Chapter 2

The Constitution and Health Care Services

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2.1 Introduction

The concept of values permeates the Constitution[1]. It is thus hardly surprising that the constitutional court has committed itself to a purposive approach to interpretation of the Bill of Rights[2]. Since the Constitution is the supreme law of the Republic and law *or*

[1] Act No 108 of 1996. Cockrell A, 'Rainbow Jurisprudence' (1996) *SAJHR* 1 notes that: "A convenient starting point is to focus on the one word which resonates like a leitmotiv throughout the judgements of the Constitutional Court in the past year: 'values'. Many commentators have foregrounded the permanent place of 'values' in our new constitutional dispensation. See for example Botha H, 'The values and principles underlying the 1993 Constitution' (1994) 9 *SAPL* 233, who states that 'the Constitution is a repository of values' (at 233) and goes on to identify the following values in the constitutional text: national unity; limited government; liberty and equality; and pluralism. See also AJ van der Walt 'Tradition on trial: A critical analysis of civil-law tradition in South African property law' (1995) 11 *SAJHR* 169 at 191-192 who echoes those 'constitutional vales' and concludes that 'the Constitution must be interpreted in terms of values which take the past into account, but in doing so it looks towards the future, towards reconstruction and reconciliation in an "open and democratic society based upon freedom and equality'...(at 192)... The impatient observer might be tempted to dismiss this persistent refrain regarding the role of 'values' in constitutional adjudication as mere verbiage or rhetorical bluster. In my view that would be a mistake. The Constitutional Court's pre-occupation with the intrusion of 'values' into the adjudicative process provides us with an important clue for understanding the changes that have occurred at a deep level within the South African legal system over the past year. In this article I wish to investigate that clue in detail, and probe some of the implications which are attendant on the value-based nature of constitutional adjudication....In essence my argument will be that the explicit intrusion of constitutional values into the adjudicative process signals a transition form a 'formal vision of law' to a 'substantive vision of law'."

[2] See de Waal, Currie, Erasmus *The Bill of Rights Handbook* (4 ed) p 130 and the cases referred to there in footnote 13, where it is observed that the purposive approach is also sometimes referred to as "value oriented" or "teleological". According to the court in *Baloro And Others v University Of Bophuthatswana And Others* 1995 (4) SA 197 (B), referring to the interim Constitution, (Act 200 of 1993): "Chapter 3 contains at least one section (s 35) which deals with its interpretation in explicit terms. According to s 35(1) a court interpreting the provisions of the chapter is firstly required to ("a . . . court . . . shall") promote the values which underlie an open and democratic society based on freedom and equality. This formula opens the door to the evolution of a teleological approach to the interpretation of chap 3 which, amongst others, allows for the interpretive adaptation of the human rights norms enshrined in it to constantly changing circumstances. This can be done without necessarily compromising the element of constancy inherent in the chapter and embodied in durable values fundamental to any (hypothetically) open and democratic society based on freedom and equality. The mandatory nature of this intrinsically teleological interpretation formula is bolstered up by two further provisions forming part of s 35(1), namely that, where applicable, a court shall have regard to applicable norms of international law (note the mandatory language) and that it may have regard to comparable foreign case law (the court, in other words, has a discretion)." Ackerman J in *Ferreira v Levin No And Others; Vryenhoek And Others v Powell No And Others* 1996 (1) SA 984 (CC) noted that: "A teleological approach also requires that the right to freedom be construed generously and extensively. In *Makwanyane*, O'Regan J, adopting such a teleological approach, correctly observed as follows: "Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution. In my view exactly the same approach needs to be adopted in the case of the right to freedom."

In *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) Oliviera J, commenting on the virtues of the teleological approach stated at p623 that: "The last-mentioned approach, in particular, not only 'encapsulates in a synthesis the meritorious aspects of other theories and excludes their limitations' (Devenish *Interpretation of Statutes* (1992) at 53) but also gives expression to the fundamental principles and ethos of the legal system as a whole: it is a value-coherent approach which best accords with the values of our Constitution."

O'Regan J in *S v Makwanyane And Another* 1995 (3) SA 391 (CC) commented at para 325, p506: "In giving meaning to s 9, we must seek the purpose for which it was included in the Constitution. This purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to provisions of chap 3 of the Constitution and at other times a narrower or specific meaning. It is the responsibility of the courts, and ultimately this Court, to develop fully the rights

conduct inconsistent with it is invalid[3], values must have a profound and pervading impact on the way that law is interpreted and applied in South Africa. The evolving South African legal order emphasises values[4] in a way that the pre 1994 legal system did not. To the extent that values represent the spirit of the law, the Constitution and more especially, the Bill of Rights, in many respects embodies the spirit of the law leaving the letter of it to subordinate legislation[5]. The specific values it promotes are those that underlie an open and democratic society based on human dignity, equality and freedom[6]. This said, there existed

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entrenched in the Constitution. But that will take time. Consequently any minimum content which is attributed to a right may in subsequent cases be expanded and developed."

3 Act No 108 of 1996 section 2

4 See for instance the judgement of Mahomed J in *S v Makwanyane And Another* (fn 2 *supra*) at 487 where he states: "In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic." See also the same judgment at p 498 where he states: "The Constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society. To this end common values of human rights protection the world over and foreign precedent may be instructive." At p 505, O'Regan J observes that: "In interpreting the rights enshrined in chap 3, therefore, the Court is directed to the future: to the ideal of a new society which is to be built on the common values which made a political transition possible in our country and which are the foundation of its new Constitution. This is not to say that there is nothing from our past which should be retained. Of course this is not so. As Kentridge AJ described in the first judgment of this Court (*S v Zuma and Others* 1995 (2) SA 642 (CC) (1995 (1) SACR 568)), many of the rights entrenched in s 25 of the Constitution concerning criminal justice are long-standing principles of our law, although eroded by statute and judicial decision. In interpreting the rights contained in s 25, those common-law principles will be useful guides. But generally s 35(1) instructs us, in interpreting the Constitution, to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition." In *Ryland v Edros* 1997 (2) SA 690 (C) at p709, the court stated that: "I agree with the submission that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our Constitution. In my view those values 'irradiate', to use the expression of the Germah Federal Constitutional Court cited earlier, the concepts of public policy and *boni mores* that our Courts have to apply. Contrary to public policy (as opposed to those that are *contra bonos mores*) are contracts which might redound to the public injury; see Voet 1.14.16. The distinction is clearly put by Aquilius in the article to which I have already referred ((1941) 58 *SALJ* 335 at 346)... In my opinion the 'radiating' effect of the values underlying the new Constitution is such that neither of these grounds for holding the contractual terms under consideration in this case to be unlawful can be supported." In *S v Jordan And Others (Sex Workers Education And Advocacy Task Force And Others As Amici Curiae)* 2002 (6) SA 642 (CC), at p 670 the court observed that: "The Constitution itself makes plain that the law must further the values of the Constitution. It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law but in social values when the law serves to foster those values. The law must be conscientiously developed to foster values consistent with our Constitution. Where, although neutral on its face, its substantive effect is to undermine the values of the Constitution, it will be susceptible to constitutional challenge."

5 See for instance sections 9 (equality), 22 (freedom of trade, occupation and profession), 23 (labour relations), 24 (environment), 25 (property), 26 (housing), 27 (health care, food, water and social security) section 32 (the right of access to information), section 33 (the right to just administrative action) and section 41 (co-operative government) all of which contemplate legislative measures and expressly, in the case of sections 32, 33 and 41 mandate legislation to give effect to the principles enunciated in the Constitution. Section 39(2) provides that a court, tribunal or forum interpreting legislation and developing the common law must promote the 'spirit, purport and objects of the Bill of Rights'. It is submitted that the same holds true, subject to the provisions of section 36, for Parliament when exercising its legislative power. (Section 44 (4) of the Constitution states that "when exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution. Section 36(2) states that 'except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.")

6 Act No 108 of 1996, section 1 states that: "The Republic of South Africa is one, sovreign, 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." Section 7 states 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 39(1) requires that the rights in the Bill of Rights must be interpreted in such a way that the values that underlie an open and democratic society based on human dignity, equality and freedom are promoted".

before the Constitution a long established and well defined legal order which did not employ or apply the same principles and values that are now found in the Constitution. Whilst the importance of the South African historical background has been emphasised by the courts, they have also pointed to the need to break with the past and to retain from it only that which is defensible. For a legal system that is strongly premised upon precedent, this creates more than a little turbulence and a great deal of uncertainty in untried constitutional waters[7]. As a result, the transformation of the South African legal system, not only in terms of procedural law but also the substantive law, in line with constitutional principles and thinking is an ongoing process[8]. There is thus great value in the thoughtful application and consideration of constitutional legal principles, and the underlying values, in relation to factual situations that arise in the delivery of health care services. Such labour in the abstract is likely to produce fruit in reality because the individual facets of often complex and multi-faceted situations have been explored conceptually in a rational and methodical way so as to arrive at some conclusions which can be of considerable value in their practical application. Since a number of different branches of law are involved in the delivery of health care services, not least of which are the law of contract, delict and administrative law, it is critical to fully understand the nature of the rights conferred by the

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7 De Vos P 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution', *South African Journal of Human Rights* (2001) 17 SAJHR 1 at p 3-4, expresses this tension in the following terms: "The fact that the text of the 1996 Constitution is often vague, ambiguous and seemingly contradictory, means that it cannot provide a self-evident and fixed meaning to those who read it. Instead, it requires interpretation, and to do so it seems necessary to invoke sources of understanding and value external to the text and other legal materials. Most judges, lawyers and legal academics in South Africa seem profoundly uncomfortable with the notion that judicial decision-making in the constitutional sphere is not (always) aimed merely at discovering a 'true', 'objective' or 'original' meaning of the text and hence is not based (solely) on predictable and neutral principle. For if this is so, the interpreter of the constitutional text will (often) have to rely on other, subjective and extra-textual factors – perhaps even the interpreter's own personal, political and philosophical views- to give meaning to that text. The discomfort flows from the fact that most judges, lawyers and legal academics in South Africa broadly adhere to the traditional liberal school of adjudication, a tradition that jealously guards the boundary between law and politics. As Karl Klare has recently pointed out, this traditional view of adjudication maintains a view of law as 'describing rational decision-procedures...with which to arrive at determinate legal outcomes from neutral, consensus-based general principles expressed or immanent within a legal order'." (Footnotes omitted)

8 Klare K 'Legal Culture and Transformational Constitutionalism' (1998) 14 *SAJHR* 146 argues that the 1996 Constitution can be understood as establishing a long-term project described as 'transformative constitutionalism' in terms of which the Constitution is seen as a transformative, dynamic document that requires continual reinvention to make sense of a changing world. It is a project with no instant solutions, requiring constitutional enactment, interpretation and enforcement committed to transforming South African social and political institutions and power relationships in a democratic, participatory and egalitarian direction. He points out that "transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase' reform', but something short of or different from 'revolution' in any traditional sense of the word." It is submitted that the South African legal system itself must therefore be seen as being in a considerable state of flux as traditional legal doctrines, methods of statutory interpretation and legal principles stand in line to be tested against the new standard set by the Constitution. Uncertainty, at least in the beginning, is the price one pays for a new legal order. Brand D in "A Review of Important Cases and International Developments Relating to Economic and Social Rights" *ESR Review* Vol 1, No 1 March 1998 (http;//www.community;awcentre.org.za/ser/esr1998/1998march_cases.php) observes: "A fledgling jurisprudence on economic and social rights is at last starting to develop in South African law." Khoza R in 'Understanding the Synergy Between the Bill of Rights and Commercial Activity' points out that the Bill of Rights is not an end in itself. Its overarching objective is to promote and to secure growth and prosperity for all.
(http://www.kas.org.za/publications/SeminarReports/Business%20&%20Human%20Rights/khoza.pdf).

Constitution with regard to health care services in order to ascertain how the delivery of health care services is likely to be treated within these various branches. Constitutional law affecting the delivery of health care services must inform all other branches of law that relate to the delivery of health care services in light of the foregoing[9].

In this chapter it is proposed to embark on a number of conceptual exercises in which the consideration and manipulation of constitutional principles and precepts will hopefully lead to an improved understanding of the constitutional aspects of health services delivery generally and of certain practical aspects of health services delivery in particular. The relevance of a right to health, as opposed to a right to health care services, will be examined in order to establish the approach of South African constitutional law relative to the principles of international law on health care, the latter having been canvassed in more detail in the preceding chapter. An analysis of the elements of the constitutional right of access to health care services will also be undertaken with the intention of arriving at a full appreciation of the scope and content of the right. Similar exercises will be conducted with regard to the rights of children and prisoners to basic health care services and medical treatment respectively and also the right not to be refused emergency medical treatment. No discussion of rights, especially socio-economic rights, is complete without an exploration of the question of the limitation of those rights and so a consideration of both implicit and explicit rationing of health care services is included. Lastly, the question of rights must provoke the question of obligations and so the chapter undertakes an examination of the roles of the various spheres of government in respect of the various constitutional rights relating to health care services.

2.2 The Right To Health Care Services v The Right to Health

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9 Chaskalson, A notes in "The Impact of Seven Years of Constitutionalism on Law and Government in South Africa" that the Constitutional Court has stated in *The Pharmaceutical Manufacturers Association of South Africa in re: The ex parte Application of the President of the Republic of South Africa* 2000(3) BCLR 241 (CC) para 44 that:" There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives from the Constitution and is subject to constitutional control." He also observes that in *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA) the court said that "where the common law deviates from the Bill of Rights the courts have an obligation to develop it by removing that deviation." (http://kas/org/za/Publications/SeminarReports/Constitution%20and%20Law%20iv/chaskalson.pdf)

The Constitution contains a number of different references to health care services and medical treatment. Apparently in contrast to international law, there is no express mention of a broad right to health. This said, it must, however, be borne in mind that the rights in the Bill of Rights are not discrete legal concepts but rather elements of a system of fundamental rights that are inextricably interlinked[10]. There is a suite of rights which, when viewed collectively, could be said to constitute a right to health. These rights are, the right to life[11], the right to dignity[12], the right to bodily and psychological integrity[13], the right to privacy[14], the right to an environment that is not harmful to health or well-being[15], the right to emergency medical treatment, the right of access to health care services[16] and the rights to sufficient food and water and social security, including appropriate social assistance[17]. The overall result of this rights matrix would seem to be in general accordance with the World Health Organization's definition of health as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'[18]. However, for the purposes of legal exposition and practical implementation it is submitted that a right to health is unwieldy and less valuable than its component parts. Since it is not the intention in this thesis to embark upon an in-depths examination of all, or even the majority, of the rights in the Bill of Rights, the discussion of the various rights in this chapter is confined to

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10 In *Government Of The Republic Of South Africa And Others v Grootboom And Others* 2001 (1) SA 46 (CC) the court observed at p83: "But s 26 is not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings."

11 Act No 108 of 1996, section 11

12 Act No 108 of 1996, section 10. Concerning the fundamental importance of the right to dignity, O'Regan J observed in *Dawood And Another v Minister Of Home Affairs And Others; Shalabi And Another v Minister Of Home Affairs And Others; Thomas And Another v Minister Of Home Affairs And Others* 2000 (3) SA 936 (CC) at 962-962 that: "The value of dignity in our constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour." (footnotes omitted)

13 Act No 108 of 1996, section 12 (2)

14 Act No 108 of 1996 section 14

15 Act No 108 of 1996 section 24 (a)

16 Act No 108 of 1996 section 27(1)(a)

17 Act No 108 of 1996 section 27(1)(b) and (c)

18 Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June 1946, signed on 22 July 1946 by the representatives of 61 states (Official Records of the World Health Organization, no. 2, p 100) and entered into force on 7 April 1948.

their relevance to the delivery of health care services. The elemental rights that could be said to comprise a right to health are discussed briefly below in order to obtain a clearer picture of their contribution to such right. Further and more detailed discussion of the rights that relate specifically to the delivery of health care services, and which are thus of central importance in this thesis, is to be found later in the chapter.

2.2.1 Life

The right to life has been characterized as the most fundamental of all human rights[19] Without life, the other aspects of the right to health are meaningless. At the same time the right to life does not mean life 'as mere organic matter… but the right to human life the right to live as a human being, to be part of a broader community, to share in the experience of humanity'[20]. The right to life attaches only to persons recognized as such by the law. Since the law in South Africa does not recognize a foetus as a person, it does not enjoy a constitutional right to life[21]. The government has an obligation to protect the life of everyone in South Africa[22]. With regard to dying, the constitutional court observed in *Soobramoney*[23] that dying is part of life – its completion rather than its opposite, and that there is in reality no meaningful way in which it can constitutionally be extended to encompass the right indefinitely to evade death. In the context of the delivery of health care services the relevance of this observation cannot be overstated. Although the government has a constitutional duty to respect, protect, promote and fulfil the right to life, there are

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19 Per Lord Bridge in *R v Home Secretary, Ex Parte Bugdaycay* [1987] AC 514 ([1987] 1 All ER 940 (HL)) at 531G (AC) cited *in Makwanyane* fn 2 *supra* at 429. Concerning the fundamental nature of the right to life and the interdependence of the rights to life and human dignity, O'Regan J observed in *Makwanyane* beginning at para 326, p506: "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 was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre 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, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence - it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."

20 See *Makwanyane*, fn 2 *supra*

21 *Christian Lawyers Association of SA and Others v Minister Of Health and Others* 1998 (4) SA 1113 (T). This issue is discussed in more detail later in this chapter.

22 *Mohamed And Another v President Of The Republic Of South Africa And Others (Society For The Abolition Of The Death Penalty In South Africa And Another Intervening)* 2001 (3) SA 893 (CC) at p 917

23 *Soobramoney v Minister Of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) per Sachs J at para 57 p784. The facts of this case and the judgment are discussed in detail further on in this chapter.

limitations upon this duty when it comes to prolonging life indefinitely through health care services. This is a good example of a situation in which the protection aspect outweighs the promotion and fulfilment aspects of the state's obligations with regard to a right in the Bill of Rights. Protection of life implies a negative obligation to ensure that no one else can take it away[24]. It may seem a fine distinction but the only apparent manner in which one can reconcile the government's duty to protect life and the view of the court in *Soobramoney* that this cannot be seen as a right to evade death indefinitely is to take the view that not all health care services serve to protect life. Some of them actively promote and fulfil it. Emergency medical treatment protects life. This is why, in terms of section 27(3) of the Constitution, it cannot be refused. Protection of a right as opposed to its promotion or fulfilment comes close to being something of a minimum standard of recognition of a right[25]. Other health care services go further than protection. They are the positive as opposed to negative aspect of access to health services. This is why they are dependent upon the availability of resources. This argument is best understood if one regards life as a limited resource which inevitably dwindles over time, rather than as a binary state of life versus death, which is what Sachs J seems to be stating in his judgment in *Soobramoney*. Constitutionally speaking, one should not be robbed of the internal resource called life and one's possession of it should be respected but the extent to which one is entitled to have that resource replenished when it is running low is a question of the balancing of the rights of others to that same resource relative to the availability of the external resources which

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24 Ackerman et Goldstone JJ pointed out in *Carmichele v Minister Of Safety And Security And Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras 44-45 p 957-958: "Section 8(1) of the Constitution provides: 'The Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of state.' It follows that there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection. In the United States, a distinction is drawn between 'action' and 'inaction' in relation to the 'due process' clause of their Constitution (the 14th Amendment). In *De Shaney v Winnebago County Department of Social Services*, the majority declined to hold a government authority liable for a failure to take positive action to prevent harm. As stated in the dissent of Brennan J: 'The Court's baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights.' The provisions of our Constitution, however, point in the opposite direction. So too do the provisions of the European Convention on Human Rights (Convention). Article 2(1) of the Convention provides that '(e)veryone's right to life shall be protected by law'. This corresponds with our Constitution's entrenchment of the right to life. We would adopt the following statement in *Osman v United Kingdom*: 'It is common ground that the state's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that art 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.'"

25 It could be argued that respect of a right, rather than its protection, is the absolute minimum form of recognition but it is submitted that respect in many ways begs the question of protection since respect without protection, i.e. the enforcement of respect, is largely worthless in practice. In the real world, the obligation to respect is given teeth by machinery designed to protect rights. The checks and balances of the Constitution and the existence of the three branches of government are all designed to ensure *inter alia* that the rights enshrined in the Constitution are protected even from violation by a particular branch of government.

are necessary to replenish it. In this sense the right to life takes on some of the nature of a socio-economic right. This is because in the context of health care services, the preservation of life is dependent upon the availability of health care resources. This is no doubt the conclusion which is so abhorrent to critics of the decision of the judgment in *Soobramoney*. For idealists, life is sacrosanct and can under no circumstances be compromised. In reality this objection is simply yet another iteration within the larger fractal of the dynamic that pits the interests of the individual against those of the collective. In reality, life is a concept that is not readily described or defined, its complexity often highlighted by the many unique and emotionally charged situations that present in the context of health services delivery.

2.2.2 Dignity

There is a close connection between health and human dignity, another right that has been identified as central both in the founding provisions of the Constitution[26] and by the constitutional court[27]. Health is an essential for life and for human dignity. Human dignity is both a constitutional value and a right[28]. The enjoyment of the rights to life and human dignity is obviously significantly diminished by poor health. In the context of health care, situations which throw into stark relief the concepts of life and human dignity and their interdependence are those in which patients are so severely injured that they can no longer function as human beings yet remain biologically speaking, alive. Thirion J observed in the case of *Clarke v Hurst*[29]:

"As it was put in 58 US Law Week 4936: 'Medical advances have altered the physiological conditions of death in ways that may be alarming: highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than its continuation.'

26 Section 1(a) of Act No 108 of 1996

27 In *Makwanyane*, fn 2 *supra*, the court said that: "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern" at 507 ... and "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others" at 451.

28 Act 108 of 1996 section 1(a) and section 10 respectively.

29 *Clarke* 1992 (4) SA 630 (D) at p653

Patients may be resuscitated and maintained alive when there is not the remotest possibility that they would ever be able to consciously experience life."

In the terminology of health care, dignity usually equates to quality of life. In a situation in which a person no longer has quality of life, his or her dignity is usually significantly impaired. Dignity is thus a prerequisite of health in the sense contemplated by the constitution of the World Health Organisation.

2.2.3 Bodily and Psychological Integrity

Section 12 (2) of the Constitution lends further support to the concept of a right to health in its provision to the effect that –

"Everyone has the right to bodily and psychological integrity, which includes the right-

(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.

Although there is an express right of access to health care services, including reproductive health care[30], a right to health, being broader than a right to medical treatment, must also protect and respect a person's physical and mental well being which includes bodily and psychological integrity. This right is a part of the larger right of freedom and security of the person. Kriegler J observed in *Ex Parte Minister Of Safety And Security And Others: In Re S v Walters And Another*[31]:

"What looms large in both the threshold and the limitation phases of the exercise in the present case is that the right to life, to human dignity and to bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. Compromise them and the society to which we aspire becomes illusory. It therefore follows that any significant limitation of any of these rights would for its justification demand a very compelling countervailing public interest."

In the health care context, the right to bodily and psychological integrity implies a right to informed consent. This right is also used as support for the argument that a woman is

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30 Section 27(1) of Act 108 of 1996

31 *Walters* 2002 (4) SA 613 (CC) at para 28 p631

entitled to terminate a pregnancy. The post-constitutional legal position with regard to terminations of pregnancy differs significantly from the pre-constitutional legal position and the former now permits 'abortion on demand'. In *G v Superintendent, Groote Schuur Hospital, And Others*[32] the pregnant woman, N, and her grandmother, agreed that she should terminate her pregnancy while N's mother opposed such action as the applicant in this case. At the time when the case was heard there was no recognised right to a termination of a pregnancy on demand[33]. The court after examining the evidence and considering the relevant legislative provisions came to the conclusion that the termination of the pregnancy was legally permissible[34]. The post-constitutional legislation that allows abortion on demand has been attacked twice by the Christian Lawyer's Association and the latest decision of the High Court is the subject of an appeal[35]. Despite the fact that South African courts have recognised the right of the mother to terminate a pregnancy, and have

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32 *G v Superintendent, Groote Schuur* 1993 (2) SA 255 (C).

33 The applicable legislation, the Abortion and Sterilisation Act 2 of 1975, allowed a woman to terminate her pregnancy only in certain narrow and specific circumstances. The Act provided *inter alia* that a pregnancy may be terminated: "where the foetus is alleged to have been conceived in consequence of unlawful carnal intercourse, and two other medical practitioners have certified in writing, after such interrogation of the woman concerned as they or any of them may have considered necessary, that in their opinion the pregnancy is due to the alleged unlawful carnal intercourse." Other provisions, not in issue permitted abortion where the continued pregnancy endangers the life of the woman concerned, or constitutes a serious threat to her physical or mental health; where there exists a serious risk that the child to be born will suffer from a physical or mental defect of such a nature that he or she will be irreparably seriously handicapped; and where the pregnancy is a result of illegitimate carnal intercourse, and two other medical practitioners have certified in writing that the woman concerned suffers from a permanent mental handicap or defect resulting in an inability to comprehend the implications or to bear parental responsibility for the child. In *G v Superintendent Groote Schuur*, (fn 32 *supra*) the 14 year old mother claimed that she had been raped.

The court noted: "The Abortion Act does not deal expressly with the position of a minor in respect of whom a legal abortion is sought to be procured in terms of its provisions. In the normal course, under the common law, the consent of the minor's guardian would nevertheless have been required before an abortion could be carried out on the child pursuant to the provisions of the Abortion Act. The common law position has, however, been altered in a significant respect by the provisions of s 39(4) of the Child Care Act, [Act No 74 of 1983] which provides as follows:

'Notwithstanding any rule of law to the contrary -

(a) any person over the age of 18 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any operation upon himself; and

(b) any person over the age of 14 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any medical treatment of himself or his child.'

For the purposes of this application it was accepted by counsel for all the parties that the proposed abortion should be regarded as an operation, and not simply a form of medical treatment. This means that in the present case the consent of applicant as the minor's guardian was required, N being only 14 years of age; but applicant in fact refused such consent." Act No 2 of 1975 has been superseded by the Choice on Termination of Pregnancy Act No 92 of 1996.

34 Seligson AJ noted that counsel for the applicant "raised the question whether the reference in the Abortion Act to a woman (the Afrikaans version has 'vrou'), and the absence of any reference to a child, excludes the application of the Abortion Act to females under the age of 18 years, the definition of 'child' in s 1 of the Child Care Act being any person under that age. He suggested, albeit somewhat faintly, that such a restrictive interpretation should be given to the term 'woman' in the Abortion Act. Seligson AJ held that: "Apart from the fact that the Afrikaans term 'vrou' used in the Act also connotes the feminine gender, it would have absurd results if the statute were interpreted to permit abortions in the case of females over the age of 18 years who have been the victims of rape and incest, but not in respect of females under that age. held that: "The Abortion Act was, in my view, intended to apply to any female who is carrying a live foetus. If she is a child for the purposes of the Child Care Act, then the provisions of s 39 of that Act govern insofar as consent to the abortion procedure is concerned."

35 The Choice on Termination of Pregnancy Act No 92 of 1996 was first attacked in *Christian Lawyers Association of South Africa and Others v Minister of Health* fn 21 *supra* on the basis of the right to life of an unborn child. The attack was unsuccessful. A second attack took place in *Christian Lawyers Association of South Africa and Others v Minister of Health* in the Transvaal Provincial Division of the High Court case no 7728/2000 somewhat ironically on the basis that the definition of "woman" in the Act does not differentiate between minors and adults. The Christian Lawyers Association has appealed against the decision of the court in the second application.

stated that the unborn child does not have legal personality which is a prerequisite for the capacity to be a rights holder, they still acknowledge the need to balance the interests of the mother and those of her unborn child[36]. However the mother's rights are taken very seriously as appears from the judgments of the High Court in the post-constitutional cases that are discussed in more detail in the pages that follow.

The right to bodily and psychological integrity carries the implication that a person may not be forced to receive medical treatment against his or her will. In *Minister of Safety and Security and Another v Xaba*[37], the court refused to grant an order allowing a bullet to be forcibly surgical removed from a prisoner's leg against his will on the basis that his section 12 rights would clearly be infringed if the proposed surgery were to take place without his consent in the absence of a law limiting these rights as contemplated in section 36 of the Constitution. In *Xaba*, The Durban and Coast Local Division of the high court criticised the decision of the Cape High Court in *Minister of Safety and Security and Another v Gaqa*[38]in which the latter concluded that the relevant sections of the Criminal Procedure Act and of the Constitution permitted a police official to use the necessary violence to obtain the surgical removal of a bullet in similar circumstances to those in *Xaba*. The decisions in these two cases revolved around interpretations of provisions of the Criminal Procedure Act and whether they constituted law of general application as contemplated in section 36 of the Constitution, capable of justifiably limiting a right in the Bill of Rights. It is submitted that the decision in *Xaba* is more consistent with the concept of both the right to bodily integrity

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36 *G v Superintendent, Groote Schuur* fn 32 *supra*. The court observed with regard to the rights of the unborn child that: "Mrs Steyn, [the unmarried mother's *curator ad litem]* quite correctly, pointed out in her report that in the circumstances there is a conflict between the interests of N and the unborn foetus she is carrying. She contended, however, that the appointment of a *curator ad litem* to represent the unborn child was neither competent nor necessary. In this regard she relied on the decision in *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) in which it was held that an unborn child is not clothed with legal personality, that there were no legal grounds for the appointment of a *curator ad litem* to represent the foetus in connection with the termination of the mother's pregnancy, and that there is no scope or need for the appointment of such a curator when the provisions of the Abortion Act are applied. I have certain doubts about the correctness of that decision insofar as it holds that there is no scope for the extension of the nasciturus doctrine so as to provide protection for an unborn foetus against an abortion. It seems to me that there is much to be said for recognising that an unborn child has a legal right to representation, or an interest capable of protection, in circumstances where its very existence is threatened. This issue is discussed in an interesting and thought-provoking article by Professor L M du Plessis entitled 'Jurisprudential Reflections on the Status of Unborn Life' in (1990) 1 Tydskrif vir die Suid-Afrikaanse Reg 44 at 51-4. The learned author criticises the decision in Rall's case *supra* and contends that the law should provide what he calls 'preventive protection' for the unborn child. See also Barnard, Cronje and Olivier *The South African Law of Persons and Family Law* 2nd ed at 26 and *Wille's Principles of South African Law* 8th ed at 68, footnote 1, and the authorities there cited. It is, in my judgment, however, unnecessary for me to enter into this complex question since, unlike the position in the Rall case, in the instant matter the interests of the foetus are in fact being actively represented and advanced by the applicant and her legal representatives who seek to stop the abortion." See further the subsequent discussion in this chapter of the two *Christian Lawyers' Association* cases.

