A Critical Analysis of the Law On Health Service Delivery in South Africa

By

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ABSTRACT

This thesis examines the law relating health care in South Africa rather than medical law which is a subset of this field. It attempts to synthesise five major traditional areas of law, namely international, constitutional, and administrative law, the law of contract and the law of delict, into a legal conceptual framework relating specifically to health care in South Africa. Systemic inconsistencies with regard to the central issue of health care across these five traditional fields are highlighted. The alignment of the various pre-existing areas of statutory and common law with the Constitution is an ongoing preoccupation of the executive, the judiciary, the legislature and academia. In the health care context, the thesis critically examines the extent to which such alignment has taken place and identifies areas in which further development is still necessary. It concludes that the correct approach to the constitutional right of access to health care services is to regard it as a unitary concept supported by each of the five traditional areas of law. The traditional division of law into categories of public and private and their further subdivision into, for instance, the law of delict and the law of contract is criticized. It promotes a fragmented approach to a central constitutional construct resulting in legal incongruencies. This is anathema to a constitutionally based legal system. There is no golden thread of commonality discernible within the various public international law instruments that contain references to rights relating to health and it is of limited practical use in South African health law. The rights in the Bill of Rights are interdependent and interconnected. The approach of the courts to the right of access to health care needs to be considerably broader than it is at present in order to fully embrace the idea of rights as a composite concept. Administrative law, especially in the public health sector, offers an alternative basis to pure contract for the provider-patient relationship. It is preferable to a contractual relationship because of the many inbuilt protections and legal requirements for administrative action. Contracts can be unfair but courts refuse to strike them down purely on this basis. Administrative action is much more likely to be struck down on grounds of unfairness. The law of contract as a legal vehicle for health service delivery is not ideal. This is due to the antiquated approach of South African courts to this area of law. There is still an almost complete failure to incorporate constitutional principles and values into the law of contract. The law of delict in relation to health care services has its blind spots. Although it seeks to place the

claimant in the position in which he or she found himself prior to the unlawful act whereas the law of contract seeks to place him in the position he would have occupied had the contract been fulfilled, in the context of health care this is a notional distinction since contracts for health services seldom guarantee a specific outcome.

PREFACE

Many people question the validity of health law as a legal concept. They take the view that it is simply a compendium of aspects, taken within a particular context, of the more traditional legal categories such as constitutional law and the common law of contract and delict. This view is limited in that it ignores the immense value of a teleological approach. Logically speaking, law can never be an end in itself. Law only has meaning when viewed as a means. One can only assess the value and significance of law in the light of how successful and effective a means it proves to be in relation to a particular end. That end, hopefully, is justice within the specific context in which the law has been applied. Law begs the question of application and application begs the question of context. If general principles of law applied in a particular context lead to a result that is irrational or unfair then obviously such an application of the law is ineffectual. The recognition and compilation of a body of law within a particular context, such as health or communications, is thus of considerable value to persons whose daily lives are preoccupied by, and regulated within, that context.

The law relating to health care in South Africa has become significantly more complex of late. There have been many recent legislative changes which have materially altered the law governing both the funding and delivery of health care in this country and there are more such changes to come. A complicating factor in the legislative arena is that, in terms of Schedule 4 of the Constitution of the Republic of South Africa, each of the nine provinces has legislative competence in the area of health services. In addition, there is also a national legislative competence in the area of health services in terms of Schedule 4. The health services industry is therefore likely to be faced with the complexities of an unprecedented plethora of provincial and national legislation governing various aspects of health services. Some of the provinces have already enacted health legislation while others are in the process. The level of sophistication, the extent of the incorporation of constitutional principles and the manner of interpretation of the constitutional rights to

health care services vary considerably across the legislation of the provinces at the time of writing.

In South Africa, the health care arena is subdivided into public and private sectors, both on the side of health services and facilities and on the side of funding. The legal rules governing both the public and private sectors differ substantially in certain areas, for instance pharmacy ownership and the employment of health professionals, whilst in others, for example, licensing and legal operational issues, there is increasing convergence. New, constitutionally mandated human rights legislation such as the Promotion of Access to Information Act[1], the Promotion of Administrative Justice Act[2] and the Promotion of Equality and Prevention of Unfair Discrimination Act[3], present considerable challenges to both private and public health sectors in their various spheres of operation.

The legislation governing the funding of health services in the private sector, and to an increasing extent, the public sector, has also undergone substantial alteration in the preceding six or seven years. In 1998, for the first time a mandatory package of minimum benefits was incorporated into the private health funding legislation and there is regulatory provision for monitoring and reviewing the package and its effects on the market on a regular basis. There is also a growing movement within the health sector towards partnerships between public and private providers of health care services. This has created a real need to explore or even create legal models which are able to successfully integrate the often disparate philosophies and approaches of these two sectors in a workable fashion.

Due to the unprecedented proliferation of legislative and market changes within the health care sector, legal analysis and critique at an academic level has fallen behind. There is presently no in depth, authoritative examination of and commentary on the new legal environment in which providers and funders of health care services in South Africa

1 Act No 2 of 2000
2 Act No 3 of 2000
3 Act No 4 of 2000

are operating. There has never, to the knowledge of the writer, been an attempt to synthesise within a single work the legal principles of South African law as they pertain to health service delivery. There has been some substantive work on the subject of medical negligence[4], the doctor/patient relationship[5] and on isolated issues such as informed consent[6], HIV and AIDS[7], termination of pregnancy[8] and *res ipsa loquitur*[9] but no in depth framework study of South African law in the health care context exists or has to date been attempted. Since 1994 when the Constitution came into effect, there has been no comprehensive academic scrutiny of the meaning and import of the constitutional Bill of Rights with regard to health service delivery and how it impacts on other law affecting health service delivery although there have been journal articles commenting on landmark cases decided by the constitutional court in this area.

