration by the accused to the deceased of Pentothal.[68] The accused did not dispute the evidence.[69] The court conceded that the deceased was in dying condition when the dose of Pentothal was administered and that there was evidence that the deceased may very well have died as little as a few hours later, but the Court continued and said that nonetheless such an act constitutes a crime of murder

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[60] *Ibid* at 659A-C.
[61] S 36 of the 1996 Constitution provides for the limitation of rights in the Bill of Rights.
[62] *S v Hartman* 1975 (3) SA 532 CPD.
[63] *Ibid* at 553C.
[64] *Ibid* at 532C-D.
[65] *Ibid* 533D.
[66] *Ibid* 533G.
[67] *Ibid* at 533H.
[68] *Ibid* at 534A.
[69] *Ibid* at 534C.

even if all the accused had done was to hasten the death of a human being due to die in any event.[70]

The Court classified the accused's action in this case as a "mercy killing". The Court nevertheless found the accused guilty of murder.[71] The accused's sentence was the detainment until the rising of the Court and the balance was suspended for one year on condition that the accused would not; during the period, commit an offence involving the intentional infliction of bodily injury.[72]

The Court's lenient sentence might be interpreted as an indirect recognition of euthanasia. However, that might not be the case. The Court's intention was to do justice, which is to convict the guilty and acquit the innocent. In this matter all elements of murder were present and the Court correctly found the accused guilty of murder. The court recognised that the crime committed was not an ordinary murder, but mercy killing. The perspective of the Court was right in that it recognised that there was life in the deceased, life that was inevitably ending at the time the accused injected the Pentothal to hasten the deceased's death. The Court recognised the deceased's right to life and realistically admitted that the accused's action was understandable. The accused's action of killing his father in this case was noble but not legal. Judged from the stance of *boni mores*, the accused would not have acted wrongfully, however, still would have acted illegally.

5.3.4. *State v Bellocq*

In another case involving mercy killing, *S v Bellocq*, a woman was found guilty for killing her baby for being an idiot.[73] The accused gave birth to a premature baby. The baby was kept at the hospital to be put in an incubator.[74] A few days later the accused learned that the child had had a lumber puncture and the diagnosis was that the child suffered from a disease known as toxoplasmosis. The accused knew

[70] *Ibid* at 534E.
[71] *Ibid* at 535C.
[72] *Ibid* at 537G.
[73] *S v Bellocq* 1975 (3) SA TPD 538.
[74] *Ibid* at 538F-G.

that the child was already an idiot.[75] In bathing the child she suddenly decided it would be best to do away with the child and she drowned the child.[76]

It was argued that her conduct amounted to culpable homicide but not murder. The Court concluded that since the accused confessed that she did intend to kill the child, she must be found guilty of murder.[77] The law does not allow any person to be killed whether the person is an imbecile or very ill. The killing of such person as an unlawful act and it amounts to murder in law.[78] Like in *Hartman*, the sentence was very lenient;[79] the accused was discharged on condition that she enters into recognizance to come up for a sentence within the following six months if called upon.[80] The leniency of the sentences in cases involving mercy killing is the recognition by the judiciary of the end of the right to life of the human being who is in a permanent vegetative stage. However, the same cannot be said about the recognition of the beginning of the right to life at the other end of the life circle.[81]

5.3.5. Conclusion: Euthanasia

The judiciary recognises that the right to life extends to those who no longer wish to live; on the other hand the judiciary indirectly recognises that the quality of life determines whether a person should continue to live or not.[82] The Courts' perspective on euthanasia and the right to life is clear; people who wish to die due to irreversible vegetative state or any other irreversible medical condition have the right to life but that right is limited by the interests of the patients.[83]

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[75] *Ibid* at 538G-H.
[76] *Ibid* at 538H.
[77] *Ibid* at 539B.
[78] *Ibid* at 539D.
[79] *Supra* n (51) at 537G.
[80] *Supra* n (62) at 539E-F.
[81] Christian Lawyers Association *supra* n (3) at 1121H.
[82] In *Cruzan v Director Missouri Dept of Health* 497 US 261(1990) the US Supreme Court allowed Nancy's parents to direct the hospital to withhold nutrition to hasten her death, see also in the matter between *Quinlan, the Supreme Court, State of New Jersey* 355 A2D 647, 1976, *Bouvia v Superior Court ex rel Glenchur cal Repter* 297 C. CT APP (1986), *Compassion in dying ET al v State of Washington* 850 F. SUPP.1454 (1994)/79 F.3RD 790 (9th Cir 1996), *Quill v Koppel* 870F.SUPP. 78(S.D.N.Y)(1994), *Washington State v Glucksberg* 1175.CT.2258(1997), *New York State v Quill* 1175.CT.2293 (1993).
[83] See *David v Schapira* in Berger AS (ed) (1990) *To Die or Not to Die: Cross Disciplinary, Cultural and Legal Perspective on the Right To Choose Death* at 9-10 where it is argued that patients have the ultimate right to control all aspects of medical care; see also Humphrey D (1992) *Dying with Dignity: Understanding Euthanasia* at 103-107; Battin MP (1994) *The Least Worst Death: Essays in*

The decision to die is a personal decision which must be respected. People should be allowed to die in dignity and not be forced to live the life they no longer enjoy. Are people allowed to make life and death decisions? People make life and death decisions when they procreate, they also make life and death decisions when they decide to abort the developing embryo or when they request others to end their lives when they no longer want to live or when others make decisions on their behalf that they must die as they may no longer be able to take that decision.[84]

Do people have the right to die? Not exactly, as dying is the natural process that need not be conferred by law. Whether people have the right to die or not, they would die anyway. There is no need to exercise a right to die, but there is a need to exercise the right to take a decision about how one dies, especially when one no longer enjoys the life he or she lives at a particular moment in life. The question is whether the decision of how or when his life should end violates the right to life?

The answer to the question posed in the preceding paragraph is not in the affirmative. The right to die is a personal decision and people have the right to decide what happens to them for as long as that decision does not affect the community negatively. The right to life would be limited in this case because the limitation would be reasonable in an open and democratic society based on human dignity equality and freedom. People who want to die would be allowed to die with dignity. Euthanasia would serve the purpose of the limitation as far as the nature of the right and the interests of the patients who want die are concerned.[85] The purpose of euthanasia would be to relieve the person of his intense and unbearable suffering, which cannot be otherwise alleviated, when the end of his life is inevitable and he no longer wishes to continue with it; or to put an end to the vegetative state he is in – the termination of such existence would be the less restrictive method of achieving the object.[86] The relation between the limitation and the purpose in

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Bioethics on the End of Life at 279, also see Pretoria News of 3 November 2011 where Prof Sean Davidson admitted aiding her sick mother to die, and Pretoria News of 12 January 2012 wherein Sean indicated no remorse for assisting his mother to die in dignity. He served five months home detention in New Zealand (Pretoria News 03 May 2012).

[84] See also Dworkin RM *supra* n (6) at 179,183 and 184.

[85] S 36(1) of 1996 Constitution.

[86] S 36(1)(e) of 1996 Constitution, see also Battin MP (1994) *The Least Worst Death: Essays in*

euthanasia is the reason why the patient wants to end his or her life, to be allowed to die in dignity. The patient would benefit from death, as death also signals the end of suffering. I believe there would not be any less restrictive means to achieve the purpose, which in this case is to end torment. It is therefore concluded that euthanasia would pass the requirements set out in section 36 of the Constitution, should a court ever be required to pronounce on that issue.

While some may decide to take their own lives, others' lives may be under threat from being taken by the State: I have thus come to the final section of this chapter - the death penalty.

5.4. Death Penalty

After euthanasia and abortion, death penalty is the last controversial matter enveloping both the developed and the developing world, including South Africa (for the purposes of discussing the judicial decision on the right to life) and the United States of America, the latter still practicing the death penalty. The death penalty is a form of punishment where a convicted person is put to death. The death penalty was a controversial form of punishment in South Africa; until it was abolished by the Constitutional Court in *S v Makwanyane*.[87] The death penalty brings life to an end, which *prima facie* violates the right to life. The right to life is enshrined in section 11 of the 1996 Constitution (section 9 in the 1993 Constitution). In this section the right to life in the context of the death penalty is discussed and contrasted with the decision in the access to medical treatment case.[88] These cases are analysed and contrasted and at the end of the Chapter the conclusion is presented as to whether the Constitutional Court has been consistent in its approach to the right to life.

For purposes of this discussion, death penalty is the putting to death of a convicted

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Bioethics on the End of Life at 101 where he argues that the case of euthanasia rests on three fundamental moral principles of autonomy, mercy and justice. See also Pretoria News of 15 July 2014 wherein Archbishop Emeritus Desmond Tutu argued that Euthanasia would constitute a dignified death where someone is terminally ill with no prospect of recovery, in the Citizen 15 July 2014 the Political Opposition leaders Helen Zille argued that Euthanasia is a personal choice, personal matter. Meanwhile Pretoria News of 20 August 2014 reported that IFP Parliamentarian Mario Oriani-Ambrosini took his life to end his suffering from rare form of inoperable lung cancer.

[87] *Makwanyane supra* n (2).

[88] *Soobramoney v Minister of Health KZN* 1998 (1) SA 765 (CC).

person as a form of punishment; murder on the other hand is the intentional killing of a human being or unlawful premeditated killing of one person by another.[89] Both the death penalty and murder involve the taking of someone's life; in the former case the State takes life legally as a form of punishment, while in the latter the perpetrator intentionally and unlawfully takes someone's life. Does the word "everyone" used in section 11 of the Constitution include the murderer, the foetus, the poor and the dying? The Constitutional Court was called upon to decide whether the death penalty would violate the right to life. The decision was taken in terms of the 1993 Constitution, and became the landmark case on death penalty, the right to life, dignity and the right not to be subjected to cruel, inhuman, degrading and unusual punishment in South African constitutional jurisprudence.

5.4.1. *State v Makwanayane and Others*

The accused applied to the Constitutional Court to have section 277(1) (a) of the Criminal procedure Act 51 of 1977 declared unconstitutional. The accused were convicted on four counts of murder, one of account of attempted murder and one account of robbery with aggravating circumstances.[90] On appeal to the then Appellate Division (now Supreme Court of Appeals) the appeals against the conviction and sentences were dismissed and the further hearing of the appeals against the death sentence were postponed until such time as the newly constituted Constitutional Court should determine the constitutionality of the death sentence.[91] No execution had taken place in South Africa since 1989.[92] In the interim the convicted persons were waiting on death row for the issue to be resolved.[93]

The issue before the Constitutional Court was the constitutionality of section 277(1) (a) of Criminal Procedure Act. This section prescribed the death penalty as a competent sentence for murder and other capital offences. The counsel for the South African Government informed the court that Government had accepted that the death penalty was cruel, inhuman and degrading punishment and should be

[89] The Concise Oxford Dictionary 10th Ed at 938, see also Kahn E "What is happening to the death penalty?" (1981) 98 *SALJ* 103, Kahn defines death penalty as a dreadful homicide at 105.
[90] *Makwanyane supra* n (2) par [1]401C-D.
[91] *Ibid* par [3] 401G.
[92] *Ibid* par [6] 402 D.

declared unconstitutional.[94] The Attorney General on the other hand contended that death penalty was necessary and accepted form of punishment was not cruel, inhuman and degrading within the meaning of section 11(2) of the 1993 constitution.[95]

Chaskalson P delivered the judgment, with all judges concurring. The Court looked and used international and foreign law extensively in its interpretation of the Constitution to support its decision that death penalty is inhuman and degrading punishment.[96] The argument brought forward by the applicants in support of their contention was that the imposition of the death penalty for murder was cruel, inhuman and degrading, that the death penalty was an affront to human dignity, inconsistent with the unqualified right to life entrenched in the Constitution; that it could not be corrected in the case of error; that it was enforced in a manner that was arbitrary, and that it negated the essential content of the right to life and other rights which flow from it.[97]

The Court rejected the Attorney General's contention that the death penalty was a necessary and deterrent form of punishment and accepted the applicant's contention that death penalty was cruel, inhuman and degrading form of punishment. The Court said that it had not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into account, as well as the element of arbitrariness and the possibility of error in enforcing the death penalty, the clear and concise case that is required to justify the death sentence as a penalty for murder, had not been made out.[98]

5.4.2. Analysis of Court's Decision and Reasoning

The court decided that the requirements of section 33, the limitation clause, had not been satisfied and the provisions of section 277(1) (a) of Criminal Procedure Act