37 *Xaba* 2003 (2) SA 703

38 *Gaqa* 2002 (1) SACR 654 (C)

and a right to health since health in its broader sense is based as much on psychological integrity as it is on bodily integrity and the power of a person to refuse a surgical invasion of his or her person is essential for both.

2.2.4 Privacy

The right to privacy, in terms of section 14 of the Constitution, *includes* the right not to have one's person or home searched. The physical examination of a person in a health care context is very much an invasion of his privacy and such examination can only be lawfully conducted if that person waives his right to privacy for the purpose of examination. Information as to a person's health status is also inextricably bound to issues of privacy[39]. It is information that is personal and confidential and if disclosed without permission could adversely affect his psychological integrity. This is recognised in the Promotion of Access to Information Act, Act[40] in which personal information is defined as including information relating to "pregnancy", "physical or mental health, well-being, disability", "medical, criminal or employment history of the individual" and "blood type"[41]. In terms of sections 34 and 63 of the Promotion of Access to Information Act, unreasonable disclosure of personal information about a third party is prohibited. The right to bodily and psychological integrity, which implies a right to give or refuse informed consent, the right to privacy, the right to dignity and the right to life together imply a wider approach to questions of health than simply a right of access to health care services[42]. The right to privacy may be breached by the wrongful disclosure of personal facts[43]. Privacy in relation to the right to bodily

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39 See for instance *Seetal v Pravitha And Another No* 1983 (3) SA 827 (D) "Yet a blood test on somebody without his consent is unquestionably an invasion of his privacy. And the invasion is no less such because on just about every occasion the test is otherwise innocuous." The court also observed at p861 that: "In the end the debate about compulsory blood tests amounts, as I see it, to a showdown between the two ideas, these two ideas which cannot satisfactorily be reconciled, the idea that the truth should be discovered whenever possible and the idea that personal privacy should be respected. Both are important. Neither, however, is sacrosanct. Each, as it happens, gets sacrificed, the first on some occasions, the second on others. The clash between the two does not really lend itself to argument. How the conflict is resolved in this country when the law on the point is eventually settled will depend largely on the store the Court then sets by each idea, on its own sense of priority in that regard."

40 Act No 2 of 2000

41 Section 1(a) (b) and (d) of Act 2 of 2000

42 Leary V 'The Right To Health in International Human Rights Law' *Health and Human Rights* Vol. 1, No. 1, Fall 1994 states that: "The concept of a right to health implies that fundamental principles of human rights, dignity, non-discrimination, participation, and justice are relevant to issues of health care and health status."

43 In *Bernstein And Others v Bester And Others* NNO 1996 (2) SA 751 (CC), the constitutional court observed at para 73 p791: "The difficulty that remains is the determination of the scope of 'the provision as a whole' or, as it is commonly called, 'the right to privacy'. Use of this term has not been unproblematic, since in terms of a resolution of the Consultative Assembly of the

integrity is also recognised in the Choice on Termination of Pregnancy Act[44] in section 5(3) which acknowledges a pregnant minor's right to choose whether or not to consult with her parents, guardian, family members or friends before the pregnancy is terminated. The choice whether or not to disclose an intention to terminate a pregnancy is essentially based on principles of privacy. It does not relate to health care services directly but it does have an impact on the psychological and social well being of the pregnant minor.

2.2.5 Environment

In terms of section 24(1) of the Constitution everyone has the right to an environment that is not harmful to their health or well-being. This right is a key aspect of the international right to health as reflected in the ICESCR[45], the Constitution of the WHO[46] and similar instruments. It implies a right to health rather than a right to health care services[47]. The

Council of Europe this right has been defined as follows: 'The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially.'
And in the final conclusions of the Nordic Conference on the Right to Respect for Privacy of 1967 the following additional elements of the right to privacy are listed: "the prohibition to use a person's name, identity or photograph without his/her consent, the prohibition to spy on a person, respect for correspondence and the prohibition to disclose official information" and at para 73 p 795, "The German, European and American approach seems to accord with the analysis attempted above, namely that the nature of privacy implicated by the 'right to privacy' relates only to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience."
In *S v Jordan And Others (Sex Workers Education And Advocacy Task Force And Others As Amici Curiae)* 2002 (6) SA 642 (CC) the court stated at para 76 p673 "There can be no doubt that autonomy to make decisions in relation to intensely significant aspects of one's personal life are encompassed by the term. As Ackermann J held in the *Gay and Lesbian Coalition* (Sodomy) case: "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy" and at para 81 p 674 that: "One of the considerations is the nature of the relationship concerned: an invasion of the relationship between partners, or parent and child, or other intimate, meaningful and intensely personal relationships will be a strong indication of a violation close to the core of privacy. Another consideration is the extent to which the body of a person is invaded: physical searches or examinations are often invasive of privacy, as s 13 of the interim Constitution suggests. As we observed before, the constitutional commitment to human dignity invests a significant value in the inviolability and worth of the human body. The right to privacy, therefore, serves to protect and foster that dignity."

44 Choice on Termination of Pregnancy Act fn 35 *supra*

45 International Covenant on Economic, Social and Cultural Rights (art. 12); the Universal Declaration of Human Rights (art. 25); American Declaration on the Rights and Duties of Man (art. 33); European Social Charter (art. 11); African Charter on Human and Peoples' Rights (art. 16); The Constitution of the World Health Organization recognises the right to health as "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."

46 The World Health Organization developed and promulgated the understanding of health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." (Constitution of the World Health Organization, *Basic Documents*, Official Document No. 240 (Washington, 1991)). The Constitution of WHO was adopted at the International Health Conference held in 1946 in New York, where it was signed by the representatives of sixty-one states.

47 Article 12(2)(b) of the ICESCR specifies the environment as one of the areas for state intervention in the realization of the right to health. This provision has traditionally been interpreted as relating simply to occupational health, but in state reporting to the

phrase "health and well-being" is very broad in its ambit and may well anticipate *inter alia* the considerable body of the law of nuisance which has developed in South Africa over a number of years. Air pollution, noise pollution and water pollution are just some of the issues which, even if they do not affect health *per se*, could certainly be said to affect the well-being of human beings. Occupational health issues also enter the equation in terms of this right since, it is submitted, the term environment is not confined only to a home or living environment but embraces also the working environment.

2.2.6 Emergency Medical Treatment

In terms of section 27(3): "No one may be refused emergency medical treatment." The relevance of the prohibition of the refusal of emergency medical treatment to the right to life has already been discussed under the section dealing with the latter. A right not to be refused emergency medical treatment is a fundamental element of a right to health because it relates to the protection of life itself without which a right to health cannot be appreciated or enjoyed. A right of access to emergency medical treatment could in a sense be regarded as part of a minimum core of the right to health. The comforting knowledge that one will always receive medical assistance in an emergency in conducive to a state of psychological and social well-being. The nature of the right and its elements is discussed in more detail elsewhere in this chapter.

2.2.7 Access to Health Care Services, Food and Water Etc

Section 27 (1) stipulates that –

(1) Everyone has the right to have access to-

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and

CESCR, it is increasingly being considered as relating to all environmental issues that affect human health. Primary health care strategies include access to clean drinking water and sewage services, and preventive health programs should include control over human activities that may expose people to environmental hazards detrimental to their health. (Circle of Rights – *Economic, Social and Cultural Rights Activism: A Training Resource*. Module 14 University of Minnesota Human Rights Research Centre)

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance[48].

The rights expressed in section 27(1) are fully supportive of a more general right to health since health is dependent upon not only access to health care services but also sufficient food and water[49]. Adequate nutrition and sanitation and social security for those unable to support themselves are essential ingredients for physical, mental and even social well-being yet do not qualify as health services *per se*.

2.2.7 Relationship Between Rights to Health and Access to Health Services

The inter-relationship between the whole and its parts in the case of the right to health and the rights that comprise it can be complex. A right to health and a right of access to health care services could in certain circumstances even conflict, for example, in the case where treatment severely adversely affects a patient's physical or mental well-being such as happens in the case of chemotherapy for cancer patients and some forms of radiation therapy. The spraying of dwellings with DDT to kill mosquitoes in order to protect the health of residents against malaria impacts on the right to an environment that is not harmful to health or well-being. DDT has been shown to be highly environmentally toxic. It is a persistent organic pollutant (POP) which can accumulate in the environment over many years and has been shown to be carcinogenic to humans and hazardous to the long-term survival of wildlife[50]. At one level, the right to an environment that is not harmful to health or well-being could be said to be both adversely and positively affected by the DDT

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48 This is entirely consistent with the provisions of article 25 of the UDHR which emphasizes recognition of the right of all persons to an adequate standard of living, including guarantees for health and well-being. It acknowledges the relationship between health and well-being and its link with other rights, such as the right to food and the right to housing, as well as medical and social services.

49 Thus for instance it has been observed with regard to reproductive health that: "Reproductive health is only a small component of reproductive rights. Further access to reproductive health services is only one part of the right to reproductive health, just as access to health services is only one aspect of the right to health. For women to have good reproductive health they have to have good general health and the physical, economic and social conditions that make possible good health overall. (Asian Forum for Human Rights and Development, *Report of a Consultation on Reproductive Rights and Human Rights* (Bangkok, 1997).)

50 Smolen, Sang and Liroff, "Hazards and Exposures Associated with DDT and Synthetic Pyrethroids used for Vector Control" World Wildlife Fund, January 1999 (www.worldwildlife.org/toxics/progareas/pop/ddt5.pdf) See also Raloff "The Case for DDT: What do you do when a dreaded environmental pollutant saves lives?" *Science News* July 1 2000, www.malaria.org/raloff.html and "WHO calls DDT use vital for malaria control" (WHO text) available at http://usinfo.state.gov.topical/global/ebviron/latest/00120406.htm

spraying. This scenario constitutes, in logical terms, what a Möbius strip portrays spatially since it presents two apparently diametrically opposed situations that are in fact located upon a single boundary, i.e. the same right, and arise from the same external activity. If a court were faced with an action against the spraying of DDT to control malaria it would have to look at whether the short-term improvement in the environment caused by the elimination of the mosquitoes outweighed the long-term detriment to the environment caused by the DDT. It would have to ask itself, furthermore, whether the right of future generations to an environment that is not harmful to health or well-being is greater than the right of the present generation to life and human dignity which are adversely affected by malaria. In the examples given above, the composite right to health must be tempered with or balanced against the component rights to bodily and psychological integrity and the right to an environment that is not harmful to health or well-being. For instance, a person must be able to choose to exercise the right of access to health care services. It cannot be argued that because there is a right of access to health care services that there is no choice to be made by the holder of the right as to the nature or level of the services which are to be provided or by whom. The right to accept or refuse health care services is an aspect of the right to health since it impacts upon a person's psychological well-being as much as his or her physical well-being.

2.2.8 In Summary

It is evident in view of the foregoing that a right to health, although not expressly provided for in the wording of the Constitution, can conceivably exist in the interfaces of the various constitutional rights referred to above. It is not so much an element of the Bill of Rights as an inevitable result of the matrix formed by the interaction of the various rights therein contained[51]. One must thus be careful of overemphasising the right to health, which is only a result or effect of the various expressly stated constitutional rights, at the expense of those

[51] Leary (fn 42 *supra*) notes that: "Human rights are interdependent. That is, particular rights may depend on other rights for their fulfilment. The right of freedom of association, for example, is closely related to that of freedom of expression. Many other examples could be cited. As has been frequently reiterated by human rights organizations, all human rights and fundamental freedoms are indivisible and interdependent.[39] Therefore, the right to health cannot be effectively protected without respect for other recognized rights. These include, in particular, both prohibition of discrimination, and the right of persons to participate in decisions affecting them."

rights. As Chaskalson P observed in *Soobramoney*[52] with regard to the right to life: "Unlike the Indian Constitution ours deals specifically in the bill of rights with certain positive obligations imposed on the state and, where it does so, it is our duty to apply the obligations as formulated in the Constitution and not to draw inferences that would be inconsistent therewith"[53].

The value of a consideration of a broader right to health is that it emphasizes the need, when dealing with rights involving health care services, not to lose sight of the other rights conferred by the Bill of Rights, especially those to life and dignity, which the courts have identified as fundamental to the other rights in the Bill. However, a right to health is the result of, rather than a prerequisite for, the interaction of the various rights that are expressly awarded in the Constitution. The outcome of any exercise in the application of a right in the Bill of Rights is of necessity the result of a balancing of various relevant rights in the circumstances of the individual case. Ultimately the concept of a right to health in South African law is thus likely to be of limited value since it is the interaction of the various rights in the Bill of Rights which will determine the outcome of a particular case involving health care services rather than a global consideration of a right to health *per se*. It must also be borne in mind that although there may be many similarities between a right to health implied within the Bill of Rights and the right to health as contemplated in various instruments of international law, the emphasis of the South African courts has been on local conditions and the historical background of South Africa[54]. Any right to health implied

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52 *Soobramoney* fn 23 *supra*

53 *Soobramoney* fn 23 *supra* at p 772

54 "The historical background to the inclusion of the right to dignity in both the interim and final Constitutions is also of considerable importance in the interpretative enterprise. As pointed out by Du Plessis and Corder ... '(t)he history of systematic discrimination in South Africa, from segregation through apartheid, was premised on gross invasions of human dignity. The denial of this human right, protected in many international human rights instruments . . . was so pervasive that its inclusion here [in s 10 of the interim Constitution], immediately after the rights to equality and life, was completely uncontroversial.'"
The importance of this historical background was also emphasised by O'Regan J in the *Makwanyane* case at para [329] and by Ackermann J, O'Regan J and Sachs J, in *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) (1997 (6) BCLR 759) at para [31]. *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (1) SA 997 (C) ". In *Makwanyane*, fn 2 *supra*, the court said: "Undoubtedly, this conclusion does involve in some measure a value judgment, but it is a value judgment which requires objectively to be formulated, having regard to the ordinary meaning of the words used in s 11(2); its consistency with the other rights protected by the Constitution and the constitutional philosophy and humanism expressed both in the preamble and the post-amble to the Constitution; its harmony with the national ethos which the Constitution identifies; the historical background to the structures and objectives of the Constitution; the discipline of proportionality to which it must legitimately be subject; the effect of the death sentence on the right to life protected by the Constitution; its inherent arbitrariness in application; its impact on human dignity; and its consistency with constitutional perceptions evolving both within South Africa and the world outside with which our country shares emerging values central to the permissible limits and objectives of punishment in the civilised community."

within the Bill of Rights would in any event have to be construed in the uniquely South African context. This may lead to outcomes which would not be anticipated in an international human rights setting. In view of the fact that the constitutional court itself has deemed it inadvisable to deal with rights not expressly awarded by the Constitution[55], it is proposed that further discussion of a notional right to health be dispensed with in favour of a more concrete examination of the express rights within the Constitution that relate to the delivery of health care services.

2.3 Understanding The Right Of Access To Health Care Services

The right of access to health care services as expressed in the Constitution gives rise to many questions concerning its practical implementation. It is therefore important to clearly understand the various elements of the right of access to health care services and their practical significance. Examples of questions relating to its implementation are:

- What are the respective obligations of the state and the private health sector in relation to this right? The issue of the horizontal application of the right of access to health care services is of considerable importance to the private health sector in South Africa to the extent that it may require the utilisation of private resources to achieve public health goals.
- Does it mean that everyone has a right of access to all health care services no matter how expensive the technology involved?
- Is the rationing of health care services constitutional?
- To what extent may access to health care services be restricted at an individual level in order to ensure greater benefits to society as a whole?
- To what extent is utilitarianism an acceptable standard or basis upon which to ration access to health care services?

In *Park-Ross and Another v Director: Office For Serious Economic Offences* 1995 (2) SA 148 (C): "The South African Constitution must be interpreted within the context and historical background of the South African setting." See also *Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 (T) at 633F.

55 In *S v Jordan And Others (Sex Workers Education And Advocacy Task Force And Others As Amici Curiae)* (fn 43 *supra*) at para 53 p663 the court noted with regard to privacy that: "While we accept that there is manifest overlap between the rights to dignity, freedom and privacy, and each reinforces the other, we do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy. There can be no doubt that the ambit of each of the protected rights is to be determined in part by the underlying purport and values of the Bill of Rights as a whole and that the rights intersect and overlap one another. It does not follow from this however that it is appropriate to base our constitutional analysis on a right not expressly included within the Constitution."

- What is reproductive health care as opposed to "health care services"?

The manner in which the right to health care services can be limited must also be considered in some detail in order to arrive at a proper understanding of the right of access to health care services. In general terms, the state is required to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of the rights referred to in section 27(1)[56]. There is thus an acknowledgement within the Constitution that the socio-economic rights such as the right of access to food and water and health care services are limited by the available resources[57]. Further discussion of the issue of available resources is to be found with reference to specific case discussions below. Possible answers to the questions posed above with regard to the right of access to health care services and its limitations are discussed in the rest of this chapter.

2.3.1 'Health Care Services'

The right of access to health care services expressed in section 27(1) is a socio-economic right[58]. According to the constitutional court such rights are justiciable. In the *Certification*[59] judgment the court observed that[60]:

"(T)hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion."

Socio-economic rights must be considered as a suite of rights and not discretely when interpreting them[61]. Court decisions involving socio-economic rights generally, and not

56 Section 27(2) of Act No 108 of 1996

57 *Government of the Republic of South Africa and Others v Grootboom and Others* fn 10 *supra*; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC);

58 *TAC*, fn 57 *supra*

59 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) at para [78]

60 This was subsequently affirmed in *Grootboom* (fn 10 *supra*) at 60-61, where the court noted that: "While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the *Certification* judgment...Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only." The court in the *TAC* case (fn 57 *supra*) at para [25] observed: "The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are."

only those directly concerned with the right of access to health care services are therefore of relevance to a consideration of the right of access to health care services[62]. The court in the *TAC*[63] case observed that in both of the previous cases involving the enforcement of socio-economic rights, these rights and the corresponding obligations of the state were interpreted in their social and historical context[64].

In *Grootboom*[65] the court observed that:

"Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality. The context in which the Bill of Rights is to be interpreted was described by Chaskalson P in *Soobramoney*: 'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.'"

The court in *Grootboom* pointed out that the question of how socio-economic rights are to be enforced is a difficult issue that must be carefully explored on a case-by-case basis considering the terms and context of the relevant constitutional provision and its application to the circumstances of the case[66].

The term 'health care services' is not defined in the Constitution. It is submitted that the scope of the health care services contemplated in the Constitution is very broad, including as it does 'reproductive health care'. The express mention of reproductive health care is significant. It indicates that the contemplated health care services must not only address pathological or disease states but also healthy states[67]. Health care services must, in other

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61 In *Grootboom* (fn 10 *supra*) at para [24] the court observed that: "Socio-economic rights must all be read together in the setting of the Constitution as a whole. The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them."

62 This is the approach that was adopted in the TAC case (fn 57 *supra*) at para [23] in which the court noted that: "This Court has had to consider claims for enforcement of socio-economic rights on two occasions" and then referred to the *Soobramoney v Minister of Health, Kwazulu-Natal*, fn 23 *supra* and *Grootboom* fn 10 *supra*.

63 *TAC* fn 57 *supra*

64 *TAC* fn 57 *supra* at page 1043 para [24] and footnote 8.

65 *Grootboom*, fn 10 *supra*

66 *Grootboom*, fn 10 *supra*

67 O'Sullivan and Bailey in Chaskalson M, Kentridge J, Klaaren J, Marcus, Spitz D and Woolman S (eds) *Constitutional Law of South Africa* at 16-16, quoting Fathalla MF 'Reproductive Health: A Global Overview' *Annals NYACAD, SCI* 28 June 1991 at p 1 as quoted in Cook R 'Human Rights and Reproductive Self-Determination' (1995) 44 *The American University LR* 975 at

words not only be curative but also preventive of disease states or protective of existing good health. A pregnant woman is not necessarily ill. There are nonetheless health services which she requires in order to successfully give birth to a living healthy baby. Reproductive health care may include advice on how to avoid the transmission of sexually transmitted illnesses, including HIV, or services involving the termination of a pregnancy. Similarly, a person with a terminal illness, although unable to benefit from curative care, may well have a right to palliative health care services if some of the other rights, such as the right to human dignity and the right to psychological integrity, in the constellation of rights that compose a right to health are taken into account. A holistic approach to health care services would be in keeping with the constitutionally imposed obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. It is also supportive of the idea of a right to health if one considers the rights in the Bill of Rights as being different aspects of a central concept. The preservation of a person's health is just as important as its promotion and restoration. In the context of health care services the obligation to respect, protect, promote and fulfil covers the full spectrum of the various purposes or objectives of health care activities which range through disease monitoring and prevention, health maintenance and promotion programs, to curative and palliative care.

Whilst it could be argued that such a wide interpretation of the meaning of "health care services" is impractical and that it poses an impossibly wide obligation upon the state, it is submitted that as long as the limitation of the right within available resources is maintained[68], such an interpretation is not only reasonable but appropriate to the underlying humanitarian approach of the Constitution, based on the right to human dignity, as

1002, note that: "Reproductive health is: 'a condition in which the reproductive process is accomplished in a state of complete mental, physical and social well-being and is not merely the absence of disease or disorders of the reproductive process. Reproductive health therefore implies that people have the ability to practice and enjoy sexual relations. It further implies that reproduction is carried to a successful outcome through child and infant survival, growth and health development. It finally implies that women can go safely through pregnancy and childbirth and that fertility regulation can be achieved without health hazards and people are safe in having sex.'"

68 A fact recognised in both *Grootboom* (fn 10 *supra*) and *Minister of Health and Others v Treatment Action Campaign and Others* (fn 57 *supra*) in which the court, referring to *Grootboom*, said: "It is also made clear that 's 26 does not expect more of the state than is achievable within its available resources' and does not confer an entitlement to 'claim shelter or housing immediately upon demand' and that as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants are concerned, 'the state is not obliged to go beyond available resources or to realise these rights immediately'. In *Soobramoney*, fn 23 *supra*, the court held that: "The appellant's demand to receive dialysis treatment at a state hospital must be determined in accordance with the provisions of s 27(1) and (2) and not s 27(3). These sections entitle everyone to have access to health care services provided by the State 'within its available resources'."

recognized by the constitutional court[69]. One cannot escape such a broad approach because of the existence of other rights in the Bill of Rights such as the right to dignity, the right to bodily and psychological integrity and the right to life. By way of example, it could be argued that a person would be entitled to palliative care as much on the basis of the rights to psychological integrity and dignity as on the basis of a right of access to health care services. A person has a right to emergency medical treatment as much on the basis of the right to life as on the basis of the right to emergency medical treatment reflected in section 27(3) of the Constitution. The available resources limitation keeps the right within reasonable and practicable bounds[70].

2.3.2 Access

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69 See for instance *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) where O'Regan J observed at 409: "The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual". In *Dawood* (fn 12 *supra*) at para [35] the court stated that "The value of dignity in our Constitutional framework cannot . . . be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels." Cited with approval in *Khumalo* fn 45 *supra*. Also in *Dawood* (fn 12 *supra*) the court noted that: "The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights." Cited with approval in *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC). In *S v Dodo* 2001 (3) SA 382 (CC): "Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end." See also *Grootboom* (fn 10 *supra*) in which the court said: "The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings."

70 See the discussion in Chapter 1 on minimum core content. It is important to realise that, unlike international law, the South African Constitution uses a top-down approach in terms of which the rights are construed widely but limited to the extent of the available resources. This approach obviates the need for the minimum core concept because the latter suggests a bottom-up approach in terms of which the content of the right is slowly increased or built up with the minimum core content as a base. It is submitted that the South African approach is preferable as it allows for changing circumstances in which resources may grow or dwindle without detracting from the value of the right or losing sight of its key objectives. It is more realistic than the minimum core concept which seeks to impose upon States a duty to provide a particular set of benefits irrespective of whether or not the resources exist for them to do so. There is an unfortunate tendency amongst some human rights lawyers to see socio-economic rights in the abstract, divorced from the economic realities of existence in which the notion of unlimited resources is a fairytale. This approach, it is submitted undermines and devalues these rights, rather than reinforcing and adding weight to them in practical terms.

The fact that the Constitution makes provision for "access" to health care services must be taken into consideration in seeking to understand the nature of the right. It is not a direct right to health care services but a right of access. A right of access, it is submitted, is not as direct a right, as a right to health care services *per se*. The meaning and implications of a right of access should not be underestimated[71]. It is submitted that this distinction allows for the possibility of payment for health care services by those who can afford to do so and also emphasizes the responsibility of the individual for his or her own health status. A direct right to health care services is likely to preclude the legitimacy of a payment requirement and also to preclude, to a significant extent, the responsibility of an individual for his or her own health status. A right that grants access implies that the holder of the right must also make some kind of an effort in order to obtain the services. A direct right to health care services tends to suggest rather that health care services must be brought to the right holder on whatever circumstances or situation he finds himself. The aspect of access suggests health care services must be placed within the reach, in terms of geographical, economic, sociological and physical factors, of people in South Africa. In this sense it could be much wider, in practical terms, than a direct right to health care services. For instance, a right of access can also imply that in a deep rural area, where it is not feasible to build a clinic and people do not have readily available transport, there is an obligation on the state to provide the necessary transport to the nearest health care facility, rather than building a health care facility in a location where it is not cost effective to do so. Similarly in a situation where for instance there is a natural disaster such as flooding, which is preventing people from accessing health services because they are stranded, a right of access means that the state must alter their circumstances so that they are able to freely exercise their right of access to health care services. A right of access also implies a greater degree of flexibility than a direct right to health care services in that the state could take a decision not to provide health care services at all but rather allow the private health sector to do so in a system in which the state is a funder of health care services rather than a supplier. "Access" widens the focus to include activities that may not themselves fall within the definition or scope of

[71] Liebenberg in Chaskalson *et al* fn 67 *supra* at 41-26 states that: "The phrase 'access to' the rights in ss26 and 27 (as opposed, for example, to a 'right to adequate housing') appears to have been used to resist an interpretation that the state is obliged to deliver the rights directly and without charge to everyone. Those with sufficient resources will have the means of access to adequate housing (for example through rental, purchase etc) and will not need state assistance to secure housing. It thus limits the state's responsibility to those individuals and groups who encounter particular difficulties in gaining access to the various rights. In the South African context, these will generally be members of disadvantaged and vulnerable groups."

the term "health care services" *per se*. It includes state activities in the maintenance and upgrading of public hospitals and ambulances, referral systems between municipal, provincial and national health facilities, the licensing of public and private health establishments, programmes for the education and retention of sufficient numbers of health professionals necessary to provide health care services and the creation of a non-discriminatory environment in the health sector.

2.3.2.1 Practical Implications

The right of access, in its practical outworking, can imply obligations upon government departments other than the departments of health. For example, if the road that leads to a hospital becomes inaccessible due to lack of maintenance or a natural disaster it may be the duty of the department of public works or its provincial or municipal equivalent to ensure that it is cleared. The inappropriate or over regulation of health care markets by the department of trade and industry or the Competition Commission could conflict directly with the right of access to health care services where for instance it results in loss of access to medicines because trade conditions in South Africa are so unfavourable that major drug manufacturers are no longer prepared to supply the medicines and there is no alternative source of supply. If the department of education, and tertiary education facilities, for example, do not make provision for the education and training of suitably qualified pharmacists, this will impact upon access to health care services. Even within the narrower context of health establishments, access to health care services is dependent upon effective and efficient management that ensures that electricity and water bills are paid timeously so that these utilities are not cut off, that relationships with external suppliers of food and telephone services are maintained, that human resources are managed in a responsible manner so that strikes and other disruptive labour action are avoided where reasonably possible.

Liebenberg[72] points out that:

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72 Chaskalson *et al* fn 67 *supra* at 41-28 to 41-29.

"Deprivation of access arises when the state, through legislation or administrative conduct deprives people of the access they enjoy to socio-economic rights…Administrative conduct under a statute may amount to the deprivation of a substantive constitutional guarantee…In the absence of justification, administrative action that deprives people of their access to socio-economic rights is unconstitutional. Unreasonable administrative action and procedural unfairness also infringe the right to just administrative action and will require independent justification under the limitations clause. This illustrates the inter-relationship between socio-economic rights and the right to just administrative action."

The relationship between administrative law and the rights involving health care services will be discussed in a subsequent chapter. The foregoing does not mean that the state is obliged to maintain all existing health facilities and programmes and may not shut any of these down, especially when they are shown to be inefficient and wasteful or resources could be better deployed elsewhere. Logically speaking the executive branch of government must have the flexibility to be able to reallocate resources in accordance with changing needs and circumstances[73]. There may well be individuals who are adversely affected by such reallocation decisions and the debate is then likely to turn again to whether the interests of the individual must take preference over the interests of a larger group of people or even society as a whole. As noted elsewhere, whilst the constitutional court has acknowledged that there may be times when the interests of society as a whole must prevail over the interests of the individual[74] it has tended in other cases to prefer the interests of smaller groupings[75]. It is clear that there are qualifiers as to when the interests of the whole will prevail against those of the individual. These will be discussed at a later stage. It is submitted that as the South African legal system and government develop and mature beyond the binary questions of access and no access and have and have-not, issues of access will increasingly become questions of degree. In other words, instead of whether or not a drug should be available, it will be a question of which one out of a choice of several alternatives should be preferred and included in the essential drugs list and why or how far

73 Liebenberg (fn 67 *supra)* at 41-29 observes that: "In considering whether a person has been deprived of access to a socio-economic right, account must also be taken of the fact that access is not solely dependent on state provision. Not every scaling down or even abolition of a programme of state support will amount to a negative infringement of the rights in ss26(1) and 27(1). The effects of a particular measure will require close scrutiny to ascertain whether it deprives the affected beneficiaries of effective access to the particular right. A violation will not arise if suitable alternative programmes exist or if the beneficiary can gain access to the right through his or her private resources. This interpretation preserves a reasonable measure of flexibility for the state in its policy and legislative choices. At the same time it requires the application of heightened scrutiny to measures depriving poor and disadvantaged groups to state assistance."