There is also a dearth of case law involving statutes despite the considerable number of statutes that deal with various aspects of health service delivery. The Medicines and Related Substances Act[10] is one of the oldest and most important of these yet since 1977, of the dozen or so cases that significantly featured this Act, the majority of them did not deal specifically with health service delivery issues in relation to medicines but rather

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4 Burchell JM and Schaffer RP 'Liability of Hospitals for Medical Negligence' 1977 *BML* 6(4) p 109; Brownlie S 'Wrongful Life: Is It A Viable Cause of Action in South Africa' *Responsa Meridiana* 1985 5(1) p 18; Louw PF '"Wrongful Life": 'n Aksie Gebaseer op die Onregmatige Veroorsaaking van Lewe' 1987 *SALJ* (2) p 199; Carstens PA 'The Locality Rule in Medical Practice' 1990 *De Rebus* p 421; De Klerk A 'Middelike Aanspreeklikheid van 'n Hospitaalowerheid' 1990 *TSAR* (1) p 148; Carstens PA 'Nalatigheid in Verskillende Gedagterigtings Binne die Mediese Praktyk' 1991*THRHR* 54 (4) p 673; Cleaver B 'Wrongful birth – the Dawning of a New Action' 1991 *SALJ* 108 (1) p 47; Hebblethwaite L 'Mishap or malpractice? Liability in Deliot for Medical Accidents' 1991 *SALJ* 108(1) p 38; Claassen NJB and Verschoor T *Medical Negligence in South Africa* (1992) based on an unpublished dissertation entitled 'Aanspreeklikheid van Geneeshere Op Grond van Nalatige Wanpraktyk' written by NJB Claassen under tutorship of Prof R Verschoor as part of the requirements of the LLM degree at the University of the Orange Free State; Carstens PA 'Die Strafregtelike en Deliktuele Aanspreeklikheid van die Geneesheer op grond van Nalatigheid' (unpublished LLD thesis, University of Pretoria 1996); Strauss SA '"Wrongful conception", "wrongful birth" and "wrongful life": the first South African cases' 1996 *Medical Law* 15 p 161; Strauss SA 'An Unusual Case of Wrongful Pregnancy: Liability of Doctor Resulting From Misrepresentation' 1998 *Medical Law* 17 p 7; Strauss, SA 'Twee mediese regsvrae: die Aanspreeklikheid van Private Hospitale met Ongevalle-Afdelings en die Aanspreeklikheid van Sportpromotors en Skeidregters Teenoor Beseerde Spelers' 2000 *TSAR* p 205

5 Strauss SA *Doctor, Patient and the Law* (1991)

6 Strauss SA 'Toestemming Deur 'n Jeugdige' 1964 *THRHR* p 116; van Oosten FFW, *The Doctrine of Informed Consent in Medical Law* (1989) doctoral thesis University of South Africa. See also van Oosten FFW 'HIV Infection Blood Tests and Informed Consent' *Essays In Honour of SA Strauss* Joubert JJ (ed) 1995 p 281;Van Oosten FFW *International Encyclopaedia of Laws*, Vol 3 Medical Law – South Africa, (1996) Blanpain (ed);

7 Van Wyk CW 'VIGS en die Reg: 'n Verkenning' 1988 *THRHR* p 317; Van Wyk CW 'Aspekte van Regsprobleme rakende VIGS' (Unpublished thesis, University of South Africa (1991)); Van Wyk CW 'AIDS: Some Medicolegal Aspects' 1991 *Medicine and Law* p 139; Strauss SA *The Nurse and AIDS: Legal Issues* (in association with the South African Nursing Association)

8 Strauss SA 'Abortion Law Reform' (1995) 112 *SALJ* p 195

9 Van den Heever P unpublished doctoral thesis entitled 'The Application of the Doctrine of Res *Ipsa Loquitur* to Medical Negligence Actions: A Comparative Survey' (2002) University of Pretoria; Carstens PA 'Die Toepassing van *Res Ipsa Loquitur* in Gevalle van Mediese Nalatigheid' 1999 *De Jure* p 19

10 Act No 101 of 1965

with such subjects as search and seizure[11], copyright[12] and trade mark[13], the repackaging of medicines at provincial hospitals[14] for supply to district pharmacists, procedural issues at disciplinary hearings[15] and the possession of dagga (marijuana)[16]. There are only three of substantial interest for health service delivery purposes, one relating to the definition of a medicine,[17] one relating to product liability in respect of a medicine[18] and the other relating to the supply of an unregistered medicine to an AIDS patient[19]. The case law with regard to the Health Act[20], the central legislation governing health service delivery by hospitals and other health establishments in South Africa, is even scarcer. Since 1977 cases that significantly involve this legislation are one relating to the licensing of a private hospital[21], one relating to an administrative decision to terminate a contract for health service delivery[22] and one relating to nuisance caused by offensive odours from sewage treatment works operated by a local authority[23].

While detailed analysis and exposition of statute law is important and valuable work, the practical application of South African health statutes seems to have been a relatively uncomplicated issue for those working within the South African health system judging by the number of cases and their central themes. Very few of these cases are relevant to issues of health service delivery within South African law. Where they are, they have been discussed in this thesis. For the most part, however, detailed discussion of statute law has been avoided because it was felt that a long and tedious exposition of such law would reflect only the views of the writer and very few others besides. There would be no

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11 *Mistry v Interim Medical and Dental Council Of South Africa and Others* 1998 (4) SA 1127 (CC)

12 *Biotech Laboratories (Pty) Ltd v Beecham Group plc and Another* 2002 (4) SA 249 (SCA)

13 *Adcock-Ingram Laboratories Ltd v Lennon Ltd* 1982 (1) SA 862 (T); *Adcock-Ingram Laboratories Ltd v SA Druggists Ltd And Another; Adcock-Ingram Laboratories Ltd v Lennon Ltd* 1983 (2) SA 350 (T); *The Upjohn Company v Merck and Another* 1987 (3) SA 221 (T);

14 *Raats Röntgen and Vermeulen (Pty) Ltd v Administrator, Cape, And Others* 1991 (1) SA 827 (C); *Administrator, Cape v Raats Röntgen and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A)

15 *Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad v Strauss en Andere* 1991 (3) SA 203 (A)