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[93] *Ibid*.
[94] *Ibid* par [11] 404C-D.
[95] *Ibid* par [11] 404C-D.
[96] *Ibid* paras [33] to [79].
[97] *Ibid* par [27] 410C.

were unconstitutional. The decision of the Court was correct; however, Chaskalson P seemed to emphasise the issues of cruel, inhuman and degrading punishment over the destruction of life caused by the death sentence. He mentioned that the right to life and dignity were the most important of all human rights, and the source of all other rights in Chapter 3,[99] but his conclusion was based on the death penalty being a cruel, inhuman and degrading form of punishment.[100] Chaskalson's protection of the right to life was very narrow. It is noteworthy that other judges emphasised the right to life, as well as the right not to be subjected to cruel, inhuman and degrading punishment, before outlawing the death penalty.[101]

As mentioned above, it is disappointing that the court did not focus its decision on the breach of the right to life, but on the cruel, inhuman and degrading element inherent in the death penalty.[102] On its own, this reason could have easily failed because one may have argued against the cruelty of that form of punishment. The elements of arbitrariness and the possibility of error are good reasons to outlaw death penalty.[103]

5.4.3. Conclusion: Death Penalty

The Court's decision was correct although Chaskalson differed with other judges on the right to life relationship with the death sentence. He clearly did not have or share the same understanding as the other judges who emphasised that the death sentence was a cruel, inhuman and degrading form punishment *and* breached the right to life as well. Death sentence destroys life before it can even be classified as

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[98] *Ibid* par [146] 451G-H.
[99] *Ibid* par [144] 451D.
[100] *Ibid* par [146] 451G-I
[101] *Ibid*. Ackerman J par [166] 458B-C, Didcott J par [174] 461E, Langa J par [217] 479C, O'Regan J par [318] 504B-C.
[102] *Ibid* Chaskalson P par [146] 451-I, on inhuman treatment see *N v UK* 2008 (29) HRLJ 289, *Gafgen v Germany* 2008 (29) HRLJ 56, and Article 13 of Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949; Gaitan A & Kuschnik B "Tanzania's death penalty debate: An epilogue on *Republic v Mbushuu"* (2009) 9 *AHRLJ* 459 at 463 where it is stated that Tanzania hangs the accused to death.
[103] *Ibid* par [145] 451E-F, see also Chenwi L "Breaking New Ground: The Need for a Protocol to the African Charter on Abolition of Death Penalty in Africa" (2005) 5 *AHRLJ* 89, at 96 where Chenwi argues that arbitrariness in the use of death penalty cannot be eliminated because of the imperfections inherent in criminal trials; Bojosi K "The Death Row Phenomenon and Prohibition against Torture, Cruel or Degrading Treatment" (2004) 4 *AHRLJ* 303, Van Zyl Smit D "The Death Penalty in Africa" (2004) 4 *AHRLJ* 1 and Laubscher P "The Death Penalty" (1998) 115 *SALJ* 773.

punishment. Punishment should not destroy the right but rather be used as a corrective measure and clearly one will not correct another by killing him or her.

The Court rightfully concluded that the death penalty failed to meet the requirements of the limitation clause in that it would not qualify as the less restrictive means to achieve the purpose for limiting the right.[104] Life sentence could be used as a less restrictive means to punish the convicted criminal. The nature of the right in question is that once taken away it could not be restored.[105] The right to life is the mother of all human rights contained in both national constitutions and international human rights instruments.[106] Therefore the right to life must always be valued above any other right in the overall scheme of things.[107] "Human life bears inestimable worth regardless of externally applied criteria", Thomasma argues.[108]

The death penalty is cruel punishment in that in most cases the convicted prisoners have to wait for a very long period of time before the actual execution.[109] It is a mental torture for a prisoner as a human being to wait for his or her demise. Then life sentence would be a less restrictive means to remove the convicted killer from

[104] Currie I & De Waal J (2013) *The Bill of Rights Handbook*, 6th Ed Juta at 170, Davis D, Cheadle H, Hayson N (1997) *Fundamental Rights in the Constitution* at 319-320; on the appropriateness of death penalty see *S v Mafu* 1992 (2) SACR 494(A), *S v Van Niekerk* 1992 (1) SACR 1 (A), *S v Mazibuko & Another* 1992 (2) SACR 491; on the question of less restrictive or alternate punishment to death penalty see Viljoen F "End Notes to the Death Penalty Decision" (1996) 113 *SALJ* 652, although life imprisonment is viewed as alternative to death penalty, some writers have indicated that even life imprisonment is cruel and degrading punishment, see Verrier C "Is Imprisonment in South Africa Legally Defensible?" (2009) December *Advocate* at 41; Gumboh E "The Penalty of Life Imprisonment under International Criminal Law" (2011) 11 *AHRLJ* 75 and Metz T "Ubuntu as a Moral Theory and Human Rights in South Africa" (2011) 11 *AHRLJ* 532.

[105] *Ibid* at 178-179.

[106] Van Wyk D, Dugard J, de Villiers B and Davis D (eds) (1994) *Rights and Constitutionalism: The New SA Legal Order* at 213, see also article 6 of ICCPR, Article 3 of UDHR, article 1 of American Declaration of the Rights and Duties of Man, article 4 of American Convention on Human Rights, article 2 of European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4 of African Charter on Human Rights and People's Rights, section 1(a) of the Constitution of the Kingdom of Lesotho, Section 4 of the Constitution of the Republic of Botswana, section 4 of the Constitution of the Kingdom of Swaziland, section 12 of the constitution of the Republic of Zimbabwe, Article 6 of the constitution of the Republic of Namibia, and section 11 of the constitution of the Republic of South Africa.

[107] Thomasma DC (1990) *Human Life in Balance* John Knox Press at 39.

[108] *Ibid*.

[109] Van Niekerk BVD "Hanged by the Neck Until You are Dead" 1969 (86) *SALJ* 457; Van Niekerk BVD "Hanged by the Neck Until You are Dead" 1970 (87) SALJ 60 at 68; see also Kahn E "The Death Penalty in South Africa" (1970) 33 *THRHR* 108 at 134; Mihalik J "The Death Penalty in Bophuthatswana: A New Deal for Condemned Prisoners?" (1990) 107 *SALJ* 465; Mujuzi JD "Why the Supreme Court of Uganda should Reject the Constitutional Court's Understanding of Imprisonment for Life" (2008) 8 *AHRLJ* 163, Mujuzi argues that whole life imprisonment is cruel, inhuman and

the community.[110] The other reason why it was correct to abolish the death penalty, is that sentencing involves discretion on the part of individual judges who might harbour prejudices and as such the death penalty is arbitrary.[111] The last and most important reason for not supporting death penalty is that there can be mistakes during the trial and an innocent person may be convicted; the sentence of execution cannot be reversed, unlike life imprisonment. Most importantly, I do not support the death penalty because it destroys life.[112] Life is something that once lost may not be regained by whatever means.[113]

5.5. Conclusion on the Right to Life in the Context of Abortion, Euthanasia and Death Penalty

The three institutions, abortion, euthanasia and death penalty teach us that the right to life, like any other fundamental human right, is not absolute, it can also be limited in terms of section 36 of the 1996 Constitution. The prohibition of the death penalty supports the right to life, while the acceptance of euthanasia does not. Abortion is also against the right to life. The perspective of the Court before which a person appears in connection with one of these institutions determines his or her fate. It is from these decisions where the inconsistency emanates: the judiciary has outlawed the death penalty,[114] therefore supporting the right to life, while it allowed legislation regulating abortion[115] to stand and failed to recognise pre natal life.[116]

The three institutions, namely, the death penalty, euthanasia and abortion are part of the process of life. They are inevitably part and parcel of human existence in

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degrading punishment at 185.

[110] Viljoen *supra* n (104), at 670-71 where he argues that life imprisonment is an adequate alternative available.

[111] Some judges favoured the death penalty: Viljoen *supra* n (104) at 653; see also Angus L, Grant E, "Sentencing in Capital Cases: Transvaal Provincial Division and Witwatersrand Local Division 1987-1989" (1991) 7 *SALJ* 50; Murray C, Nielsen J & Tredoux C "The Death Penalty in the Cape Provincial Division 1986-1988" (1989) 5 *SAJHR* 154; on the arbitrariness of death penalty see Hintzel MD "The Cost of Retaining the Death Penalty: Some Lessons from the American Experience" (1994) 111 *SALJ* 55 at 57.

[112] Chenwi *supra* n (103).

[113] Van Niekerk BVD "Hanged by the Neck until You are Dead" 1970 (87) *SALJ* 60: Van Niekerk argues correctly that death penalty is gruesome, absolute and irrevocable, and irremediable in case of judicial error.

[114] *Makwanyane supra* n (2).

[115] *Christian Lawyers Association supra* n (3).

[116] *Mshumpa supra* n (40).

different phases of his or her life. Abortion involves the deliberate destruction of the embryo in its developmental stages before birth, the death penalty is the judicially sanctioned killing of the convicted person, and euthanasia involves the taking of a life for mercy. The death penalty does not support the right to life, and neither do euthanasia and abortion. The abolition of the death penalty by the Court in *Makwanyane* supported the right to life, while on the other hand the confirmation by the same Court of the Termination of Pregnancy Act did not support the right to life, hence one can argue that an inconsistency is shown by courts in decisions involving the right to life.

CHAPTER 6
CONCLUSION: INCONSISTENCY IN JUDICIAL DECISIONS: THE RIGHT TO LIFE IN PERSPECTIVE

6.1. Right to Life in Perspective

The objective of this dissertation is to undertake a comparative study and to critically analyse the decisions of the Constitutional Court and the High Courts on the right to life. The right to life is used as a means to show the inconsistency by the judiciary in taking the decision on similar matters. The right to life is chosen as it is the most important of all human rights and it is the mother all rights in the Bill of Rights and other international instruments. Therefore the legal institutions that affect life both positively and negatively have been used to indicate and show the inconsistency of judicial decisions relating to, or involving life, namely, access to health care services, abortion, euthanasia, and the death penalty.

The right to life for the purpose of this dissertation is viewed from two perspectives, namely, the protection and preservation of life. Protection of life refers to the situation where, for example, life is threatened by external factors such as criminal activities or other human activities and the police or authorities are called in to protect the communities or individuals against such threats.[1] Preservation of life refers to the situation where life is threatened by factors such hunger, disease,[2] and natural disasters and where human intervention in the form of medical intervention and provision of life saving necessities is possible but would require financial resources.

[1] See section 14 of SAPS Act 68 of 2005, *Rail Commuters Action Group and Others v Transnet Lts t/a Metro Rail and Others* 2005 (2) SA 359 (CC); Twinomugisha BK "Exploring Judicial Strategies to Protect the Right of Access to Emergency Obstetric Care in Uganda" (2007) *AHRLJ* 283 at 302 where the writer contends that the State must not only prevent physical termination of life, but must work towards quality and sustainability of life.

[2] Menghistu F "The satisfaction of survival requirements" in Ramcharan BG (1985) *The Right to Life in International law* at 63, where links the right to life to starvation and lack of other basic needs required for survival.

6.2. Right to Life: Perspective of the Court

The courts, as arbiters in the human society are called upon to adjudicate and interpret the law to give effect to it and thus protect and preserve human life. As indicated in the previous Chapters, various cases have come before both the Constitutional Court and the High Courts in which the courts were requested to interpret the law, the constitutional right to life. The decisions of the Courts in the right to life cases are therefore very important as it determines whether one's life is preserved or not.[3] The judgments of both the High Court and the Constitutional Court indicate without a doubt that conflicting decisions have been issued by both courts on the right to life, or that their perspective on the right to life differs.

Although the South African jurisprudence on euthanasia has not developed, the courts issued favourable decisions in matters involving euthanasia.[4] Euthanasia, as its main objective is to end life, does not support the right to life. The Courts have found people who have killed others out of mercy to be guilty of murder, but the punishments that followed have been lenient. However, the trend by the judiciary of being lenient on people who have committed euthanasia is not unique to South Africa.[5]

Euthanasia may constitute a justifiable ground to limit the right to life in terms of section 36 of the Constitution of South Africa, 1996. The limitation would be reasonable in that the right in question is no longer being enjoyed by the bearer to its fullest extent, that the bearer of the right no longer wants to enjoy it and must be given the freedom to choose how he or she dies.[6] While euthanasia is the right that

[3] In *Minister of Health and Others v Treatment Action Campaign (TAC) and Others* 2002 (5) SA 721 (CC) the Court ruled in favour of the applicant who sued State for not supplying life-saving drugs free of charge to pregnant mothers, Court saved millions of lives, and in *Soobramoney v Minister of Health KZN* 1998 1 SA 430 (CC) the Constitutional Court denied the ailing man the right to medical treatment at state expense and the patient died after that decision.