74 In *Soobramoney* fn 23 *supra*

75 Such as *Grootboom* and *TAC* fn 10 and fn 57 *supra*

away the nearest accessible emergency unit or pharmacy is situated and whether it is close enough.

For the present, as the recent *TAC* case[76] demonstrates, the early stages of development do require the resolution of such binary questions, and are still very much in evidence. That case was essentially about deprivation of public sector patients of a right of access to health care services, specifically a drug known as Nevirapine. It was not complete denial of access as the government had established a number of pilot sites which offered treatment using the drug to mothers and their newborn babies. However, the objection to the policy was that the drug was only available at a few pilot sites in each province and that it should be made available at all public sector health facilities. The drug was already available in the private sector as it had been registered with the Medicines Control Council as being indicated for the prevention of mother to child transmission of HIV. In that case the applicants, and subsequently the constitutional court, made much of the fact that the drug was available in the private sector but not in the public sector[77]. The government's administrative decision to gradually introduce a treatment regimen for pregnant mothers and their babies in the public sector was unconstitutional deprivation of access to health care services because the public sector caters for the poor and disadvantaged who have no alternative means of securing the drug themselves. The fact that the drug was available to the state free of charge and that the treatment was relatively short term did not help the state's case.

2.3.2.2 Links to other rights

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76 *TAC*, fn 57 *supra*. See later for the facts of the case.

77 *TAC* fn 57 *supra*. See the argument of the applicants at p 735 of the judgment where it is stated that: "There is no rational or lawful basis for allowing doctors in the private sector to exercise their professional judgment in deciding when to prescribe Nevirapine, but effectively prohibiting doctors in the public sector from doing so", at p 746 where the court observes that: "The risk of Nevirapine causing harm to infants in the public health sector outside the research and training sites can be no greater than the risk that exists at such a site or where it is administered by medical practitioners in the private sector", at p 733 "The crux of the problem, however, lies elsewhere: what is to happen to those mothers and their babies who cannot afford access to private health care and do not have access to the research and training sites?" at p 748 "In dealing with these questions it must be kept in mind that this case concerns particularly those who cannot afford to pay for medical services. To the extent that government limits the supply of Nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences" and at p750 "Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the State to make health care services available to them."

It is submitted that a right of access harks back to the fundamental constitutional value of and right to dignity and dignity in its turn is closely linked to equality. In the past, people were denied access to certain health facilities and health care services because the values of dignity and equality were not respected.[78] A right of access to health care services reflects more accurately the break with the past intended by the Constitution than a mere right to health care services would have done. It implies that in the private and public health sectors alike, people of all races and cultures must have equal access to health care services. Access may not be denied in the private sector on the grounds of unfair discrimination such as happened in the past. This is not to say that people of all races and cultures must have free access to health care services in the private sector. It is arguing rather that criteria for access must be applicable to everyone regardless of their race, culture and other characteristics on the basis of which they were previously the victims of unfair discrimination. The right of access to health care services as stated in section 27(1) imposes no specific obligations upon the state as opposed to the private sector. It is important to make this distinction in order not to conflate the right with the corresponding obligation of the state alone as expressed in section 27(2). It is submitted that the right in section 27(1) does not only give rise to a corresponding obligation on the part of the state to give access to health care services although the obligations of the state, as expressed in section 27(3), with regard to promotion and fulfilment of the right are undoubtedly broader than those of private entities. Questions of the ability to pay aside, a private sector health establishment that denied a person access to its facilities for a reason which is not legally justifiable is as likely to be acting in violation of the constitutional right of access to health care services as it is to be guilty of unfair discrimination. This demonstrates the link between access on the one hand and dignity and equality on the other.

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78 See for instance, Cowen S 'Can 'Dignity' Guide South Africa's Equality Jurisprudence?' (17) *SAJHR* 2001 p 34 at p 43 where she states that: "O'Regan J makes a useful distinction between a vision of dignity that is informed by the past and a vision for the future. Viewing dignity through the lens of history and humanity that was denied people in the past can provide a useful way to understand its meaning more fully. Such an historical approach is also evident in recent extra-curial statements by Ackerman J. In his Bram Fischer speech delivered in May 2000, Ackerman J suggested that: 'it is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way to establish what equality and dignity mean...What lay at the heart of the apartheid philosophy was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination...Who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationships was determined for you by the state... The state did its best to deny blacks that which is definitional to being human, namely the ability to understand or at least define oneself through ones own powers and to act freely as a moral agent pursuant to such understanding of self-definition. Blacks were treated as a means to an end and hardly ever as an end in themselves; and almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.'"

It is submitted that questions of access are fundamental to government's obligation to respect, protect, promote and fulfil the rights in the Bill of Rights as envisaged in section 7(2) of the Constitution. It imposes both negative and positive obligations on the state.[79] In a consideration of whether access has been unlawfully denied in a particular instance, an examination of the state's obligation to respect, protect, promote and fulfil would have to be undertaken with regard to the specific circumstances of the case together with other limiting factors such as the availability of resources.

2.3.2.3 Rationing

A further question that is of importance in understanding the right of access to health care services is the question of the nature and level of care to which people are entitled. Whilst this question may be answered at one level on the basis of the limitation of available resources it does raise other issues which are not necessarily completely addressed by this argument. Take for example the situation of a terminally ill person or someone who is in a persistent vegetative state who can perhaps be kept alive by a particular health care intervention but with no improvement in quality of life or prospects of recovery. The treatment is of such a nature that it simply adds on a few more days or weeks of life but

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[79] De Vos P, 'Grootboom, The Right of Access To Housing and Substantive Equality as Contextual Fairness' 17 *South African Journal of Human Rights* 2001 p258 at p 271-2 points out that: "The judgement in *Grootboom* confirms that the right of access to housing creates both negative and positive obligations for the state...But the fact that s26 creates a right that can be enforced by individuals does not mean that individuals have a right to claim access to shelter or housing on demand. The individual has a right to demand that the state take action to begin to address the housing needs of those individuals who cannot provide for themselves or who need assistance from the state before they would be able to gain access to adequate housing. The positive component of the right of access to adequate housing thus places a duty upon the state to take steps to address the housing needs of society. Given the constitutional vision of a society in which all individuals will have access to adequate housing, the failure by the state to take adequate steps to achieve this goal would constitute a failure to engage meaningfully with the transformative vision of the Constitution. In enforcing this right, a court will be required to evaluate the state's action, first, to determine whether *any* steps have been taken and second, whether *appropriate* steps have been taken. At the heart of the *Grootboom* judgment is the Court's interpretation of what would constitute such appropriate steps and when the steps taken by the state would not be satisfactory from a constitutional point of view. Where courts are called upon to consider whether the state has fulfilled its positive obligations to take appropriate steps to realise the right of access to adequate housing, the question will revolve around the *reasonableness* or not of the state's plan and the implementation of this plan."
It is submitted that the validity of these statements in the context of access to health care services is born out by the approach of the constitutional court in the *TAC* case. However these comments also add a subtle gloss to the significance of a right of *access*. A right of access in a sense precludes a claim to health care services on demand. In more developed countries access is likely in many instances to be a fairly subjective concept that involves questions of degree. Whilst there will always be new medical technologies and drugs that are out of the reach of many people because they are too expensive, there are very often other pre-existing, albeit slower or more cumbersome ways to address a health condition. An example is that of so-called 'keyhole surgery' or minimally invasive surgery which employs very small instruments to perform endoscopically certain types of surgery that would otherwise require much larger incisions and more physical injury to the body. Keyhole surgery by experienced surgeons usually takes less time than ordinary open surgery and the patient usually has a much quicker recovery rate. However the technology used for keyhole surgery can be more expensive than that used in ordinary open surgery and some public sector health establishments may simply be unable to afford it. This does not mean however, that they cannot treat the condition at all. It means that they simply use the older methods of doing so.

cannot necessarily do so indefinitely. It is expensive and its utilisation to prolong the life of the terminally ill person may entail an opportunity cost for saving the life of someone else who stands a better chance of recovery. Is a person entitled to such treatment? The question relates as much to the right to life as it does to the right to health care services. These questions are at the heart of the interface of the law and the profession of medicine. Medical personnel are faced with difficult decisions of this nature on a regular basis. At what point can and should the law interfere with such decisions? These questions were canvassed by the constitutional court in *Soobramoney v the Minister of Health (KwaZulu-Natal)*[80].

2.3.2.4 Soobramoney v the Minister of Health (KwaZulu-Natal)[81]

Facts

The applicant was a 41-year-old unemployed man, who was gravely ill. He was a diabetic, he suffered from an ischaemic heart disease and he had chronic renal failure. The province had refused to allow him access to provincial renal dialysis facilities and he could not afford to access these in the private sector because he was unemployed and was not a member of a medical scheme. The basis for the refusal of the province to dialyse the applicant was that he did not satisfy the criteria that had been laid down by the provincial health authorities in order to ensure that maximum benefit was derived from the limited number of renal dialysis machines available in the province. Patients suffering from irreversible chronic renal failure were not admitted automatically to the provincial renal dialysis programme but according to a set of guidelines in terms of which the primary requirement for admission was a patient's eligibility for a kidney transplant. A patient who was eligible for a transplant would be provided with dialysis treatment until an organ donor was found and a kidney transplant had been completed. According to the guidelines, patients were not eligible for kidney transplants unless they were free of significant vascular or cardiac disease. Since the appellant suffered from ischaemic heart disease and

80 *Soobramoney v Minister of Health,Kwazulu-Natal* fn 23 *supra*
81 *Soobramoney* fn 23 *supra*

cerebro-vascular disease he was not eligible for a kidney transplant and therefore did not qualify for the renal dialysis program. The High Court[82] noted that in the applicant's case, "[t]he word 'chronic' denotes a progressive deterioration and irreversible disease".

Judgment

The constitutional court upheld the decision of the High Court in favour of the Minister of Health (KwaZulu-Natal). It took the view that that the obligations imposed on the state by sections 26 and 27 of the Constitution dealing with the right of access to housing, health care, food, water and social security were dependent upon the resources available for such purposes, and the corresponding rights themselves were limited by reason of the lack of resources. Given this lack of resources and the significant demands made on them by high levels of unemployment, inadequate social security and a widespread lack of access to clean water or to adequate health services, an unqualified obligation to meet these needs would not at the time of the case be capable of being fulfilled.

On the subject of the allocation of scarce resources Chaskalson P quoting with approval from *R v Cambridge Health Authority, ex parte B*[83] in which the British court of appeals stated:

"I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the Court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make"

and then observed that:

"The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds

[82] *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 430 (D)

[83] *Ex parte B* [1994] All ER 129 CA

should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters"[84].

The constitutional court rejected the argument that the applicant's situation fell to be decided under section 27(3) which grants the right not to be refused emergency medical treatment. It held, given that the appellant suffered from chronic renal failure and that to be kept alive by dialysis he would require such treatment two to three times a week, that his condition was not an emergency calling for immediate remedial treatment. It was rather an ongoing state of affairs resulting from an incurable deterioration of the applicant's renal function.

The court also rejected the right to life argument which claimed that on the basis of the right to life, everyone requiring life-saving treatment who was unable to pay for such treatment herself or himself was entitled to have the treatment provided at a state hospital without charge. Chaskalson P observed in this regard that:

"In our Constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in s 27. If s 27(3) were to be construed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfil its primary obligations under ss 27(1) and (2) to provide health care services to 'everyone' within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. In my view, much clearer language than that used in s 27(3) would be required to justify such a conclusion."[85]

Significantly, the court held that the state's failure to provide renal dialysis to all persons suffering from chronic renal failure did not constitute a breach of its constitutional obligations as reflected in section 27(1).

Discussion

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84 *Soobramoney*, fn 23 *supra*, para 29 p776

85 *Soobramoney*, fn 23 *supra* at para 19 p 773 - 774

It is submitted with respect that the constitutional court made a number of significant pronouncements on the right to life and health care services in this case and provided some fairly solid answers to the questions posed previously. *Soobramomey*[86] is an extremely important decision in that it highlights the fact that there is justification in preferring the interests of the collective over those of the individual in certain circumstances. The individualistic approach must have limits if society is to function successfully as a whole. This principle applies as much with regard to constitutional rights as it does to criminal law. Chaskalson P recognised this in the *Soobramoney* judgment with the words:

"The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."[87]

Another important point to emerge from the decision of the Court in *Soobramoney*[88] is that rationing of access to health care services is a legitimate, and necessary activity and that a constitutional right of access to health care services cannot detract from the hard fact of limited resources. Sachs J observed that:

"In all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care,"[89]

pointing out that:

"Section 39(1)(a) of the Constitution requires us when interpreting the bill of rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[90]

The concept of rationing is discussed in more depths elsewhere in this chapter. It is intricately linked to the issue of available resources and the progressive realisation of socio-economic rights which is essential to an understanding of the constitutional right of access to health care services.

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86 *Soobramoney*, fn 23 *supra*

87 *Soobramoney* fn 23 *supra*, para 31

88 *Soobramoney* fn 23 *supra*

89 *Soobramoney* fn 23 *supra* para 52 p 782

90 See *Soobramoney* fn 23 *supra*, footnote in judgment

It is clear from the judgment of the court in *Soobramoney* that there are boundaries beyond which the law should not interfere in matters involving the allocation of resources[91]. Even the right to life cannot found a right on demand to life-saving medical treatment in all cases. The criteria for the courts in deciding whether or not interfere with a decision of the political organs and medical authorities responsible for such matters as stated by the court are rationality (it is submitted that in the light of the *Grootboom* and *TAC* decisions[92] this is better described as 'reasonableness'[93]) and good faith. These criteria are in many respects simply a reflection of the administrative law principles of procedural fairness and administrative justice. After all, the decision by the KwaZulu-Natal health authorities to adopt the renal dialysis protocol which applied to Mr Soobramoney could be classified as an administrative decision although the court does not seem to have expressly regarded it as such. As with all administrative decisions, if one applies one's mind then one is likely to act rationally and take reasonable decisions. If one acts in good faith, there must be an absence of bias and the proper application of one's mind. It is submitted that these grounds are similar to the grounds of review that are often applied in order to judge the integrity and validity of administrative decisions. In the case of *Roman v Williams NO*[94] the court held that an administrative decision was:

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[91] See Roux T "Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court" http://www.law.wits.ac.za/cals/lt/publications/pdf/norway_paper.pdf at p2 who observes that: "Judges, it is said, are neither mandated nor institutionally equipped to undertake the complex economic and interest balancing enquiries that inform the allocation of public resources. It is therefore unwise to give judges the power to review decisions taken by the political branches in this area and foolish for judges to assume this power when they are not compelled to do so. If these propositions are true for judges in established democracies, one would expect that they would apply with even greater force in new democracies where the judicial branch is by definition, still in the process of building the institutional legitimacy required to play a meaningful role in politics. It is therefore surprising that some of the most far-reaching decisions in this area have been handed down by constitutional courts in Hungary and South Africa – both countries democratised in the last fifteen years. It is even more surprising that, in the case of South Africa, the judicial review of political resource allocation has not as yet triggered any significant protest from the executive."

[92] *Grootboom* fn 10 and *TAC* fn 57 *supra*

[93] See de Waal, Currie and Erasmus, fn 2 *supra* at p 439, where they observe that: "While there can be considerable disagreement about the best way to achieve these goals, the state has an obligation to justify its choice of means to the public. Put another way, the standard of reasonableness requires reason giving. But the court's role does not end with requiring an explanation. The explanation can be evaluated for its reasonableness, its ability to convince a reasonable person of its coherence. The obligation of justification means the provision of reasons that would satisfy most people of the rationality of a policy on its own terms, even if they are not convinced about the wisdom of choosing such a policy in the first place." See also Roux fn 91 *supra* at p 7 who states that: "It is therefore instructive to compare this review standard [as expressed in *Grootboom*] to the rational-basis and proportionality standards in South African and comparative constitutional law, which mark respectively the low and high ends of the continuum of review standards from which the court might have chosen. The reasonableness standard in *Grootboom* is clearly stricter than the rational-basis standard applied under section 9(1) of the 1996 Constitution." He refers as authority for this observation to *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape and Another* 2002 (9) BCLR 891 (CC) para 46 where it was held that the *Grootboom* reasonableness review standard was a "higher standard" than the review standard applied under section 9(1) of the Constitution.

[94] *Roman* 1998 (1) SA 279 (C) at p 284 - 285

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"reviewable administrative action within the purview of s 33(1) and (2) of the Constitution Act 108 of 1996 (as these subsections are to be deemed to be read in terms of item 23(2)(b) of Schedule 6 of the Constitution) and such a decision must be justifiable, in relation to the reasons given for it. Justifiability as specified is to be objectively tested. The scope of this constitutional test is clearly much wider than that of the common-law test and it overrides the common-law review grounds as set out in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* ...
Administrative action, in order to prove justifiable in relation to the reasons given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality which requirements involve a test of reasonableness. Gross unreasonableness is no longer a requirement for review.
The constitutional test embodies the requirement of proportionality between the means and the end. The role of the Courts in judicial reviews is no longer confined to the way in which an administrative decision was reached but extends to its substance and merits as well."

The relevance of administrative law to health care delivery will be canvassed in more depths in a later chapter. On the question of the meaning of the right to life in the context of life prolonging health care services Sachs J observed that:

"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. As Stevens J put it: dying is part of life, its completion rather than its opposite. 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"[95].

There are thus circumstances in which, even if the resources may, technically speaking, be available, there is no right to their use for the purpose merely of evading death. The right of a person in a persistent vegetative state to be maintained in that state indefinitely is thus questionable. However, this calls into the play the fact that in South Africa, the withdrawal of life support could in certain circumstances amount to criminal conduct due to the fact that euthanasia is not legally recognised[96]. One cannot avoid getting involved in discussions involving utilitarianism at this level. The hard question is that in a country in which there is a shortage of health care personnel to treat a patient, how can one justify keeping such a patient 'alive' when the nursing staff and possibly the bed may be required for the purpose of the delivery of health care services to other patients who have a good chance of

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95 *Soobramoney* fn 23 *supra*, para 57 p 784, footnotes omitted.

96 *S v Hartmann* 1975 (3) SA 532 (C); *S v De Bellocq* 1975 (3) SA 538 (T). The South African courts have not, however, been entirely unsympathetic. In *Clarke v Hurst No and Others* (fn 29 *supra*) the court observed that: "There are no doubt many whose susceptibilities would be offended at the thought that it could ever be reasonable for those responsible for the care of the disabled patient not to take whatever steps it may be reasonably possible to take to keep the patient alive - regardless of the quality of the life which the patient would have to endure if kept alive. A moment's reflection would however tell one that it happens regularly, especially in the case of the terminally ill, that decisions are taken to allow the patient to die rather than to prolong a life of suffering by taking life-support measures."

recovery. At present it seems that an answer to the question of the legal acceptability of euthanasia lies somewhere between the fact that the right to life does not encompass the right to indefinitely evade death and the legal convictions of society upon which issues of wrongfulness depend[97].

There is a tendency in human rights law to favour the interests of the individual rather than those of society as a whole[98]. This can create a considerable degree of tension for the policy makers in the executive and legislative branches of government who often have to make decisions and set policy at the level of society as a whole in order to obtain the most benefit for the greatest numbers of people. This approach is very likely to compromise the interests of particular individuals who fall on the borderlines of policy positions. The interests of an individual can at times seriously conflict with the broader interest of the collective and it becomes a question of achieving an acceptable balance between individual and group interests in setting policy. This is easier said than done.

2.3.2.5 The Individual v The Collective

It is necessary to examine the decisions of the constitutional court in *Government of the Republic of South Africa and Others v Grootboom and Others* and *Minister of Health and Others v Treatment Action Campaign and Others* in order to further explore the need to balance the interests of smaller groupings and individuals against those of society as a whole in resource allocation decisions and to understand how the constitutional court has

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97 See discussion of wrongfulness and relevant case law in *Clarke v Hurst No and Others* 1992 (4) SA 630 (D) from 652 onwards.

98 This is possibly to some extent, in South Africa at least, a product of the perceived roles of the legislature and the judiciary. See for instance, the observations of Kentridge and Spitz, Chaskalson *et al*, fn 60 *supra*, at 11-23 to 11-24 where, in a discussion of value-based interpretation, they state: "Like other interpretive approaches, value based interpretation is also grounded upon a vision of the appropriate institutional role of the judiciary and reflects a particular response to the countermajoritarian dilemma. Its proponents acknowledge the countermajoritarian nature of constitutional review and argue that this role is most appropriate to the protection of individual rights. The majoritarian institutions of government possess different institutional competencies from those of the judiciary. The role of the courts is not to make social policy but rather to articulate principle. Consequently, the relative insulation and weaker mechanisms of democratic accountability characteristic of the judiciary provide the necessary space within which to perform the proper judicial function. If the role of the legislature is to give expression to the majority will, the role of the courts, at least in constitutional matters, is to protect the individual rights which may be countermajoritarian in nature. The courts are far more than clearing-houses for the products of the legislature. They protect certain spheres of personhood against incursion by the majority. Meaningful enforcement of individual rights may have, as its consequence, large-scale social intervention. One of the functions of constitutional review is to determine when such intervention is justified by the duty to protect individual rights. Viewed in this light, insulation from the vagaries of the political process is an advantage. Instead of being a participant in majoritarian bargaining through the political process, the judiciary may consider questions of principle and political morality." (footnotes omitted). In practice this would seem to be the experience of the executive branch of government in the area of socio-economic rights.

dealt with socio-economic rights, of which the right of access to health care services is one, thus far.

2.3.2.6 Government of the Republic of South Africa v Grootboom[99]

Facts

This case involved the right to housing of the respondents who had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They applied to a High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court held that s 28(1)(c) of the Constitution obliged the state to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children, that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of s 26 of the Constitution and that the state was bound to provide this rudimentary shelter irrespective of the availability of resources. The appellants were accordingly ordered by the High Court to provide the respondents who were children and their parents with shelter. The appellants appealed against this decision.

Judgment

The court held that the question of how socio-economic rights were to be enforced was a difficult issue which had to be carefully explored on a case-by-case basis considering the terms and context of the relevant constitutional provision and its application to the circumstances of the case. It said that that interpreting a right in its context required the consideration of two types of context. On the one hand, rights had to be understood in their textual setting, which required a consideration of chapter 2 and the Constitution as a whole. On the other hand, rights also had to be understood in their social and historical context.

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99 *Grootboom* fn 10 *supra*

The right to access to adequate housing could therefore not be seen in isolation but in the light of its close relationship with the other socio-economic rights, all read together in the setting of the Constitution as a whole. It observed that the interconnectedness of the rights and the Constitution as a whole had to be taken into account in interpreting the socio-economic rights and, in particular, in determining whether the state had met its obligations in terms of them. The court noted further that for a person to have access to adequate housing there had to be the provision of land, services (such as the provision of water, the removal of sewage and the financing of all these) and a dwelling. The right also suggested that it was not only the state who was responsible for the provision of houses but that other agents within society had to be enabled by legislative and other measures to provide housing. The state therefore had to create the conditions for access to adequate housing for people at all economic levels of society. With regard to the obligations of the state the court observed that s 26(2) made it clear that the obligation imposed upon the state was not an absolute or unqualified one. The extent of the state's obligation was defined by three key elements which had to be considered separately: (a) the obligation to take reasonable legislative and other measures; (b) to achieve the progressive realisation of the right; and (c) within available resources.

It went on to point out that reasonable legislative and other measures such as policies and programs had to be determined in the light of the creation by the Constitution of different spheres of government and the allocation of powers and functions amongst these different spheres thus emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. A reasonable housing program capable of facilitating the realisation of the right therefore had to clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources were available to implement it. The formation of a program was therefore only the first stage in meeting the state's obligations. The program also had to be reasonably implemented as failure to do so would be a breach of the state's obligations.

The court said that in order to be reasonable, a program had to be balanced and flexible and make appropriate provision of attention to housing crises and to short, medium and long

term needs. It commented that a program excluding a significant segment of society would not be reasonable and noted that reasonableness had to be understood in the context of the Bill of Rights as a whole, especially the constitutional requirement that everyone be treated with care and concern and the fundamental constitutional value of human dignity.

The court held that the term 'progressive realisation' showed that it was contemplated that the right contained in section 26 could not be realised immediately. The goal of the Constitution was that the basic needs of all in South African society must be effectively met and the requirement of progressive realisation meant that the state had to take steps to achieve this goal. This in turn meant that accessibility had to be progressively facilitated, involving the examination of legal, administrative, operational and financial hurdles which had to be lowered over time. It was thus a requirement that housing was not only to be made accessible to a larger number of people but also to a wider range of people over time. It observed that the third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

The court said that the national government bore the overall responsibility for ensuring that the state complied with the obligations imposed on it by section 26. It found in particular that the programs adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need and held that the Constitution obliged the state to act positively to ameliorate these conditions. This obligation, said the court, was to devise and implement a coherent, co-ordinated program designed to provide access to housing, healthcare, sufficient food and water and social security to those unable to support themselves and their dependants. The state also had to foster conditions to enable citizens to gain access to land on an equitable basis. Those in need had a corresponding right to demand that this be done.

It emphasised, however, that section 26 (and also section 28) did not entitle the respondents to claim shelter or housing immediately upon demand. With regard to the rights of children in section 28 vis-à-vis the more general rights in section 27 and 28 the court observed that there was an overlap which was not consistent with the notion that section 28(1)(c) created separate and independent rights for children and their parents. The court ruled that subsections 1(b) and 1(c) of section 28 must be read together and that they ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. The section encapsulates the conception of the scope of care that children should receive in South African society. The court observed that it followed from subsection 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in ss (1)(c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows, said the court, that section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families. The court noted, however, that this does not mean that the state incurs no obligation in relation to children who are being cared for by their parents or families. In the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28. In addition, the state is required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. The court held that it followed that sections 25 and 27 require the state to provide access on a programmatic and coordinated basis, subject to available resources. One of the ways in which the state would meet its section 27 obligations would be through

a social welfare program providing maintenance grants and other material assistance to families in need in defined circumstances. The court ruled that in the circumstances of the case, there was no obligation upon the state to provide shelter to those of the respondents who were children and, through them, their parents in terms of s 28(1)(c) and that the High Court therefore erred in making the order it did on the basis of this section.

In conclusion the constitutional court observed that this case showed the desperation of hundreds of thousands of people living in deplorable conditions throughout the country, that Constitution obliges the state to act positively to ameliorate these conditions and that the obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. It said that the state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done. The court acknowledged that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in South Africa and that this is also recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. It stressed, however, that despite all these qualifications, it was a matter of rights, and that the Constitution obliges the state to give effect to them. Consequently the state's obligation is one that courts can, and in appropriate circumstances, must enforce.

It made a declaratory order to the effect that the appeal was allowed in part, that the order of the Cape High Court was set aside and its own order substituted for it and that the state's housing program in the Cape Metropolitan Council area fell short of its obligation to provide to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations. It made no order as to costs.

Discussion

Grootboom[100] was the first major constitutional court decision involving socio-economic rights. As such, it is respectfully submitted that it laid down some extremely important ground rules for similar situations involving such rights. It emphasised the plight of those in desperate need and pointed out that a state program that did not address the plight of such persons could not be considered reasonable no matter how considerable the advances in a socio-economic program might be. It is in this context that the court preferred, at a certain level, the interests of the individual over those of the collective. This aspect of the case is discussed in more detail below after the facts and judgment of the *TAC*[101] case have also been canvassed since they are also of relevance to this tension between individual rights and collective interests. It must be pointed out at this stage that this aspect of the *Grootboom* decision has to be applied with care, and not in isolation but in the broader context of the *Grootboom* judgement as a whole, in the context of health services delivery because, as is clear from the case of *Soobramoney* described previously, in health care it is not always those whose needs are most urgent who must necessarily be given priority. Taken out of context, the logic of *Grootboom* and its emphasis on those in most desperate need could easily be misapplied at a policy level in the context of health care. By way of example take the government's policy decision to boost health care services at primary care level with a view to improving the overall health of the general population. Since there are limited resources this means that funding for secondary and tertiary levels of care would have to be reduced in order to have sufficient funding for a successful primary health care programme unless one assumes that there were large additional injections of funding forthcoming from the fiscus. In the light of the judgment in *Grootboom*, how can the state justify its focus on primary health care which by definition tends to address the less desperate and less urgent health needs of the general population if it means a reduction in health facilities designed to address the more urgent and desperate heath needs of those individuals who are served by the secondary and tertiary health care levels of the system? In medicine, primary health care does not generally address the health needs of so-called

100 *Grootboom* fn 10 *supra*
101 *TAC* fn 57 *supra*

'acute' cases. It can assist very much with the treatment of chronic cases and with prevention of disease[102]. If a person has a heart attack or appendicitis or goes into a diabetic coma or renal failure these are not health conditions that can be addressed at primary health care level. Yet if Article VIII of the Declaration of Alma Ata[103] states that all governments should formulate national policies, strategies and plans of action to launch and sustain primary health care as a part of a comprehensive national health system and in co-ordination with other sectors, how unreasonable is a program to ensure the rendering of primary health care services? It is clearly a question of balance between the desperate and most urgent health needs of individuals and the less urgent but equally important health needs of communities. It is submitted that in seeking to achieve such a balance equality considerations must form an important guide for policymakers as will become evident from the judgment of the court in the *TAC*[104] case. In the *Grootboom* context this is evidence by the court's cautionary observation that the question of how socio-economic rights are to be enforced is a difficult issue which must be carefully explored on a case-by-case basis taking into account the terms and context of the relevant constitutional provision and its application to the circumstances of the case as well as its rulings that:

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[102] The Declaration of Alma Ata following on the International Conference in Primary Health Care, Alma Ata, USSR in 1978 states in Article VI that: "Primary health care is essential health care based on practical, scientifically sound and socially acceptable methods and technology made universally accessible to individuals and families in the community through their full participation and at a cost that that community and country can afford to maintain at every stage of their development in the spirit of self-reliance and self-determination. It forms an integral part of the country's health system of which it is the central function and main focus, and of the overall social and economic development of the community. It is the first level of contact of individuals, the family and community with the national health system bringing health care as close as possible to where people live and work, and constitutes the first element of a continuing health care process" and in Article VII that: "Primary health care:

1. reflects and evolves from the economic conditions and socio-cultural and political characteristics of the country and its communities and is based on the application of the relevant results of social, biomedical and health services research and public health experience;
2. addressed the main health problems in the community, providing promotive, preventive, curative and rehabilitative services accordingly;
3. includes at least: education concerning prevailing health problems and the methods of preventing and controlling them; promotion of food supply and proper nutrition; an adequate supply of safe water and basic sanitation; maternal and child health care, including family planning; immunization against the major infectious diseases; prevention and control of locally endemic diseases; appropriate treatment of common diseases and injuries; and provision of essential drugs;
4. involves in addition to the health sector, all related sectors and aspects of national and community development, in particular agriculture, animal husbandry, food, industry, education, housing, public works, communications and other sectors; and demands the co-ordinated efforts of all those sectors;
5. requires and promotes maximum community and individual self-reliance and participation in the planning, organization, operation and control of primary health care, making fullest use of local, national and other available resources; and to this end develops through appropriate education the ability of communities to participate;
6. should be sustained by integrated, functional and mutually supportive referral systems, leading to the progressive improvement of comprehensive health care for all, and giving priority to those most in need;
7. relies, at local and referral levels, on health workers, including physicians, nurses, midwives, auxiliaries and community workers as applicable, as well as traditional practitioners as needed, suitably trained socially and technically to work as a health team and to respond to the expressed health needs of the community."