16 *S v Ndamase* 1979 (3) SA 346 (N); *S v Julius* 1984 (2) SA 480 (O); *Prince v President, Cape Law Society, And Others* 2000 (3) SA 845 (SCA); *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC)

17 *Reitzer Pharmaceuticals (Pty) Ltd v Registrar of Medicines and Another* 1998 (4) SA 660 (T)

18 *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA)

19 *Applicant v Administrator, Transvaal, and Others* 1993 (4) SA 733 (W)

20 Health Act No 63 of 1977

21 *Medforum Hospitaal (Edms) Bpk v Departementshoof, Departement Gesondheid en Welsyn: Administrasie Volksraad en Andere* 1994 (4) SA 852 (T)

22 *Independent Municipal And Allied Trade Union and Others v MEC: Environmental Affairs, Developmental Social Welfare And Health, Northern Cape Province, and Others* 1999 (4) SA 267 (NC)

23 *Eskom v Rini Town Council* 1992 (4) SA 96 (E)

dynamic in the arguments presented and no way of evaluating them against academic or judicial opinion in order to ascertain their weight or validity. As such they would simply exist until either proven correct or incorrect in the judgment of a court or the relevant section is amended. Furthermore, at the time of writing certain key sections of the Medicines and Related Substances Act relating to pricing of medicines and the licensing of dispensing doctors have only just come into operation and with regard to the latter, the National Department of Health is presently engaged in litigation with the National Convention on Dispensing. The decision of the court in this matter has yet to be handed down. It is thus too early to start discussing the relevant sections of this Act as regards their impact on health service delivery. The National Health Act, destined to repeal the Health Act[24], has been signed by the President and is presently awaiting proclamation. Its regulations have not yet been written. Since much of the mechanics of the legislation will be contained in the regulations, detailed discussion and analysis of the Act at this time would have been premature and largely speculative.

Legislation such as the Hazardous Substances Act[25], the Foodstuffs, Cosmetics and Disinfectants Act[26], the Occupational Injuries in Mines and Works Act[27], the Sterilisation Act[28] and the Choice on Termination of Pregnancy Act[29], while clearly of relevance to specialized issues in health care, are not of sufficient general relevance that it was felt that they should be discussed in any detail in a thesis of this nature. Sterilisation and termination of pregnancy are aspects of health care which undoubtedly raise a number of interesting legal debates but they fall specifically into the category which the Constitution calls 'reproductive health care' and the relevant case law is thus dealt with in the section of this thesis dealing with constitutional rights. In a subject as vast as this, one has to set realistic boundaries in order to be able to cover most of the material in sufficient depth to make a meaningful contribution to the field rather than to cover all of the material at a superficial level that, at the end of the day, brings no value.

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24 Fn 20 *supra*
25 Act No 15 of 1973
26 Act No 54 of 1972
27 Act No 78 of 1973
28 Act No 44 of 1998
29 Act No 92 of 1996

The scope of the present work is therefore, of necessity, broad. It is an attempt to uncover the central legal principles governing the South African health care system from a critical, analytical perspective. Since critical analysis requires a convergent, as opposed to divergent, conceptual approach, international comparisons are confined to pointed examples of instances in which a particular issue or principle has been dealt with in other jurisdictions by a more or less effective or efficient method. References to international cases and situations are sometimes as much, if not more, for the purpose of demonstrating a particular legal principle from a practical, factual point of view as for examining the relative merits of that principle in the context of a foreign legal system. A selection of more specific issues is canvassed in this work in order to illustrate, in practical terms, the relevance and impact of the general legal principles discussed.

It was felt that broad-brush comparisons with other jurisdictions were neither appropriate nor particularly illuminating in trying to establish the essence of the local legal framework on a particular subject. It is of no use, for instance, to persons operating within the South African health care industry to be told that the right to health care services in Bulgaria is very different, in terms of its content, to that in South Africa. International comparisons are more appropriate at the legal policy level. At the level of practical implementation of the law, careful dissection, analysis and exposition are of greater value.

The Court in *B and others v Minister of Correctional Services and others*[30] expressed much the same sentiments in quoting the words of Lord Simon of Glaisdale in *Miliangos v George Frank (Textiles) Ltd*[31]:

"...the training and qualification of a judge is to elucidate the problem immediately before him, so that its features stand out in stereoscopic clarity. But the beam of light which so illuminates the immediate scene seems to throw the surrounding areas into greater obscurity: the whole landscape is distorted to the view. A penumbra can be apprehended, but not much beyond; so that when the searchlight shifts a quite unexpected scene may be disclosed. The very qualifications for

30 *B and others* [1997] 2 All SA 574 (C)
31 *Miliangos* [1976] AC 443 481-482

the juridical process thus impose limitations on its use. This is why judicial advance should be gradual. 'I am not trained to see the distant scene: one step is enough for me' should be the moot on the wall opposite the judge's desk. It is, I concede, a less spectacular method or progression than somersaults and cartwheels; but it is the one best suited to the capacity and resources of a judge. We are likely to perform better the duties society imposes on us if we recognize our limitations. Within the proper limits there is more than enough to be done which is of value to society."

It is therefore the object of this work to focus largely on South African law and to provide the necessary dissection, analysis and exposition of this law for the practical benefit both of those whose responsibility it is to ensure or effect the delivery of health services in South Africa and of those whose lives are affected by the delivery of those services.

Introduction

Law neither arises nor operates in a vacuum. It is a medium for the distillation and implementation of the fundamental beliefs and values of the society by and for which it is written. Public policy and the public interest, as determined by the legislature and the judiciary, underpin the creation and application of law. Whilst the preamble[1] and founding provisions[2] of the South African Constitution are obvious examples of legislative expression of the underlying importance of public values to law, it is by no means a new idea. It was central to Roman law[3] and is very much in evidence in the Roman law of contract[4]. From the Roman-Dutch writers it is clear that it survived beyond the time of Rome[5]. Thence it found its way into the South African common law[6]. In the present instance, the question is whether public policy supports a right to health care and if so, on what basis[7]. The issue of whether a person has a fundamental

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1 The Preamble of the Constitution of the Republic of South Africa (Act No 108 of 1996) states that the Constitution is adopted as the Supreme Law of the Republic *inter alia* so as to –
"heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" and "improve the quality of life of all citizens and free the potential of each person".