[4] *Clark v Hurst and Other* 1992(4) SA 630 NDP, see also *S v Nkwanyana* 2003 (1) SA 303 (W), *S v Smorenberg* 1992 (2) SACR 289 (C), *S v Robinson* 1968 (1) SA 666 (A) and *S v Grotjon* 1970 (2) SA 355 (A).

[5] See Humphrey D (1992) *Dying with Dignity*: *Understanding Euthanasia* Carol Pub Group at 191-196 where it is indicated that eleven doctors where accused of practising euthanasia in the United States but none of them was sent to prison.

[6] Paterson C (2008) *Assisted Suicide and Euthanasia* Ashgate at 21 where he argues that decisions made by individuals that shape the course of their lives should be respected as long as they do not significantly injure or harm others; see also Momeyer RW (1988) *Confronting Death*, Indiana Univ

can be exercised to end a life which is inevitably on the edge, or almost at the end, of the life journey of an individual,[7] abortion is the intentional ending of life at the beginning of life itself.

The abortion controversy in South Africa is argued from religious perspective rather than a legal one, and religious groupings do not represent all citizens of the country more than an elected representative does.[8] The matter of abortion is regulated by a statute.[9] The Act allows a woman to terminate pregnancy during the first twelve weeks on request, meaning the woman is free to choose whether or not to keep her baby. The court has already decided that the foetus was not the bearer of any right.[10] The court therefore avoided resolving the question as to whether abortion *terminated life* or not. I have argued that abortion terminates life, life that is not ordinarily constitutionally protected and thus it would seem that the Constitution would give more weight to the right of the mother to decide whether she intends to have the baby or not. My view is that life begins on conception and as such abortion terminates life.[11] The above-mentioned High Court decision does not support the right to life; the Court did not give the right to life the widest possible interpretation.

Another aspect discussed in this dissertation has been the fact that the right to access to health care services also indirectly supports the right to life. When the right to life is construed in the context of preservation and protection of life, the right to health becomes inevitably part of the equation of life.[12] Adequate health care

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Press at 121-123 and 146; Humphrey *supra* n(5) at 21.

[7] Euthanasia effectively means killing or ending someone's life to relieve that person of the pain due to irreversible medical conditions the patient suffers, for different definitions of this concept, see Moreland JP and Geisler NL (1990) *The Life and Death Debate: Moral Issues of Our Time* Prager Publishers New York at 64; Swanepoel M "*End of Life Decisions with Regard to Mentally Disordered Patient in SA* (2011) 74 THRHR 402, *South African Law Reform Commission: Report on Euthanasia and Artificial Preservation of Life* (1998) RP 186/1999 ISBN 062129831X; Young R (2007) *Medically Assisted Death* at 61-83, Shandu S "Prisoners Waiting to Die with Dignity" (2004) Nov *DR* 18; Boyd K Callghan B, Shotter E (1986) *Life before Birth: Consensus in Medical Ethics* Bell and Bain Ltd Glasgow at 2-5, Gula RM (1994) *Euthanasia: Moral and Pastoral Perspective* Paulists Press New York at 20, 21-33; Humphrey *supra* n (5) at 21.

[8] Parliamentary members are elected by the electorate; see section 1(d) of the 1996 Constitution.

[9] Choice on Termination of Pregnancy Act 92 of 1996.

[10] *Christian Lawyers Association v Minister of Health and Others* 1998 (4) 111 (T).

[11] Moreland and Geisler *supra* n (7) at 34-35; see also Thomasma DC (1990) *Human Life in the Balance* at 41 where he argues that embryos and foetuses are pre-persons who enjoys peripheral or secondary rights.

[12] Menghistu supra n (2) at 63; and Ramcharan BG *ibid* at 12; see also WS Vorster's, definition of human life at 89; Du Plessis L.M and De Villiers, JR in *Rights and Constitutionalism The New SA*

services therefore preserve the right to life. The main reason people seek medical treatment is to cure the disease so as to save their lives against an imminent threat brought by the diseases or ailment or injuries in cases of car accident and other accidents. The right to access health care services then becomes a survival requirement, as the elongation of life depends on it when people are sick.

The courts have decided three cases involving the right to health care linked to the right to life.[13] In *Soobramoney*, the court interpreted the right to life, as entrenched in section 11, narrowly. The Court could have interpreted the Constitution generously; it could have explored further the interplay between socio-economic rights and the right to life, and concluded that *Soobramoney* enjoyed the right to life. The patient died after the judgment. This judgment did not support the right to life.

In *Van Biljon* the Cape High Court ruled in favour of the prisoner who sought access to health care at the state's expense and ordered the Government to provide the prisoners with treatment as prescribed to them by their physicians.[14] The Court decided that lack of resources could not be a good reason to deny prisoners access to treatment at the State expense. This decision is in contrast with the Constitutional Court decision in *Soobramoney*, as both patients suffered from chronic ailments and wanted to prolong their lives medically. Although the other was a prisoner, both wanted to save their lives which I suppose had the same value at any given time. The decision in *Van Biljon* supported the right to life.

The last case involving the right to medical treatment was that of the *Treatment Action Campaign* against the Department of Health.[15] The applicants argued that that they could not afford the drugs themselves. The Court ordered the Government to provide anti-retroviral drugs to such mothers, as it found that the programme which the government had put in place was unreasonable. This Constitutional Court judgment supported the right to life although the Court's decision was focused on the unreasonableness of the programme, rather than the preservation of life. The Court

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Legal Order at 213.
[13] Menghistu *supra* n (2).
[14] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 C.
[15] *Treatment Action Campaign supra* n (3).

failed to link the right to life to access to health care services.[16]

The right in the context of abortion came before the Court in *Christian Lawyers Association.*[17] The Court ruled in favour of the defendants and concluded that foetus did not enjoy legal personality or protection. The decision was therefore not based on the right to life as foetus and the unborn children do not have legal personality and cannot enjoy any personal right.[18] The decision did not support the right to life.

Although euthanasia case was decided before the commencement of the 1996 Constitution, that decision has never been reviewed or set aside by the Constitutional Court or Supreme Court of Appeal. In all the cases that came before the Courts the accused were found guilty but the sentences were so lenient that the inference drawn can be the judiciary recognizes that the right to life extends to those who no longer wish to live, on the other hand the judiciary indirectly recognized that the quality of life determines whether a person should continue to live or not. The decisions partially supported the right to life, however, the picture drawn from the decisions indicated legislative vacuum to guide the judiciary and public on the euthanasia matter once and for all.

The Constitutional Court dealt with the right to life directly in *Makwanyane* when it rightfully outlawed the death penalty.[19] The Court unanimously concluded that the death penalty was an inhuman and degrading form of punishment and therefore it was unconstitutional.[20] The Court did not base its decision on the violation of the right to life only. But for the purpose of this dissertation, it must be emphasised that the death penalty violates the right to life as its result signals the end of life. The death penalty should be outlawed because it breaches the right to life, the nature of

[16] Chirwa DM "The Right to Health in International Law: Its Implications for the Obligations of State and Non- State actors in Ensuring Access to Essential Medicine" (2003) 19 *SAJHR* 541 at 541 and 565; see also Nthai S "The Implementation of socio-economic rights in South Africa" 1999 (July) *De Rebus* 41.
[17] *Christian Lawyers Association supra* n (10).
[18] Kruger H (ed), Skelton A (ed), Carnelley M, Human S, Kruuse H, Mofokeng L and Robinson JA (2010) *The Law of Persons in South Africa,* Oxford university Press at 21-23, Van Heerden B, Cockrell A, Keightley R, Heaton J (ed), Clark B (ed), Sinclair J (ed), and Mosikatsana T (ed) (1999) *Boberg's Law of Persons and Family* 2nd ed Juta at 28-41.
[19] *Makwanyane and Others v State* 1995 3 SA 391 (CC).
[20] *Ibid* par [11] 404C-D.

which indicates that once destroyed, it cannot be reinstated;[21] it also has elements of arbitrariness and prejudice.

The Constitutional Court's judgment supported that right to life indirectly. The term 'indirectly' is used because the Court's own decision focused more on the aspect of inhuman treatment, rather than the right to life. Overall, however, the Court was correct in deciding that the death sentence was an inhuman and degrading form of punishment in a civilised society. Life imprisonment is a very good substitute and less restrictive alternative to the death sentence.[22] The last and most important reason why the death sentence should be outlawed is that sometimes wrong people are convicted for a crime they did not commit.[23]

6.3. Inconsistency in Judicial Decisions

The courts, as arbiters in society, are called upon to adjudicate and interpret the law and to give effect to it, and must therefore - *inter alia* - *protect* and preserve human life. The decisions of the Constitutional Court and the High Courts discussed in this dissertation indicated that the judiciary is not consistent on its decisions relating to the right to life presented in different context. The Court's decision supported the right to life in one case involving access to health care, and the other decision of the same court did not support the right to life even though the facts were almost similar. In *Van Biljon* the Court's decision supported the right to life while in *Soobramoney* it did not.[24] Both cases involved access to health care to save lives.

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[21] *When State Kills: The Death Penalty v. Human Rights,* 1989 Amnesty International Publication at 1; Carpenter G "Case Law Constitutional Court Sounds the Death Knell for Capital Punishment *S v Makwanyane*" 1996 (59) *THRHR* 145 at 164; Le Roux J, Bekink B "The Abrogation of Death Penalty in South Africa: Participating in the Ongoing Debate*"* 2006 (69) *THRHR* 201 at 201-215.

[22] Recent decision of European Court of Human Rights in *Venter and Others v. The United Kingdom*, available at echhr.coe.int/pages/home.aspx visited on 10 July 2013 found that life sentence is inhuman and degrading punishment. See also Camarer S "What about the Victims" (1999) *De Rebus* at 22-25; Ngalwana V "Perverts Rights are Also Worthy of Constitutional Protection" (1998) *De Rebus* 59-61*; Gafgen . Germany* HRLJ 2008 (29) 56; *M.S.S v. Belgium and Greece* HRLJ 2011 (31) 121; *Giuliani and Gagglio v. Italy* HRLJ 2011 (31) 185.

[23] *When State Kills: supra* n (21) at 2, where it is argued that the irrevocability of death sentence removes not only the victims right to legal redress for wrongful conviction but also judicial system's capacity to correct its error, see also Nkosinathi Chiya Release after being convicted of murder and new evidence indicated that he may not have been the killer, www. iol.co.za visited 19 April 2013, Eikenhof Three released after six years for triple murder during the apartheid era, but PAC members took responsibility for attack and murder during the TRC Amnesty application, www.justice.gov/trc/media/1999/9911/p991109c (site last visited on 24 April 2013).

[24] See *Soobramoney supra* n (3), *Van Biljon supra* n (14).

The Court decision in *Christian Lawyers* did not support the right to life, while in *Makwanayane* it supported the right to life.[25] Although the facts of the cases are not similar, life or the right to life features in both cases. The decision of the Court affects life either negatively or positively. So the judges must at least reach similar decisions for similar cases before them.