(http://www.who.int/hpr/backgroundhp/almaata.htm)

[103] *Declaration of Alma Ata* fn 102 *supra*

[104] *TAC* fn 57 *supra*

- the interconnectedness of the rights and the Constitution as a whole have to be taken into account in interpreting the socio-economic rights;
- the real question in terms of the Constitution is whether the measures taken by the state to realise the right afforded by the Constitution are reasonable;
- the obligation imposed upon the state is not an absolute or unqualified one and that regard must be had to the three key elements of (a) the obligation to take reasonable legislative and other measures; (b) to achieve the progressive realisation of the right; and (c) within available resources; and
- that the term 'progressive realisation' showed that it is contemplated in the Constitution that the rights cannot be realised immediately.

The court in *Grootboom*[105] gives some critically important guidance for the executive with regard to the formulation of policy decisions. It asserts that the state's duty to adopt reasonable legislative and other measures to achieve the progressive realization of socio-economic rights implies that the policy must be:

- Comprehensive – it must be inclusive of all significant segments of society[106];
- Balanced and flexible – it must be able to adapt to changing needs and circumstances across interest groups[107];
- Attentive to those whose need is most urgent and who have only the state to look to for assistance[108].

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105 *Grootboom* fn 10 *supra*

106 *Grootboom* fn 10 *supra*, para 36: "In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups." And para 40: "Thus, a co-ordinated state housing program must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by chap 3 of the Constitution."

107 *Grootboom* fn 10 *supra* para 37: "The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live" and para 43: "The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the program will require continuous review."

108 *Grootboom* fn 10 *supra*, para 36: "The poor are particularly vulnerable and their needs require special attention" and at para 44 "Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right." *Grootboom* fn 10 *supra* at p 69 "Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right." *TAC* (fn 57 *supra*) at p749 referring to the language used in

Whilst there will always be the potential for constitutional challenge to state policy, this need not be seen as entirely pathological, especially if the political branches of government are able to learn from and implement the lessons expounded by the courts in such a way that such litigation is eventually no longer a viable proposition because it invariably ends in failure for the applicant. In this sense, frequent constitutional challenge can be seen as a feature of the developmental stages of the new legal order. Even at this stage, however, it is submitted that the determination and implementation of policy involving socio-economic rights by the executive could be legitimized in many instances by following a few simple guidelines based partly upon the principles of administrative law and partly upon the pronouncements of the constitutional court to date. These are:

1. The importance of objective decisions based upon scientifically obtained and credible information. The more comprehensive and reliable the factual information upon which the policy decision is based, the more reasonable the decision is likely to be. The kind of information and the nature of its source will depend upon the subject matter of the policy in question.

2. Related to the first principle above is the importance of interaction and communication with stakeholders. The court in *TAC*[109] dealt with it under the heading of 'transparency'[110]. It is submitted that transparency is more than just the communication of the existence of a particular programme however. It includes a programme of openness to representation by stakeholders before during and after the policy has been formulated and implemented and relates therefore to the requirement of flexibility referred to earlier with reference to the judgment in *Grootboom*[111]. Even the executive has to take a hard decision to prioritise some needs over others, this will

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Grootboom stated that: "The provision of a single dose of Nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are 'most in peril' as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine."

[109] *TAC* fn 57 *supra*

[110] *TAC* fn 57 *supra* at p762: "Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately."

[111] *Grootboom* fn 10 *supra*

ensure that it does so on an informed basis and is more aware of the legal risks and arguments attendant upon making a particular decision.

3. Related to the second principle enunciated above, procedurally and substantively, within the processes for both formulation and implementation of the policy, there must be a back door through which the executive can escape accusations of inflexibility and administrative unfairness. Since the executive is not superhuman and omniscient, there is the possibility that it could overlook a particular need or segment of society in formulating or implementing the policy. A backdoor, for example a process of review or interaction with stakeholders, or which makes provision for hearing or taking account of hard cases is likely to go a considerable distance in improving the reasonableness of the policy whilst at the same time encouraging the disaffected to approach the executive rather than the courts for a remedy. In this way, if a hard case is turned down or cannot be accommodated, this can be rationalized and the risk of judicial disapproval reduced to a minimum. The administrative law principle of *audi alteram partem* particularly informs this third principle but the principles of administrative justice generally are of assistance in this instance. It is clearly implied in this principle that the basic tenets of the policy should ideally be documented and if at all possible published or at least publicized. The advantages of this are that publication invites dialogue with and comment from the significant segments of society which enhances flexibility but also promotes a clear understanding of the policy intention and the reasons for it.

4. The fourth and last principle is to ensure that the policy is informed by legal knowledge and expertise that relates specifically to the subject matter of the policy. This is necessary in order to deal with the specifics of the policy rather than the generalities which are covered in the first three principles given above. Sound legal exposition and analysis in this context has to be both retrospective, with reference to decisions and judgments of the courts that have already been handed down, and prospective with regard to the potential manner in which new ground is likely to be

broken by the courts in a situation where existing jurisprudence offers only limited guidance.

2.3.2.7 *Minister of Health and Others v Treatment Action Campaign*[112]

Facts

The state instituted a policy whereby an antiretroviral drug, Nevirapine, was made available only in certain research sites within the public health sector for the purposes of testing the efficacy of a larger programme involving the drug for the prevention mother-to-child transmission of HIV. The respondents had applied for an obtained an order from the High Court obliging the state to make Nevirapine more widely available within the public health sector on the basis that the state programme was effectively denying access to Nevirapine to people who did not have access to the research sites. The state appealed against the order of the High Court on the basis, *inter alia*, that it did not have the capacity to make available the full package of treatment which included voluntary counselling and testing and the option of substitute feeding of which Nevirapine formed a part.

Judgment

The court held that although the concerns raised on behalf of the appellants were relevant to the ability of government to make a 'full package' available throughout the public health sector, they were not relevant to the question whether Nevirapine should be used to reduce mother-to-child transmission of HIV at those public hospitals and clinics outside the research sites where facilities in fact existed for testing and counselling. It said that the fact that the research and training sites would provide crucial data on which a comprehensive programme for mother-to-child transmission could be developed and, if financially feasible, implemented was clearly of importance to government and to the country. So, too, was ongoing research into safety, efficacy and resistance. This did not mean, however, that until the best programme had been formulated and the necessary funds and infrastructure

[112] *TAC* fn 57 *supra*

provided for the implementation of that programme, Nevirapine had to be withheld from mothers and children who did not have access to the research and training sites. Nor could it reasonably be withheld until medical research had been completed. A programme for the realisation of socio-economic rights had to be balanced and flexible and make appropriate provision for attention to crises and to short, medium and long term needs. A programme that excluded a significant segment of society could not be said to be reasonable. The court held that that the provision of a single dose of Nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV was, as far as the children were concerned, essential, that their needs were most urgent and their inability to have access to Nevirapine profoundly affected their ability to enjoy all of the other rights to which they were entitled. The court observed that the children's rights were most in peril as a result of the rigid and inflexible policy that had been adopted which excluded them from having access to Nevirapine. The state was obliged to ensure that children were accorded the protection contemplated by section 28 that arose when the implementation of the right to parental or family care was lacking. The policy prejudiced children born in public hospitals and clinics to mothers who were for the most part indigent and unable to gain access to private medical treatment which was beyond their means. They and their children were in the main dependent upon the state to make health care services available to them. The court held that a factor that needed to be kept in mind was that government policy was and should be flexible. It could be changed at any time and the Executive was always free to change policies where it considered it appropriate to do so. The only constraint was that policies had to be consistent with the Constitution and the law. Court orders concerning policy choices made by the Executive should therefore not be formulated in ways that precluded the Executive from making such legitimate choices. The court held further that the state's policy failed to meet constitutional standards because it excluded those who could reasonably be included where such treatment was medically indicated to combat mother-to-child transmission of HIV. That did not mean, however that everyone could immediately claim access to such treatment, although the ideal was to achieve that goal.

The court referred specifically to the cases of *Soobramoney*[113] and *Grootboom*[114] noting that:

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[113] *Soobramoney* fn 23 *supra*

"In both cases the socio-economic rights, and the corresponding obligations of the State, were interpreted in their social and historical context. The difficulty confronting the State in the light of our history in addressing issues concerned with the basic needs of people was stressed."

The constitutional court expressly rejected the argument that there was a minimum core obligation upon the state to provide a certain basic level of health care to everyone on demand saying that a purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis. It concluded that section 27(1) of the Constitution did not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in s 27(2) but that sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to 'respect, protect, promote and fulfil' such rights. The court pointed to the fact that the rights conferred by ss 26(1) and 27(1) are to have 'access' to the services that the state is obliged to provide in terms of ss 26(2) and 27(2). The court made the important observation that in dealing with these questions it must be kept in mind that this case concerned particularly those who could not afford to pay for medical services. It said that to the extent that government limits the supply of Nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences. With regard to the powers of the courts in such matters, the constitutional court noted that the primary duty of Courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where state policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so.

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[114] *Grootboom* fn 10 *supra*

Discussion

It is not meaningful to discuss the *TAC* case without constant reference to the judgment in *Grootboom* because of the number of references by the constitutional court in its judgment in the former to the latter. Consequently The constitutional court decisions in both *Grootboom*[115] and *TAC*[116], whilst emphasising the fact that the Constitution mandates the 'progressive' realisation of rights within 'available resources', see for instance the discussion of *Grootboom* in the judgement of Chaskalson P in the *TAC* case[117] where it is stated that:

"It is also made clear that 's 26 does not expect more of the state than is achievable within its available resources' and does not confer an entitlement to 'claim shelter or housing immediately upon demand' and that as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants are concerned, 'the state is not obliged to go beyond available resources or to realise these rights immediately' "

and[118] that

"It is impossible to give everyone access even to a 'core' service immediately"

have tended to uphold the interests of the individual, or at least certain minority groupings, as opposed to the majority[119]. Whilst it can most certainly be argued that in upholding the interests of the individual, the interests of the majority are served, this is not necessarily always the case - especially in situations which demand the allocation of resources. In *Grootboom* the court went so far as to say that:

"Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that

115 *Grootboom* fn 10 *supra*
116 *TAC* fn 57 *supra*
117 *TAC* fn 57 *supra* at para 32 p739
118 *TAC* fn 57 *supra* at para 35
119 The court in *Grootboom*, fn 10 *supra*, took the view that it is not reasonable for the state to "exclude" a "significant segment of society" in its policy (at para 43 page 69)

everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they mav not pass the test." [120]

The point about statistics is that they are essentially concerned with the bigger picture - the whole rather than its parts, the average across the population rather than the position of the few individuals at either end of the Bell curve. Yacoob J is saying in *Grootboom* that the minorities, those at the lower end of the Bell curve, cannot be ignored and that it is insufficient for government to show that overall (statistically) it has achieved a great deal in the progressive realisation of the rights if the plight of those who are most in need has not been attended to. In statistical terms, the court's view is that entire Bell curve may have to be shifted to the right, before the courts will find that government has acted reasonably. It may not be sufficient to simply increase the size of the middle (highest and largest part) of the curve relative to its lower end. Whilst this is a debate that goes far beyond the scope of this thesis, including as it does other disciplines such as health economics, statistics and sociology, it is important to make a few observations about the effect of this issue in law. It is not disputed that in the *Grootboom* and *TAC* cases[121], from at least one perspective, the interests of the majority may well have been served by the judgments handed down and it is submitted, with respect, that the judgments in both cases have contributed significantly to South African jurisprudence on socio-economic rights. However, the tendency of the judiciary to adopt the perspective of the individual or those groups at the extreme right of the Bell curve that usually describes the 'have-nots', is likely continue to further the tension between the executive and the judiciary unless the former can find a way to accommodate within its own perspective the narrower approach of the judiciary without compromising its own capacity to fulfil its constitutional obligations as a whole[122]. By its own admission the

120 *Grootboom* fn 10 *supra* at para 44, p 69.

121 *Grootboom* fn 10 and *TAC* fn 57 *supra*

122 Roux fn 91 *supra* is of the view that the constitutional court has shown itself to be particularly adept at exploiting ambiguities in the normative structure governing its decisions and has thereby managed its relationships with the political branches of government to a considerable degree. He seems to think that it is this skill on the part of the constitutional court which is largely the reason why there has as yet been no significant constitutional crisis caused by the objection of the political branches of government to the court's decisions. It is submitted, however, that interference by the court in issues of allocation of resources is highly likely to provoke a constitutional crisis with regard to all but the most blatantly unjust political decisions unless the court exercises considerable judicial circumspection in the manner in which it approaches cases involving socio-economic rights. The balance between the executive, which is faced with the almost impossible task of ensuring that the right of 'everyone' to have access to health care services and other socio-economic amenities, is realized, and the judiciary which comes under extreme pressure from political and other interest groups when it is faced with decisions involving socio-economic rights of individuals and relatively small groups as a result of the high emotional content of such debates, is delicate. The lack of a constitutional crisis in the South African legal order thus far is due in no small part to the commendable reluctance of the executive to provoke one, despite often sensationalistic adverse press coverage and at times emotionally charged negative criticism and comment from stakeholders and the judiciary. (See the comments of the court in *TAC*, fn 57 *supra* at para 20 p735 where it notes that: "Many of

judiciary is not equipped to deal with issues which are faced by the executive on a daily basis – issues such as the equitable allocation of scarce resources. In *TAC* the court noted[123]:

"As this Court said in Grootboom, '(i)t is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations'. It should be borne in mind that in dealing with such matters the Courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second *amici* should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in Soobramoney: 'The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.' Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets."

The fact is that judgments on socio-economic rights in particular do have the effect of compelling a reallocation of resources if one works from the premise that all resources are scarce and that they have all been specifically allocated[124]. In other words if the executive is doing its job properly and consciously applying its mind to resource allocation, then a judgment such as that in *Grootboom* requires that the executive must take resources from some other population group or programme in order to accommodate the one in whose

these disputes gave rise to a regrettable degree of animosity and disparagement, culminating in unsubstantiated and gratuitous allegations of untruthfulness being levelled at one of the attorneys on an insignificant side-issue. In our country the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention. This is perhaps unavoidable, having regard to the magnitude of the catastrophe we confront. Nevertheless it is regrettable that some of this contention and emotion has spilt over into this case. Not only does it bedevil future relations between government and non-governmental agencies that will perforce have to join in combating the common enemy, but it could also have rendered the resolution of this case more difficult."). The threat of constitutional crisis is one which, with respect, both the judiciary and the executive need to consciously avoid if the new South African legal order is to have any credibility. It is encouraging to note that from the judgment in *TAC* (fn 57 *supra*) that the judiciary is apparently to some extent alive to these issues as Chaskalson P states at p759-760:."South African Courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may - and, if need be, must - use their wide powers to make orders that affect policy as well as legislation. A factor that needs to be kept in mind is that policy is and should be flexible. It may be changed at any time and the Executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the Constitution and the law. Court orders concerning policy choices made by the Executive should therefore not be formulated in ways that preclude the Executive from making such legitimate choices."

123 *TAC*, fn 57 *supra* at p 740

124 Haysom N at p 270 of Davis, Cheadle, Haysom *Fundamental Rights in the Constitution,Commentary and Cases*, recognises this in his observation that: "The courts will need to determine whether the level of the services delivered meets the basic needs. While s 30(1)(c) allocates to the judiciary a most important role of diverting resources from one area of social security spending to another area of need, the correct approach to be adopted to such a provision is to recognise that notwithstanding the resources are allocated through the political process, this basic need must first be met. In conformity with international jurisprudence in regard to the adjudication and enforcement of socio-economic rights, the courts may make use of orders compelling state delivery of resources as would enable the state to satisfy such claims. Under this subsection such orders may allow the state a period of grace within which to divert resources or to establish the necessary institutional machinery, or they may afford the state an opportunity to establish the necessary legislative or policy framework to meet this demand." He notes that "In this regard the wording of s28 (1)(c) must be taken to emphasise that the state has a duty to fulfil these obligations even if it means diverting funds from other social projects." [Note: the reference to s 30(1)(c) is a reference to the interim Constitution which, as Haysom point out on p 265, does not differ materially from the text of the final Constitution.]

favour the court has decided. In effect the judiciary is substituting its own rationing decision for a rationing decision of the executive branch of government. This clearly has the potential to create considerable problems for the executive if there is a proliferation of cases involving various sectors of society all clamouring that their need is the most urgent. The wealthy in most, if not all, countries tend to be in the minority by far and in developing countries it is often those whose various needs are most urgent which represent the majority of the population. This clearly has the potential to create significant problems with regard to availability of resources. In a developing country in which litigation contesting policy determinations of the executive branch of government becomes a cottage industry, in which a judiciary that by its own admission does not have the tools to consider the bigger picture consistently hands down decisions against the executive because it is in the words of Kentridge and Spitz protecting "certain spheres of personhood against incursion by the majority", it is not difficult to imagine a situation in which the judiciary finds that it has become the executive in all of the ways that count.[125] Since this is a situation that is to be

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[125] Bollyky R 'If C>P+B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations' *SAJHR* vol 18 2002 p 161 postulates in a lengthy article that socio-economic rights are subject to enforcement in the same manner as civil and political rights and that if a remedy requires extensive – both in quantitative and qualitative terms- policy and budgetary choices, the court will only make them for a constitutional violation which is proportionately extensive. The article was written before the judgement of the constitutional court in the *TAC* case (fn 50 *supra*) was handed down. Bollyky makes the point that the argument that judicial redress for constitutional violations may depend on the degree to which the remedy considered necessitates involvement in policy issues and has financial implications is not new. He suggests, however, that the paradigm proposed in the article goes much further in that it describes the intuitive process by which judges assess their legitimacy to issue a particular remedy within a constitutional democracy with separation of powers. He posits that judges intuitively weigh their mandate against the 'illegitimacy' of issuing the relief sought – as defined by the sum of the interference in policy and budgetary decisions. He says that judges ultimately make an assessment of remedies based on the proportionality of competing values. He admits, however, that the usefulness of the paradigm in predicting constitutional court decisions is limited by the difficulty of assigning precise values to variables in light of the different social, historical, moral and political forces at work in particular constitutional disputes. It is submitted that analyses that attempt to reduce the application of law to mathematical statements will always be of limited value due to the fact that the application of law is not a mathematical exercise involving bald numerical reasoning (no matter how abstract or algebraic) but rather an analytical exercise involving the richly textured values embedded in the culture and history of the society that made the law in question. It may even be dangerous to inject into the popular consciousness the idea that decisions involving the law can be reduced to a mere algebraic formula if there is a tendency to seize on such postulates as a substitute for genuine thought. If one considers the arguments of de Vos P "Substantive Equality After Grootboom: the emergence of social and economic context as a guiding value in equality jurisprudence" available at http://www.uct.ac.za/depts/lrgu/equapaps/devos.pdf that at the heart of the constitutional court's approach to social and economic rights lies a particular understanding of the role of the Bill of Rights as a transformative document aimed at addressing the deeply entrenched structural inequality in South African society and that *Soobramoney* (fn 23 *supra*) and *Grootboom* (fn 10 *supra*) are entirely consistent decisions and do not represent opposing views to socio-economic rights, it is submitted that this is a far more elegant analytical base from which to work off than a dry formula whose object is to predict the court's future decisions in this area. It is submitted that people confuse a perceived discrepancy in the outcomes of these two cases with a discrepancy in the approach of the court to socio-economic rights. It is facile to assume that an applicant in a socio-economic rights action must win every time in order to achieve consistency in the law on socio-economic rights and that the interests of the particular individual who happens to be in court will always prevail over the interests of those who are not. De Vos argues that the constitutional court's understanding of the scope and content of social and economic rights is inextricably linked with its conception of the right to equality in section 9 of the Constitution. He says that the court sees the right to equality on the one hand and socio-economic rights on the other as symbiotically linked – the one providing some of the context within which the other can be understood. He observes that a very particular conception of the right to equality is required to give effect to the project of transformative constitutionalism identified by Klare, (fn 8 *supra*) pointing out that it requires a rejection of the traditional liberal conception of equality that is based on the notion of sameness and similar treatment. The court has adopted a contextual approach to equality in which the actual impact of an alleged violation of the right to equality on the individual within and outside the different socially relevant groups is to be examined in relation to the prevailing social, economic and political

avoided at all costs because it would represent a gross imbalance in the structures of government as envisaged by the Constitution, the judiciary and the executive need to be alive to these dangers and must within their respective fields of operation take the necessary measures to avoid it. In the case of the executive, for instance, policy decisions concerning the allocation of resources can be protected against judicial sanction in some respects by following the principles of administrative law in taking them[126].

2.3.4 Progressive Realisation

An important factor to emerge from both the *Grootboom* and *TAC* cases[127] is chronology. The timing of the activities of the executive in fulfilling its constitutional obligations relates implicitly to the term 'progressive' in section 27(2). In *TAC* the issue, by the time it reached the constitutional court, could be said to have boiled down to the issue of timing of the roll-out of the state's comprehensive package for the prevention of mother to child transmission of HIV as opposed to whether or not the drug should be made available at public health facilities in advance of the roll-out of the comprehensive programme.[128] The difference was, in the end, a matter of months. It was not that the state had no intention of introducing a

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circumstances in the country, De Vos observes that the Lockean notion (on which traditional equality is based) that all humans are born free and equal and that the harm of discrimination is situated in the failure of government to treat all humans as equally free becomes untenable within the paradigm of transformative constitutionalism. He quotes from the judgement of the court in Hugo where it stated that: " We need to develop a concept of unfair discrimination which recognises that although our society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting on identical treatment in all circumstances before the goal is achieved. If one considers the judgment of the court in *TAC* (fn 50 *supra)* it was also very much about equality and transformative constitutionalism. It was about the fact that private sector doctors could prescribe the drug for their patients while public sector doctors could not. It was about the lives of wealthy private sector patients' babies being saved and not the lives of the babies of poor people who had nowhere else to turn.

126 Kinney D 'Administrative Law and the Public's Health', *Journal of Law, Medicine & Ethics* 30 (2002) 212-223 at 213 observes that "Administrative law can be particularly helpful in addressing the major challenges facing public health...namely, the proper allocation of scarce resources to address essentially insurmountable demands on public health agencies." She points out (at p215) that in the US administrative law and public health have had a long relationship with much of administrative law developing in a public health context and that state regulation of the professions has generated many important doctrines in state administrative law. Interestingly, she notes that the law of administrative inspections has also evolved almost entirely on the context of public health regulation.

127 *Grootboom* fn 10 and *TAC* fn 57 *supra*

128 In *TAC*, fn 57 *supra*, the constitutional court observed at para 118 p760-761:"During the course of these proceedings the state's policy has evolved and is no longer as rigid as it was when the proceedings commenced. By the time this appeal was argued, six hospitals and three community health care centres had already been added in Gauteng to the two research and training sites initially established and it was contemplated that during the course of this year Nevirapine would be available throughout the province for the treatment of mother-to-child transmission. Likewise, in KwaZulu-Natal there was a change of policy towards the supply of Nevirapine at public health institutions outside the test sites" and at para 132 p 764: "Government policy is now evolving. Additional sites where Nevirapine is provided with a 'full package' to combat mother-to-child transmission of HIV are being added. In the Western Cape, Gauteng and KwaZulu-Natal, programmes have been adopted to extend the supply of Nevirapine for such purpose throughout the province. What now remains is for the other provinces to follow suit." The question of whether it was the commencement of litigation that lead to the acceleration of the programme or whether it would have happened regardless is a debate for politicians and civil society rather than lawyers.

programme for the prevention of mother to child transmission of HIV. By the end of the year in which the constitutional court handed down its judgment, a significant majority of public hospitals were offering the full package of care identified as appropriate by the State as opposed to just making Nevirapine available as contemplated in the court order. In *Grootboom* the court referred to those whose needs were 'most urgent'.[129] The margins of error, from the point of view of the executive, are narrow. They are distilled to the question of whether the state was fulfilling its duties quickly enough with respect to certain interest groups and whether, in doing so, it was paying particular attention to certain groupings whose circumstances were more desperate than those of others. Whilst there is no denying that the needs of those in the most desperate of circumstances should be prioritized, it is submitted that litigation against the state on the basis of the timing of the delivery of access is especially problematic because, in the case of health care services for example, it potentially requires an overview and a review of the entire programme of health services delivery over the next five to ten years. This is not a task which it is appropriate for the judiciary to undertake. Time is a resource. Unfortunately unlike other resources it is not one that can be increased. Children, for instance, grow up and pass the stage where their physical and mental development can be boosted through appropriate nutrition. Those who specialize in emergency medicine speak of a 'golden hour' within which to reach and treat a trauma patient before serious and irreversible physical damage or death ensues. Other resources such as human resources, availability of medicines etc can be expanded over time but time itself cannot. This is why prioritisation of health programmes is a form of rationing in its own right. In the context of health care, and specifically the urgent need for HIV and AIDS counsellors to help with pregnant patients who have been diagnosed as HIV positive, nurses in rural clinics whose duties would have included a walk to the neighbourhood school to attend to the health needs of the children there in connection with vaccinations and nutritional needs are now in certain instances no longer able to fulfil those duties. Whilst it would undoubtedly be argued that the interests of these children are not as urgent as those of mothers and their babies in the prevention of mother-to-child transmission of HIV, those babies will eventually grow up and attend that same school where, due to lack of adequate nutrition and immunisation programmes, they may die

anyway. A well-rounded public health programme is not necessarily aimed predominantly at the postponement of death. The point is that an unbalanced focus on a particular area of health service delivery, due to the fact that its protagonists have the loudest voices, or that their issue is more emotionally charged or that they have the most money for litigation, and a resulting inappropriate prioritisation of service delivery is not in the broader interests of public health. Prioritisation of health programmes and the allocation of available resources on emotional grounds is a path to chaos.

2.3.5 "Everyone"

A further significant aspect of the manner in which the right is expressed is the use of the word "everyone". Everyone has the right to have access to health care services. There are few rights in the Bill of Rights that are accorded only to South African citizens. These relate primarily to political rights such as the right to vote, the right to form a political party etc. This raises questions as to the rights of non-citizens, especially foreign nationals in South Africa, to have access to health care services, particularly when they are not in a position to make payment for such services. In *Larbi-Odam*[130] the constitutional court held that discrimination between permanent residents and citizens for employment purposes was not justified. It pointed out that:

"The government has made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner is a detraction from that commitment."[131]

It is submitted that the same argument holds for permanent residents in respect of a right of access to health care services[132]. But what of temporary residents and those who are illegally in the country?

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[130] *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC)

[131] *Larbi-Odam* fn 130 *supra* at p759

[132] Klaaren J 'Non-citizens and Equality' 1998 (14) *SAJHR* 286 at 293 observes that: "the implications of the principle announced in *Larbi-Odam* go beyond the employment field. The two most prominent examples concern two categories of welfare payments depended upon heavily in rural areas of the country. As a matter of present legislation, old age pensions are restricted to citizens. Permanent residents are thus excluded. Likewise s 3(c) of the Social Assistance Act 59 of 1992 which came into effect on 1 March 1996 restricts social grants such as welfare payments to South African citizens. Both these restrictions are vulnerable to attack in light of the *Larbi-Odam* reasoning. If permanent residents are able to reside and compete for employment on equal terms with citizens, there would seem no reason why they should not enjoy the same social safety net underpinning the

2.3.5.1 Temporary Residents

There is a wide variety of purposes why people enter South Africa from other countries on temporary residence permits ranging from vacation through attendance of international conferences through exploration of business opportunities to obtaining medical treatment. Many of them have health insurance but some do not. If they enter the country with a health condition what is the duty of the South African government towards them? It could be argued that the government, in permitting them to enter the country, even if only for a limited period, accepted certain obligations towards them such as those contained in the Bill of Rights.[133] The national department of health often receives enquiries from temporary residents who have been in the country for periods of several months as to whether medication for chronic health conditions such as diabetes can be given to them free of charge by public hospitals because they receive it free of charge in their country of origin[134]. The response of the department is usually that they are obliged to obtain the medication in the private sector and pay for it. However, if such a person presents in diabetic coma at a public hospital this poses a dilemma. Even if such a person presents at a public hospital in non-emergency circumstances requesting medication, if there are inadequate controls in place to ensure that foreign nationals are not treated at such facilities or if such a person says he has no money to buy insulin what are the choices? Ideally such people should not be permitted to enter the country without medical insurance but this does not necessarily

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competition (at least beyond a reasonable initial restriction period to discourage unfounded applications for permanent residence). The line of argument that these restrictions are unconstitutional is directly supported by the text of the final Constitution. There is no constitutional restriction to citizens of the right of access to social security."