2 Section 1 of Act No 108 of 1996 states that:
"the Republic of South Africa is one, sovereign democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Non-racialism and non-sexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

3 Ulpian declared that the basic principles of law are to live honourably, not to harm another and to render to each his own (*Dig* 1 1 10 1). At *Dig* 45.1.26 Ulpian says: 'Generaliter novimus turpes stipulationes nullius esse momenti'. (We generally recognise that immoral stipulations have no validity.) See also Papinian (*Dig* 28.7.15): *'Nam quae facta laedunt pietatem, existimationem, verecundiam nostram et ut generaliter dixerim contra bonos mores fiunt, nec facere nos posse credendum est.'* (For acts which offend our sense of duty, our reputation or our sense of shame, and if I might speak generally which are done against sound morals, it is not to be accepted that we are able to do them.)

4 They created remedies such as the *exceptio doli* and the doctrine of *laesio enormis* which effectively allowed a contracting party to escape his obligations on equity grounds. See also the Digest: Paul (*Dig* 2.14.27.4): *'Pacta quae turpem causam continent non sunt observanda; veluti si paciscar ne furti agam vel injuriarum, si feceris: expedit enim timere furti vel injuriarum poenam.'* (Pacts founded on shameful ground are not to be enforced: an example would be if I make a pact that I will not bring an action for theft or insult if you commit either of these delicts. For it is generally beneficial that there be fear of the penalty for theft or insult.)

5 *Grotius* 3.1.42 and 43 stated that obligations are void "whereby something is promised which is regarded as dishonourable by municipal law and morality; as to do or omit to do anything wicked or to remit the punishment of some crime not yet committed. In like manner obligations are invalid which arise from some immoral cause or consideration." See also du Plessis P "Good faith and equity in the law of contract" 2002 *THRHR* 397, 405-406 where it is stated that "Prominent Roman –Dutch jurists such as Dionysius van der Keessel, Johannes Voet, Ulrik Huber and Johannes van der Linden later adopted the regulatory function of equity and applied it to the various fields of Roman-Dutch law. When taking the influence of Grotius's concept of equity into account, it seems that equity in Roman-Dutch law was viewed as a sophisticated regulatory concept with prohibitive and corrective functions that could be employed to address inequality in performance."

6 *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173; *Minister van Polisie v Ewels* 1975 (3) SA 590 (A); *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Schultz v Butt* 1986 (3) SA 667 (A); *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A); *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A); *Edouard v Administrator Natal* (2) SA 368 (D).

7 In South Africa, the Constitution itself is a powerful indicator of public policy. Thus in *Ryland v Edros* 1997 (2) SA 690 (C) the court observed that: "It is true that public policy is essentially a question of fact (see the statement by Aquilius (the late Mr Justice F P van den Heever) in his article 'Immorality and Illegality in Contract' (1941) 58 *SALJ* 337 at 346: 'what is immoral is a factual not a legal problem', on which Mr Trengove strongly relied. This is so even though in most cases the factual finding in question is not based on evidence before the Court but on facts regarded as so notorious that

right to an economic commodity or good strikes at the heart of many of the ideologies of Western society and consequently, the legal principles that entrench them. Examples are the common law principles of freedom of contract and ownership of property. In the context of socio-economic rights, such as a right to health care, these principles take on a new dimension that requires a re-examination of their role in the legal fabric. Many are not keen to undertake such re-examination, perhaps fearful of where it might lead[8].

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the Court takes judicial notice of them. In the present case it would be difficult to find that there has been such a change in the general sense of justice of the community as to justify a refusal to follow the Ismail decision if it were not for the new Constitution. In the circumstances I prefer to base my decision on the fundamental alteration in regard to the basic values on which our civil policy is based which has been brought about by the enactment and coming into operation of the new Constitution... In his judgment in *Du Plessis and Others v De Klerk and Another* (case No CCT 8/95), a decision of the Constitutional Court delivered on 15 May 1996, Ackermann J referred (in para [106] of his judgment) to 'the marked similarity between the provisions of s 35(3) . . . and the indirect horizontal application of the basic rights in the (German Basic Law) in German jurisprudence.' In paras [103] and [104] of his judgment Ackermann J said: '[103] Any attempt at a detailed discussion on the operation of mittelbare Drittwirkung (indirect horizontality) in German constitutional law would be out of place here. There are some features, however, which bear on the construction of our own Constitution. The Federal Constitutional Court refers to the radiating effect (Ausstrahlungswirkung) of the basic rights on private law. In the Lüth case the Federal Constitutional Court held as follows: 'The influence of the scale of values of the basic rights affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the *ordre public* - in the broad sense of the term - that is, rules which for reasons of the general welfare also are binding on private legal relationships and are removed from the domination of private intent. Because of their purpose these provisions are closely related to the public law they supplement. Consequently, they are substantially exposed to the influence of constitutional law. In bringing this influence to bear, the courts may invoke the general clauses which, like art 826 of the Civil Code, refer to standards outside private law. 'Good morals' is one such standard. In order to determine what is required by social norms such as these, one has to consider first the ensemble of value concepts that a nation has developed at a certain point in its intellectual history and laid down in its constitution. That is why the general clauses have rightly been called the points where basic rights have breached the (domain of) private law. . . .' [104] Thus, in private litigation, the German courts are obliged to consider the basic rights in interpreting concepts such as 'justified', 'wrongful' 'contra bonos mores' et cetera. The basic rights therefore have a radiating effect on the common law through provisions such as, for example, s 138 of the Civil Code, which provides that "legal acts which are contrary to public policy are void."'

In a footnote giving the reference to the Lüth case, Ackermann J said: "The word 'radiating' seems preferable to the somewhat pejorative term 'seepage'. In my view it is clear that if the spirit, purport and objects of chap 3 of the Constitution and the basic values underlying it are in conflict with the view as to public policy expressed and applied in the Ismail case then the values underlying chap 3 of the Constitution must prevail."