The judges reach the correct decision when two or more judges arrive at the same conclusion when adjudicating the same subject matter or interpreting the same text.[26] If the judges arrive at different conclusions, that means that the law does not determine the outcome, but rather the outcome is based on the different interpretation and understanding of the very law which the judges have been called upon to interpret. The courts have shown on different and many occasions that judges interpret and understand the law differently and that is the reason we have unanimous decisions,[27] and split decision.[28] An unanimous decision signals that all adjudicating judges agree and have reached the same conclusion in the case,[29] and a split decision means that judges reached different conclusions, and those judges would have to vote: the majority decision would become the decision of the court.[30]

For the most part, the Constitutional Court has since its inception been issuing conflicting decisions on the right to life. In the death penalty case, the Constitutional Court protected the life of the convicted murderer,[31] and in contrast the Transvaal Provincial Division allowed the Termination of Pregnancy Act in an abortion matter

[25] *Christian Lawyers Association supra* n (10) and *Makwanayane supra* n (19).
[26] Some decisions of the Constitutional Court are not unanimous, meaning some judges held different view on the subject matter.
[27] All eleven judges in *Soobramoney v Minister of Health KZN* 1998 (1) SA 765 CC; see other unanimous decisions: *S v Vermaas* 1995 (3) SA 292 (CC), *S v Williams* 1995 (3) SA 632 (CC), *Premier Kwazulu Natal and Others v President of RSA and Others* 1996 (1) SA 769 (CC), *Tshabalala and Others v Attorney General Transvaal and Another* 1996 (1) SA 725 (CC), *S v Ntuli* 1996 (1) SA 1218 (CC).
[28] In *Ferreira v Levin* 1996 (1) SA 984 (CC) out of eleven judges only Kriegler J dissented, *Du Plessis and Others v De Klerk and Another* 1996 (4) 331 (CC) where Kriegler J and Didcott J dissented.
[29] See *Brink v Kitshoff NO* 1996(4) SA 197 (CC), *Key v Attorney-General Cape Provincial Division and Another* 1996 (4) SA 187 (CC).
[30] In *President RSA and Another v Hugo* 1997 (4) SA 1 (CC) only two judges dissented and the rest concurred, see also *Executive Council, Western cape Legislature and Others v President of RSA and Others* 1995 (4) SA 877 (CC), *S v Coetzee and Others* 1997 (3) SA 153 (CC).
[31] *Makwanyane supra* n (19).

which clearly was not supporting the right to life.[32] In a socio-economic case, the Constitutional Court denied an indigent man the right to treatment, because he was suffering from chronic incurable disease,[33] and in contrast the same Court granted anti-retroviral drugs to HIV positive pregnant women to save their unborn babies even though HIV is a chronic and incurable disease.[34] In the abortion controversy it has been decided that developing embryo or unborn human beings did not enjoy the right to life as enshrined in the Constitution,[35] this is in contrast to the anti-retroviral case where the mothers were seeking life-saving drugs for their unborn babies.[36]

The Courts have given the right to life different degrees of protection and different perspectives; the Court outlawed the death penalty wherein most judges based their decision on the right to life.[37] It is common cause that the death penalty does not support the right to life. In this case the court protected the right to life of the murder because even though a murderer, he still enjoyed the right to life as a human being.

The inconsistency appears where the courts interpret the matter relating to the protection and preservation of the right to life differently as indicated by their support of abortion, support of passive euthanasia and prohibition of the death penalty. In any matter before the Constitutional Court where the court's decision is not unanimous, the dissenting judgment would be in favour of the losing party, which means the judgment was partially in his favour. In the same breath, the dissenting judgment indicates that the winning litigant was wrong; the judgment would have been against him if the dissenting judges were in majority on the day in question.[38]

The courts arrive at different conclusions because the law is indeterminate and the outcome is dependent on the understanding or interpretation of the law by the judge in question. Law varies in rhetorical forms; judges may misconceive the meaning of

[32] *Christian Lawyers Association supra* n (10).
[33] Soobramoney *supra* n (3).
[34] *Treatment Action Campaign supra* n (3).
[35] *Christian Lawyers Association supra* n (10).
[36] *Treatment Action Campaign supra* n (3).
[37] *Makwanyane supra* n (19).
[38] Splits decisions: *Glenister v President RSA* 2011 (3) SA 347 (CC): four judges agreed with the President and five did not, see also *Le Roux and Others v Dey* [2011] ZACC4, *S v Mhlungu and Others* 1995(3) SA 867 (CC).

the constitutional text.[39] This is because adjudication involves interpretation and it is with respect to interpretation that judges differ in their conclusions, even when they adjudicate the same disputes.[40] The interpretation of statutes is essentially a creative and discretionary exercise.[41] Van Zyl argues that justice, equity, good faith and *boni mores* contain subjective elements when they pertain to a particular person and the meaning thereof is dependent on and is inextricably linked to the personal circumstances of that particular individual.[42] In the same vein, legal interpretation is in no way an exact science but rather a judicial art, in the end it is a matter of judicial instinct.[43] In end, the judges of the Constitutional Court or the High Court, including the Supreme Court of Appeal, apply a science that is not determinate like other branches of science.[44]

The inconsistency in the decision of the court is brought about by one factor, the human factor on the bench of both the Constitutional Court and the High Court with the power to decide someone's fate.[45] The inconsistency in this regard refers to the difference, in that there seems to be different understanding of the law by individual judges hearing the matter. The right to life, which is used here as the yardstick to

[39] Woolaman S and Bishop M (ed) (2008) *Constitutional Conversations* at 1 and 5; see also Cockrell APH "Adjudication Styles in SA Private Law" (1993) 56 *THRHR* 590 at 606 where he suggests that different judges understand and justify their roles in profoundly divergent ways, Lord Denning Stevens (1997) *Law and Politics* 490; Cameron E "Lawyers, Language and Politics-in Memory of JC De Wet and WA Joubert" (1993) 110 *SALJ* 51; Van Der Walt AJ "Striving for Better Interpretation - A Critical Reflection on the Constitutional Court's *Harksen* and *FNB* on the property clause (2004) 121 *SALJ* 854 pp 854-878, Chetty D "The Perspective of a High Court Judge" (2004) 121 *SALJ* 493, see also Motala Z "The Constitution is not Anything the Court Wants It to be: The *Mhlungu* Decision on the Need for Disciplining Rules" (1998) 115 *SALJ* 141; Fiss OM "Objectivity and Interpretation" (1982) 34 *Stanford Law Review* 739.

[40] Higher Courts can reach a different conclusion and set aside the decision of the lower Court, the Supreme Court of Appeals can overturn the decision of the High Court, and the Constitutional Court can overturn the decision of the Supreme Court of Appeal.

[41] Dlamini M "The Political Nature of the Judicial Function" (1992) 55 *THRHR* 411 at 416; see also Van der Walt J "The Relation between Law and Politics: A Communitarian Perspective" (1993) 110 *SALJ* 757 at 768; see also Davis DM "Integrity and Ideology towards a Critical Theory of the Judicial Function" (1995) 112 *SALJ* 104 at 106; Motala *supra* n 20, wherein he argues that the constitutional interpretation of terms used therein invites widespread interpretation at 141.

[42] Van Zyl DH "The Significance of the Concepts 'Justice' and 'Equity' in Law and Legal Thought (1998) 105 *SALJ* 272 at 290.

[43] Brown LN & Kennedy T (2000) 5th ed *The Court of Justice of the European Communities* at 323.

[44] In Chemistry one hydrogen molecule plus two oxygen make water (H2O), extraction of potassium irons from potassium permanganate result in the loss of purple colour by the chemical solutions, no matter who conducts he experiment, but the same cannot be said about law, see Brown and Kennedy *supra* n (43) at 323.

[45] The High Courts have inherent powers to decide anything except matters that can be heard by the Constitutional Court, see section 169 of the Constitution, and the Constitutional Court has the power to decide anything, see sections 172 and 173 of the Constitution.

indicate the inconsistency in judicial decisions, is enshrined in the Constitution in simple literal language without any qualification or limitation. This provision means that “life” must be protected, preserved and promoted.

This is the perspective from which the court should understand and interpret the right to life: the right in section 11 relates to or has inevitable connections with “life”. One may argue that the adjudication process itself is not clear, it provides for different methods of interpretation which leaves the judges with wide discretion as to which method to apply. Then an individual judge chooses the method he or she prefers in a particular case. The different methods of interpretation utilised by different judges adjudicating the same case before them may results in them reaching different conclusions.

The classical example of judges going astray was illustrated by Motala in which he asked: Does the Constitution mean what the court says it does?[46] The question before the Court involved the transitional arrangement from the Interim Constitution about a matter pending before a court, section 241(8) of the Interim Constitution provided:

> All proceedings which immediately before the commencement of this Constitution were pending before any court of law; including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this constitution had not been passed.

The decision of the court was split 5-4, the majority holding that the provision had to be interpreted to provide the most benefit in the widest possible way and the minority stated that there was no ambiguity in section 241(8).[47] Motala correctly argues that there was no justification to depart from the express language of the Constitution and this is an example of a nihilistic assumption of the Constitution which ignores its text as being binding to judges.[48] Motala argues further that the Constitution cannot

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[46] Motala Z *supra* n (39).
[47] *S v Mhlungu* 1995 (3) SA 867 (CC), 1995 (7) BCLR (CC) par 75.
[48] Motala Z *supra* n(39) at 154.

simply mean what the judges want it to mean and that judges must adhere to disciplining rules of interpretation.[49] The text of the Constitution was very much clear in this case, but the majority decided to ignore it because they thought the result would be adverse to the applicant.[50] It was not up the judges to correct the defect in law as they are not legislators but adjudicators.

6.4. Conclusion

The decisions or judgments of both the Constitutional Court and the High Courts on the right to life indicate that adjudication is a complex process, but is all about interpreting the law.[51] Adjudication involves interaction between the interpreter and the text itself.[52] We cannot escape the reality that judges are human beings; they are also influenced by various factors in their dealings with the law.[53] Language also complicates the understanding of law; law and language are inevitably linked.[54]

The involvement of language in the life of law brings different context and understandings to adjudication and therefore different judgments.[55] The language of law is sometimes ambiguous and complex. Legislatures do not have in mind the position of the interpreter and that of the person who seeks redress through law when making the law.

As indicated above, the Constitutional Court and High Courts were called upon to adjudicate cases involving the right to life. I used euthanasia, death penalty, access to health care and abortion to illustrate the involvement of the judiciary in taking decisions on the right to life, or a matter in which the right to life may be implicated. Different courts ruled differently on the cases before them, but all cases involved the

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[49] *Ibid* at 155.
[50] Motala Z *supra* n (39) at 141-142.
[51] Fiss OM *supra* n (39) at 739; see also Brest P "Interpretation and Interests" (1984) 34 *Stanford law Review* 1325.
[52] *Ibid*.
[53] Chetty *supra* n (39) at 493; Dhlamini M "The Political Nature of the Judicial Function" 1992 (55) *THRHR* 411; Botha H "Freedom and Constraints in Constitutional Adjudication" (2004) 20 SAJHR 249.
[54] Bix B (1993) *Law, Language and Legal Determinacy* Oxford University Press on pp 1-2 argues that language is the medium through which law acts.
[55] Hutchinson AC (2000) *"It's All in the Game"* Duke University Press at 54-55; Carter LH (1998) 5th ed *Reason in Law* Addison Wesley Educational Publishers at 1.

right to life directly or indirectly.

Some decisions of the court supported the right to life,[56] and some did not support the right to life.[57] The death penalty case in which the convicted murderer applied to have death sentence declared unconstitutional supported the right to life indirectly, while on the other hand a decision to confirm the validity of the Choice on Termination of Pregnancy Act did not support the right to life. The denial of access to health care services in *Soobramoney* did not support the right to life; in contrast, the decision in *Van Biljon* to order government to provide lifesaving drugs to prisoners supported the right to life.

It is therefore concluded that there is inconsistency in judicial decisions involving the right to life. The inconsistency is a result of the Constitution that was drafted as a political compromise between the National Party government and the African National Congress and other political parties at CODESA in 1993. The right to life for example, is enshrined in such way that a court can take any decision based on the provision, it does not continue to qualify the right.[58]

It is therefore recommended that section 11 of the Constitution be reviewed and amended to qualify the right to life so that the courts need not infer this right from other rights in the Bill of Rights. The provisions must be clear to indicate exactly what is allowed and what is not allowed in the context of the right to life. The Namibian Constitution's right to life provision is clear, section 6 thereof provides that:

> The right to life shall be respected and protected. No law may prescribe death penalty as competent sentence. No Court or Tribunal shall have the power to impose sentence of death upon any person. No execution shall take place in Namibia.

This Namibian constitutional provision on right to life is clear and to the point,

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[56] *Makwanayane supra* n (19).
[57] *Soobramoney supra* n (2*)* (CC) and *Christian Lawyers Association supra* n (10).
[58] See section of the Namibian Constitution, it clearly indicate that death penalty is not allowed, see also article 8 of Lesotho Constitution, article 4 of Botswana Constitution, article 4 of Swaziland Constitution and section 12 of Zimbabwean Constitution.

especially on the issue of death penalty. The South African provision may therefore read as follows:

11 (1) Every has the right to life;

(2) The right to life is protected from conception until the person is certified death by medical practitioners;

(3) Death penalty may not be imposed as a sentence in the Republic; and

(4) Legislation regulating euthanasia and abortion must be enacted by Parliament within four years from the date of commencement of this Constitution as proclaimed by the President in the National Gazette.