133 In fact Klaaren, fn 132 *supra*, at 294 points out that in terms of the criteria announced in *Larbi-Odam* (fn 130 *supra*) with respect to non-citizens in the equality context, temporary residents bear some similarities to permanent residents. He observes that like permanent residents, temporary residents constitute a political and largely powerless minority and would also be subject to threats and intimidation demonstrating their vulnerability. He states that: "The differences comes perhaps in regard to the second rationale to which Mokgoro J referred, the extent to which the status of a non-citizen is a personal attribute that is difficult to change. If anything, for temporary residents, this argument is stronger than for permanent residents, some of whom have the option to naturalise but choose not to. Indeed Mokgoro J's reasoning as to the immutability of the attribute did not depend on its longevity but rather on the individual's ability to change the attribute... Before leaving the topic we should note that *Larbi-Odam* did not present a case of differentiation on the grounds of temporary residence. Whether that distinction is proscribed in some way by the equality clause remains an open question." Klaaren goes on to ask the question whether discrimination against temporary residents on the ground of citizenship is unfair, noting that the court in *Larbi-Odam* drew a distinction between permanent and temporary residents. It based its conclusion that the discrimination against permanent residents was unfair on the fact that permanent residents needed job security in the context of potential indefinite employment; that they would be allowed to become citizens in a few years; that they had been selected into the community; and that they had made a conscious commitment towards South Africa. Temporary residents, observes Klaaren, by definition do not meet these standards. This does not, however, rule out the possibility of unfair discrimination against temporary residents in other circumstances.

134 They even try to cite non-existent international agreements between South Africa and their countries of origin as the basis for this boon!

always happen. It is submitted that a person who is a temporary resident and is in a diabetic coma would become the responsibility of the public health sector which then raises the question whether it would not be cheaper to supply such a person with the chronic medication, in this case insulin, and where possible charge him or her for it even in the public sector, rather than end up with a comatose and very expensive patient on one's hands. From a legal perspective, it is submitted that at least the bare minimum of health care services would have to be delivered sufficiently to enable the person to return to his country of origin but these issues are more difficult to control in the field without highly proactive management of the situation by government officials which in itself entails costs to the state. From a pragmatic perspective, such money could be better spent on treating South African citizens and permanent residents who have nowhere else to go and no other country to look to for health care services.

Klaaren[135] discusses four types of citizenship. These are cultural citizenship, membership citizenship, post-national citizenship and lawful status citizenship. The first has as its principal tent an identification between a particular culture and citizenship. He notes that it is often ruled out of the analysis on first principles by many liberal democratic theorists of citizenship. In any event this kind of citizenship is likely to find scant support within the parameters of the Constitution. The second adopts a sharp distinction between citizens and non-citizens, the latter being defined as aliens. He notes that this is a vision of citizenship as a status. The third, post-national citizenship, has at its centre the simple notion that persons are entitled to human rights in their capacity as human beings. The conception of citizenship most reflected in the jurisprudence of the constitutional court is, however, lawful status citizenship. Klaaren describes its core nation as being that all persons who are lawfully and permanently residing within a country are entitled to be full members of the community of that country. He observes that in contract to membership citizenship, lawful status citizenship accepts gradations within the granting of privileges of membership. It is submitted that purely from an economic and practical point of view in the light of the limited availability of resources in a developing country such as South Africa, this is the most pragmatic and practically feasible view of citizenship. However, the Constitution's

135 Klaaren fn 132 *supra* at 296

use of the word 'everyone' in most instances, as opposed to the term 'citizen' renders such discussions of the meaning of the term 'citizen' largely irrelevant unless one is prepared to draw the illogical conclusion that the two terms are synonymous.

2.3.5.2 Illegal Immigrants

If this is the position of persons having temporary residence permits what then are the obligations of the South African government to persons who are in the country illegally? This question presents itself at a number of different levels within both the private and the public health sectors. Many people illegally enter South Africa from neighbouring countries with the express intention of obtaining medical treatment in the public health sector because such services are not available in their own countries. Do they have a constitutional right of access to health services as much as does any South African resident? If the answer is "yes" then this could clearly lead to unsustainable demands on South African resources at the expense of those who are legitimately living in the country. However, if the answer is "no", then this would not accord with international and constitutional law principles of humanitarianism[136]. In practical terms can a rural, primary health care clinic near the borders of South Africa legitimately turn away people who have illegally crossed into South Africa to obtain services at the clinic? It is submitted that logically there would have to be some kind of limitation imposed upon the delivery of health care services to such people in order to protect the constitutional rights of South African residents.

One of the ways of addressing the problem in practical terms is to enter into international agreements with neighbouring states in terms of which only limited numbers of their nationals will be treated, and in controlled circumstances, for payment. This does not, however, address the question of whether foreign nationals illegally present in South Africa have a constitutional right to health care services. One may be able to argue that the government has no legal duty to such persons because it has not permitted their entry into

136 Pieterse M "Foreigners and socio-economic rights: Legal entitlements or wishful thinking?" 2000 (63) *THRHR* p 51, points out that "Migration is a feature of international reality which cannot be ignored, and which must not lead to violations of those rights essential to humanity. We cannot make all fundamental rights dependent on geographic location, for if we do, then we run the risk of replacing humanity with citizenship, a mere political category."

the country and therefore has no legal obligations towards them. Section 36 of the Constitution allows for the justifiable limitation of rights but "only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open[137] and democratic society based on human dignity, equality and freedom, taking into account all relevant factors". Some of these factors are the importance of the purpose of the limitation, the relation between the limitation and its purpose and the nature of the right. It is submitted that possibly with the exception of emergency medical treatment, a public sector health care institution may have an argument for turning away persons who are illegally in the country. However, this would have to be in terms of a law of general application. The Immigration Act may be such legislation. One of its objects is to ensure that "immigration control is performed within the highest applicable standards of human rights protection". The Immigration Act provides specifically for entry of foreign nationals into South Africa for medical treatment reasons in section 17[138]. In terms of section 29 of

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[137] Jordaan DW 'The Open Society' 2001 (64) *THRHR* p107 notes that "Since the dawning of our country's constitutional era the phrase *open and democratic society* has become well known." He explores what is meant by the concept 'open society' with reference to the work of Henry Bergson in the early nineteen thirties and Karl Popper in the nineteen forties and observes that in his definition of open society Popper emphasises the concepts of freedom, humaneness and rationality. He suggests that since these three concepts are used as the basis for measuring openness, they can most suitably be described as principles of an open society. In examining more closely the principle of freedom, Jordaan points out that Judge Ackerman, in his minority judgement in *Ferreira v Levin NO*; Vryenhoek *v Powell NO* (1996 (1) SA 984 (CC)) contends that the right to freedom and security of the person is a residual freedom right in the sense that it encompasses all the aspects of freedom which have not been specifically named in the rest of Chapter 3 of the interim Constitution. He gives a broad and generous construction to this right differing from the majority of his colleagues on the bench. Jordaan notes that the fact that the interim Constitution's limitation clause demanded that the limitation on the right to freedom and security of the person be not only reasonable, but also necessary influenced the majority's judgment to a considerable degree and that since the necessity requirement is not included in the 1996 Constitution, Judge Ackermann's interpretation of the right to freedom and security of the person "can very likely be followed in future constitutional cases." He distinguishes between an open society and a free society by saying that an open society encompasses a free society but is more than that. It embraces the principles of humaneness and reasonableness, asserting that these two principles have specific meaning and purposes independent of freedom. He continued to observe that in *S v Lawrence; S v Negal; S v Solberg* (1997 (4) SA 1176 (CC)) Sachs J inseparably links the open society to diversity and typifies it as pluralistic – "one in which there is no official orthodoxy or faith". He refers to the words of Sachs J in *National Coalition of Gay and Lesbian Equality v Minister of Justice* (1991 (1) SA 6 (CC)) that: "What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference but the acceptance of the principle of difference itself, which accepts the variability of human behaviour" and goes on to observe that Sachs J states that the acceptance of the principle of difference does not imply an absence of a point of view or an absence of morality. In conclusion he proposes the following definition of am open society: "A society which rejects the absolute authority of merely established social arrangements, while trying to preserve and develop social arrangements based on the principles of freedom, humaneness, rationality and diversity." In the health care context the principles of diversity, humaneness and rationality are especially relevant as evidenced *inter alia* by the Hippocratic Oath and the International Code of Medical Ethics of the World Medical Association. (See www.pbs.org/wgbh/nova/doctors/oath_classical for the classical version of the Hippocratic Oath and www.iit.edu/departments/csep/PublicWWW/codes/coe/World_Medical_Association for the International Code of Medical Ethics of the WMA) A rational society might well be forced to limit the help it gives to persons who are not its members in keeping with limited availability of resources but would not act in a manner that was inhumane or unfairly discriminatory.

[138] "(1) A medical treatment permit may be issued to a foreigner intending to receive medical treatment in the Republic for longer than three months by-

(a) the Department, as prescribed; or

(b) the Department through the registrar's office or a designated official of an institution where the foreigner intends to receive treatment, provided that such institution-

(i) has been approved by and is in good standing with the Department;

(ii) certifies that it has received guarantees to its satisfaction that such foreigner's treatment costs will be paid;

this same Act, foreigners who are infected with certain infectious diseases as prescribed from time to time are prohibited persons. As such they do not qualify for a temporary or permanent residence permit[139]. Section 42 of this Act states that save for necessary humanitarian assistance, no person, shall aid, abet, assist, enable or in any manner help an illegal foreigner. It is not clear what exactly is encompassed by the phrase 'necessary humanitarian assistance' but it is submitted that, in the absence of an agreement or the status of the foreign nationals as refugees in terms of national law[140], it cannot reasonably include health care services that are not immediately necessary to save life. For purely pragmatic reasons, foreigners should not necessarily be entitled to socio-economic rights to the same extent and in the same circumstances as residents. This could change with time and the availability of resources but for the foreseeable future, it is submitted that the obligations of the state are primarily towards South African citizens and lawful residents. Some may argue that the temporary nature of the presence of foreigners in the country will itself limit the potential costs of affording them the benefit of the socio-economic rights enjoyed by South African residents. However, if there is a relatively large, albeit revolving population of foreigners constantly illegally present in the country the cost of fulfilling the full spectrum of socio-economic rights in their case is likely to be unaffordable, especially given the relatively low level of their contribution to the economy as a whole. Whilst it may be eminently sensible from a humanitarian perspective, from an economic perspective such

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(iii) in the case of a minor, provides the name of a person present in South Africa who is, or has accepted to act, as such minor's guardian while in the Republic or certifies that such minor will be accompanied by a parent or guardian to the Republic;

(iv) undertakes to provide a prescribed periodic certification that such foreigner is under treatment; and

(v) undertakes to notify the Department when such foreigner has completed his or her treatment.

(2) When so requested by, and after consultation with, the Department of Health, the Department shall determine an ad hoc fee for the issuance of medical treatment permits in respect of institutions publicly funded or subsidised.

(3) A medical treatment permit does not entitle the holder to conduct work."

139 One wonders whether, from a constitutional point of view, this is a justifiable limitation of the right not to be unfairly discriminated against on the basis of disability.

140 Section 27 of the Refugees Act 130 of 1998 stipulates that: A refugee "enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act". More specifically subsection 27 (g) provides that a refugee " is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time". It is curious that the legislature thought fit to include section 27(g) after stating in 27(b) that refugees are entitled to all of the rights in Chapter 2 of the Constitution which include the rights to health care services and to education. One of the objects of this Act is to "To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees". In terms of section 3 of the Act, "a person qualifies for refugee status for the purposes of this Act if that person-

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in paragraph (a) or (b)".

a policy could be suicidal. For a developing country that cannot even afford to realize in full socio-economic rights for citizens, it is submitted that such an approach is inconceivable. Pieterse argues that though the Department of Home Affairs contends in its White paper on international migration that constitutional provisions relating to everyone cannot always apply equally to illegal aliens, legal residents and citizens alike, there is no constitutional indication why all aliens should not in principle be equally entitled to all constitutionally entrenched rights other than those reserved for citizens[141]. He notes with regard to emergency medical treatment that: "Commendably the Department of Home Affairs acknowledged in its *Green Paper on international migration* that all aliens, legal or illegal, should be afforded the right to emergency medical treatment, although no detailed provisions to this effect are contained in the Department's subsequent White Paper on the same issue."[142] With particular regard to access rights such as those contemplated in section 26(1), 26(2) and 27(1) of the Constitution, Pieterse observes that the Department of Home Affairs apparently does not wish to extend any social welfare benefits (apart from emergency medical treatment and temporary schooling) to anyone other than citizens and

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141 Pieterse fn 136 *supra*. He notes that: "Modern society is learning to accept that the benefits of citizenship are not limited to civil and political rights but include social and economic rights. Social resources like health and education are vital for the citizen's economic efficiency and for furthering his and other citizens' civil and political rights. It is argued that welfare rights are 'conceived as a core element of citizenship in Western society" and are "integral to the modern sense of citizenship" Whether the entitlement to social and economic rights should extend to non-citizens is polemical. International human rights documents conferring such rights upon aliens are not widely ratified and many states are reluctant to include aliens in social assistance schemes. Because of the nature of socio-economic rights their availability is often dependent on the availability of state resources and they can therefore not always be guaranteed to the same extent as civil and political rights. Many countries are not in a position to provide adequately for the socio-economic needs of their citizens, let alone those of foreigners in their territory. Furthermore, aliens (especially those of the illegal variety) are often blamed for contributing to socio-economic hardship by taking away jobs and public benefits believed to be rightly due to citizens... South Africa's Constitution differs significantly from that of the United States and most other countries of the world in that it expressly guarantees socio-economic rights...Both categories of socio-economic right are conferred on all people without any distinction between citizens and non-citizens...The extent to which aliens will succeed in relying on these rights is anything but clear."

142 Pieterse fn 136 *supra* at p 57. Interestingly the Immigration Act No 13 of 2003, which is not yet operational, makes no express mention of the rendering of emergency medical treatment or any other kind of health services to foreigners illegally in the country. Section 42 simply says that save for "necessary humanitarian assistance" no person, shall aid, abet, assist, enable or in any manner help an illegal foreigner. The Promotion of Equality and Prevention of Unfair Discrimination Act No of 2000, which is not yet operational, prohibits unfair discrimination *per se*. It defines 'prohibited grounds' of discrimination as:

" (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
(b) any other ground where discrimination based on that other ground-
  (i) causes or perpetuates systemic disadvantage;
  (ii) undermines human dignity; or
  (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);"

A person's citizenship (i.e. of another country) is not listed expressly in the prohibited grounds but culture or birth could include citizenship by implication. In the Schedule, under section 3 it lists some unfair practices relating to health services and benefits as: 3 Health care services and benefits

(a) Subjecting persons to medical experiments without their informed consent.
(b) Unfairly denying or refusing any person access to health care facilities or failing to make health care facilities accessible to any person.
(c) Refusing to provide emergency medical treatment to persons of particular groups identified by one or more of the prohibited grounds.
(d) Refusing to provide reasonable health services to the elderly. "

permanent residents. He further observes that no authorities are cited for this stance and that it is doubtful whether this policy is in accordance with the Constitution. He does concede the possibility that the limitations clause in the Constitution may be used more vigorously against immigrants and that it is easily foreseeable that' despite aliens' entitlement to socio-economic rights, the courts and the legislature will favour the socio-economic needs of citizens when deciding on policy in this regard, pointing to the dictum of Chaskalson P in *Soobramoney*[143] to the effect that:

"We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security and many do not have access to clean water or to adequate health services."

It is submitted that the restriction of socio-economic benefits to, or discrimination in the area of socio-economic rights against, illegal foreigners is neither unfair nor unreasonable as long as there are limited resources available to the state for the fulfilment of socio-economic rights. South Africa is surrounded by countries that are much poorer than itself with literally millions of people who are in need of adequate health services and other socio-economic benefits. If there were no lawful way to ration health care services to illegal aliens in South Africa, it is submitted that the state would be unable to fulfil its constitutional obligations to progressively realize the fulfilment of socio-economic rights to anyone. If as fast as one illegal alien is deported, another enters the country and demands and receives health care services from the state, there will be a constant, very large rotating population of illegal aliens depleting the limited resources available for the rendering of those health care services and South African citizens and residents, with nowhere else to go for such services, are likely, contrary to the intention of the Constitution, to be progressively deprived of them. There is significant scope for argument that the obligation to protect, respect, promote and fulfil the rights in the Bill of Rights works in more than one direction and that it may also require the state to take reasonable measures to ensure that its capacity to progressively realize the socio-economic rights in the Bill of Rights is not eroded to the point where it no longer exists. The fact that the Constitution refers to citizens

143 *Soobramoney* fn 23 *supra*

in some cases and "everyone" in others does not necessarily imply that "everyone" includes illegal aliens. There are two categories of persons on the spectrum between citizens and illegal aliens. These are temporary residents and permanent residents. It is conceivable that the 'everyone' referred to by the Constitution means everyone who is lawfully present in the country. There seems to be a logical disjunction in the argument that illegal aliens fall within the scope of the term 'everyone' used in the Constitution when they have defied the same legal system of which the Constitution is the grundnorm by their presence in the country. The Constitution does not award rights to persons in other countries- only to persons in South Africa. It could be argued that it does not contemplate or condone the illegal presence of citizens of other countries in South Africa since to do so would be to condone the violation of a part of the legal system of which it is the foundation. Illegal aliens are thus, for purposes of the South African legal system, in a sense not in South Africa since their entry took place without the sanction of the legal system. It thus seems incongruous to argue that they can claim rights in terms of that same legal system to all the benefits it confers upon those lawfully present. This is not to say that illegal aliens should not be accorded basic human rights in the process of their detention and deportation. Human rights are a concept of international law and therefore of much wider geographical application than the specific rights contained in the South African Constitution. It is of interest on this note, that Pieterse himself points out that international human-rights documents conferring social and economic rights upon aliens are not widely ratified. Furthermore, even the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families which he cites as arguably the most progressive human-rights instrument in this regard, guaranteeing amongst other things that migrant worker shall be afforded equal treatment to nationals with regard to social security, the right to emergency health care, access to educational institutions, vocational training and housing schemes does not apparently include a right to health care services apart from emergency medical treatment. The other international legal instrument cited, the United Nations Declaration on the Human Rights of Individuals Who Are Not Nationals of The Country in Which They Live, determines that aliens *lawfully* residing in a state should enjoy rights to safe and healthy working conditions, health protection, medical care, social

security, social services and education.[144] This is logical because these people by following the legal procedures necessary to be lawfully present in the country have subjected themselves to the laws of that country and fall within the full scope of its legal system. The state in allowing them to enter has made a legal commitment to them. The court in *Larbi Odam* stressed not only the fact that the state had made a commitment to permanent residents by permitting them to enter the country[145] but also that the permanent residents had made a commitment to the country[146].

2.3.5.3 Health Tourists

The other question is whether, from a policy perspective, if the State wished to discourage so-called 'health tourism', if would be able to do so. Although this is predominantly a private health sector issue, people entering the country in significant numbers with the express purpose of undergoing surgery or some other form of medical treatment are likely to inadvertently affect the access to health care services of South African residents. The Immigration Act, which is not yet operational at the time of writing, does envisage such a possibility and makes express provision for permits for the purpose of medical treatment but only where such treatment is likely to be for longer than three months[147]. In reality there are very few medical interventions which require even one month's stay in a hospital and generally speaking people who are treated for three months or longer are likely either to have a chronic health condition which cannot be cured by a single series of interventions or they have a terminal illness. The harsh economic reality is that either way, one would not want to see such patients in South Africa. If their medical insurance benefits run out or they suddenly take an unanticipated turn for the worse they may become a burden on the public health sector in which resources are already severely overstretched. Many health tourists come to South Africa for elective surgery in the private sector such as cosmetic surgery and

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144 Pieterse fn 136 *supra* at p55 and footnote 28

145 *Larbi Odam* fn 130 *supra* at p759

146 See *Larbi Odam* fn 130 *supra* at p758-749 where Mokgoro J stated that: "Permanent residents are generally entitled to citizenship within a few years of gaining permanent residency, and can be said to have made a conscious commitment to South Africa. Moreover, permanent residents are entitled to compete with South Africans in the employment market. As emphasised by the appellants, it makes little sense to permit people to stay permanently in a country, but then to exclude them from a job they are qualified to perform."

147 Immigration Act fn 142 *supra*

surgery for less pressing health needs. Such treatment nonetheless requires the utilisation of human and other resources such as operating theatres which could be used in the treatment of South African residents. Such treatment rarely takes even one month. There is apparently no obligation in terms of the Immigration Act on people entering South Africa for the express purpose of receiving medical treatment for less than three months, which is likely to be the majority, to apply for a medical treatment permit or even declare the real reason for their entering the country.

Whilst at present most health tourists target the private health sector in South Africa, the question of whether the health care services are delivered in the public or the private sectors is largely irrelevant. Even where there is spare bed capacity in private hospitals, for instance, there are significant shortages of other resources used in the delivery of health care in South Africa, particularly human resources, at various levels within the health care system. If the private sector is doing a roaring trade in health tourism and is able to attract human resources away from the public sector and into the private sector to render health care services to tourists, this constitutes a significant loss for the public health sector and could severely impact upon its capacity to deliver health services to citizens and permanent residents. There is an opportunity cost in terms of the treatment of a South African citizen or permanent resident, in servicing a health tourist. Whilst there are not the long waiting lists for treatment in South Africa that there are in the British National Health Service, the question is whether, if such long waiting lists did develop as the result of an influx of health tourists, would there be a constitutional obligation upon the South African government to ensure that this does not happen? It is submitted that there would be such a constitutional obligation in view of the injunction not only to promote and fulfil the rights in the Bill of Rights but also to respect and protect them.

The other possibility is that health tourism could lead to a situation where private hospital treatment becomes so expensive for South African residents, due to the fact that a private hospital would rather treat a foreign patient paying in a strong foreign currency than a South African resident who cannot compete with weak rands, that the private sector becomes largely inaccessible to South African patients. They will then be forced to fall

back on the already overburdened public health sector for their health needs. In this way, valuable health resources located in South Africa could effectively be diverted away from South African residents for the benefit of foreign nationals who contribute very little to the economy in comparison to a tax paying local resident. The issue of health care services to foreigners also has a bearing on the question of the horizontal application of the Bill of Rights. If private health institutions are constitutionally obliged to provide health care services to South African residents as opposed to foreign nationals, they will be restricted in their capacity to deliver those same services to non-residents. Liebenberg[148] remarks with regard to the rights implicit in section 27(3) that this subsection is applicable horizontally and hence binds private hospitals, clinics, consulting rooms and ambulance services. Since emergency medical treatment is a specific, specialised subset of health care services it could be argued that the right to health care services contemplated in section 27(1) is not necessarily also horizontally applicable and that, in the present context, emergency medical services are in any event not the kind of services that are usually targeted by health tourists except unintentionally. The kind of health care services that health tourists are interested in are very often cosmetic surgery and other types of services that fall into the non-emergency category. Furthermore the private facility at which they are to undergo the treatment is likely to have made sure that they are in a financial position not only to pay for the contemplated treatment but also for other treatment in the event that something goes wrong. If private health facilities are not bound by a horizontal application of the rights in section 21(1) of the Constitution to deliver health care services to South African residents then from the current legal perspective they are under no obligation not to treat foreign patients. From a practical point of view, however, this may not be a desirable state of affairs given the potential indirect effects on the capacity of the health care system as a whole to deliver services to locals and, depending upon the magnitude of health tourism and its impact on the South African health system, it may have to be restricted in some way in order to protect the right of South African residents to access to health care services. The question of the horizontal application of the rights in the Bill of Rights is dealt with elsewhere in this chapter.

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[148] Davis, Cheadle, Haysom (fn 124 *supra*) p 358

2.3.6 Available Resources

As discussed at length in chapter 1, the question of available resources is central, from a constitutional point of view, to the right of access to health care services. Liebenberg[149] observes that the critical question that arises is whether the 'available resources' of the state refers to its existing budgetary allocations, or whether it is a broader concept, incorporating the totality of the resources available to the state. She points out that Alston and other international law scholars are of the view that the phrase 'to the maximum of its available resources' in art 2 of the ICESCR refers to the overall resources of the country and is not confined to budgetary appropriations[150]. Liebenberg notes further that the implication of the former interpretation is that the state would be in a position to determine the extent of its own obligations, by, for example, allocating minimal funds to the portfolios of housing, education, etc. The further question also arises whether the 'available resources' of a provincial government are to be determined only by reference to the budget of that provincial government or whether a court can enquire into the national government's allocations to provincial levels in areas critical to the realisation of the rights. It is submitted that the views of Alston P *et al* on the level of international law are not necessarily appropriate or applicable to constitutional questions involving the availability of resources for the following reasons:

International law, as stated in chapter one, is essentially involved with the obligations of nation states to observe the provisions of various instruments of international law as opposed to the obligations of states towards their citizens and of citizens towards each other. Whilst these latter types of obligations clearly have an impact on the state's fulfilment of its obligations in terms of such instruments of international law, in terms of the South African Constitution, international law does not automatically form part of the South African legal system. This is entirely consistent with the rule of law in terms of

[149] Chaskalson *et al*, fn 67 *supra* at p41-41

[150] Chaskalson *et al* fn 67 *supra* at p41-41 footnote 3

which the Constitution has been designated as the supreme law of the country and therefore even international law which is inconsistent with the Constitution cannot legitimately be applied by the courts. The Constitution itself is in some ways a moving target as a result of its emphasis on the values that underlie an open and democratic society and the fact that the constitutional court has emphasised the process approach to the Constitution.[151]

Due to the fact that international law is essentially involved with the obligations of nation states *inter se* and to the international community of nation states as a whole, its perspective must, of necessity, because it stands outside systems of national law, be different to the perspectives of national law. The perspective of international law is one of being on the outside looking in whereas the perspective of South African constitutional law is one of being on the inside looking out. Consequently the approach of international law in measuring the extent to which a nation state as a whole has met its obligations with regard to the available resources must be that suggested by Alston *et al.* It has to be a bird's eye view. However, from the point of view of the constitutional order within South Africa, recognising the doctrine of separation of powers, a system of fiscal federalism and imposing a complex matrix of obligations on national, provincial and local governments, one cannot afford to take the bird's eye view of international law if one wishes to preserve the supremacy of the Constitution within South Africa[152]. The weave of constitutional and

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151 See for instance the words of Chaskalson P in *Van Rooyen And Others v The State And Others (General Council Of The Bar Of South Africa Intervening)* 2002 (5) SA 246 (CC) at para 34, p 273 "Bearing in mind the diversity of our society this cautionary injunction is of particular importance in assessing institutional independence. The well-informed, thoughtful and objective observer must be sensitive to the country's complex social realities, in touch with its evolving patterns of constitutional development, and guided by the Constitution, its values and the differentiation it makes between different levels of courts." The court in *Dawood*, fn 12 *supra*, at p 1043 comments: "Thus as this right has 'been crucial to our *constitutional project*', very compelling reasons would have to be advanced to justify its limitation." (writer's emphasis) See also Klare K "Legal culture and constitutionalism" (1998) 14 *SAJHR* 146 who speaks of transformative constitutionalism and notes that the Constitution as a transformative document requires continual reinvention to make sense of the changing world. The constitutional project becomes a long term project of constitutional enactment, interpretation and enforcement.

152 This question of differences in perspective is quite nicely illustrated in the observations of the court in *Mangope v Van Der Walt And Another NNO* 1994 (3) SA 850 (BG) where it said that: "I do not consider that the principles of international law, to which I was referred, are apposite to a case of the type now before me. I think it is a question of constitutional law. As Lord Reid observed in *Madzimbamuto v Lardner-Burke and Another* [1968] 3 All ER 561 (PC) at 573H-B: "With regard to the question whether the usurping government can now be regarded as a lawful government much was said about de facto and de jure governments. Those are conceptions of international law and in their Lordships' view they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control. As was explained in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd* (No 2) when a question arises as to the status of a new regime in a foreign country the court must ascertain the view of Her Majesty's Government and act on it as correct. In practice the government has regard to certain rules, but those are not rules of law. And it happens not infrequently that the government recognises a usurper as the de facto government of a territory while continuing to recognise the ousted Sovereign as the de jure government. But the position is quite different where a court sitting in a particular territory has to determine the status of a new regime which has usurped power and acquired control of that territory. It must decide. And it is not possible to decide that there are two lawful governments at the same time while each is seeking to prevail over the other. It is a historical fact that in many countries - and indeed in many countries which are or have been under British sovereignty - there are now regimes which are universally recognised as lawful

national law is much more dense and intricate than that of international law and for the national system to be internally consistent, one has to look to the Constitution, as opposed to international law, as the grundnorm. Provision has been made in the Constitution for courts and other tribunals to consider international law with a view no doubt *inter alia* to observing South Africa's international legal obligations but there is no obligation upon the courts to apply international law irrespective of whether or not it is consistent with the values enshrined in the Constitution. In *Grootboom* and *TAC*[153], for example, the constitutional court refused to apply the international law principle of minimum core obligations.

As pointed out in the previous chapter, taken to its logical extreme the question of a country's available resources could extend to implied obligations upon the international community to 'put its money where its mouth is'. If it seeks to impose obligations upon a country which require resources that country does not have and there are mechanisms for financial and other support at international level available to that country then those mechanisms must be mobilised to ensure that the resources are made available otherwise the pointing finger of accusation is simply turned back in the direction of the accusers. At a certain level international law seems inherently self-contradictory since on the one hand it seeks to deny national boundaries in terms of legal principles by insisting that international legal principles are applicable across national boundaries, regardless of the views of those nations on the subject, but on the other seeks to hold individual nations liable for their failure to observe those principles. It seems that the permeability of national boundaries for purposes of international law is, at times, unidirectional. If the courts themselves[154] do not believe that they have the necessary resources to make decisions concerning the allocation

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but which derive their origins from revolutions or coups d'etat. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful.' The court emphasised that it is the consent or acceptance of the people of a new government established as the result of a revolution which is relevant rather than the principles of international law."

153 *Grootboom* fn 10 and *TAC* fn 57 *supra*

154 *TAC* fn 57 *supra* at para 37, p 740: "It should be borne in mind that in dealing with such matters the Courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent" and para 38: "Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community."

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of resources at provincial level[155], the notion that they can even begin to contemplate the allocation of resources across provinces and take on the role of Parliament to provide for 'the equitable division of revenue raised nationally among the national, provincial and local spheres of government' is nothing short of mind boggling. It is submitted that the constitutional court has itself answered the question as to whether the court has the power to enquire into the national government's allocations to provincial levels in areas critical to the realisation of the rights in *TAC* where it noted that:

"The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."[156]

Viewed systemically, it is submitted that the role of the courts is not to rearrange the system in all its complex interrelationships but rather to exert acupressure at sensitive points within the system so as to encourage it to move or develop in a certain way.