Further support for this view may be found in the dictum of Mahomed AJ (as he then was) in *S v Acheson* 1991 (2) SA 805 (Nm) at 813A–B (1991 NR 1 at 10A–B): "The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

In *Mthembu v Letsela and Another* 1998 (2) SA 675 (T), the court accepted as correct the conclusion of Farlam J in *Ryland v Edros* that if existing notions and views as the public policy are in conflict with the spirit, purport and objects of chapter 3 of the Interim Constitution, and the basic values underlying it, 'then the values underlying chap 3 of the Constitution must prevail'

In *Coetzee v Comitis and Others* 2001(1) SA 1254 (C) the court took the view that "... considerations of public policy cannot be constant. Our society is an ever-changing one. We have moved from a very dark past into a democracy where the Constitution is the supreme law, and public policy should be considered against the background of the Constitution and the Bill of Rights. One can think of many situations which would, prior to 1994, have been found not to offend public policy which would today be regarded as inhuman. Examples are so plentiful that I do not believe that it is necessary for me to mention them."

There is thus argument for the fact that in South Africa, public policy does support a right to health care in the terms in which it is couched in the Constitution.

8 See for instance Kelley D "The rights angle – the consequences of a "right" to health care", *Reason Magazine*, January 1994. Kelley was at the time the executive director of the Institute for Objectivist Studies in Pughkeepsie, New York. He argues that: " the very concept of such a right is corrupt in theory" because "a right is a principle specifying something that an individual should be free to have or do." One of his main objections to so-called 'welfare rights' is the fact that they "impose on others the positive obligation to provide the goods in question." He describes welfare rights as "rights to goods: a right to food, shelter, education, a job etc" – and contrasts them with 'liberty rights' which are "rights to freedom of action but don't guarantee that one will succeed in obtaining any particular good one may be seeking." He observes that every right imposes some obligation on others and questions the practicality of this in the light of limited resources.

It is trite that for a right to exist there must be some legal basis for it. The content of a right is shaped by that branch of law from whence it arises. Because, rights tend to be flavoured by the jurisprudence that gave birth to them, when a particular right[9] is reflected as the subject matter of more than one area of law and is developed separately on different legal fronts, and to varying degrees given the conceptual and doctrinal limitations of that particular legal area, there is the potential for dissonance in attempts to conceptualise the right as a single legal construct. In other words, when one encounters the question of a right to health care, one must ask whether there is in fact a single right with a number of different facets, depending upon the legal perspective of the viewer, or whether there are rather many discrete rights to health care within the various branches of law across which synthesis is not possible. In South African law, the idea of a right to health care is addressed to varying degrees in a number of different legal areas notably, international law, constitutional law, the common law of contract, the common law of delict and statutory law. The extent to which these various areas of law may be reconciled to yield a single, multifaceted right to health care is one of the issues explored in this thesis. Some practical implications of a right, or various rights, to health care will be examined by way of a series of situational questions. The relevance and importance of an attempt at synthesis is highlighted by the comparatively recent introduction into South African law of a constitutional Bill of Rights which, in terms of both the Constitution itself[10] and the legal theory behind its construction, must serve as a grundnorm for the further development, in terms of both modification and edification, of the entire legal system.

Synthesis: Some Legal Questions

To illustrate the importance of the possibility of synthesis of various branches of the law, the question has been posed whether the Constitution can give rise to a 'constitutional delict' as distinct from a common law delict[11] or whether the common

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See also Faria MA "Is there a right to health care?" *Medical Sentinel*, Vol 4 No 4, July/August 1999, 125-127. Faria questions whether health care is really a basic human right on essentially the same grounds as Kelley, namely that a right to medical care "imposes an obligation on a physician".

9 Conceptually, as opposed to legally, speaking.

10 See section 39(2) of Act No 108 of 1996 which requires every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law or customary law.

11 Neethling J, Potgieter JM, Visser PJ, *Law of Delict* (1999) 22-23. The authors submit that a clear distinction should be made between a constitutional wrong and a delict even though these two figures may overlap on the basis that the

law of delict should be used to underscore and remedy violations of constitutional rights that satisfy the recognised common law requirements for delict. In other words, does the constitution create another, new, category of delict outside of the common law, which must be developed in accordance with constitutional law principles or is it more logical to develop the common law of delict so as to accommodate certain violations of the constitutional law therein. A further question could be posed in relation to the law of contract? Would breach of a contractual right, which in itself involves a constitutional right, render the breach of contract unconstitutional? Must one consider two separate actions for the same wrong, one in terms of constitutional law and one in terms of the law of contract - in which case, would the relief claimed differ depending on the basis of the action - or must one regard it as a simple breach of contract?

Even at a purely constitutional level, there is a need to synthesise provincial and national legislation. There is apparently scope for variation in the content of the constitutional right to health care services across provinces insofar as health care services are a Schedule 4, Part A, competency. This means that the provinces and the national government have concurrent legislative power in this area. In terms of section 41(1) (e) all spheres of government and all organs of state within each sphere must respect the constitutional status, institutions, powers and functions of government in the other spheres. The national government may not simply override a provincial government by way of legislation on a particular issue. Section 104(1) of the Constitution gives a provincial government the power to pass legislation for its province with regard to any matter within a functional area listed in Schedule 4. In terms of section 104(3) a provincial legislature is bound only by the Constitution and, if it has passed a constitution for its province, also by that constitution. Given the fact