The above provision would have dealt with the controversial death penalty matter in the constitution rather than leaving it to the Constitutional Court and High Courts to decide. It would also clarify the issue of constitutional protection of unborn child's life and allowed the legislature to regulate abortion and euthanasia in national legislation with ease. The interests to be protected and promoted here would be life itself, life would be protected from conception and would also be protected from State execution through implementation of death penalty. Life would also be protected on the other end, euthanasia, when the quality of life is no longer worth enjoying, the law would regulate how to materialise the will of the person to die in dignity. On the same footing, the Constitution would allow pregnant woman a freedom to choose whether or not to have a baby through legislative provisions. These are the measures that would emanate from the proposed section 11 above.

The second problem is that the Constitutional Court is given too much power to the extent that the law becomes what the Court believes it to be. Sometimes the court takes a policy decision on behalf of the electorate. The Court has become the Might who is always right. The decision of the Constitutional Court stands and there is no appeal or review or recourse against the decision of this Court.

Because the decisions of the court are taken by majority votes, sometimes 5-4 split decisions, it is recommended that the decision of the Court be subjected to compulsory review after ten years or whenever two-thirds of the judges who participated in the votes on the decision are no longer serving. The review must be initiated by the Chief Justice on his or her own initiative or whenever the case before

Court deals with similar subject matter. The review applies to the Constitutional Court's decisions only as is the apex court of the land. This would assist in speedy development of constitutional jurisprudence, as we have seen that consensus is not part of daily life at the Constitutional Court.

BIBLIOGRAPHY

BOOKS

1. Ashworth A (2006) *Principles of Criminal Law* 5th ed Oxford University Press, New York
2. Austin J (1970) *The Province of Jurisprudence Determined* 2nd ed, Burtin Franklin, New York
2. Beauchamp TL & Perlin S (1978) *Ethical Issues in Death and Dying,* Englewood Cliffs, NJ, Prentice-Hall
3. Baird RM & Rosenbaum SE (eds) (1989) *Euthanasia: The Moral Issues* Prometheus Books, Buffalo, New York
4. Bajwa DK (1994) *Right to Life: Its Study under Indian Political System* Amar Prakashan, Delhi India
5. Barrow D, Walker TG (1988) *A Court Divided* Yale University Press, New Haven
6. Battin MP (1994) *The Least Worst Death: Essays in Bioethics on the End of Life* Oxford University Press, New York
7. Bekker PM, Geldenheyns T, Joubert JJ, Swanepoel JP, Terblanche SS, van Der Merwe SE and Van Rooyen JH (2001) *Criminal Procedure Hand Book* 5th ed Juta, Johannesburg
8. Bennett B (ed) (2004) *The International Library of Medicine, Ethics, and the Law: Abortion* Dartmouth, Aldershot, England
9. Berger AS (1920) *Dying and Death in Law and Medicine: A Forensic Premier for Health and Legal Professionals* Praeger, Westport, Conn
10. Berger AS & Berger J (ed) (1990) *To Die or not to Die: Cross-Disciplinary, Cultural, and Legal Perspective on the Right To Choose Death* Praeger, New York
11. Bix B (1993) *Law, Language and Legal Determinacy* Oxford, Oxford
12. Bloom LH Jr (2009) *Methods of Interpretation* Oxford University Press, Oxford
13. Bondeson WB & Engelhard HT Jr, Spicker SF, Winship JD (eds) (1938) *Abortion and the Status of the Fetus* Reidel, Dordrecht
14. Burger AJ (2001) *A Guide to Legislative Drafting in South Africa* Juta, Lansdowne

15. Brand D & Russel S (eds) (2002) *Exploring the Core Content of the Socio-Economic Rights: South African and International Perspective* Protea Book House, Pretoria
16. Botha H, van Der Walt A and van Der Walt J (eds) (2003) *The Rights and Democracy: A Transformative Constitution* Stellenbosch University Press, Stellenbosch
17. Brown LN (1994) *The Court of Justice of the European Communities* Sweet & Maxwell, London
18. Campbell EL (1996) *The Science of Law*, Gaunt Inc, Holmes Beach
19. Campbell T, Ewing KD, Tomkins A (eds) (2010) *The Legal Protection of Human Rights: Sceptical Essays* Oxford University Press, Oxford and New
20. Carter LH (1998) *Reason in Law*, Longman, 5th ed New York
21. Carney T, (1991) *Law at the Margin: Towards Social Participation,* Oxford University Press, Oxford
22. Chaskalson M *et al* (1996) *Constitutional Law of South Africa* Juta, Kenwyn
23. Clayton R &Tomlinson H (1954) *The Law of Human Rights* Oxford University Press, Oxford
24. Cockram GM (1983) *Interpretation of Statutes* 2nd ed Juta, Kenwyn
25. Collins English Dictionary 9th ed, 2007, Harper Collinins, London
26. Currie I & De Waal J (2013) *The Bill of Rights Hand Book* 6th ed Juta, Kenwyn
27. Currie I, De Waal J (2001) *The New Constitutional and Administrative Law: Vol 1. Constitutional Law*, Juta, Lansdowne
28. Corcoran S, Bottomley S (eds) (2005*) Interpretating Statutes* The Federation Press, Sydney
29. Corder (1984) *Judges at Work: The Role and Attitude of the South African Appellate Division Judges, 1910-50,* Juta, Cape Town
30. Davis D (1999) *"Democracy and Deliberation"* Juta, Kenwyn
31. D' Amato A (1984) *Jurisprudence: A Descriptive and Normative Analysis of Law* Martinus Nijhoff, Dordrecht
32. Denning A (1955) *The Road to Justice* Stevens & Sons Ltd, London
33. Derham DP, Maher FKH and Waller L (2000) *Introduction to Law* LBC Information Services, Sydney
34. Deshta S, Deshta K (1965) *Fundamental Human Rights; The Right to Life and Personal Liberty* Deep & Deep Publications, New Delhi

35. Douzinas C, Geary A (2005) *Critical Jurisprudence: The Political Philosophy of Justice* Hart, Portland Oregon
36. Dowel-Jones M (2004) *Contextualising ICESCR: Assessing the Economic Deficit* Martinus Nijhoff Leiden
37. Du Plessis L (2004) *Re-Interpretation of Statutes* LexisNexis Butterworths, Durban
38. Dugard J (2011) *International Law: A South African Perspective* 4th ed Juta, Cape Town
39. Dworkin RM (1977)*The Philosophy of Law* Oxford University Press, Oxford
40. Dworkin RM (1986) *Law's Empire* Harvard University Press, Cambridge
41. Dworkin RM (1985) *A Matter of Principles* Harvard University Press, Cambridge
42. Dworkin RM (1993) *Life's Dominion an Argument Abortion and Euthanasia* Harper Collins, London
43. Edwards AB (1996)*The History of South African Law* Butterworths, Durban
44. Emanuel SL (2011) *Civil Procedure* 20th ed Wolters Kluwer, New York
45. Engel Verlag NP (1990) *Democracy and Human Rights*, NP Engel Publisher, Johannesburg
46. Feibleman JK (1985) *Justice, Law and Culture* Martinus Nijhoff, Dordrecht
47. Feinberg J, Coleman J (eds) (2004) *Philosophy of Law* Thomson 7th ed Wadsworth, Belmont CA
48. Fieldman D (ed) (2013) Law in Politics, Politics in Law Hart, Oxford
49. Friedrich CJ and Chapman JW (eds) (1963) *Nomes VI Justice*, Athernton Press, London
50. Geldenhuys T (1992) *Introduction to Security Law* Juta, Cape Town
51. Glick HR (1992) *The Right to Die: Policy Innovations and its Consequences* Columbia University, New York
52. Goldman RK, Grossman CM, Martin C (2001) *"The International Dimension of Human Rights, A Guide for Application in Domestic Law"* IDB Publication, Washington DC
53. Gomez CF (1991) *Regulating Death* The Free Press, New York
54. Gruberg M, *Introduction to Law*, University Press of America, Lanham MD
55. Harms LTC (ed) (2004) *Civil Procedure in Magistrates' Court* LexisNexis Butterworths, Durban
56. Harms LTC (2005) *Civil Procedure in Superior Court* LexisNexis Butterworths,

Durban

57. Hahlo HR and Kahn E (1968) *The SA Legal System and its Background* Juta, Cape Town
58. Hart HLA (1961) *The Concept of Law* Oxford University Press, Oxford
59. Hattersley AF (1930) *A Short History of Democracy* Cambridge University Press, Cambridge
60. Holland D, Nonini DM, Lutz C, Frederick-McGlathery M, Guldbrandsen TC & Murillo EG Jr (2007) *Local Democracy under Siege* New York University Press, New York
61. Humphry D (1930) *Dying with Dignity: Understanding Euthanasia* Carol Pub. Group, Secaucus, NJ
62. Hutchinson AC (2000) *It is All in the Game* Irwin Law, Toronto
63. Hutton C (2009) *Language, Meaning and the Law* Edinburg University Press
64. Irving R (2001) *The Law is A Ass*, Duckbacks, London
65. Jackson P, (1973) *Modern Legal studies: Natural Justice*, Sweet and Maxwell, London
66. Jayaplan N (2000) *Human Rights* New Dehli Atlantic Publishers, New Dehli
67. Johnson D, Pete S, and du Plessis M, (2000) *Jurisprudence: A South African Perspective,* Butterworths, Durban
68. Johnson BR (ed) (2011) *Life and Death Matters* Walnut Creek, CA
69. Kaarthikeyan DR (2005) Human Rights: Problems and Solutions Gyan Publishing House, New Dehli
70. Kaczor CR (1969) *The Edge of Life: Human Dignity and Contemporary Bioethics* Springer, Dordrecht
71. Kavanagh A, Oberdiek J (eds) (2009) *Arguing about Law* Routledge, London New York
72. Kellaway EA (1995) *Principles of Legal Interpretation Statues Contracts and Wills* Butterworths, Durban
73. Kelsen H (1967) *Pure Theory of Law* University of California Press, Berkeley and Los Angeles
74. Kennedy D (1997) *A Critique of Adjudication* Harvard University Press, Cambridge Massachusetts and London
75. King J (2012) *Judging Social Rights* Cambridge University Press, New York
76. Kruger H (ed), Skelton A (ed), Carnelly M, Human S, Kruuse H, Mofokeng L and

Robinson JA (2010) *The Law of Persons in South Africa*, Oxford University Press, Cape Town

77. Kung H & Jens W (1995) *A Dignified Dying* SCM Press Ltd, London
78. Levi JN and Walker AG (eds) (1990) *Language in Judicial Process*, Plenium Press, London
79. Liebenberg S & Pillay K (2000) *Socio-Economic Rights in South Africa*, University of Western Cape, Bellville
80. MacAdam A & Pyke J (1998) *Judicial Reasoning and the Doctrine of Precedent in Australia* Butterworths (Heinemann), Sydney
81. MacMahan J (2002) *The Ethics of Killing-The Problems at the Margins of Life* Oxford University Press, New York
82. Mahesh K & Bhattacharyya B (eds) (1999) *Judging the Judges* Gyan Publishing House, New Dehli
83. Marmor A (ed) (1995) *Law and Interpretation* Clarendon Press, Oxford
84. McCormic P and Greene I, (1990) *Inside the Canadian Judicial System: Judges and Judging* James Lorimer and Co, Toronto
85. McLean SAM (ed) (1996) *Death*, *Dying and the Law* Dartmouth Publishing Co, Brookfield
86. Misbin RI (1992) *Euthanasia: The Good of the Patient, the Good of the Society,* University Pub Group, Frederick
87. Molan M, Laser D, Bloy D (2000) *"Principles of Criminal Law"* 4th ed Cavendish Publishing Ltd, London
88. Momeyer RW (1988) *Confronting Death* Indiana University Press, Bloomington
89. Morawetz T (1991) *Justice* Dartmouth, Aldershot
90. Moreland JP & Geisler NL (1990) *The Life and Death Debate: Moral Issues of Our Time,* Praeger, New York
91. Newton CR (1983) *General Principles of Law* Sweet Maxwell, London
92. Nielson K (1985) *Equality and Liberty* Bowling Green State University Press, Oxford
93. Oxford Concise English Dictionary 10th ed, Oxford
94. Pillay K (2000) *South Africa's Commitment on the Right to Health in the Spot Light: Do we Meet the International Standard* University of Western Cape, Bellville
95. Patel EM & Watters C (1994) *Human Rights Fundamental Instruments and*