Section 27(2) stipulates that the state must take reasonable legislative and other measures to achieve the progressive realisation of the right within available resources. In this regard, the constitutional court has pointed out that:

"The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources. As Chaskalson P said in Soobramoney:
'What is apparent from these provisions is that the obligations imposed on the state by ss 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.'

155 *Soobramoney* fn 23 at p 776: "These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."

156 *TAC* fn 57 *supra* para 38 at p 740

There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable."[157]

Since the availability of resources is a variable which, by definition, is subject to fluctuation, and since what is reasonable in terms of the state's efforts to fulfil its constitutional obligations must be seen in the context of the available resources, it follows that the state's obligations can and do vary not only from one context to another but also across time. Admittedly, the Constitution requires "progressive" realisation which means that ideally the state's obligations should not be permitted to regress in terms of its constitutional obligations but, in a situation where resources are greatly reduced from what they were previously and where the state finds itself in dire economic circumstances, it is submitted that in practical terms what it is constitutionally obliged to provide by way of access to health care services may well amount to less than what it was obliged to provide in more prosperous times. In a sense, the available resources limit or bound the right in a given set of circumstances. It is submitted that this is partly the reason that the court in *Grootboom* observed that deciding whether the state has fulfilled its obligations in a particular instance is very difficult and that every case has to be considered individually.[158]

In keeping with this line of reasoning, the constitutional court in both the *Grootboom* and the *TAC*[159] cases rejected the argument that socio-economic rights have a minimum core to which every person in need is entitled. The concept of minimum core is discussed in considerable detail in chapter one and that discussion will therefore not be repeated here. However, it is important to point out that: "[t]his argument fails to have regard to the way ss (1) and (2) of both ss 26 and 27 are linked in the text of the Constitution itself, and to the way they have been interpreted by this court in *Soobramoney* and *Grootboom*."[160]

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157 *Grootboom* fn 10 *supra* p 70-71 para 46

158 See *Grootboom* fn 10 *supra* para 20 p 61 where the court observed that: "The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis." (footnotes omitted)

159 *Grootboom* fn 10 and *TAC* fn 57 *supra*

160 *TAC* fn 57 *supra* p738 para 29

The manner in which sections 26 and 27 of the Constitution have been constructed defeats the argument in favour of a minimum core obligation as espoused in international law. The court in the *TAC* case observed that:

"Section 26(1) refers to the 'right' to have access to housing. Section 26(2), dealing with the state's obligation in that regard, requires it to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. The reference to 'this right' is clearly a reference to the s 26(1) right. Similar language is used in s 27, which deals with health care services, including reproductive health care, sufficient food and water, and social security, including, if persons are unable to support themselves and their dependants, appropriate social assistance. Subsection (1) refers to the right everyone has to have 'access' to these services; and ss (2) obliges the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. The rights requiring progressive realisation are those referred to in ss 27(1)(a), (b) and (c). In *Soobramoney* it was said: 'What is apparent from these provisions is that the obligations imposed on the state by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, that the corresponding rights themselves are limited by reason of the lack of resources.'
The obligations referred to in this passage are clearly the obligations referred to in ss 26(2) and 27(2), and the 'corresponding rights' are the rights referred to in ss 26(1) and 27(1). This passage is cited in *Grootboom*. It is made clear in that judgment that ss 26(1) and 26(2) 'are related and must be read together'. Yacoob J said: 'The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the state. . . .' It is also made clear that s 26 does not expect more of the state than is achievable within its available resources' and does not confer an entitlement to 'claim shelter or housing immediately upon demand' and that as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants are concerned, 'the state is not obliged to go beyond available resources or to realise these rights immediately'." [161]

There is only a single obligation upon the state, dependent upon the availability of resources, to provide access to health care services and not two: one based on the minimum core concept and one on the available resources concept. The court rejected the idea that a minimum core obligation was enforceable against the state irrespective of the resources that are available to fulfil that minimum core. It is submitted that, far from being a weakness in the right of access to health care services, the element of the availability of resources is its saving grace. It provides the mechanism for the translation of the right from the paper on which it is written into something that has practical meaning. Moreover the flexibility that it allows renders it possible to adapt and realistically apply the right to every possible permutation that could arise in relation to the need for health care services.

161 *TAC* fn 57 *supra*, p738-739 para 30-32 (footnotes omitted)

2.4 The Right of Children To Basic Health Care Services

The Constitution makes specific reference to a right of children to basic health care services in section 28(1)(c). It is thus necessary to consider this provision and its implications in the context of the broader right of everyone to health care services as provided for in section 27(1). Does this mean that children have a greater or more specific right to health care services than adults? Is the right of children to health care services a separate right from the rights conferred in section 27(1)? In other words do children have 'two' rights to health care services, one in terms of section 27(1) which refers simply to "health care services" and the other in terms of section 28(1)(c) which speaks of 'basic health care services'? The answer has a bearing on the broader question of whether the right to health care services is a single right with many facets or whether there is in reality only a number of discrete rights, within different contexts, having no underlying systemic consistency.

2.4.1 Section 28 Rights v Section 26 and 27 Rights

One of the major differences between section 27 and section 28 is that the former stipulates that the state must take reasonable legislative and other measures to achieve the progressive realisation of the rights referred to in section 27. There is no similar qualification in section 28. It would in theory be possible to argue that the reason for the provision for basic health care services in paragraph 28(1)(c) is to ensure a minimum core of health services to children, available resource considerations aside[162]. However, the constitutional court in

[162] Haysom N in the chapter on children in Davis *et al*, fn 124 *supra*, lends support to this view in his submission at p 269, that the term 'basic' implies a 'minimum level necessary to prevent malnutrition or disease must be provided.' He further states at p 270 that: "Unlike the formulation of the rights in s 26 and 27, where a greater discretion is allowed to the state, the courts do not have to refer to the question of availability of resources in determining whether the state has met its obligation to provide these basic necessities to children (See generally de Vos P 'The Economic and Social Rights of Children and South Africa's Transitional Constitution' 1995 (10) *South African Public Law* 233)." Haysom appears not to be entirely consistent in this view however because in discussing the right of children to basic nutrition, shelter, health care services and social services at p 269 he says "This provision will be subject to reasonable limitations arising out of the available resources of the state." It is interesting that Haysom sees the right of children to basic health services as being preventive as opposed to curative. It is not clear whether he intended to refer to the more formal classification of different types of health care or whether the term "prevent" as applied to "disease" is intended to include curative health care as well as preventive in the sense that a cure prevents continuation in the diseased state. He states that the right conferred is intended to serve primarily as a safety net in cases of deprivation, neglect, starvation or abuse and observes that: "In comparison with the costs involved in the enforcement of civil rights (for example legal aid), the delivery of a minimum level of food and health services in areas enduring extreme deprivation should not be formidable." It is submitted that unfortunately in health care terms, "the minimum necessary to prevent malnutrition and disease"

Grootboom and the *TAC*[163] cases rejected the minimum core concept[164] in principle, albeit primarily with reference to sections 26 and 27(1) which expressly require the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources. In *Grootboom*[165] the court specifically considered the right of children to shelter as contained in section 28(1)(c). It observed with regard to *both* sections 26 and 28(1)(c) that: "[t]hese rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution." The court in its judgement discussed the concept of minimum core obligations within the context of the obligations of the State in terms of section 26 and rejected that concept on the basis of the construction of the section in a manner which ties the rights therein contained to the issue of available resources. Some might be tempted to argue that the concept of minimum core could nonetheless be valid with regard to the rights of children expressed in section 28 which does not contain the same qualifications with regard to available resources as does section 26. However, in its discussion of the judgment of the high court as it pertained to section 28(1)(c), the constitutional court observed the following:

"The judgment of the High Court amounts to this: (a) s 28(1)(c) obliges the state to provide rudimentary shelter to children and their parents on demand if parents are unable to shelter their children; (b) this obligation exists independently of and in addition to the obligation to take reasonable legislative and other measures in terms of s 26; and (c) the state is bound to provide this rudimentary shelter irrespective of the availability of resources. On this reasoning, parents with their children have two distinct rights: the right of access to adequate housing in terms of s 26 as well as a right to claim shelter on demand in terms of s 28(1)(c). This reasoning produces an

in children does not necessarily mean that the funding of such health care services is as minimal as Haysom would have his readers believe. The prevention of disease in children is not necessarily either simple or straightforward and the phrase 'minimum necessary to prevent' can in itself be the subject of some debate. For example, in the context of the *TAC* case, the argument of the State was in a sense that that the provision of the drug Nevirapine to pregnant mothers and their newborn babies was not sufficient. It was not the minimum necessary to prevent malnutrition and disease in children since studies had shown that if the mother breastfed the child there was still a considerable risk of transmission of HIV from the mother to the child and that feeding substitutes were an important part of a programme that sought to prevent mother to child transmission of HIV. Furthermore, the State had concerns about potential adverse effects on long term management of the disease such as the development of large scale drug resistance in the face of only marginal success in the prevention of HIV transmission at birth. The court, of course, took the view that it is better to live now and die later than not to live at all and that even if only a few hundred lives were saved initially, the potential loss of life of thousands in the long term due to drug resistance was no argument for the State's failure to provide the drug. In this case it is important to remember that the drug was available to the State free of charge but what if it had not been? What if there had been a significant price tag? Would the provision of Nevirapine still constitute basic health care services to children in the context of Haysom's submission that it is the minimum level necessary to prevent malnutrition or disease? The numbers of antiretroviral drugs on the market are few and alternatives are even scarcer. This greatly reduces the options for HIV and AIDS prevention strategies generally. It is comparatively easy to run a vaccination programme for measles or rubella or smallpox in terms of which children can be immunized against these diseases and the vaccines are not prohibitively expensive but what are "basic health services" for children in the context of HIV and AIDS, hepatitis C and similar health conditions where no vaccines exist or where they are expensive and may carry significant adverse side effects that have cost implications for the health system in their own right?

163 *Grootboom* fn 10 and *TAC* fn 57 *supra*

164 *Minister of Health and Others v Treatment Action Campaign and Others*, fn 57 *supra*, see p 737 onwards

165 *Grootboom* fn 10 *supra*

anomalous result. People who have children have a direct and enforceable right to housing under s 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand. Moreover, there is an obvious danger. Children could become stepping stones to housing for their parents instead of being valued for who they are."[166]

This reasoning, although it is aimed at defeating the inference drawn by the high court to the effect that because children have a right to shelter, so do their parents and that this is a right on demand, also implies that the rights of children in section 28(1)(c) must be seen in the context of available resources and as argument for the fact that one cannot regard this particular socio-economic right of children to shelter outside of the context of the available resources when the broader socio-economic right to housing contained in section 26 is part of a 'carefully constructed constitutional scheme' for the progressive realisation of socio-economic rights in general. In other words the implication is that the right of children to shelter in terms of section 28(1)(c) is no more a right on demand than is the right to housing expressed in section 26. In *Grootboom*[167], the respondents and the *amici* in supporting the judgment of the High Court drew a distinction between housing on the one hand and shelter on the other. They contended that shelter is an attenuated form of housing and that the state is obliged to provide shelter to all children on demand. The respondents and the *amici* emphasised that the right of children to shelter is unqualified and that, the 'reasonable measures' qualification embodied in ss 25(5) 26, 27 and 29 are markedly absent in relation to s 28(1)(c). The appellants disagreed and criticised the respondents' definition of shelter on the basis that it conceives shelter in terms that limit it to a material object. They contended that shelter is more than just that, but defined it as an institution constructed by the state in which children are housed away from their parents.[168]

The court did not accept the argument of the respondents that there is a distinction within the Constitution between housing on the one hand and shelter on the other. It argued that:

"Housing and shelter are related concepts and one of the aims of housing is to provide physical shelter. But shelter is not a commodity separate from housing. There is no doubt that all shelter

166 *Grootboom* fn 10 *supra* p 80 para 70-71
167 *Grootboom* fn 10 *supra*
168 *Grootboom* fn 10 *supra* p 80 para 72

represents protection from the elements and possibly even from danger. There are a range of ways in which shelter may be constituted: shelter may be ineffective or rudimentary at the one extreme and very effective and even ideal at the other. The concept of shelter in s 28(1)(c) is not qualified by any requirement that it should be 'basic' shelter. It follows that the Constitution does not limit the concept of shelter to basic shelter alone. The concept of shelter in s 28(1)(c) embraces shelter in all its manifestations. However, it does not follow that the Constitution obliges the state to provide shelter at the most effective or the most rudimentary level to children in the company of their parents."[169]

The differences in terminology between sections 26 and 28(1)(c) were not enough to convince the constitutional court that there were differences in the substance or content of the rights expressed in the two sections. The crux of the argument against seeing the rights of children to food, shelter and health care services as separate from those of other socio-economic rights, however, is contained in *Grootboom* where the constitutional court said:

"The obligation created by s 28(1)(c) can properly be ascertained only in the context of the rights and, in particular, the obligations created by ss 25(5), 26 and 27 of the Constitution. Each of these sections expressly obliges the State to take reasonable legislative and other measures, within its available resources, to achieve the rights with which they are concerned."[170]

Again in its summary and conclusion the constitutional court noted that:

"Neither s 26 nor s 28 entitles the respondents to claim shelter or housing immediately upon demand."[171]

It is submitted that these findings and observations of the constitutional court conclusively preclude the argument that whilst minimum core obligations may not be a feature of the rights contained in sections 26 and 27 of the constitution they are applicable to those of children as expressed in section 28(1)(c) on the ground that the latter are not expressly subject to the requirement of progressive realisation within available resources.

The court in *Grootboom* observed that there is an overlap between the rights contained in sections 26 and 27 and those in 28(1)(c) in that the rights in section 26 and 27 are bestowed upon everyone whereas the rights in section 28(1)(c) are those of children only. It pointed out that:

169 *Grootboom* fn 10 *supra* p 80-81
170 *Grootboom* fn 10 *supra* para 74 p 81
171 *Grootboom* fn 10 *supra*, para 95 p 86

"Apart from this overlap, the s 26 and 27 rights are conferred on everyone including children while s 28, on its face, accords rights to children alone. This overlap is not consistent with the notion that s 28(1)(c) creates separate and independent rights for children and their parents."[172] [footnotes omitted]

The court went on to comment that 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families. It further observed that this does not mean that the state incurs no obligation in relation to children who are being cared for by their parents or families and that in the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28[173].

From the foregoing it is thus clear that the right of children to basic health care services in terms of section 28(1)(c) is not a separate and independent right from that of their parents to access to health care services in terms of section 27(1) but rather a subset of the broader right. The right of children to health care services is primarily, but not exclusively, a right as against their parents or families[174]. However, the state does have a responsibility, as the constitutional court pointed out in the *TAC* judgment[175] to create circumstances in which the

[172] *Grootboom* fn 10 *supra* para 74 p 81

[173] *Grootboom* fn 10 *supra* para 78 p 82

[174] *Grootboom* fn 10 *supra*. The court said at p 81-82, para 76-77: "Section 28(1)(c) must be read in this context. Subsections 28(1)(b) and (c) provide: 'Every child has the right -
(a)...
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services.'
They must be read together. They ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. The section encapsulates the conception of the scope of care that children should receive in our society. Subsection (1)(b) defines those responsible for giving care while ss (1)(c) lists various aspects of the care entitlement. It follows from ss 1(b) that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking. Through legislation and the common law, the obligation to provide shelter in ss (1)(c) is imposed primarily on the parents or family and only alternatively on the State. The State thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that s 28(1)(c) does not create any primary State obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families."
See also *TAC* (fn 57 *supra* para 79 p 750) where the constitutional court observed that: "The state is obliged to ensure that children are accorded the protection contemplated by s 28 that arises when the implementation of the right to parental or family care is lacking." (footnotes omitted)

[175] *TAC* fn 57 *supra*, citing with approval *Grootboom* (fn 10 *supra*) in which the court said: "This does not mean, however, that the state incurs no obligation in relation to children who are being cared for by their parents or families. In the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in s 28. In addition, the state is required to fulfil its obligations to provide families with access to land in terms of s 25, access to adequate housing in terms of s 26 as well as access to health care, food, water and social security in terms of s 27. It follows from this judgment that ss 25 and 27 require the state to provide access on a programmatic and

right can be fulfilled. The right of children to basic health care services is therefore a facet of a single right of access to health care services rather than an additional and separate right to the one expressed in section 27(1) of the Constitution. In fact it would appear from the decision of the constitutional court in *Grootboom* that even a right to health care services is part of the larger bundle or system of socio-economic rights and as such, it should not be considered in isolation from these other rights. It remains to be explored whether the constitutional right of access to health care services is itself simply a facet of a larger right of access to such services or whether it in fact defines that single right in all of its facets as reflected in the various branches of South African law.

2.4.2 What is a child?

It is important to establish what is meant by the term 'child' for the purposes of the Constitution in order to establish who exactly holds the rights conferred on children in section 28 and how they may be exercised. A foetus is not a child for purposes of the Constitution[176]. The Constitution provides that a child is a person under the age of 18 years but is silent on the subject of whether an unborn person is a child or not. Usually, in South African common law, personality is regarded as beginning at birth which means that a foetus or an unborn child cannot be the holder of legal rights except, in certain circumstances, by way of a fiction known as the nasciturus rule[177]. In terms of this fiction, a

coordinated basis, subject to available resources. One of the ways in which the state would meet its s 27 obligations would be through a social welfare program providing maintenance grants and other material assistance to families in need in defined circumstances."

176 Chaskalson *et al* fn 67 *supra*, at 16.2 Reproductive Rights.

177 The rule was discussed in *Pinchin and Another v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) in the context of a delictual claim. The full statement of the rule is '*nasciturus pro iam nato habetur quotiens de commodo eius agitur*' Hiemstra J observed that: "The legal question is crisply: Does a person have an action in respect of injury inflicted on him while he was still a foetus in his mother's womb? This looks like a philosophical conundrum as much as a legal one, but such philosophy as I have found on the question, seems to have come from the Delphic oracle. Professor Martin Versfeld tells us in *Acta Juridica*, 1960 p. 2: "St Thomas Aquinas drives things right back to the first fundamental truth that as justice presupposes right, so right presupposes that in the first place man should be there. Before you can have a right, you must be. 'It is through creation that the created being first comes to have rights.' He deduces from this, incidentally, that man had no right to creation and that God owed man nothing, since right and justice are a consequence of creation and do not merely precede it." The court then referred to Roman Law, D.1.5.7, where it is stated that "A child in its mother's womb is cared for just as if it were in existence, whenever its own advantage is concerned; but it cannot benefit anyone else before it is born." and D.1.5.96 in which it is stated that: "Those who are unborn are, by almost every provision of the Civil Law, understood to be already in existence, this is only true where his rights are in question, but no advantage accrues to others unless they are actually born." The court also referred to an American case, *Smith v Luckhardt* (1939) and a note in 13 *Tulane Law Review* (1939) provoked by the decision of the Illinois Appellate Court in this case. The facts were that a minor sued the defendant physicians for injuries sustained before birth. They had wrongfully diagnosed the pregnancy of the plaintiff's mother as a tumour of the uterus and tried to destroy it by X-ray treatment. As a result the plaintiff was born "a cripple and feebleminded". The facts of *Smith v Luckhardt* offer an important reminder to

foetus is deemed to have the rights of a child if it is subsequently born alive. Initially it was applied only in the law of succession but the *Santam*[178] case extended it to the law of delict. The obvious question for anti-abortionists was whether the nasciturus rule could be applied to protect the life of an unborn child in a situation in which the mother desires to termination the pregnancy. Could it be argued that a foetus has the right to life by virtue of an application of the nasciturus rule? This argument was tested in the first *Christian Lawyers* case discussed below[179].

2.4.2.1 Christian Lawyers Association of South Africa v Minister of Health[180]

Facts

In *Christian Lawyers Association of South Africa and Others v Minister of Health and Others*[181], the court had to consider whether the Choice on Termination of Pregnancy Act, 1996 (Act No 92 of 1996) was unconstitutional and should be struck down in its entirety on the basis that it infringed the right to life of a foetus[182]. The plaintiffs sought an order from the court declaring the Choice on Termination of Pregnancy Act[183] to be unconstitutional and striking it down in its entirety on the basis that section 11 of the Constitution, which provides that '(e)veryone has the right to life', applied also to unborn children from the

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those in the health sector who may be tempted to draw the inference that because a foetus is not regarded as a child for purposes of the Constitution, it has no rights at common law. The application of the *nasciturus* rule in *Santam* so as to allow a claim in delict for wrongful injury sustained by a foetus while it was still in its mother's womb where it was subsequently born alive should not be discounted by those rendering health services to pregnant mothers.

178 *Santam* fn 177 *supra*

179 *Christian Lawyers* (No1) fn 21*supra*

180 *Christian Lawyers* (No 1) fn 21 *supra*

181 *Christian Lawyers* (No 1) fn 21 *supra*

182 *Christian Lawyers* (No 1) fn 21 *supra*. The court observed at 1118 that: "The plaintiffs' cause of action, founded, as it is, solely on s 11 of the Constitution, is therefore dependent for its validity on the question whether 'everyone' or 'every person' applies to an unborn child 'from the moment of the child's conception'. The answer hereto does not depend on medical or scientific evidence as to when the life of a human being commences and the subsequent development of the foetus up to date of birth. Nor is it the function of this Court to decide the issue on religious or philosophical grounds. The issue is a legal one to be decided on the proper legal interpretation to be given to s 11. I am in agreement with the dictum of the Canadian Supreme Court in *Tremblay v Daigle* (1989) 62 DLR (4th) 634 (SC) at 650a–c, where the following is said: 'The respondent's argument is that a foetus is an "etre humain", in English "human being", and therefore has a right to life and a right to assistance when its life is in peril. In examining this argument it should be emphasised at the outset that the argument must be viewed in the context of the legislation in question. The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person but, rather, to answer the legal question of whether the Quebec Legislature has accorded the foetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of enquiry. Nor are scientific arguments about the biological status of a foetus determinative in our enquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties - a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one."

183 Choice on Termination of Pregnancy Act fn 35 *supra*

moment of conception. The defendants excepted to the plaintiffs' particulars of claim on the ground that they did not disclose a cause of action because section 11 conferred no rights on a foetus and did not preclude the termination of pregnancy in the circumstances and manner contemplated by the Act.

Judgment

With regard to the question of whether or not a foetus should be regarded as a person for the purposes of the Constitution, the court made some observations[184] which are quoted below because they conveniently encapsulate some of the prior jurisprudence on the subject of the legal personality of a foetus in South African law:

> "I turn to consider the question whether the word 'everyone' in s 11 includes the unborn child. It is desirable that some consideration be given to the common-law status of the foetus. A word of caution should perhaps first be sounded. In the particulars of claim the plaintiffs allege that the foetus qualifies for protection under s 11 because 'the life of a human being starts at conception' and by implication therefore that human beings are from conception a person as envisaged by the said section. This is a *non sequitur*. As pointed out by Professor Glanville Williams in an article entitled 'The Foetus and the Right to Life' (1994) 33 *Cambridge Law Journal* 71 at 78 'the question is not whether the *conceptus* is human but whether it should be given the same legal protection as you and me'. In *Van Heerden and Another v Joubert NO and Others* 1994 (4) SA 793 (A) the Appellate Division of the Supreme Court (as it then was) considered various dictionary meanings of the word 'person' (*inter alia* 'an individual human being') and concluded (at 796F) that there is no suggestion in any of these meanings that the word 'person' can also connote a stillborn child, an unborn child, a viable unborn child, an unborn human being or a living foetus."[185]

The court came to the conclusion that if section 28 of the Constitution, the section specifically designed to protect the rights of the child, does not include the foetus within the ambit of its protection then it can hardly be said that the other provisions of the bill of

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184 *Christian Lawyers*, (No 1) fn 21 *supra* at 1120 to 1121

185 *Christian Lawyers*, (No 1) fn 21 *supra*. The constitutional court observed that: " The Court went on, however (at 797H--798B) to point out that there are a growing number of jurists who hold the view that the application of the *nasciturus pro iam nato habetur quotiens de commodo eius agitur* rule of the Roman law amounts to predating the legal subjectivity of the foetus. Thus, P J J Olivier Legal Fictions: An Analysis and Evaluation (Doctoral Thesis Leiden) and L M du Plessis 'Jurisprudential reflections on the status of unborn life' 1990 TSAR 44 maintain that the foetus is recognised as a legal persona and is protected as such. As pointed out by Professor Du Plessis, the decision in *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W), in which a person's right to claim, after birth, compensation for injuries sustained in *ventre matris*, was recognised, makes sense only if it is assumed that that person was indeed in law a *persona* at the time when the injuries were sustained. The status of the foetus under our common law was left open in Van Heerden's case *supra*. The Appellate Division decided that, even if it is to be assumed that a stage has been reached in our legal development where the law recognises the foetus as a legal persona, the Legislature had no such legal persona in mind when it used the word 'person' in the legislation there under consideration, namely the Inquests Act 58 of 1959. There are South African decisions denying the foetus legal personality - see *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) at 829 *in fin*; *Friedman v Glicksman* 1996 (1) SA 1134 (W) at 1140G. It is not necessary for me to make any firm decision as to whether an unborn child is a legal persona under the common law. What is important for purposes of interpreting s 11 of the Constitution is that, at best for the plaintiffs, the status of the foetus under the common law may, as at present, be somewhat uncertain."

rights, including section 11, were intended to do so. This conclusion, said the court, finds further support in the fact that in all the provisions of the Bill of Rights, other than those in which a specific class of person is singled out for special protection, the rights are conferred on 'everyone'. Yet in many instances it is clear that the term 'everyone' could not have been intended to include the foetus within the scope of its protection. Thus, the right not to be deprived of one's freedom (section 12(1)(a)), not to be detained without trial (section 12(1)(b)), to make decisions concerning reproduction and to security in and control over one's body (section 12(2)(a) and (b)), not to be subjected to slavery, servitude or forced labour (section 13), rights relating to privacy and freedom of conscience, religion, thought, belief, opinion, expression, assembly, association and movement (sections 14, 15(1), 16(1), 17, 18 and 21) and other rights in regard to language, cultural life, arrest and detention (ss 30 and 35) are all afforded to 'everyone' and clearly do not include a foetus.

The court held that to include the foetus in the meaning of that term in section 11 would ascribe to it a meaning different from that which it bears everywhere else in the bill of rights and that, in the courts view was untenable[186].

Discussion

The statement of the court concerning the status of the foetus under the common law is being 'somewhat uncertain' is, it is submitted, somewhat unfortunate given the ruling in the *Santam*[187] case insofar as it may cast doubt upon the right of a child who is subsequently born alive to take legal action for delictual harm caused to it whilst *en ventre matris*. It appears, at least partly, to contradict the court's earlier statement that it is desirable that some consideration be given to the common-law status of the foetus and its observation that there is a growing number of jurists who hold the view that the application of the ***nasciturus pro iam nato habetur quotiens de commodo eius agitur*** rule of the Roman law amounts to predating the legal subjectivity of the foetus. It is submitted that the positions of the common law and the Constitution on the subject of rights attributable to a child whilst still in its mother's womb are reconcilable in logical terms and that the ***nasciturus*** fiction is

186 *Christian Lawyers (No 1)* fn 21 *supra* at p1122
187 *Santam* fn 177 *supra*

a valuable part of South African jurisprudence which should not be undermined. The important point about the arguments in the *Christian Lawyers*[188] case was that the *nasciturus* rule did not and could not logically assist arguments regarding the constitutional right to life of a *conceptus* because it begged the question as to whether or not it would be born alive. The *nasciturus* rule, even if it does confer legal subjectivity on a foetus, contains a suspensive condition. The child must subsequently be born alive. If it is not born alive then no rights accrue. Questions of the termination of the pregnancy negative the possibility of fulfilment of this suspensive condition within the *nasciturus* rule. This does not mean that the *nasciturus* rule should be discarded or that the decision in the *Santam*[189] case was wrong. This would be throwing the baby out with the bathwater. Whilst it may not be logically possible to apply the *nasciturus* fiction to the right to life, what about the other rights in the Constitution? If the bodily integrity of a child is breached *in utero* so that she is subsequently born disabled should she have a right of action? If a pregnant mother presents at a hospital with foetal distress and the unborn baby is denied emergency medical treatment with the result that he is born with cerebral palsy should there be no right of recourse for the child?

The court in *Christian Lawyers*[190] observed that:

> "There is no express provision affording the foetus (or embryo) legal personality or protection. It is improbable, in my view, that the drafters of the Constitution would not have made express provision therefor had they intended to enshrine the rights of the unborn child in the bill of rights, in order to cure any uncertainty in the common law and in the light of case law denying the foetus legal personality. One of the requirements of the protection afforded by the *nasciturus* rule is that the foetus be born alive. There is no provision in the Constitution to protect the foetus pending the fulfilment of that condition."

Does this mean then, that for purposes of any of the rights contained in the Bill of Rights, the *nasciturus* rule cannot be applied? It is submitted that this question stands at the interface of constitutional and common law. It provokes a further question. If the *nasciturus* rule is inapplicable to rights conferred by the Constitution then why should it remain applicable to rights conferred at common law? In *Van Heerden and Another v Joubert NO*

188 *Christian* Lawyers (No 1) fn 21 *supra*
189 *Santam* fn 177 *supra*
190 *Christian Lawyers* (No 1) fn 21 *supra* at p1122

and Others[191], the Appellate Division had to consider the question of whether a stillborn baby was a person for the purpose of the Inquests Act, 1959 (Act No 58 of 1959). As the court pointed out in this case, the main objects of an inquest are to determine the cause of death, the circumstances surrounding the death, whether any person was responsible for such death, and whether the death can be attributed to the commission of any offence. It observed that:

> "The State has an interest in the proper investigation of deaths due to other than natural causes. Even if nobody can be held responsible for a death in a particular case, it may still remain pertinent to determine the circumstances and cause of death in order that appropriate measures can be taken to prevent similar occurrences. There might therefore be reasons to proceed with an inquest in the present case. The question however remains whether the provisions of the Act are wide enough to confer jurisdiction upon the magistrate to do so. That in turn depends on the meaning of the word 'person' in the context of the Act."[192]

The court after studying dictionary definitions of the term "person" came to the conclusion that there was no suggestion in any of the dictionary meanings that the word 'person' can also connote a stillborn child, an unborn child, a viable unborn child, an unborn human being, or a living foetus. Significantly, the court then turned to the decision of the American Supreme Court in *Roe v Wade*[193]. It also referred to *R v Tait*[194] in which the Court of Appeal held that a threat to a pregnant woman to kill her foetus was not a threat to kill a person under the Offences Against a Person Act, 1861. On the strength of these decisions the court came to the conclusion that the word 'person' in the context of the Inquests Act does not include an unborn child.