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"requirements for a delict and those for a constitutional wrong differ materially." They also point to the fact that "...unlike a delictual remedy which is aimed at compensation, a constitutional remedy (even in the form of damages) is directed at affirming, enforcing, protecting and vindicating fundamental rights and at preventing or deterring future violations of chapter 2". According to the authors a constitutional wrong and a delict should not be treated alike and for conceptual clarity the term constitutional 'delict' or 'tort' should rather be avoided. They do state, however, that where a delictual remedy will also effectively vindicate the fundamental right concerned and deter future violations of it, the delictual remedy may be considered to be appropriate constitutional relief and in this way may serve a dual function. The view of the authors that a constitutional wrong must be viewed as distinct from a delict is apparently at odds with the provisions of section 8(3)(a) and (b) of the Constitution which states that in order to give effect to a right in the Bill, a court must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1). This section promotes the understanding that the vehicle for giving effect to rights in the Bill is the common law in the absence of relevant legislation. The concept of constitutional 'wrongs' as a discrete category of wrongs apart from common or statutory law does not seem to be in keeping with what is intended by the Constitution itself. Rather the Constitution is to be regarded as the base reference for the edification of the legal system generally.

that the right to health care services is tempered by the state's[12] obligation to ensure the *progressive* realisation of the right within available resources[13] and the possibility that "the state" can mean a provincial or even municipal government as much as it does the national government, how does one reconcile this potential for variation in the content of the right across provinces with the fact that in terms of section 9(1) of the Constitution, "Everyone is equal before the law" and in terms of section 9(2), "Equality includes the full and *equal* enjoyment of all rights and freedoms"? (writer's italics).

Does the Constitution in fact create a right of access to health care services which exists independently of any other legislative or other measure taken by the state in order to achieve the progressive realisation of that right within available resources or does it effectively only impose an obligation upon the state to create instances or facets of such a right by way of legislation as and when the resources are available? The implications of each of the possible answers to this question are profound. If the answer is the former then there exists a fundamental and underlying right of access to health care services which in certain circumstances, could be enforceable against any number of potential suppliers of health care services irrespective of any other specific legislative provisions relating to access to health care services. The idea, in terms of this view, is that the nature, content, level and method of delivery of the particular health services in question would be determined by a court in the given circumstances

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12 In analysing what is meant by "the State" in the case of *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 SCA, at 876 the court stated that: "In its ordinary meaning for the purposes of domestic law the word is frequently used to include all institutions which are collectively concerned with the management of public affairs unless the contrary intention appears. In this sense the State may manifest itself nationally (through the executive or legislative arm of central government), provincially, locally and, on occasions, regionally." In *R v Bethlehem Municipality* 1941 OPD 227 Van den Heever J said the following at 231: "A facile distinction is sometimes drawn between municipalities and other entities with legislative and executive powers on the ground that municipalities are mere creatures of statute. This is undoubtedly so, but so are provincial councils and, for that matter, the Union Parliament. With respect to authority of course they differ vastly and are ordered in a definite hierarchy, but the function of each is government. A municipality is not merely a corporation like a company; it is a phase of government, local it is true, but still government." And in *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) the same Judge commented at 855: "The modern trend is to recognise that municipal government may be local, yet it is a phase of government." In *Chandler and Others v Director of Public Prosecutions* [1962] 3 All ER 142 (HL) the phraseology that had to be construed was 'the safety and interests of the State'. Lord Devlin, after asking "what is meant by 'the State'?" gave the following answer at 156D - E: "Counsel for the appellants submits that it means the inhabitants of a particular geographical area. I doubt if it ever has as wide a meaning as that. I agree that in an appropriate context the safety and interests of the State might mean simply the public or national safety and interests. But the more precise use of the word "State", the use to be expected in a legal context, and the one which I am quite satisfied for reasons which I shall give later was intended in this statute, is to denote the organs of government of a national community." And in the same case Lord Reid suggested that the 'organised community' comes as near to a definition of 'State' as one can get. As Baxter points out in *Administrative Law* at 95, although the expression 'the State' is extensively employed in legislation, it is not used with any consistency. The precise meaning of 'the State' depends on the context within which it is used. It is submitted, in view of the foregoing and in view of the nature of the Constitution itself that the word 'state' as it appears in section 27(2) cannot be interpreted to mean anything other than all of the spheres of government established by and recognised in the Constitution.

13 Section 27(2) of the Constitution states that: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

of a particular case. If the answer is the latter then it is a right enforceable against the state only and then only to the extent that the state is obliged to take reasonable legislative and other measures to achieve the progressive realisation of the right. The nature, content, level and method of delivery of the health services would be the subject of other legislation and other measures to be adopted by the state and no further legal action to obtain health care services could be taken until those legislative and other measures were in place. In terms of the latter view, the content of the constitutional right of access to health care services is restricted to the state's obligation to take those legislative and other measures to achieve the progressive realisation of the right. The appropriate relief on the latter view, in terms of a Constitution based action, would be a simple order directing the state to enact legislation or adopt certain measures to achieve this. Further discussion of this issue will be undertaken in a later section dealing more closely with the constitutional right of access to health care services.

In the context of statutory law, for example the Compensation for Occupational Injuries and Diseases Act[14], can the fact that section 73 of this Act provides for the payment by the Director-General, the employer or the mutual association concerned, as the case may be, of the reasonable costs of medical expenses for occupational injuries and diseases for a period of two years be seen as a legislative measure taken by the state to progressively realise the constitutional right of access to health care services? In other words can the right embodied in section 73 of the Compensation for Occupational Injuries and Diseases Act now be regarded as a subset of the constitutional right of access to health care services or is it merely a right conferred by a statute independently of section 27(1) of the Constitution? If the answer is the former then the section 73 right must be tested against the provisions of section 27 of the Constitution. Is it a reasonable legislative measure?[15] Does it sufficiently take into account the availability of resources? Should the state take further steps to develop the content of this particular right in this particular context or should it rather be supplemented or complemented by other rights relating to access to health care

14 Act No 130 of 1993

15 See section 27(2) of the Constitution quoted at fn 13 *supra*.

services in other contexts?[16] Would the fact that this particular law predates the Constitution mean that it cannot be seen in the broader context of the constitutional right of access to health care services or should it nonetheless now be interpreted in this context irrespective of when it was promulgated?