Documents Butterworts, Durban

96. Paterson C (2008) *Assisted Suicide and Euthanasia* Ashgate, Aldershot

97. Perelman CH (1963) *The Idea of Justice and the Problem of Argument* Routledge Kegan Paul Ltd Broadway House, London

98. Pete S, Hulme D, Du Plessis M, Palmer R (2005) *Civil Procedure: A Practical Guide on Both Magistrates and High Court Generally* Lexis-Nexis, Durban

99. Posner RA (1990) *The Problems of Jurisprudence*, Harvard University Press, Cambridge

100. Ramcharan BG (ed) (1985) *The Right to Life in International Law* Martinus Nijhoff, Boston

101. Ramlogan R (2011) *Sustainable Developments: Towards a Judicial Interpretation*, 2nd ed Martinus Nijhoff, Leiden

102. Remblay LB (1997) The Rule of Law, Justice and Interpretation, McGill-Queens University Press, Montreal

103. Rauntebach C, Jansen van Rensburg L (2004) *Politics*, *Socio-Economic Issues and Culture in Constitutional Adjudication* North West University, Potchefstroom

104. Read W (1986) *Legal Thinking* University of Pennsylvania Press, Philadelphia

105. Redman N, Whalen L (1988) *Human Rights* 2nd ed Manhattan Beach, California

106. Reeder JP Jnr (1937) *Killing and Saving: Abortion, Hunger and War* Pennsylvania University Press, University Park PA

107. Riddal JG (1991) *Jurisprudence* 2nd ed Butterworths, London

108. Roederer C & Moellendoorf D (2006) *Jurisprudence* Butterworths, Durban

109. Sachs A, (2009) *The Strange Alchemy of Life and Law*, Oxford University Press, Oxford and New York

110. Samar VJ (1998) *Justifying Judgement*: *Practising Law and Philosophy* Univ Press of Kansas, Lawrence

111. Sarvis B & Rodman H (1974) *The Abortion Controversy* 2nd ed Columbia University Press, New York

112. Schotsmans P & Meulenbergs T (2005) *Euthanasia and Palliative Care in the Low Countries* Peeters, Leuven and Dudley

113. Schwar TG, Loubser JD, Olivier JA (1998) *The Forensic ABC in Medical Practice, a Practical Guide* Kagiso, Pretoria

114. Shiela ED & Mclean AM (eds) (1996) *Death, Dying and the Law* Dartmouth, Brookfield

115. Singh K.J, (1995) *Distributive Justice in India: A Socio-Legal Study*, Reliance Publishing House, New Dehli
116. Slabert MN (2000) *The Human Embryo and Foetus: Constitutional and other Legal Issues* LLD Thesis, Unisa Pretoria
117. Smith JC, Weisstub DN (1983) *The Western Idea of Law* Butterworths, London
118. Smith JC (2002) *Smith and Hogan Criminal Law* 10th ed Butterworth, Edinburgh
119. Somerville MA (2001) *Death Talk, the Case against Euthanasia and Physician Assisted Suicide* McGill-Queen's University Press, Montreal
120. Steinbock B & Norcross A (1994) *Killing and Letting Die* 2nd ed Fordham University Press, New York
121. Steinbock B (1992) *Life before Birth: The Moral and Legal Status of Embryos and Foetuses* Oxford University Press, New York
122. Stourzh G & Lerner R (eds) (1959) *Readings in American Democracy* Oxford University Press, New York
123. Tarrant J (2012) *Disqualification for Bias* Federation Press, Annadale
124. Theophilopoulos C, Rowan AWT, van Heerden CM, Boraine A (2006) *Civil Procedure* LexisNexis Butterworths, Durban
125. The New York Task Force on Life and the Law (1984) *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* Health Education Services, New York
126. Thomas PhJ, van der Merwe CG, Stoop BC (2000) *Historical Foundations of South African Law* Butterworths, Durban
127. Thomasma DC (1990) *Human Life in Balance* Westminster/John Knox Press, Louisville, Kentucky
128. Turrel RC (2004) *White Mercy: A Study of the Death Penalty in South Africa,* Praeger, Wespoort, Conn
129. Van Blerk AE (1998) *Jurisprudence: An Introduction* 1st ed Revised Butterworths; Durban
130. Vorster WS (ed) (1988) *The Right To Life Issues in Bioethics* UNISA, Pretoria
131. Van Wyk D, Dugard J, De Villiers B & Davis D (eds) (1994) *Rights and Constitutionalism: The New South African Legal Order* Juta, Cape Town
132. Van Heerden B, Cock Rell A, Keightley R, Heaton J, Clark B, Sinclair J and Mosikatsana T (1999) *Boberg's Law of Persons and Family Law,* 2nd ed Juta,

Kenwyn

133.Van Niekerk (ed) (1991) *The Status of Prenatal Life* Lux Verbi, Cape Town

134.Van Zyl L (2000) *Death and Compassion*: *A Virtue-Based Approach to Euthanasia* Ashgate, Burlington VT

135.Van Wyk D, Wiechers M & Hill R (1991) *Namibia: Constitutional and International Law Issues* VerLoren van Themaat Center for Public Law Studies, University of South Africa, Pretoria

136.Vaux KL (1992) *Death Ethics: Religious and Cultural Values in Prolonging and Ending Life,* Trinity Press International, Philadelphia

137.Vorster WS (ed) (1988) *The Right To Life: Issues in Bioethics* Unisa, Pretoria

138.Wagner A, and S Cacciaguldi-Fahy (Eds) (2008) *Obscurity and Clarity in Law: Prospects and Challenges* Ashgate, Aldersho Hampshire

139.Weisheit R, Morn F (2004) *Pursuing Justice* Thomson Wadsworth, Belmont

140.Wells WAN (1991) *Law, Judges and Justice* Butterworths, North Ryde NSW

141.Wennberg RN (1989) *Terminal Choices: Euthanasia, Suicide and the Right To Die* Paternoster Press, Grand Rapids

142.Whalen L & Redman N (1998) *Human Rights: A Reference Book* 2nd ed ACB-Clio, Santa Barbara, CA

143.Wille G (1961) *Principles of South African Law* 5th ed Juta, Cape Town

144.Williams C (2011) *In the Words of Nelson Mandela* Walker & Co, New York

145.White TI (ed) (1993) *Business Ethics: A Philosophical Reader* Maxwell MacMillian Canada: MacMillan Pub Toronto, New York

146.Woods S (2007) *Death's Dominion: Ethics at the End of Life* Open University Press, Maidenhead, Berkshire

147.Woolman S & Bishop M (eds) (2008) *Constitutional Conversations* Pretoria University Law Press, ABC Cape Town

148.Woolman S, Roux T, Bishop M (2006) *Constitutional Law of South Africa* 2nd ed, Juta, Kenwyn

149.Young L (2007) revised ed *The Right To Die and Euthanasia* Facts-on-File Inc., New York

150.Young R (2007) *Medically Assisted Death* Cambridge University Press, Cambridge New York

151. Yorke J (2012) *The Right to Life and Value of Life* Ashgate, Surrey

152. Zimmermann R, Visser D (1996) *Southern Cross*: *Civil Law and Common Law*

in South Africa Juta, Cape Town

LEGISLATION

BOTSWANA

Constitution of the Republic of Botswana, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents* Butterworths 453-465

NAMIBIA

Constitution of the Republic of Namibia reprinted in Pattel EM & Watters C (1994) *Human rights: Fundamental Instruments and Documents* Butterworths 505-514 and in Wyk M, Wiechers M & Hill R, 1991 *Namibia: Constitution and International Law Issues* Unisa

SOUTH AFRICA

1. Abortion and Sterilisation Act 2 of 1975 (repealed)
2. Appropriation Act 2 of 2006
3. Black Administration Act 38 of 1927
4. Broad Based Black Economic Empowerment Act 53 of 2003
5. Constitution of South Africa Act 108 of 1996
6. Choice on Termination of Pregnancy Act 92 of 1996
7. Constitution Act 200 of 1993 (repealed)
8. Criminal Procedure Act 51 of 1977
9. Defence Act 41 of 2002
10. Division of Revenues Act 2 of 2006
11. Group Areas Act 77 of 1950
12. Implementation of Geneva Conventions Act 4 of 2012
13. Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002
14. Interpretation Act 33 of 1957
15. Magistrates Court Act 32 of 1944
16. Military Ombud Act 4 of 2012

17. National Health Act 61 of 2003
18. Native Building Workers Act 27 of 1951
19. Population Registration Act 30 of 1950
20. Prohibition of Mixed Marriages Act 55 of 1949
21. Prohibition or Restriction of Certain Weapons Act 18 of 2008
22. Reservation of Separate Amenities Act 49 of 1953
23. South African Police Service Act 68 of 2005
24. Suppression of Communism Act 44 of 1950
25. Supreme Court Act 59 of 1959
26. Native Labour (Settlement of Disputes) Act 48 of 1952

SWAZILAND

Constitution of the Kingdom of Swaziland, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents* Butterworths 467-483

ZIMBABWE

Constitution of the Republic of Zimbabwe, reprinted in Pattel EM & Watters C, *Human Rights: Fundamental Instruments and Documents*, Butterworths, pages 485-504

INTERNATIONAL INSTRUMENTS AND CONVENTIONS

1. African Charter on Human and Peoples' Rights, Addis Ababa 1981, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents* Butterworths 141-148
2. American Declaration of the Rights and Duties of Man, Bogota 1948, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents* Butterworths 89-94
3. American Convention on Human Rights, San Jose 1969, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents*, Butterworths 94-103
4. Declaration of the Basic Rights of Asean Peoples and Governments, Jakarta

1983, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents,* Butterworths 149-160

5. European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents* Butterworths 111-116
6. Geneva Conventions of August 1949.
7. ICESCR-International Covenant on Economic, Social and Cultural Rights, United Nations 1966, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents* Butterworths 16-21
8. ICCPR-International Covenant on Civil and Political Rights, United Nations 1966, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents,* Butterworths 21-30
9. UDHR-Universal Declaration of Human Rights, United Nations 1948, reprinted in Pattel EM & Watters C (1994) *Human Rights: Fundamental Instruments and Documents* Butterworths 11-15
10. UN General Assembly Resolution 421(v) of 4 December 1950 and World Conference on Human Rights: Vienna Declaration and Programme of Action, UN Doc. A/Conf.157/23
11. Protocol to the African Charter on Human and Peoples' Rights on Establishment of an African Court on Human and Peoples' Rights available at www.african-court.org visited on 13 January 2015.

CASE LAW

NAMIBIA

Van Rhyn NO v Namibian NHCA36/06

SOUTH AFRICA

1. *Albut v Center for the Study of Violence and Reconciliation and Others* 2010 (6) SA 232 (CC)
2. *Bernert v Absa bank Ltd* 2011 (3) SA 92 (CC)
3. *Brink v Kitshoff* 1996 (4) 197 (CC)
4. *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)

5. *Carmichele v Minister of Safety and Security* 2003 (3) SA 656 (SCA)
6. *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297
7. *Christian League of Southern Africa v Rall* 1981 2 SA 821 (O),
8. *Christian Lawyers Association v. State* 1998 (4) SA 1113 (T)
9. *Clark v Hurst and Others* 1992 (4) SA 630 (NDP)
10. *Duddley v Minister of Justice* 1963(2) SA 464 (AD)
11. *Executive Council, Western Cape Legislature and Others v President of RSA and Others* 1995(4) SA 877 (CC)
12. *Ex Parte Administrator Estate Asmall 1954 (1) PH G4 (N)*
13. *Ex parte Boedel Steenkamp* 1962 3 SA 954 (O),
14. *Ferreira v Levin* 1996 (1) SA 984 (CC)
15. *Glenister v President RSA* 2011 (3) SA 347 (CC)
16. *Government RSA v Grootboom and Others* 2000(11) 1169 (CC)
17. *G v Superidendent Groot Schuur Hospital* 1983 2 SA 255 (C)
18. *Harksen v Lane No and Another 1998 (1) SA 300 (CC)*
19. *Hlope v Premier of the Western Cape Province, Hlope v Freedom Under Law* [2012] ZACC 4.
20. *Kaunda v President of RSA* 2004 (10) BCLR (CC)
21. *Key v Attorney-General Cape Provincial Division and Another* 1996 (4) SA 187 (CC)
22. *Mahomed v President of RSA* 2001 (3) SA 893 (CC)
23. *Masiya v Director of Public Prosecution* 2007 (2) SACR 435 (CC)
24. *Mine Stores (Natal) Ltd and Booysens v the Magistrates Danhauser* 1966(3) SA 745 (NPD)
25. *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA)
26. *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA)
27. *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (2) SA 467 (CC)
28. *Le Roux v Dey* [2011] ZACC 4
29. *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W)
30. *President of Republic of South Africa v South African Rugby Football Union* 1999 (7) BCLR 725
31. *President RSA v Hugo* 1997(4) SA 1 (CC)