Counsel for the respondents relied on *Santam*[195] and its application of the *nasciturus* rule in the context of the law of delict. The court skirted the question of whether the application of the *nasciturus* rule in terms of the law of delict supported its conclusion that a stillborn child was not a person for purposes of the Inquests Act by saying that the issue was not whether a foetus should be regarded as a legal *persona* or to what extent life before birth should be protected, but whether the Act applies to the present case. It observed that had the

191 *Van Heerden and Another* 1994 (4) SA 793 (A)
192 *Van Heerden and Another* fn 191 *supra* at 795
193 *Roe* 410 US 113 (1973)
194 *Tait* [1990] 1 QB 290 (CA)
195 *Santam* fn 177 *supra*

drafters of the Constitution wished to protect the foetus in the bill of rights at all, one would have expected this to have been done in section 28, which specifically protects the rights of the child. The right of every child to family or parental care (28(1)(b)), to basic nutrition, health care and social services (28(1)(c)), to protection against maltreatment, neglect, abuse or degradation (28(1)(d)), and to legal representation (28(1)(h)), as well as the provision in ss (2) that a child's best interests are of paramount importance in every matter concerning the child, would have been particularly apposite to protect the foetus as well. Yet, said the court, there are clear indications that the safeguards in section 28 do not extend to protect the foetus. A 'child' for purposes of the section is defined in subsection (3) as a person under the age of eighteen years. In the court's view, age commences at birth. The protection afforded by subsections (1)(f)(i) and (1)(g)(ii) is dependent on the 'child's age'. A foetus is therefore not a 'child' of any 'age'. It said that the rights afforded by section 28(1) are in respect of 'every child' - i.e. all children. Yet certain of the rights could not have been intended to protect a foetus; para (f) relates to work, para (g) to detention and (i) to armed conflict. The protection afforded in the other paragraphs of subsection (1) must accordingly also exclude the foetus.

The Constitution itself is forward looking. Section 24(b) states that everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures. Future generations are persons not yet conceived let alone not yet born. The question, in the light of the foregoing discussions is whether the as yet unborn generations would have the right, when they are subsequently born to take legal action against a previous generation for damage to the environment? The answer, it is submitted, lies in the wording of section 24(b) which says 'everyone' has the right. In accordance with the arguments above, an unborn generation would only have the right to take legal action after it was born in which case it would then be included in the category of 'everyone'. It could take action for the benefit of its own and future generations to protect the environment. Whether or not it could take action, on the basis of the *nasciturus* rule, in terms of the law of delict for damage to the environment whilst it was in its mother's womb is a matter which has still to come before the courts and which is beyond the scope of this chapter. Presumably the notion of 'environment' would have to be

the immediate environment of the pregnant mother and the damage to the environment would have to be such that the unborn child sustained some harm. If it was the environment, as opposed to the foetus, that sustained the harm so that the foetus, when subsequently born could no longer enjoy it because it has been rendered dangerous to health or well-being, the issue becomes interesting from a constitutional law point of view. Should the matter be treated as a constitutional violation or a constitutional delict? If the latter then the *nasciturus* rule might apply, if the former then possibly not, depending upon how uncertain the constitutional court perceives the *nasciturus* rule to be.

At a general level, one cannot help but feel a certain measure of unease with the judgement in *Christian Lawyers*[196]. The logic seems devoid of the value considerations which are so central to constitutional issues generally and the rights in the Bill of Rights in particular. Human dignity, as noted before, is a not only a right but a constitutional value, and the court seems to have taken scant cognisance of this in its judgment. It is submitted that the question of whether or not a foetus is a person and therefore capable of being the holder of the right to life is only one aspect of abortion. Whilst it is not submitted that the court necessarily erred in its finding that a foetus cannot be the bearer of constitutional rights, its approach to the concept of balancing not only the rights of the mother and the foetus, but also the interests and values of an open and democratic society against those of the mother was possibly overly simplistic. The idea that because a foetus cannot logically hold some of the other rights in the Constitution which are conferred upon everyone, it cannot also hold the right to life does not bear scrutiny.[197] One cannot help but get the impression from the

[196] *Christian Lawyers* (No 1) fn 21*supra*

[197] The decision in *Christian Lawyers* (fn 21*supra*) has been criticised by Naudé T 'The Value of Life: A Note on Christian Lawyers Association of SA v Minister of Health' (1999) 15 *SAJHR* 541. The writer comments that: "Surprisingly, McCreath J did not commence his enquiry into the meaning of the word 'everyone' by considering relevant constitutional provisions. Instead he investigated the common law status of the foetus. He also asked whether a foetus would fall under the definition of 'person' in the Inquests Act 58 of 1959. Such an approach turns the proper enquiry on its head. The Constitution should be a yardstick against which the common law and legislation must be measured. The Constitution cannot serve as a yardstick if the interpreter's point of departure is to establish the meaning of constitutional provisions by reference to the common law and ordinary legislation...But it may be noted that instead of also asking whether the common law deems foetal life worthy of protection, Mcreath J only focused on the question of whether the foetus is a 'person'. His discussion centred on the nasciturus fiction which protects the foetus's patrimonial interests. Criminal law, which does regard foetal life as worthy of protection, was not considered." In the view of Naudé, the central shortcoming in McCreath J's approach "was that he though he could resolve the dispute by consideration of the word 'everyone'. This probably flows from his predominantly text-based or 'literalist' and 'intentionalist' approach to constitutional interpretation. The limitations of a purely text-based approach, especially in the context of constitutional interpretation, have often been pointed out... These limitations are illustrated by the startling results flowing form the court's uncritical application of the rule that the word 'everyone' should be given the same meaning wherever it appears in the legislative text." Commenting on McCreath J's reasoning that because 'everyone'in section 11 means the same as 'everyone' elsewhere in the Constitution, the foetus must be the bearer of all the other fundamental rights and because it clearly cannot be such a bearer of all the other rights, it is therefore excluded from the term 'everyone' in s 11, Naudé states that this is a

judgment of McCreath J that there is no wrongdoing in harming a foetus – even outside of the context of abortion - and that this is entirely consistent with constitutional values. In terms of even the common law the unfeeling message is if one negligently or intentionally harms a foetus, one should hope that it does not survive to sue for damages consequent upon such harm. It was possibly a weakness of the case made by the applicants that they seem to have based it purely upon the right to life of the foetus as a person as opposed to the some of the arguments cited by Naudé in the article referred to in footnote 226. Whilst it is not disputed that the question before the court had to be decided on the grounds of legal logic and law rather than philosophical or religious questions and that the decision of the court may well be correct in terms of its ultimate result, i.e. the constitutional validity of the Choice on Termination of Pregnancy Act, the logic by which the court reached its decision could still prove problematic in the future.

2.4.2.2 *Christian Lawyers Association vs Minister of Health (No 2)*[198]

Facts

The plaintiff instituted an action in which it sought an order declaring sections 5(2) and 5(3) read with the definition of "woman" in sections 1 and 5(1) of the Choice On

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startling argument. The writer states that a newborn baby is clearly not intended to be the bearer of rights such as freedom of conscience and the right to reproductive freedom yet no-one would suggest that it therefore cannot be the bearer of some of the other rights protected in s28 or of the right to life, and that legislation allowing termination of babies lives could never be unconstitutional. Naudé observes further that "Regardless of whether the foetus is the bearer of the right to life, permissive abortion legislation may be open to constitutional challenge. It could be attacked on the basis that the state has a positive duty to respect, protect, promote and fulfil the rights in the Bill of Rights…Provisions such as ss 7(2),1,2 and 39 and the Constitutional Court's approach to interpretation show that the entrenched rights do not function as negative-defensive rights guaranteeing protection against the state and others only, but also as objective norms expressing values that must be promoted by the state and the courts. A court does not have to find that a specific individual's constitutional right has been infringed before declaring challenged legislation unconstitutional. The question is rather whether, objectively, the legislation conflicts with the value norms laid down by the Constitution. That these values function as objective norms implies that the formulation of constitutional provisions as 'rights' does not mean that these 'rights' function only as 'subjective rights' with a demonstrable bearer. They have a normative power in objective law…" According to Naudé, the "question whether abortion legislation may conflict with the Constitution on the basis that it does not adequately protect foetal life, even if the foetus is not a constitutional rights bearer, has not been much debated in South Africa. 'Anti-abortionists' usually insist that the foetus has the right to life. 'Pro-choicers' who conceded that the state has an 'interest' in regulating abortions which thus limits the woman's rights usually do not consider the existence of a constitutional duty to do so. Naudé refers to the work of Meyerson in *Rights Limited* in which the latter argues that the wording of section 36 of the Constitution means that, when limitation of rights are considered, only arguments which would carry at least some weight with all reasonable people who relate to each other as possessors of equal status may be considered and that limitation of rights may only take place to avoid harms which all reasonable people would seek to avoid regardless of their conception of 'the good'. Reference is also made to the fact that German courts and academics have used and debated the idea that the objective value order created by the Constitution may give rise to justiciable constitutional duties on the state and that it is this concept of Grundrechte as value-deciding norms creating an objective value order which lead to a recognition that permissive abortion legislation may be unconstitutional, even though the foetus is not a person. The Spanish constitutional court has also, according to Naudé followed this approach by recognising foetal life as a constitutionally protected legal interest, whilst conceding that the foetus is not a person and not the bearer of the right to life.

198 *Christian Lawyers* (No 2) fn 35 *supra*

Termination of Pregnancy Act 92 of 1998 ("the Act") to be unconstitutional and an order striking down sections 5(2) and 5(3) and the definition of "woman" in section 1 of the Act.

The provisions of the Act against which the plaintiff's claim was directed are those that allow women under the age of 18 years to choose to have their pregnancies terminated without (a) the consent of the parents or guardians, (b) consulting the parents or guardians, (c) first undergoing counselling, and (d) reflecting on their decision or decisions for a prescribed period. The measures in (a) to (d) are collectively referred to as parental consent or control. In essence the plaintiff's case was that young women or girls below that age are not capable on their own – without parental consent or control – to take an informed decision as to whether or not to have a termination of pregnancy which serves their best interests. In order to succeed the plaintiffs had to establish that the relevant provisions of the Act were in conflict with those of the Constitution.

The plaintiffs argued that a pregnant girl requires special protection by the state *inter alia* by ensuring that when enacting legislation which affects her she is not deprived in any way of the support, guidance and care of her parents/guardian and/or counsellor. Essentially the plaintiffs attacked the provisions of the Act on the grounds that there were unconstitutional because they permit a woman under the age of 18 years to choose to have her pregnancy terminated without parental consent or control. The defendants filed an exception to the plaintiff's claims on the grounds that the conclusions in law with regard to the plaintiff's claims and the overall conclusions that flow therefrom are not supported by the facts on which they are based.

Judgment

Mojapelo J in giving judgment noted that it was necessary when considering the issues raised to bear in mind the statutory provisions that came under attack in this case. The relevant sections of the Act provide as follows:

In section 1 of the Act the word "woman" is defined thus:

" 'woman' means any female person of any age".

Subsections 5(1) and 5(3) provide that:

(1) Subject to the provisions of (4) and (5) the termination of a pregnancy may only take place with the informed consent of the pregnant woman.

(2) Notwithstanding any other law or the common law, but subject to the provisions of (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy.

(3) In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them.

Subsections (4) and (5) deal with exceptional cases and were irrelevant for the purposes of the judgment. They cover situations in which a woman is severely mentally disabled or in a state of continuous unconsciousness or where medical practitioners are of the opinion that continued pregnancy would pose the risk of injuries to the woman's physical or mental health, where there exists a substantial risk that the foetus would suffer from severe physical or mental abnormality, where continued pregnancy would endanger the woman's life, result in severe malformation of the foetus or pose a risk of serious injury to the foetus.

The court observed that the constitutional pegs on which the plaintiff hung its case were sections 28(1)(b), 28(1)(d) and 9(1) read with section 7(1) of the Constitution. Section 28(1) stipulates that -

"Every child has the right to family care or parent care".

Section 28(1)(d) stipulates that -

"Every child has the right to be protected from maltreatment, neglect, abuse or degradation".

Section 28(2) provides that "A child's best interests are of paramount importance in every matter concerning the child." Section 9 (1) provides that -

"Everyone is equal before the law and has the right to equal protection and benefit of the law." Section 7(1) reads "This 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."

Mojapelo J remarked that the Act regulates the termination of pregnancy of women and that the principal rules by which it does so are as follows:

(a) The termination of a pregnancy may only be done with the *informed consent* of the woman.

(b) If she gives her informed consent to the termination of her pregnancy, no other consent is required (section 5(1) and 5(2)).

(c) During the first twelve weeks of pregnancy, no more is required than the woman's informed consent.

(d) Thereafter a pregnancy may only be terminated in certain circumstances (section 2).

(e) The termination may only be performed by a medical practitioner or, if it is performed during the first twelve weeks, by a registered midwife who has completed a prescribed training course (section 2(2)).

(f) The termination may only be performed at a facility designated by the Minister (section 3(1)).

(g) A pregnancy may not be terminated unless two medical practitioners or a medical practitioner and a registered midwife who has completed a prescribed course consent thereto (proviso to section 5)

The court pointed out that the Act also has the following ancillary provisions regulating the termination of the pregnancy: The state is obliged to promote the provision of counselling to women before and after the termination of the pregnancy. The counselling is, however, not mandatory or directive (section 4). Young women (below the age of 18 years) are

encouraged to consult with their parents, guardians, family members or friends before termination of their pregnancy. The medical practitioner or midwife who performs the termination must advise them to do so before their pregnancy is terminated. The actual final decision is, however, left to them as to whether or not to consult with their parents, guardians, family members and/or friends (section 5(3)). The medical practitioner or midwife who performs the termination must inform the woman of her rights under the Act (section 6). Mojapelo J stated that it is not therefore as if the legislature left the termination of pregnancy totally unregulated. He noted that the cornerstone of the regulation of termination of pregnancy of a girl and indeed any woman under the Act is the requirement of her "informed consent". No woman, regardless of her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so. The court therefore considered it necessary to consider the juridical meaning and effect of the requirement of informed consent.

After noting that the Act does not elaborate on what is meant by "informed consent" Mojapelo J pointed out that the concept is not alien to the common law. He stated that it forms the basis of the doctrine of *volenti non fit injuria* that justifies conduct that would otherwise have constituted a delict or crime. More particularly, he said, day to day invasive medical treatment, which would otherwise have constituted a violation of a patient's right to privacy and personal integrity, is justified and lawful only because as a requirement of the law, it is performed with the patient's informed consent.[199] Mojapelo J stated that it has come to be settled in South African law in this context that the informed consent requirement rests on the three independents legs of *knowledge*, *appreciation* and *consent*. He noted that the courts, in order to found a defence of consent, have often endorsed the statement by Innes CJ in *Waring & Gillow v Sherbourne* [200] that:

"It must be clearly shown that the risk was known, that it was realised, that it was voluntarily undertaken. Knowledge, appreciation, consent – there are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent."

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199 The court referred in this regard to *Van Wyk v Lewis* 1924 AD 438 at 451; *Castell v de Greeff* 1994 (4) SA 408 (C) at 425; *C v Minister of Correctional Services* 1996 (4) SA 292 (T) at 300; Neethling J, Potgieter JM and Visser PJ: *Law of Delict*, 3rd ed p100-101; Neethling: *Persoonlikheidsreg*, 4th ed p 121-122.

200 *Waring* 1904 TS 340 at 344

The requirement of 'knowledge', said Mojapelo J, means that the woman who consents to the termination of a pregnancy must have full knowledge of the nature and extent of the harm or risk. The requirement of 'appreciation' implies more than mere knowledge. The woman who gives consent to the termination of her pregnancy "must also comprehend and understand the nature and extent of the harm or risk". The last requirement of 'consent', said Mojapelo J, means that the woman must "in fact subjectively consent" to the harm or risk associated with the termination of her pregnancy and her consent "must be comprehensive" in that it must extent to the entire transaction inclusive of its consequences".

The court then turned to the question of the capacity to consent and noted that in this context, valid consent can only be given by someone with the intellectual and emotional capacity for the required knowledge, appreciation and consent. Because consent is a manifestation of will "capacity to consent depends on the ability to form an intelligent will on the basis of an appreciation of the nature and consequences of the act consented to"[201]. Mojapelo J said that young and immature children do not have the capacity for real knowledge, appreciation and consent. Such young and immature children therefore would not qualify under the Act to access the rights to termination of pregnancy because they are incapable of complying with the important jurisdictional requirement of giving informed consent. If such children are to be considered for termination of pregnancy, then in such a case, the normal common law rules that require the consent to be given by or with the assistance of the guardian must necessarily kick in[202]. He noted that what the Act does not do is to fix a rigid age or number of years for the kicking in of such rules. Instead of using age as a measure of control or regulation, the legislature resorted/opted to use capacity to give informed consent as a yardstick. Where such capacity exists, said Mojapelo J, the Act recognises it in spite of the youthfulness or age of the person. Where it does not exist, then no such recognition is given, again in spite of youthfulness or age of the candidate for termination of pregnancy.

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201 The court referred to the case of *Van Heerden and Others* as cited in Boberg P *Law of Persons and the Family*, 2nd ed at p 849.

202 Mojapelo J referred to *S v Marx* 1962 (1) SA 848 (N) at p 854 in this regard

A girl or any woman has the capacity to consent to the termination of her pregnancy and its concomitant invasion of her privacy and personal integrity only if she is "in fact mature enough to form an intelligent will" said the court. The court held that, within the context of the Act, actual capacity to give informed consent as determined in each and every case by the medical practitioner based on the emotional and intellectual maturity of the individual concerned and not on arbitrarily predetermined and inflexible age or fixed number of years is the distinguishing line between those who may access the option to terminate their pregnancies unassisted on the one hand and those who require assistance on the other. Following on from this conclusion, it found that it would be incorrect to approach the matter as if the Act is totally blind to the question of youth or minority. The court pointed out that the Act has specific provisions dealing with minors. In the case of a pregnancy minor, a medical practitioner or registered midwife is enjoined in peremptory language to advise the minor to consult with her parents, guardians, family members or friends before the pregnancy is terminated. The person performing the termination of pregnancy has no choice in this regard. This is a further regulatory measure of the Act but not a cornerstone of regulation under the Act said Mojapelo J. The injunction is thus subject to the proviso that the termination of pregnancy shall not be denied if such minor, having been duly advised, should choose not to consult with her parents, family members or friends. The court held that this was a useful provision that prevented frustration of a constitutional right when the minor is in fact emotionally and intellectually able to give informed consent to the procedure. A medical practitioner or registered midwife who is not satisfied that the pregnant minor has the capacity to give informed consent should therefore not perform the termination of pregnancy on such a minor. This of course applies equally to pregnancy minors and pregnancy adults, said Mojapelo J. If in such a case the medical practitioner or registered midwife performs the termination of pregnancy without the informed consent of his or her patient, his or her conduct will not be in accordance with the Act and will accordingly be unlawful. The court held that informed consent required by the Act is thus a consent that can be given by each and every person having the capacity to do so. It is a threshold with both intellectual and emotional attributes and those performing the termination of pregnancy operations have to satisfy themselves that it is met.

The court then went on to explore the *ratio* behind informed consent. It stated that an examination of the rationale behind the requirement of informed consent in medical procedures brings one to the very foundation principles of and from which the right to termination of pregnancy in itself arises. Referring to the case of *Castell v De Greef*[203], Mojapelo J stated that Ackerman J on behalf of the full bench of the CPD made it clear that the ratio for that requirement was to give effect to the patient's fundamental right to self-determination. He quoted from the judgment at 420J where the court said that it was: "clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination" and at 426E where it stated that "it is in accord with the fundamental right of individual autonomy and self determination to which South African law is moving. This formulation also sets its face against paternalism, from many other species whereof South Africa is now turning away." Mojapelo J pointed out that the Transvaal Provincial Division recently endorses the approach in Castell on the basis of the patient's right to exercise her "fundamental right to self determination" in *C v Minister of Correctional Services*[204]. He held that the fundamental right to self determination itself lies as the very heart and base of the constitutional right to termination of pregnancy and pointed out that the recognition of the right of every individual to self determination has now become an imperative under the constitution and particularly in terms of the provisions of section 12(2)[205], 27(1)(a)[206], section 10[207] and section 14[208] of the Constitution. It is recognition of these rights, said Mojapelo J, that provides a foundation for the right to termination of pregnancy in South Africa. The Constitution recognises and protects the right to termination of pregnancy or abortion in two ways, firstly under section 12(2)(a), that is, the right to bodily and psychological integrity, and secondly, under section 12(2)(b), that is, the right to control over one's body. The court held that the closeness or commonality of the source of the right to termination of pregnancy with the *ratio* for informed consent make informed consent not only a viable and desirable principle for the regulation of the right but also the most

[203] *Castell* fn 199 *supra*
[204] *C v Minister of Correctional Services* fn 199 *supra* at p 300
[205] Everyone has the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction and the security and control over their body.
[206] Everyone has the right to have access to reproductive health care.
[207] Everyone has inherent dignity and the right to have their dignity respected and protected.
[208] Everyone has the right to privacy

appropriate. It stated that the Constitution not only permits the Choice on Termination of Pregnancy Act to make a pregnant woman's informed consent the cornerstone of its regulation of the termination of her pregnancy, it requires the Act to do so. To provide otherwise would itself be unconstitutional.

Mojapelo J observed that the plaintiff alleged that a girl below the age of 18 years is not capable of giving informed consent as required by the Act, i.e. to make the decision whether or not to have a termination of her pregnancy which serves her best interests without the assistance and/or guidance of her parents, guardian or counsellor. He noted that the plaintiff argued that it is because such a person is not in a position to appreciate the need for and value of parental care and support. Mojapelo J stated that if indeed this were to be so then the very incapacity to give informed consent would disqualify such a girl from accessing the right to terminate her pregnancy. He found that the plaintiff's approach is a rigid approach to maturity which is blind to the fact of life that there will be women below the age of 18 years who are in fact mature, much as there will be those above that age (or any fixed age) who are in fact immature. He said that it failed to recognise and accommodate individual differences and that this was a major flaw or weak link in the plaintiff's case.

Mojapelo J said that when considering the validity of an exception to the particulars of claim on the basis that such particulars of claim do not disclose a cause of action, the proper judicial approach is that the allegations in such particulars of claim must be accepted as true. The plaintiff, the defendant and the *amicus curiae* all agreed on this point. He noted that what had to be accepted as true in the present case includes the allegation in paragraph 20.2 of the plaintiff's particulars of claim that a woman under the age of 18 "is not capable of giving informed consent" as required in section 5(1) of the Act. He stated that this approach is fatal to the plaintiff's claim as formulated as the allegations in this paragraph of the plaintiff's particulars of claim form part of the introductory portion of the particulars and therefore relate to the three claims which made up the entire claims of the plaintiff. He said that on the basis of the truth of the allegation in the plaintiff's particulars of claim that a girl under the age of 18 is incapable of giving informed consent then on the proper

interpretation of informed consent, such a girl will for that reason be excluded from accessing the termination of pregnancy right under the Act because such consent is the cornerstone of the regulation and a prerequisite for the exercise of the right. He stated that it is in this regard that the offending paragraph was fatal to the plaintiff's claim. The plaintiff and the amicus curiae, said the court, ostensibly did not agree with the generalised statement in the particulars of claim that a girl under the age of 19 is incapable of giving informed consent. However, as a matter of correct approach to the allegations in the particulars of claim they both argued that the allegations in the particulars of claim must be accepted as true. Save for that purpose, however, they expressly reserved for themselves the right to challenge the truth of the statement in paragraph 20.2 of the plaintiff's particulars of claim. He stated that the particulars of claim were only being considered for the purposes of the exception and for no other purpose and that for that direct purpose of determination of the issue in the present judgment, the court must accept that girls under the age of 18 years are incapable of giving informed consent. He further noted that section 5(1) of the Act provides that the termination of pregnancy may only take place with the "informed consent of the pregnant woman". The implications of paragraph 20.2 of the particulars of claim are therefore that girls who are less than 18 years old cannot (on their own) have their pregnancy terminated under the Act. For that reason they fall outside the ambit of section 5(1) of the Act which is under attack and have to be dealt with on some other basis since the subsection applies only to those who are capable of giving informed consent. Mojapelo J pointed out that the plaintiffs claims, A, B and C complain about the legislative failure to impose stricter or additional control on the termination of pregnancies of girls under 18. It should, however, never be permissible for a girl under 18 years to have her pregnancy terminated because, on the plaintiff's case, she is never capable of meeting the threshold required for termination imposed by section 5(1) of the Act, namely informed consent. The court observed that the plaintiff therefore complains about the failure of the Act to impose stricter regulation on something which the Act does not permit at all. The Act cannot possibly impose stricter control on something it prohibits altogether. Mojapelo J stated that he expressly invited counsel for the plaintiffs to address him on paragraph 20.2 because in his view it posed difficulties for the plaintiff if one accepts its truth, albeit for present purposes (exception stage) only. He still maintained, said Mojapelo J, that one must accept

its truth. He even argued further that the allegations in the paragraph must be read and understood in the context of the preceding allegations and that in the content the paragraph meant that such a girl is not capable of giving informed consent as required in the section without the assistance and/or guidance of parents, guardians and/or counsellors. The court held that this argument did not help the plaintiff since, if people who, in terms of paragraph 20.2 of the particulars of claim, incapable of giving informed consent, are unassisted girls under 18 years, then that becomes the category of persons in respect of whom the patient complains. It said that they are by virtue of their incapacity to give informed consent, excluded in the category of people for whom it is permissible to terminate pregnancy.

Mojapelo J held that for the particulars of claim to disclose a cause of action the allegations contained in them must support the conclusion of fact reached by operation of law as well as the remedy sought. Because a category of persons to whom the plaintiff's complaint relates are those excluded by incapacity to give informed consent, the allegations in the particulars of claim do not, said the court, support the conclusion. It pointed out that the claims of the plaintiff were excipiable because they assume that the Act permits girls under 18 years to have their pregnancies terminated when it in fact never permits them to do so (assuming the truth of paragraph 20.2). Thus said the court, on the basis that it is true that a girl under the age of 18 years is not capable of giving informed consent required by the Act, and if in practice the pregnancy of such girls is terminated on the basis of their purported consent, then the plaintiff's remedy is not to attach the Act but to stop medical practitioners and midwives who terminate the pregnancies of girls under the age of 18 because they are doing so unlawfully in violation of section 5(1) of the Act. Mojapelo J held that the constitutionality of the attack could not be sustained on the particulars of claim. The exception was upheld.

Perhaps because this was the second attack on the Choice on Termination of Pregnancy Act by the same plaintiffs[209] on the grounds of constitutionality, Mojapelo J then went on the make some remarks and examined the matter from the perspective of the basis in law of the right of a woman to determine the fate of her pregnancy, or the right to termination of

209 They have to be admired for their persistence if not the ingenuity of their legal arguments.

pregnancy as he called it in the judgment. He considered the American case of *Roe v Wade*[210] in which the US Supreme Court founded the woman's constitutional right to determine the fate of her own pregnancy on the constitutional right to liberty entrenched in the Fourteenth Amendment to the US Constitution. He noted that it did so as follows:

1. In a line of previous cases the court recognised an implied constitutional guarantee of personal privacy derived from a variety of express constitutional guarantees, principally the guarantee of 'liberty' in the Fourteenth Amendment. In some of those cases the court struck down state prohibitions on the sale of contraceptives. In one of them Brennan J articulated the point of those decisions as follows:

   "If the right of privacy means anything, it is the right of the individual, married or single, to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"[211]

2. This right of personal privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy". Blackmun J in *Roe v Wade*[212] explained at 177:

   "The detriment that the state would impose upon the pregnant woman by denying this choice altogether, is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved."

3. The woman's right of privacy and her concomitant right to reproductive self-determination are, however not absolute. The state has an important and legitimate interest in the preservation and protection of the health and welfare of the woman herself and of the potential life of the foetus. When its interest in doing so becomes sufficiently compelling it warrants state intrusion upon the woman's privacy and self-determination[213].

210 *Roe v Wade* (1972) 35 L ed 147
211 *Eisenstadt v Baird* (1972) 31 L ed 2ed 349 at 364
212 *Roe* fn 210 *supra*
213 *Roe* fn 210 *supra*

4. During the first twelve weeks of the woman's pregnancy, the state's interest is not sufficiently compelling to warrant intrusion.

5. During the second period of twelve weeks, however, the state's interest in the protection of the health and welfare of the woman herself is sufficiently compelling to warrant regulation and control of that purpose. Its interest in the health and welfare of the foetus is however, not yet sufficiently compelling to warrant intrusion for its protection.

6. Only when the foetus becomes viable, which occurs more or less at the end of the second trimester, does the state's interest in the protection of the health and welfare of the foetus become sufficiently compelling to warrant intrusion for that purpose. The state may then regulate and even prohibit abortion to protect the life of the foetus provided that it does not preclude an abortion when necessary to preserve the life and health of the woman herself.