Synthesis: Some Practical Questions

The questions posed above and the manner in which they are answered have a direct impact on practical questions of health service delivery in South Africa. Some of these questions go to the heart of health care delivery systems generally. They relate to the implementation of socio-economic rights in the realities of a less than perfect world. They confront issues such as the rationing and equitable distribution of health care services, acceptable levels of quality and standards for health care, interfaces between the public and private sectors on issues of health care delivery and the need for a balancing of the various interests that contribute to the dynamic of the health sector. Some of practical questions in this context are:

Is there a difference between a right of access to health care services and a right to health care services?

Must the health care services be supplied irrespective of a patient's ability to pay?

If there is a right to health care services from the perspective of the consumer, is there a corresponding obligation to deliver those health care services, and if so, who bears it and to what extent?

If there is a right to health care services, is it restricted to the indigent or do all consumers, including members of medical schemes, have such a right and, if so, against whom?

Is there a specific level of health care service to which a right to health care applies? For example, is the right restricted to health care services at a primary care level or at

16 For instance in the context of Social Health Insurance legislation or even a National Health Act which provides for access to health care services for the population generally.

an emergency care level, or does it extend through all levels of care, including secondary and tertiary levels?

Would the state, and private institutions such as managed care organisations and medical schemes, be able to legitimately restrict access to, or ration, health care services?

Is there a certain standard of health care services implied in the constitutional right to health care services e.g. one which demands that the provider of such services exercises reasonable care in their delivery so as to optimise the efficacy of the services provided?

When a person contracts for certain health care services with a supplier of health care services how does this affect that person's constitutional right of access to heath care services?

Can a person contract out of his or her right to life in a health care setting or contract for a lower standard of health care services than is generally regarded as acceptable?

Would consumers in a particular locality be able to insist that the government constructs and equips a clinic or hospital in the area to serve their health care needs on the basis of a constitutional right of access to health care services?

Would consumers in a particular locality be able to prevent the closure of a state owned hospital or clinic in their area on the basis that such closure would constitute a denial of their right of access to health care services?

Can an individual insist on receiving life prolonging medical treatment when such treatment does not improve the quality of life of the patient and holds no hope of a cure but prolongs his or her life such as it is?

Does a right to health care services imply a right to funding of those services by the state or by a medical scheme?

Is it equitable to institute the implementation of a particular health intervention for select groups of people with a view to increasing coverage to the remainder of the population over a period of time?

What are the rights of providers of health care services in the light of the existence of a constitutional right to such services on the part of consumers?

Approach and Methodology

This thesis explores the questions raised above and others in the context of five broad areas of law namely international law, constitutional law, administrative law, the law of contract and the law of delict. These areas of law have in some instances been covered separately with regard to the public and private sectors in order to restrict the size of the chapters and to highlight some of the differences between the two sectors. More particularly the research material is divided into ten chapters in the following way:

- Chapter one explores the concept of a right to health and a right to health care at the level of international law and the usefulness of these concepts in international law to the South African legal system.

- Chapter two deals with the right to health care services and health service delivery from a constitutional law perspective and discusses the relevant judgments of the constitutional court in this area;

- Chapter three examines the significance and relevance of administrative law to health service delivery. The relevant case law in the area of administrative law is discussed;

- Chapter four covers the general principles of the law of contract within the context of health service delivery;

- Chapter five considers the law of contract within the context of the delivery of health services by the public sector and focuses on the case law in this area;

- Chapter six considers the law of contract within the context of the delivery of health services by the private sector and includes focuses on the relevant case law;

- Chapter seven covers the general principles of the law of delict as applicable in the health care context;

- Chapter eight considers the law of delict as it relates to health service delivery within the public sector and focuses on the relevant case law;

- Chapter nine deals with the law of delict as it related to health service delivery within the private sector and focuses on the relevant case law;

- Chapter ten consolidates the conclusions and observations that were made in each of the preceding chapters and offers some concluding thoughts on the subject matter of the thesis.

There are numerous references to articles and publications that have been sourced from the internet in this thesis. This is for a number of reasons. From a practical perspective, given the time that it takes to cover a subject of this magnitude, the internet offers extremely fast and detailed access to many sources of law that would take weeks to uncover in a paper library - assuming that they were available in hard copy in that library to begin with. Sometimes there is as much of an advantage in knowing what is *not* available as there is in seeing what is present on the shelves. The internet is fast becoming *the* central repository of knowledge worldwide and it would be nothing short of foolish not to search it for material that is relevant to the topic at hand. It is also much quicker, easier and cheaper to download and store electronically legal articles and reference material for subsequent perusal and study than to physically stand making photocopies in a law library for days. In the context of South African source materials with regard to health law in particular, reference has already been made to the relative paucity of material compared to that available in many foreign jurisdictions. While this thesis does not purport to be anything resembling a

comparative legal study, due largely to the fact that its scope within the South African legal context is extremely broad, it was useful to seek out and include, for illustrative purposes, examples from other jurisdictions of the manner in which they have dealt with issues similar to those under discussion. The internet makes this task a pleasure as opposed to the labour of sweat and tears it would quite literally have been if the writer had been obliged to trawl the law libraries. Most South Africa law libraries have in any event converted to electronic indices that are in some cases offered via subscription services on the internet. When one is attempting a work as substantive as this, it is wise to make the most efficient and effective use of one's time and other resources in order to be able to arrive at a finished product within externally imposed time constraints.

Although this work could be criticised as somewhat voluminous, some of its size is attributable to detailed coverage of the court judgments in the cases discussed. It was felt that such detailed coverage was necessary and useful for a number of reasons not least of which are -

- The thesis covers a wide expanse of law and few readers will be intimately familiar with every area;
- It was the intention to create a source reference for non-lawyers and those with no ready access to the law reports;
- In order to fully explore the nuances of the cases discussed, it is important to see the detailed thinking of the judges. Law is not a science but an art.

It was also important to cover these five areas of law because a central point of this thesis is the unity of all law in South Africa on the basis of the Constitution. It would not be exaggeration to say that it as much a work of constitutional law as it is of health law. The Constitution requires consistency of all other law not only with itself but also between various fields of law since it embodies the essence of the central themes and the guiding principles of law in this country. One cannot establish the extent to which such constitutional consistency prevails without examining major fields of law. One cannot identify inconsistencies without undertaking the same exercise. The structure of the thesis therefore reflects its approach to law – that there

is a single legal system with many facets rather than a number of different systems that operate discretely and independently of each other.