32. *Rail Commuters Action Group and Others v Transnet Ltd t/a Metro Rail* 2005 (2) SA 259 (CC)
33. *S v Basson* 2005 (1) 171 (CC)
34. *S v De Bellocq* 1975 (3) SA 538 (TPD)
35. *S v Collop* 1981 1 SA 150 (A)
36. *S v Davidow* 1955 WLD Unreported
37. *S v Gordon* 1962 (4) SA 727 (N)
38. *S v Hartman* 1975 3 SA 532 (C)
39. *S v Mafu* 1992 (2) SACR 494(A)
40. *S v Makwanyana and Others* 1995 (3) SA 642 (CC)
41. *S v Mazibuko & Another* 1992 (2) SACR 491
42. *S v McBride* 1979 (4) SA 313 (W)
43. *S v Mhlungi and Others* 1995 (3) SA 867 (CC)
44. *S v Mshumpa* 2008 (1) SACR 126 (E)
45. *S v Nsindane* 1964(1) SA 413 (NPD)
46. *S v Parmissar* 1963(1) SA 176 (NPD)
47. *S v Nbakwa* 1956 (2) SA 557 (SR)
48. *S v Scott-Crossly* 2004 (3) 436(T)
49. *S v Wyngaard and Another* 1964(2) SA 372 (CPD)
50. *S v Zuma and Others* 1995 (2) SA 642 (CC)
51. *SABC v National Director of Public Prosecution* 2007 (1) ALL SA 384 (SCA)
52. *Soobramoney v Minister of Health Kwazulu Natal* 1998 (1) SA 765 (CC)
53. *TAC v Minister of Health* 2002 (5) SA 721 (CC)
54. *The Citizen (1978)(Pty) Ltd v McBride* SA 2011 (4) 191 (CC)
55. *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C)
56. *S v Van Niekerk* 1992 (1) SACR 1 (A)

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

1. *Frank David Omary and Others v The United Republic of Tanzania* available at *http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Ruling_Appl._001-2012.PDF* (site last visited on 26 February 2015)

2. *Delta International Investments South Africa v Republic of South Africa* available at http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Decision%20%20Application%20002%202012%20Delta%20International%20v.%20South%20Africa.pdf (site last visited on 26 February 2015)

3. *Peter Joseph Chacha v The United Republic of Tanzania* available at *http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Ruling_Appl_003_2012.pdf* (site last visited on 26 February 2015)

4. *Emmanuel Uko v Republic of South Africa* available at *http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Decision%20Application%20No%20004-2012%20English.pdf* (site last visited on 26 February 2015)

5. *Amir Adam Timan v Republic of Sudan* available at *http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Decision%20Application%20No%20005-2012%20English.pdf* (site last visited on 26 February 2015)

6. *Baghdadi Ali v Republic of Tunisia* available at *http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Decision%20Application%20No%20007-2012%20%20English%20Baghdadi%20v.%20Tunisia.pdf* (site last visited on 26 February 2015)

7. *Femi Fana v African Union* available at http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Judgment%20Application%20001-2011-%20Femi%20Falana%20v.%20The%20AU.%20Application%20no.%20001.2011.EN.pdf (site last visited on 26 February 2015)

UN HUMAN RIGHTS COMMITTEE

Llantoy Huaman v Peru (2005) *HRLJ* 26, 348

EUROPEAN COURT OF HUMAN RIGHTS

1. *Bouvia v Superior Courtex rel. Glenchur cal Repter* 297 C. CT APP (1986)
2. *Pretty v United Kingdom* [2002] 35 EHRR 1
3. *Tysiac v Poland 2007* (28) HRLJ 228
4. *Pfeifer v Austria 2007* (28) HRLJ 286
5. *Khalidova et al v Russsia* 2008 (29) HRLJ 279
6. *Open Door & Dublin Well Women v Ireland* ECHR Series A Vol. 246
7. *Gafgen v Germany* 2008 (29) HRLJ 56
8. *M.S.S v Belgium and Greece* 2011 (31) HRLJ 121
9. *Giszczak v Poland* 2011 (31) HRLJ 424
10. *A, B and C v Ireland* (GC) 2011(31 HRLJ 344
11. *European Court R.R and Others v Hungary* (2012) 32 HRLJ 419
12. *Buntuv v Russia* (2012) 32 HRLJ 69
13. *Kemaloglu v Turkey* (2012) 32 HRLJ 122

INTER-AMERICAN COURT OF HUMAN RIGHTS

1. *Carcazo v Venezuela* available at www.corteidh.or.cr/docs/casos/articulus/series-58-ing (site last visited on 15 January 2014)
2. *The Last Temptation of Christ v Chile* available at www.corteidh.or.cr/docs/casos/articulus/seriec-73-ing (site last visited on 15 January 2014)
3. *Barrios Altos v Peru* available at www.corteidh.or.cr/docs/casos/articulus/seriec-75-ing (site last visited on 15 January 2014)
4. *Plan de Sanchez Massacre v Guatemala* available at www.corteidh.or.cr/docs/casos/articulus/seriec-105-ing (site last visited on 15 January 2014)
5. *Gretel Artavia Murilloet al. v Costa Rica* 2011 (31) HRLJ 295

CANADA

Rodrigues v Attorney-General Canada [1994] LRC136

UNITED STATES OF AMERICA

1. *Compassion in dying ET al v State of Washington* 850 F. SUPP. 454 (1994)/ 79 F.3RD 790 (9th Cir 1996)
2. *Crisworld v Connecticut*, 381 U.S. 479 (1965)
3. *Cruzan v Director Missouri Dept of Health* 497 US.261 (1990)
4. *New York State v Quill* 1175.CT.2293 (1993)
5. *Planned Parenthood of Central Missouri v Casey,* 505 US 833 (1992)
6. *Quill v Koppel* 870F.SUPP. 78 (S.D.N.Y)(1994)
7. *Quinlan, the Supreme Court, State of New Jersey* (355 A2D 647, 1976)
8. *Rodriques v British Columbia* (AG) [1993] 3 SCR 519
9. *Roe v Wade* 410 US 113 (1973)
10. *Washington v Glucksberg* 521 US 702 (1997)
11. *Washington State v Glucksberg* 1175.CT.2258 (1997)

INDIA

1. *Tellis & others v Bombay Municipality Corporation & Others and Kuppusami & Others v State of Maharasha &Others* AIR 1987 LRC 351
2. *Himachel Pradesh & Another v Umed Ram Sharma&Others* AIR 1986 SC 847

ZIMBABWE

R v Majoni 1963 (2) SA 310 S.R Salisbury Zimbabwe

JOURNAL ARTICLES

1. Asmal K “Victims, Survivors and Citizens-Human Rights, Reparations and Reconciliation” (1992) 8 *SAJHR* 491
2. Axam T(Jr) “A Model For Learning And Teaching-Rights And Responsibilities In

The New Legal Order" (2001) 17 *SAJHR* 404

3. Axam HS "If the Interests of Justice Permit: Individual Liberty, the Limitation Clause and the Qualified Constitutional Rights to Bail" (2000) 17 *SAJHR* 320
4. Bilchitz D "Towards A Reasonable Approach to Minimum Core: Laying the Foundation for Future Socio- Economic Jurisprudence" (2003) 19 *SAJHR* 1
5. Blackbeard M "HIV/AIDS: The Right to Privacy v The Right to Life" (2002) 65 THRHR 232
6. Bojosi K "The Death Row Phenomenon and Prohibition against Torture, Cruel or Degrading Treatment" (2004) 4 *AHRLJ* 303
7. Bollyky TJ "R if C>P+B: A Paradigm for Judicial Remedies of Socio Economic Rights Violations" (2002) 18 *SAJHR* 161
8. Brannon I "What is a Life Worth?" available at www.cato.org/pubs/regulation/regu27n4/v27n4 (site last visited on 15 January 2014)
9. Botha H "*Democracy and Rights: Constitutional Interpretation in a Postrealist World"* (2000) 63 *THRHR* 561
10. Califano JA Jnr "Rationing Health Care: The Unnecessary Solution" (1992) 140 *University of Pennsylvania Law Review* 1525
11. Cameroon E "When Judges Fail Justice" (2004) 121 *SALJ* 580.
12. Cameroon E "Lawyers, Languages and Politics-In memory of JC De Wet and WA Joubert" (1993) 110 *SALJ* 51.
13. Cameroon E "Legal Chauvinism, Executive Mindness and Justice-LC Steyn's Impact on South African Law" (1982) 99 *SALJ* 38
14. Chenwi L "Correcting the Historical Asymmetry between Rights: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2009) 9 *AHRLJ* 23
15. Chenwi L "Breaking New Ground: The Need for a Protocol to the African Charter on Abolition of Death Penalty in Africa" (2005) 5 *AHRLJ* 89
16. Chetty D "The Perspective of a High Court Judge" (2004) 121 *SALJ* 493
17. Classen CJ "The Functioning and Structure of the Constitutional Court" (1994) 57 *THRHR* 412
18. Cockrell APH "Adjudication Styles in SA Private Law" (1993) 56 *THRHR* 590
19. Corder H "Administrative Justice: A Cornerstone of South Africa's Democracy" (1998) 14 *SAJHR* 38.

20. Davis DM “The Case against the Inclusion of Socio-Economic Rights Demands in a Bill of Rights except as Directive Principles” (1992) 8 *SAJHR* 475
20. Davis DM “Duncan Kennedy’s Critique of Adjudication: A Challenge to the Business as Usual Approach of SA Lawyers” (2000) 117 *SALJ* 697
21. Davis DM “Integrity and Ideology Towards Critical Theory of the Judicial Function” (1995) 112 *SALJ* 104
22. De Villiers B “The Socio-Economic Consequences of Directive Principles of State Policy. Limitations on Fundamental Rights” (1992) 8 *SAJHR* 188
23. De Villiers B “Directive Principles of State Policy and Fundamental Rights: Indian Experience” (1992) *8 SAJHR* 29
24. De Villiers J “Meaning and Statutory Interpretation” (1999) 62 *THRHR* 373
25. Devenish G “Interpretation from the Bowels of the Act-An Essential Methodology for Unqualified Contextual Interpretation” (1989) 106 *SALJ* 68
26. De Vos P “A Bridge Too Far? History as Context in the Interpretation of the South African Constitution” (2001) 17 *SAJHR* 1
27. De Vos P “Pious Wishes or Directly Enforceable Rights: Social and Economic Rights in SA’s 1996 Constitution” (1997) 13 *SAJHR* 67
28. Dlamini M “The Political Nature of the Judicial Function” (1992) 55 *THRHR* 411
29. Dugard J “The Role of International Law in Interpreting the Bill of Rights” (1994) 10 *SAJHR* 208
30. Dugard J “Should Judges Resign?: A Reply to Professor Wacks” (1984) 101 *SALJ* 286
31. Dugard J “International Law and the Final Constitution” (1995) 11 *SAJHR* 239
32. Dugard J “Some Realism About the Judicial Process and Positivism- A Reply” (1981) 98 *SALJ* 372
33. Du Plessis LM “Jurisprudential Reflections on the Status of Unborn Life” (1990) *TSAR* 44
34. Du Plessis L “The (re)Systematisation of the Cannons of and Aids to Statutory Interpretation” (2005) 122 *SALJ* 591
35. Du Plessis M “Between Apology and Utopia-The Constitutional Court and Public Opinion” (2002) 18 *SAJHR* 1
36. Dworkin RM “Law as Interpretation: The Politics of Interpretation” (1982) *University of Chicago Press LWE* 407
37. Dyzenhaus D “Judges, Equity and Truth” (1995) 102 *SALJ* 295