The Constitution directs South African courts to consider international law and allows them a discretion to consider foreign law. The same approach has been adopted in this thesis. It is not a comparative study of health care law across different jurisdictions. An entire chapter has been devoted to international law but there are comparatively few and highly selective references to foreign law throughout the various chapters. Such references are made where they serve to further illustrate, contextualise or highlight a principle of South African law that is under discussion. In some instances they are the references found within the judgments of South African courts. The dearth of case law in South Africa in the area of health service delivery is one of the principal reasons for these references to foreign law. They serve as practical examples of 'real life' situations in which a particular legal principle has been applied and to what effect.

H Nys in the entry for Belgium in the *International Encyclopaedia of Laws*[17] explains medical law as follows:

"Medical law is an area of law, medical law does not respect traditional compartments with which lawyers have become familiar, such as torts, contracts, criminal law, family law and public law. Instead, medical law cuts across these subjects and today must be regarded as a subject in its own right. We maintain that it is a discrete area concerned with the law governing the interactions between doctors and patients and the organisation of health care."

This work is voluminous for yet another reason. It explores more than just medical law. Its focus is South African health law – a much wider concept - and there is no pre-existing foundation upon which to build in this specific context in South African law. It thus had to be done 'from scratch'. Nys observes that often the term "health (care) law" is used instead of medical law. He states:

"According to Leenen[18], 'health law is that branch of law which covers studies on both the individual and social aspects of the right to health care. It can be defined as the body of rules that relates directly to the care for health as well as the application of general, civil, criminal

17 Blanpain R (ed) Chapter III 'Medical Law' p 26-27

18 Leenen HJJ 'Health law and legislation' *Health Services in Europe*, 3rd ed vol 1: Regional Analysis, World Health Organisation, Copenhagen 1981, p 60

and administrative law designed to provide healthy conditions. Medical law ('the study of the juridical relations to which the doctor is a party' according to a widely accepted definition of Savatier) is part of health law. In health care there is a large range of juridical relations in which the doctor is not involved.'"

Furrow *et al*, authors of a leading American textbook on health law[19] observe that health law is both broader and narrower than law and medicine as it has been traditionally taught in American law schools. Law and medicine in the past generally focussed on two issues – professional malpractice and forensic medicine. In more recent years, however, law and medicine courses have been expanded to cover new issues that arise at the interface of law and medicine. They state:

"This book grows out of a belief that no longer can one course cover all the issues that now arise from the interaction of law and medicine...We do cover many subjects not previously covered in depths in law and medicine texts: health care financing and cost control, organisation and management of health care institution and access of the poor to health care, to name a few. We shift the focus from law and medicine to law as it affects the health care industry, and examine this law as an integrated whole."

The present writer could do worse than to echo their words in introducing this thesis to the reader.

19 Furrow BR, Johnson SH, Jost TS, Schwartz RL *Health Law: Cases, Materials and Problems* 1st ed West Publishing Company, 1987 p XVII. (Note: There is a third, much later edition of this work but the illustrative quotation above is taken deliberately from the first because it was introducing a new appraach at that time).

LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
AJLM	American Journal of Law and Medicine
ALR	Albany Law Review
Am U LR	American University Law Review
ARV	Anti Retroviral
ASIL	American Society of International Law
AYBIL	Australian Year Book of International Law
BLR	Buffalo Law Review
BMJ	British Medical Journal
BML	Businessman's Law
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
Ch JIL	Chicago Journal of International Law
Ch K L Rev	Chicago-Kent Law Review
CJIL	Connecticut Journal of International Law
CLJ	Cambridge Law Journal
CMAJ	Canadian Medical Association Journal
CMAJ	Canadian Medical Association Journal
CMJ	Clinical Medicine Journal
CRC	Convention on the Rights of the Child
DSU	Dispute Settlement Understanding
EJCL	European Journal of Comparative Law
EJIL	European Journal of International Law
ESR Review	Economic and Social Rights Review
FDA	Food and Drug Administration (USA)
HHR	Health and Human Rights
HJLPP	Harvard Journal of Law & Public Policy
HLJ	Health Law Journal
HLR	Harvard Law Review
ICCPR	International Convention of Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ICJ	International Court of Justice
I.CON	International Journal of Constitutional Law
IJLP	International Journal of Law and Psychiatry
ILO	International Labour Organisation
ILP	International Law and Politics
ILR	Indiana Law Review
ILT	International Legal Theory
Int Leg P	International Legal Practitioner
Is L Rev	Israel Law Review
JAMA	Journal of the American Medical Association
JIEL	Journal of International Economic Law
JLME	Journal of Law, Medicine & Ethics
LAWSA	Law of South Africa
LQR	Law Quarterly Review
M&L	Medicine and Law
MGLJ	McGill Law Journal
MLR	Michigan Law Review
N Mex L Rev	New Mexico Law Review
NEJM	New England Journal of Medicine
NHS	National Health System (UK)
Nw U. L. Rev	Northwestern University Law Review
NYACAD SCI	New York Academy of Science
SAJHR	South African Journal of Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SAPL/SAPR	South African Public Law/ Suid-Afrikaanse Publieke Reg
SAYIL	South African Yearbook of International Law

SLR	Stellenbosch Law Review
THRHR	Tydskrif Vir Hedendaagse Romeins-Hollandse Reg
TLR	Texas Law Review
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
TSAR	Tydsrif vir Suid Afrikaanse Reg
UDHR	Universal Declaration of Human Rights
UMLR	University of Miami Law Review
UN	United Nations
UPenn JCL	University of Pennsylvania Journal of Constitutional Law
WHO	World Health Organisation
WILJ	Wisconsin International Law Journal
Wis. L. Rev.	Wisonsin Law Review
WMA	World Medical Association
WTO	World Trade Organisation
WULQ	Washington University Law Quarterly
YLJ	Yale Law Journal