38. Egan A “Should the State Support the Right to Die?” (2008) 2 *SAJBL* 47
39. Feldman AM “The Value of Life” available at www.econ.brown.edu/fac/fallen-feldman/files (site last visited 31 Oct 2012)
40. Gaitan A & Kuschnik B “Tanzania’s Death Penalty Debate: An Epilogue on Republic v Mbushuu” (2009) 9 *AHRLJ* 459
41. Gowar C, Visser CJ “Distinguishing between Dignity, Identity and Privacy: Is it Really Necessary? Kumalo v Cycle Lab (Pty) Ltd” 2012 (75) *THRHR* 160
42. Gumboh E “The Penalty of Life Imprisonment under International Criminal Law” (2011) 11 *AHRLJ* 75
43. Geady P & Kgalema L, “Magistrates Under Apartheid: A case Study of Politicisation of Justice and Complicity in Human rights Abuse” (2003) 19 *SAJHR* 141
44. Hall RE and Jones CI “The Value of Life and the Rise in Health Spending” (2007) *The Quarterly Journal of Economics* 39
45. Hayson N “Constitutionalism, Majoritarian, Democracy and Socio-Economic Rights” (1992) 8 *SAJHR* 451
46. Heyns C “Reasonableness in a Divided Society’ (1990) 107 *SALJ* 279
47. Hopkins K “Constitutional Values and the Rule of Law: They Don’t Mean Whatever You Want Them to Mean” (2004) 19 *SAPR/PL* 432
48. Heyns C, Taking Socio Economic Rights Seriously: The Domestic Reporting Procedure and the Role of South African Human Rights Commission in Terms of New Constitution” (1999) 2 *De Jure* 195
49. Hutchinson AC “The Reasoning Game: Some Pragmatic Suggestions” (1998) 61 (2) *Modern Law Review* 263
50. Hlope JM “Official Languages and the Courts” (2000) 117 *SALJ* 690
51. Hlope J “The Role of Judges in a Transformed South Africa: Problems, Challenges and Prospects” (1995) 112 *SALJ* 22
53. Hoffmann L “The Intolerable Wrestling with Words and Meanings” (1997) 114 *SALJ* 656
52. Iles K “Limiting Socio-Economic Rights: Beyond Internal Limitation Clauses” (2004) 20 *SAJHR* 448
53. Jordaan DW “The Legal Status of the Pre-Embryo in the Context of Genetic Revolution” (2005) 122 *SALJ* 237
54. Jordaan L “The Right To Die With Dignity: A Consideration of Constitutional

Argument" (2000) *THRHR* 172

55. Juma L, International Dimension of rules of Impartiality and Judicial independence: Exploring the Structural Impartiality Paradigm' 2011 (2) *Speculum Juris* 17
56. Kapindu RE "Social Protection for Malawian Migrants in Johannesburg: Access, Exclusion and Survival Strategies" (2011) *AHRLJ* 93
57. Kahn E "What is Happening to the Death Penalty?" (1981) 98 *SALJ* 103
58. Kahn E "The Death Penalty in South Africa" (1970) 33 *THRHR* 108
59. Kerr AJ "The Interpretation of Contracts: Some Persistent Problems" (1994) 57 *THRHR* 87
60. Kriel RR "On How to Deal with Textual Ambiguity" (1997) 13 *SAJHR* 311
61. Kruus HJ "Foetal Rights? The Need for a Unified Approach to the Foetus in the Context of Festicide" (2009) 72 *THRHR* 126
62. Lamm RD "Rationing Health Care: Inevitable and Desirable" (1992) 40 *University of Pennsylvania Law Review* 1511
63. Laubscher P "The Death Penalty" (1998) 115 *SALJ* 773
64. Lenta P "A Neat Trick If You Can Do It: Legal Interpretation as Literary Reading" (2004) 121 *SALJ* 216
65. Lenta P "Democracy, Rights, Disagreement and Judicial Review" (2004) 20 *SAJHR* 1
66. Liebenberg S "The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa" (1995) 11 *SAJHR* 359
67. Liebenberg S "The Value of Human Dignity in interpreting Socio-Economic Rights" (2005) 21 *SAJHR* 1
68. Mnyongani FD "The Judiciary as a Site of the Struggle for Political Power: A South African Perspective" (2011) *2 Speculus Juris* 1
69. Makiwane PN Balancing Victims' Rights against those of Accused Persons: Challenges Posed by the Adversarial Criminal Justice System, 2011 (2) *Speculum Juris* 66
70. Mandela NR "The Bar's Contribution to Search for Justice" (2000) 13(3) *Advocate*
71. Mbazira C "A Path to Realising Economic, Social and Cultural Rights in Africa: A Critique of the New Partnership for Africa's Development" (2004) 4 *AHRLJ* 34
72. Mihalik J "The Death Penalty in Bophuthatswana: A New Deal for Condemned

Prisoners?" (1990) 107 *SALJ* 465

73. Mdumbe F "Socio-Economic Rights: Van Biljon vs. Soobramoney" (1998) 13 *SAPR/PL* 460
74. Metz T "Ubuntu as a Moral Theory and Human Rights in South Africa" (2011) 11 *AHRLJ* 532
75. Meyerson D "Abortion: The Constitutional Issues" (1999*) SALJ* 50
76. Moellendorf D "Reasoning about Resources: Soobramoney and the Future Socio-Economic Rights Claim" (1998) 14 *SAJHR* 327
77. Mubangizi JC "Public Health, SA Bill of Rights and Socio-Economic Polemic" (2002) 2 *TSAR* 343
78. Mujuzi JD "Why the Supreme Court of Uganda should Reject the Constitutional Court's Understanding of Imprisonment for Life" (2008) 8 *AHRLJ* 163
79. Mureinik E "Beyond A Charter of Luxuries: Economic Rights in the New Constitution" (1992) 8 *SAJHR* 464
80. Nadasen N "Suffer the Little Children-Euthanasia and the Best Interests of the Child" (1997) 60 *THRHR* 124
81. Newman DG "Institutional Monitoring of Social and Economic Rights: A south African Case Study and a new Research Agenda (2003) 19 *SAHRJ* 189
82. Ntlama N "Unlocking the Future: Monitoring Court Orders in Respect of Socio Economic Rights" (2005) 68 *THRHR* 81
83. Okpaluba C "Justiciability and Constitutional Adjudication In Commonwealth: The Problem of Definition (1)" (2003) 66 *THRHR* 424
84. Okpaluba C "Justiciability and Constitutional Adjudication: Problem of Definition (2)" (2003) 66 *THRHR* 610.
85. Onyemelukwe C "Access to Anti-retroviral Drugs as a Component of the Right to Health in International Law: Examining the Application of the Right in Nigerian Jurisprudence" (2007) 7 *AHRLJ* 446
86. Pieterse M "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 381
87. Pierterse M "A Different Shade of Red: Socio-Economic Dimensions of the Right to Life in South Africa" (1999) 15 *SAHJR* 372
88. Pieterse M "Health Care Rights, Resources and Rationing" (2007) 124 *SALJ* 514
89. Pillay A "Reviewing Reasonableness: An Appropriate Standard for Evaluating

State Action and Inaction" (2005) 122 *SALJ* 419

90. Pillay R "The Beginning of Personhood: Is South African Law Outdated?" (2010) 2 *Stell Law Review* 230
91. Rembe NS "Conceptions and Misconceptions of Justice in the Administration of Law: A reflection on Contextual Procedural and Substantive Issues" (2007) 2 *Speculum Juris* 184
92. Roeder CJ "Wrongfully Conceiving Wrongful Conception: Distributive vs Corrective Justices" (2001) 18 *SALJ* 347
93. Rudulph HG " Man's Inhumanity to Man Makes Countless Thousands Mourn! Do Prisoners Have Rights? (1979) 96 *SALJ* 640
94. Sarkin J "The Political Role of the South African Constitutional Court" (1997) 114 *SALJ* 134 at 136-137
95. Sarkin J "Problems and Challenges Facing South African Constitutional Court: An Evaluation of Its Decisions on Capital and Corporal Punishment" (1996) *113 SALJ* 71
96. Schlag P "The Normative and Politics of Form" (1991) 139 *University of Pennsylvania Law Review* 801
97. Scott C & Alston P "Adjudicating Constitutional Priorities in a Transformational Context: A Comment on Soobramoney's legacy and Grootboom's Promise" (2000) 16 *SAJHR* 206
98. Scott C & Macklem P "Constitutional Ropes of Sand or Justiciable Gurantees? Social Rights in a SA Constitution" (1992) *141 Univ of Pennsylvania LR* 1177
99. Singh D "The Constitutional Right To A Fair Trial: Understanding Section 35(3)(D) Through Cases" (2000) 63 *THRHR* 121
100. Soni S "Regulating Human Cloning-A Commonwealth Comparison" 2010 (2) *Speculum Juris* 130
101. Swart M "The Carfininan Curse: The Attitude of SA Judges Towards Women Between 1900 and 1920" (2003) 120 *SALJ* 540
102. Swart NP "Rosmini's Socio-Philosophical Foundation of Human Rights with Reference to Human Dignity" (2009) 1 *Speculum Juris* 55
103. Twinomugisha BK "Exploring Judicial Strategies to Protect the Right of Access to Emergency Obstetric Care in Uganda" (2007) 7 *AHRLJ* 283
104. Van Blerk AE "Judicial Appointment: Some Reflections" (1992) 55 *THRHR* 559
105. Van Der Walt AJ "Striving for Better Interpretation: A Critical Reflections on the

Constitutional Court's Harksen and FNB on the Property Clause" (2004) 121 *SALJ* 854

106. Van Der Walt J "The Relation between Law and Politics: A Communitarian Perspective" (1993) 110 *SALJ* 757
107. Van Niekerk B "Hanged by the Neck until You are Dead" 1969 (86) *SALJ* 457
108. Van Niekerk B "Hanged by the Neck until You are Dead" 1970 (87) *SALJ* 60
109. Van Marle K "Jurisprudence, Friendship and the University as Heterogeneous Public Space" (2010) 127 *SALJ* 628
110. Van Oosten F "Financial Resources and Patients Right to Health Care: Myth and Reality" (1999) 32 *De Jure* 1
111. Van Zyl DH "The Significance of the Concepts "Justice" and "Equity" in Law and Legal Thought" (1998) 105 *SALJ* 27279. Van Zyl Smit D "The Death Penalty in Africa" (2004) 4 *AHRLJ* 1
112. Verrier C "Is Imprisonment in South Africa Legally Defensible?" (2009) *Advocate* 41
113. Viljoen F "The Charter on Human Rights and Peoples' Rights/ The Travaux Preparatoirs in the Light of Subsequent Practice" (2001) 25 *HRLJ* 313
114. Viljoen F "Look Who's Talking, In the Courtroom, Too!" (1992)109 *SALJ* 64
115. Viljoen F "End Notes to the Death Penalty Decision" 1996 (113) *SALJ* 652
116. Viscusi WK "The Value of Life and Health" (1993) 31 *Journal of Economic Literature* 1912
117. Wacks R "Judges and Injustice" (1984) 101 *SALJ* 266
118. Wacks R "Judging Judges: A Brief Rejoinder to Professor Dugard" (1984) 101 *SALJ* 295
119. White J "Open Democracy: Has the Window of Opportunity Closed" (1998) 14 *SAJHR* 65
119. Williams G "The Foetus and the Right to Life" (1994) 53 *Cambridge Law Journal* 71
120. Wilson S "The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty" (2001) 17 *SAJHR* 531
121. Yeeshanew SA "Approaches to Justificiability of Economic, Social and Cultural Rights in the Jurisprudence of the African Commission on Human and Peoples Rights: Progress and Perspectives" (2011) 11 *AHRLJ* 317

NEWSPAPER REPORTS/ ARTICLES

Pretoria News	28 October 2009
Citizen	28 October 2009
Sunday Times	20 April 1997
Business Day	08 March 2000
Business Day	28 March 2000
Chronicle, Zimbabwe	28 December 2010
Sunday Times	25 September 2011
Advocate	25 August 2012
Sunday Independent	17 February 2013.
Pretoria News	03 May 2012
Pretoria News	03 November 2011
Pretoria News	12 January 2012
Pretoria News	15 July 2014
Citizen	15 July 2014
Pretoria News	20 August 2014

OTHER

The ANC Freedom Charter, 1955 available at www.anc.org.za (site last visited on 10 September 2007)

INTERNET SITES VISITED

www.anc.org.za (site last visited 15 January 2014)

www.cato.org/pubs/regulation/regu27n4/v27n4 (site last visited 15 January 2014)

www.constitutionalcourt.org.za (site last visited 15 January 2014)

www.saflii.org.za (site last visited 15 January 2014)

www.cato.org/pubs/regulation/regu27n4/v27n4 (site last visited 15 January 2014)

www.anc.org.za (site last visited on 10 September 2007)

www.african-court.org visited on 19 December 2014