Mojapelo J pointed out that Professor Dworkin defends the court's conclusion that the Constitution protects the woman's freedom to determine the fate of her own pregnancy[214]. He noted that in the later case of *Thornburg v American College of Obstetricians and Gynaecologists*[215] Blackmun J again explained the fundamental nature of the privacy of a woman's decision to terminate her pregnancy:

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214 He describes the impact of a prohibition on abortion as follows: "Laws that prohibit abortion or make it difficult or expensive to procure one, deprive a pregnant woman of a freedom or opportunity that is crucial to many of them. A woman who is forced to bear a child she does not want because she cannot have an early and safe abortion is no longer in charge of her own body: the law has imposed a kind of slavery on her. That is, however, only the beginning. For many women, bearing unwanted children means the destruction of their own lives, because they will no longer be able to work or study or live in ways important to them, or because they cannot support the children...Adoption even when it is available, does not remove the injury, for many women would suffer great emotional pain for many years if they turned a child over to others to raise and love." (Dworkin R, *Life's Dominion*). Mojapelo J notes that Dworkin concludes that once one accepts that the Constitution protects personal privacy then it follows that it also protects women's right to determine the fate of their own pregnancy: He quotes Dworkin as follows: "But once one accepts (the dictum of Brennan J quoted above) as good law, then it follows that women do have a constitutional right to privacy that in principle includes the decision not only whether to beget children but whether to bear them. (The line of privacy decisions referred to above) can be justified only on the presumption that decisions affecting marriage and childbirth are so intimate and personal that people must in principle be allowed to make these decisions for themselves, consulting their own preferences and convictions, rather than having society impose its collective decision on them. A decision about abortion is at least as private in that sense as any other decision the court has protected. In one way it is more so, because it involved a woman's control not just of her sexual relations but of changes within her own body, and the Supreme Court has recognized in various ways the importance of physical integrity."

215 *Thornburg* (1986) 476 US 747 at 772

"Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of her physician and within the limits specified in Roe – whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all."

Mojapelo J also referred to dicta in *Casey v Planned Parenthood of Southeastern Pennsylvania*[216], the Canadian case of *R v Morgentaler*[217], *Rodriguez v British Columbia (Attorney General)*[218], and *Bruggeman and Scheuten v Federal Republic of Germany*[219].

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216 *Casey* (1992) 120 L ed 2d 674. Mojapelo J quoted the following dicta of O'Connor J in explanation of the conclusion of the US Supreme Court that women have a constitutional right to determine the fate of their own pregnancy: "It is settled now, as it was when the court heard arguments in *Roe v Wade* that the Constitution places limits on a state's right to interfere with a person's most basic decisions about family and parenthood."(at 696-697) "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the state can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest." (698-699) "Our law affords constitutional protection to those personal decisions relating to marriage, contraception, family relationships, child rearing and education...These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion by the state." (at 698) "Abortion is a unique act. It is fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, it does not follow that the state is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love, cannot alone be grounds for the state to insist that she makes the sacrifice. Her suffering is too intimate and personal for the state to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." (at p 698-699). Mojapelo J noted that the same considerations as applied in the US would compel one to conclude that the South African Constitution protects a woman's right to choose under its guarantees of dignity in section 10 and privacy in section 14. He stated that it is however, not necessary to resort to those general guarantees because section 12(2) specifically guarantees the woman's right "to bodily and psychological integrity" including the right "to make decisions concerning reproduction" and "to security in and control over their body". They were clearly designed, said Mojapelo J, specifically to protect the woman's right to reproductive self-determination.

217 *Morgentaler* (2) (1988) DLR (4th) 385. Mojapelo J noted that in Canada, section 7 of the Canadian Charter also protects the right to 'liberty' but goes further by providing express protection to the right to 'security of the person'. In *Morgentaler* the Canadian Supreme Court held that the woman's right to determine the fate of her own pregnancy enjoyed constitutional protection. He observed that the majority of the court founded that protection on the guarantee of 'security of the person' in section 7. Wilson J, who concurred with the majority, held that, the protection could also be founded on the right to 'liberty' in section 7 and the concomitant implied guarantee of human dignity. At issue before the court was the constitutionality of section 251 of the Canadian Criminal Code which placed severe procedural restrictions on a woman's freedom to obtain an abortion. Mojapelo J quoted the dicta of Dickson CJ explaining his conclusion that it violated that constitutional right to security of the person as follows: " At the most basic, physical and emotional level every pregnant woman is told by the section that she cannot submit a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations is a profound interference with a woman's body and thus a violation of security of the person."

218 *Rodriguez* (1993) 17 CRR (2ed) 193 at 203-204 and 107 DLR (4th) 342 at 391a-b. Mojapelo J noted that in the case of *Rodriguez* concerning the constitutionality of a criminal prosecution of assisted suicide, Sopinka J, who gave the judgment of the majority of the court, reviewed its jurisprudence on the right to security of the person and concluded as follows: "In my view then, the judgment of this court in *Morgentaler*[fn 205 *supra*] can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress...There is no question then, that personal autonomy, at least with respect to the right to make choices

Mojapelo J noted that section12 (2)(a) and (b) of the Constitution provides that everyone has the right to bodily and psychological integrity which includes the right to make decisions concerning reproduction and to security in and over their body. He stated that compared to the foreign jurisdictions he had referred to previously, it is clear that the South African constitutional provisions are the most explicit concerning this right and that the provisions of section 12 guarantee the right of every woman to determine the fate of her pregnancy. A woman's freedom of choice, said Mojapelo J, is further reinforced by the right to equality and protection against discrimination on the grounds of gender, sex and pregnancy (section 9 of the Constitution), the inherent right to dignity and to have her dignity respected and protected (section 10 of the Constitution), the right to life (section 11), the right to privacy (section 14 of the Constitution) and 'more importantly' the right to have access to reproductive health care (section 27(1)(a) of the Constitution). He noted that some of these rights were themselves developed in the foreign jurisdictions previously cited by courts through judicial interpretation to found the right to termination of pregnancy. Cumulatively, therefore, the more explicit rights in section 12(2)(a) and (b) and all the other reinforcing rights provide a strong constitutional base for the right to termination of pregnancy in South African law. Mojapelo J points out in the judgment that like other constitutional rights the right to the termination of pregnancy is not absolute and that the state has a legitimate role in the protection of pre-natal life as an important value in South

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concerning one's own body, control over one's physical and psychological integrity, and basic human dignity, are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these." Mojapelo J stated that insofar as the South African Constitution also guarantees a right to 'security of the person' in section 12(1) it could similarly found a constitutional protection of a woman's right to determine the fate of her own pregnancy. He noted that it is, however, not necessary to resort to section 12(1) because section 12(2) (a) and (b) expressly guarantees a more specific right "to bodily and psychological integrity" including the right to make decisions concerning reproduction and to security in and control over one's body.

219 *Bruggemann* (1977) 3 EHRR 244. Mojapelo J noted that the German constitutional court has held that the right to life extends to the protection of pre-natal life but that it has also recognised a countervailing constitutional right which protects the woman's personal autonomy to determine the fate of her own pregnancy. He pointed out that the jurisprudence of the German constitutional court accordingly lends support to an alternative perspective that the right to freedom and security of the person affords constitutional protection to a woman's right to determine the fate of her own pregnancy albeit subject to limitation to protect the life of the foetus. He also noted that in Europe article 8 of the European Convention on Human Rights provides that "everyone has the right to respect for his private and family life". Mojapelo J quoted the following dicta of the European Commission in *Bruggemann* in holding that this right founded constitutional protection of a woman's right to self-determination: "The right to respect for private life is of such scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. In principle, therefore, whenever the state sets up rules for the behaviour of the individual within this sphere, it interferes with the respect for private life..." (at 252 para 55). "However, pregnancy cannot be said to pertain uniquely, to the sphere of private life. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus." Mojapelo J notes that the Commission accordingly concluded that although the woman has a right of self-determination, it was permissible for the state to regulate abortion because the right to privacy cannot be interpreted solely as meaning that pregnancy and its termination are as a principle solely a matter of the private life of the mother. He states that the jurisprudence of the European Union accordingly recognises the woman's constitutional right to self determination but also recognises that it is permissible for the state to regulate its exercise.

African society and may regulate and limit the woman's right to choose in this regard. However, he said, because the right itself is derived from the Constitution the regulation thereof by the state may not amount to the denial of that right. He stated that the provisions of section 36(1) of the Constitution would apply to any limitation of the right of a woman to terminate her pregnancy – in other words such limitation would be valid only to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Mojapelo J noted that South African courts, unlike the US courts, have never had to address the impact of any state-imposed interference with the autonomy of a woman to determine the fate of her own pregnancy but have in different contexts recognised the potential for catastrophic consequences that might flow from the unwanted, but state-enforced birth of a child. He referred by way of example to *Administrator Natal v Edouard*[220]. Mojapelo J observes that if the state were to prohibit termination, its prohibition would force pregnant women to bear, give birth to and nurture unwanted children at the risk of suffering such "catastrophes" and with the associated impairment of their physical and psychological well-being. The state's interference would clearly constitute an impairment of women's right "to bodily and psychological integrity" and more particularly their right "to make decisions concerning reproduction" and "to security in and control over their body" said the court. It noted that the plaintiff recognised and acknowledged that the right in issue is a constitutional one and that it complained about the way the legislature, through the Act, allows girls to access the right. The plaintiff wanted restriction or regulation of access to the right based on age.

The court observed that the Act allows all women who have the intellectual and emotional capacity for informed consent, to choose whether to terminate their pregnancies or not, that it does not distinguish between them on the ground of age and that this is what the plaintiff complains of as being unconstitutional. Mojapelo J stated that this complaint is inconsistent with the Constitution because:

220 *Edouard* 1990 (3) SA 581 (A) at 591G where Van Heerden JA stated that: "There is no justification for holding, as a matter of law, that the birth of an 'unwanted' child is 'a blessing'. The birth of such a child may be a catastrophe, not only for the parents and the child itself but also for previously born siblings."

1. The right of every woman to choose whether to terminate her pregnancy or not is enshrined in sections 12(2)(a) and (b), 27(1)(a), 10 and 14 of the Constitution. All of these rights are afforded to 'everyone' including girls under the age of 18. They are accordingly also entitled to respect for and protection of their right to self-determination.

2. Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(3) goes further to prevent unfair discrimination against 'anyone' inter alia on the ground of "age". Any distinction between women on the ground of their age, would invade these rights.

3. It follows that any limitation upon the freedom of any woman, including any girl under the age of 18 years to have their pregnancy terminated constitutes a limitation of their fundamental rights. Such a limitation is valid only if justified in terms of section 36(1).

Mojapelo J stated that because the right is a constitutional one, one of the minimum requirements for justification is that the limitation must be rational. He said that the distinction made by the Act between those women who have the capacity for informed consent on the one hand and those who do not have the capacity on the other, is a rational distinction. It is for that reason capable of justification and is therefore constitutional. He noted that the argument that the provisions of the Act that were under attack are unconstitutional because they do not cater for the interest of the child is unsustainable. The legislative choice opted for in the Act, he said, serves the best interest of the pregnant girl child (section 28(2) of the Constitution) because it is flexible to recognised and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority. It cannot be in the interest of the pregnant minor girl to adopt a rigid age based approach that take not account, little or inadequate account of her individual peculiarities. Mojapelo J stated that even if the plaintiff was to establish that the age based control or regulation was in the interest of the child, that would not be enough and that the plaintiff would have to go further and show that the legislative

choice adopted in the Act (based on informed consent) is in fact unjustifiable and unconstitutional.

The court observed that while the plaintiff had formulated its claim on the basis that girls or young women below the age of 18 are capable of giving informed consent, this is not necessarily so. The true position depends on the particular individual girl or woman and on her particular circumstances and must be determined for each and every woman in each case. In enacting the Act, the legislature assumed that there will be women below and above the age of 18 who will be incapable of giving informed consent and for this category the law requires parental or some other assistance in giving the informed consent. Mojapelo J pointed out that the legislature also recognised that there will be women above the age of 18 who are capable of giving informed consent and for this category the legislature requires no assistance when they give consent to termination of pregnancy. He said that as to whether a particular individual, irrespective of age, is capable of giving such consent, the legislature left the determination of the factual position to the medical professional or registered midwife who performs the act. Mojapelo J stated that he could not find that the exercise of this legislative choice was so unreasonable or otherwise flawed that judicial interference is called for in what is essentially a legislative function. Women or girls under the age of 18 are not unprotected for as long as they are incapable of giving informed consent. He noted that the legislature makes provision to ensure that all young women or girls below the age of 18 are encouraged to seek parental support and guidance when seeking to exercise the right to reproductive choice. The constitutional right, said the court, of a pregnant child to family or parental care (section 28(1)(b)) is therefore not denied. It is accommodated but not imposed. It is given effect under the Act in a manner that does not seek to negate other constitutional rights including the right to equality before the law, to equal protection and benefit of the law as well as the right to termination of pregnancy itself. Thus, said Mojapelo J, he could not find that the legislation is unconstitutional when it provides for what is constitutionally permissible and regulates it without affronting the Constitution. For this reason, he held, the plaintiff's particulars of claim did not disclose a cause of action. The exception was upheld, the plaintiff's claims were dismissed and no order was made in respect of costs.

Discussion

It is submitted with respect that the reasoning of the court in this case is a perfect example of the manner in which the logic within the Constitution itself must be applied to the determination of whether or not legislation is unconstitutional or not. The court interrogated the issue before it with regard not only to the most obvious and direct constitutional rights involved but also with regard to the rights that support and reinforce them. The judgment beautifully illustrates the interconnectedness and interrelatedness of the various rights in the Constitution and how they form part of a complex legal matrix that has to be considered as a whole that is more than the sum of its parts when adjudicating individual cases. The reasoning of the court also illustrates the wisdom of a bottom up approach to questions of human rights since the simple rights that are contained in the Bill of Rights can be used to construct other more complex rights that are no less constitutional. Just as the court was able to deduce a constitutional right to termination of pregnancy from the elemental rights contained in the Constitution, it is submitted, so can a constitutional right to health be deduced from the fundamental rights within the Bill of Rights. The need for such composite rights may or may not arise depending upon the facts of each case. The value of such a bottom up approach is that it is far more flexible and adaptable to the circumstances of each particular case than the top-down approach. The latter postulates composite rights which it then tries to populate with more detailed precepts. This is likely to lead to inconsistencies in practice since it requires that the basic legal principles (which may be indivisible unit rights) upon which the right rests are derived from the notion of the right itself rather than having those indivisible unit rights, or fundamental legal principles, describe and delineate the right. Unlike the situation in international law, in South African constitutional law, when dealing with rights issues one does not sit with the problem of trying to populate composite rights in terms of concepts such as minimum core and other subjective paradigms. The legal matrix of relevant rights is applied to the unique factual matrix in each case. It is submitted that the judgment of Mojapelo J neatly illustrates the logical elegance of this bottom-up approach.

At a more prosaic level, and from a different angle, it could be said that what is behind this case is an attempt by a group of religious fundamentalists to impose, by way of a court

judgment, their views concerning abortion on the rest of the population. In this sense, the case is once again a battle between a collective and the individual. It is seldom that an individual will be in any position to impose his or her religious views upon the collective and the balance of power, as history indicates, has generally not been in favour of the individual in such matters. The freedom of the individual to live his or her own life as he or she sees fit, the right to self-determination as it has sometimes been called, is fundamental to the South African constitutional system of law. In this case this principle, applied at a pragmatic, individual level trumped the abstract moralistic argument, cloaked as legal principle, of a particular religious grouping. The judgment of the court therefore supports not only the rights to bodily and psychological integrity, dignity and reproductive health care to which the court refers, but also the right to freedom of religion, thought, conscience, belief and opinion reflected in section 15 of the Constitution to which it does not expressly refer. The judgment itself is thus clearly consistent with, and integral to, a system of law that is larger than itself. At the most abstract level, sound court judgments will manifest such consistency and, due to the polycentricity of the Bill of Rights, will be justifiable at a number of different levels or from many different perspectives. The richness of such a system of law lies in its relevance to many different facets of life. It is multidimensional in its effect.

The decision of the court also emphasises the importance of flexibility in policy and legislation that impacts upon constitutional rights. It will be recalled that lack of flexibility was found to be a major failing in the government policy concerning access to Nevirapine for the purpose of the prevention of mother to child transmission of HIV[221]. The age issue is one that often arises as a threshold in law. It is relevant as such in the health care context *inter alia* in terms of the Sterilisation Act[222] which is currently in the process of amendment[223]. Section 2 of the current Act provides somewhat awkwardly that -

(1) No person is prohibited from having sterilisation performed on him or her if he or she is-

(a) capable of consenting; and

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221 *TAC* fn 57 *supra*

222 Sterilisation Act No 44 of 1998

223 The draft Sterilisation Amendment Bill was published for public comment on 04 September 2003 in Government Gazette No 25415, Notice No 2303 for public comment.

(b) 18 years or above.

(2) A person capable of consenting may not be sterilised without his or her consent.

(3) (a) Sterilisation may not be performed on a person who is under the age of 18 years except where failure to do so would jeopardize the person's life or seriously impair his or her physical health.

Subsection (2) is not entirely in keeping with subsection (1)(b) which, although it separates the capacity to consent from age, still imposes the age of 18 as a threshold. The peculiar phrasing of subsection (1) suggests that where a person is capable of consenting but is under the age of 18 years, sterilisation of that person is prohibited. However such prohibition must be inferred from section 2 (1) of the Act itself since there is no other legal prohibition or provision with regard to sterilisation either in the Act or outside of it. It is submitted that this subsection on its own could be in conflict with the constitutional right of a minor to bodily and psychological integrity given the arguments raised by the court in the second *Christian Lawyers* case[224]. According to the decision of the court in this case, it should be that where a person is capable of informed consent, this should be sufficient grounding for a right to be sterilised irrespective of the age of the person being sterilised. Sterilisation, like termination of pregnancy, is an exercise of a reproductive right and the right to security in and control over one's body in terms of section 12(2) of the Constitution. Subsection (2) of section 2 of the Act could be read as taking the principle in subsection (1) a step further in saying that a person capable of consenting may not be sterilised without his or her consent. Thus where a person is either over the age of 18 or under the age of 18, where he or she is capable of consenting, sterilisation may not take place without his or her consent. In this sense it is partially redemptive of subsection (1) because the latter gives everyone who is over 18 years of age and capable of consenting a right to be sterilised but does not address the converse which is the right of persons capable of consenting but under the age of 18 years *not* to be sterilised. It is only partially redemptive because the right to be sterilised in terms of subsection (1) is still age restricted even where a person is capable of consenting. It therefore limits the right to sterilisation for

224 *Christian Lawyers* (2) fn 199 *supra*

those persons who are under 18 years of age and capable of consenting. Since the right to make reproductive decisions and to security in and control over one's body are constitutional rights, it remains to be seen whether this provision constitutes a limitation of a constitutional right falling within the ambit of section 36(1) of the Constitution. There is an argument that sterilisation from the point of view of the right holder - especially in the case of women – is generally of a more permanent nature than the termination of a pregnancy. A person who terminates one pregnancy can usually still decide to have another pregnancy but a person who is sterilised cannot always be sure that the procedure can be reversed should he or she have a change of heart later on. Children and young people have the whole of their reproductive lives ahead of them and the question is whether, as a matter of policy, they should be allowed to be sterilised where they are capable of consenting but younger than 18 years of age. Whilst the inclination of many is likely to be that this should not be permitted, the question is if the person is capable of informed consent why should he or she be denied this choice simply on the basis of age? What is the difference between a mature 17 year old who wants to be sterilised and is fully capable of informed consent and a highly immature 18 year old who is barely capable of informed consent? Perhaps the distinction is that in terms of section 28(3) of the Constitution, a child is defined as a person under the age of 18 years and section 28(2) stipulates that a child's best interests are of paramount importance in every matter concerning the child. In such a situation it may possibly be argued that a person under the age of 18 is not capable of knowing what is in his or her best interests even if he or she is capable of giving informed consent. Informed consent involves knowledge and appreciation of the consequences as well as consent but does it necessarily encapsulate an understanding of the individual as to what is in his or her best interests? It is submitted, however, that this distinction between informed consent and what is in a person's best interests could be equally applied to decisions on choice of termination of pregnancy. The court in the second *Christian Lawyers* case[225], although it did not discuss it directly, also did not identify it as a valid distinction. The problem with the concept of what is in a person's best interests is that it is highly subjective. This is well demonstrated in legal issues involving end of life decisions. For example, to accept high doses of painkillers may hasten death but will alleviate suffering. Which option is in the

[225] *Christian Lawyers* (2) fn 199 *supra*

individual's best interests and who decides? Where a person is over the age of 21 the law is clear. Where a person is under the age of 21[226], or 18 for that matter, the law is not so clear. Section 39 of the Child Care Act states that a person who is over the age of 14 can consent to medical treatment of himself or his child, but it silent on the subject of the refusal of medical treatment by such a person. Many people would argue that a child of 14 is not in a good position to know what is in his best interests and should not be allowed to refuse essential medical treatment. The same section allows a medical superintendent to give treatment in the absence of the consent of the parents in certain circumstances but does not address the situation where a child is over the age of 14 and is refusing the proposed treatment. Whose decision prevails? It is submitted that given the provisions of section 28 of the Constitution that the interests of the child are paramount, as long as the medical practitioner acts in the best interests of the child, the courts are unlikely to decide against such practitioner in a claim for violation of the rights of the child in section 12(2) of the Constitution. It is submitted, however, there must be clear evidence that the decision was taken in the best interests of the child because in the absence of such evidence, it is likely

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[226] In terms of section 1 of the Age of Majority Act No 52 of 1972 all persons, whether males or females, attain the age of majority when they attain the age of twenty-one years. In terms of section 2 of this Act Any person who has attained the age of eighteen years may, subject to the provisions of this Act, apply to the provincial division of the Supreme Court of South Africa having jurisdiction in the area within which such person is ordinarily resident for an order declaring him to be a major. Despite the provisions of this Act many of the more recent statutes, possibly because they are following the Constitution, use the age of 18 as a threshold when it comes to taking certain decisions or performing certain actions. See for example the Explosives Act No 15 of 2003 which defines a "suitable person" as *inter alia* a person who is 18 years or older with regard to a licence which must be obtained by any person who wants to run a magazine for the storage of explosives; the Private Security Industry Regulation Act No 56 of 2001 which allows persons over the age of 18 years to be registered as a security service provider; the Electoral Act No 73 of 1998 which defines a voter as South African citizen who is 18 years old or older and whose name appears on the voters' roll; the Transport General Amendment Act 16 of 1995 which stipulates that a radio operator on a ship which is required by the International Convention for the Safety of Life at Sea, 1974, as amended, to have a radio installation, shall be not less that 18 years of age; the Basic Conditions Of Employment Act No 75 of 1997 which stipulates that 'child' means a person who is under 18 years of age as does the Social Assistance Act 59 of 1992, the Refugees Act No 130 of 1998, the Child Care Act No 74 of 1983, the Correctional Services Act No 111 of 1998; the Recognition Of Customary Marriages Act No 120 of 1998 which stipulates that for a customary marriage entered into after the commencement of this Act to be valid the prospective spouses must both be above the age of 18 years; the Liquor Act No 27 of 1989 which stipulates that the holder of a liquor licence shall not employ any person who is under the age of 18 years; the Births And Deaths Registration Act No 51 of 1992 which provides that a 'major' or 'person of age' means any person who has attained the age of 18 years or who has under the provisions of section 2 of the Age of Majority Act, 1972 (Act No 57 of 1972), been declared to be a major, and includes a person under the age of 18 years, who has contracted a legal marriage as does the South African Citizenship Act No 88 of 1995. It would seem that there is a widely held view that a child and a minor are not necessarily the same thing and that for purposes of the former, the age of 18 years is the cut off point whilst for the purposes of the latter, the cut-off point is the age of 21 years. However this is not always the case. See for example the Liquor Act which defines a minor as a person who has not attained the age of 18 years. From a pragmatic perspective what is happening is that persons over the age of 18 years are increasingly being given legal capacity for various specific purposes without the amendment of the general legislation, namely the Age of Majority Act. For health purposes, the Medicines and Related Substances Act No 101 of 1965 provides that Schedule 1, 2,3,4,5 or 6 substance shall not be sold to any person apparently under the age of 14 years except upon a prescription issued by an authorised prescriber and dispensed by a pharmacist, pharmacist intern or pharmacist's assistant or by a veterinarian or a person who is the holder of a licence as contemplated in section 22C (1) (a), or on a written order disclosing the purpose for which such substance is to be used and bears a signature known to the seller as the signature of a person known to such seller and who is apparently over the age of 14 years. Section 39(4) of the Child Care Act stipulates that notwithstanding any rule of law to the contrary any person over the age of 18 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any operation upon himself and any person over the age of 14 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any medical treatment of himself or his child.

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that the action taken in consequence thereof could well be a violation of section 12(2) rights and the provisions of section 39 will not avail the medical practitioner if his actions prove to be unconstitutional with regard to section 12(2) and section 28.

The judgment of the court in *Christian Lawyers*[227] is clearly to the effect that the right to self-determination cannot be age restricted. It also suggests that the rights of children provided for in section 28 of the Constitution should not be imposed on them, for instance, by way of legislation that denies them the right to bodily and psychological integrity on the ground that their section 28 rights override all others. The implication is that these section 28 rights must be capable of being exercised and balanced against other possibly conflicting rights. In other words, there is still an element of choice involved on the part of the right holder as to whether or not to enforce the right. If the right is imposed then there is no question of its being exercised by the right holder. Generally, as far as children are concerned this issue does provoke some circuitous debates since children are often not in a position to exercise or enforce a right independently of an adult parent, guardian or caregiver. The younger the child the more this statement holds true. If the very rights designed to protect the child against *inter alia* an adult parent, guardian or caregiver must first be exercised by the child with the assistance of that parent, guardian or caregiver, this effectively weakens the protection that the right affords the child. It is this dilemma that the Choice on Termination of Pregnancy Act has to address - particularly in situations of sexual molestation of a minor woman by her parent, guardian or caregiver. The point of the judgment of the court in the *Christian Lawyers* case[228] is that where a minor is capable of giving informed consent, the opposing will of a parent, guardian or caregiver should not be imposed upon the minor under the guise of section 28 of the Constitution simply because the minor is of a certain age. The capacity to give informed consent counts for more in such matters than an arbitrary threshold imposed in the abstract without reference to the individual who is most affected.

227 *Christian Lawyers* (2) fn 199 *supra*

228 *Christian Lawyers* (No 2) fn 199 *supra*

It is submitted that it is also not in keeping with the concept of administrative justice that rigid criteria such as age limits should be imposed where a large number of factual permutations can occur and not every one of them can be anticipated by legislation. It is a well-established principle of administrative law that each case must be decided on its merits and there is no reason why this principle should not be incorporated into legislation involving minors and the giving of informed consent by them - especially where the right to bodily and psychological integrity is involved.

Subsection (3)(a) of the Sterilisation Act does not take into account the right to psychological integrity referred to in section 12(2) of the Constitution in that it refers *only* to physical health.

Section 3 of the Act stipulates as follows –

(1) Sterilisation may be performed on any person who is incapable of consenting or incompetent to consent-
  (a) upon a request to the person in charge of a hospital and with the consent of a-
    (i) parent;
    (ii) spouse;
    (iii) guardian; or
    (iv) curator;

(b) if a panel contemplated in subsection (2) after considering all relevant information, including the fact that-
    (i) the person is 18 years of age, unless the physical health of the person is threatened; and
    (ii) there is no other safe and effective method of contraception except sterilisation, concurs that sterilisation may be performed; and

(c) if the person is mentally disabled to such an extent that such a person is incapable of-
    (i) making his or her own decision about contraception or sterilisation;
    (ii) developing mentally to a sufficient degree to make an informed judgement about contraception or sterilisation; and
    (iii) fulfilling the parental responsibility associated with giving birth.

(2) The person in charge of a hospital contemplated in subsection (1) must upon request, as prescribed for sterilisation, convene a panel which will consist of -
(a) a psychiatrist, or a medical practitioner if no psychiatrist is available;
(b) a psychologist or a social worker; and
(c) a nurse.

(3) Where a person to be sterilised is in custodial care, no member of the panel may be an employee of the custodial institution.

(4) If sterilisation is to be performed in a private health care facility, the members of the panel may not be employees of, or have a financial interest in, that facility.

(5) The person performing the sterilisation must ensure that the method of sterilisation used holds the least health risk to the person on whom sterilisation is performed.

(6) Sterilisation may not be performed in terms of subsection (1) unless the person suffers from a severe mental disability.

(7) For the purposes of this section, 'severe mental disability' means a range of functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to severely restrained sensory and motor functioning and requiring nursing care.

In this section, once again the question of 18 years of age is to be used as a threshold. In this instance, it is even more problematic because the section is dealing expressly with persons who are incapable of consenting. This incapacity is not linked in the Act to mental disability or lack of consciousness due to physical injury or illness. It can therefore also be applied to children who lack capacity simply because of their age. However section 2(3) deals with the sterilisation of mentally healthy minors and it is therefore unnecessary to regard this section as relevant to them. Age is only one factor that is an indicator of mental capacity. In the case of mentally disabled persons it may not be relevant at all since persons who are mentally disabled may never achieve legal capacity irrespective of their age. Mental capacity is often indicated or measured in terms of mental or developmental age. Thus an eighteen year old mentally disabled patient's cognitive functions may be pegged at the level of those of a healthy twelve year old. While the mind may not achieve full maturity the body of a mentally disabled person may well reach puberty and be capable of procreation. Indeed one of the primary concerns of the Sterilisation Act when it was first passed was to ensure that unnecessary sterilisation of mentally disabled persons was prohibited since mentally disabled persons also have reproductive rights. It was much easier in the past for parents and caregivers of such persons to have them sterilised than to worry about sexual activity leading to the birth of an unwanted child. However on one possible interpretation of section 3, the Act went too far in the direction of preventing sterilisation of mentally disabled persons under the age of 18 years insofar as the provisions of this section can be interpreted to mean that disabled persons younger than 18 years of

age may not be sterilised at all[229]. In the case of mentally disabled persons the age of 18 years is even more arbitrary for the purposes of sterilisation than it is for those who are not mentally disabled. In the context of sterilisation, the age of puberty is more relevant in the case of mentally disabled persons than the age of 18 years since the capacity of mentally disabled persons is unlikely to be related to their physical age. To apply the age of 18 years in this context as a reason for the refusal of sterilisation could have the effect of denying a mentally disabled person who is under the age of 18 years the right to dignity, to psychological integrity and to security in and control over his or her body. The proposed amendment to the Act seeks to preclude this.

The decision of the court in *Christian Lawyers* (No 2) has far reaching implications for legal capacity in general and is more in keeping with the Roman Law on the subject which attributed at least partial capacity to children over the age of seven and a significant degree of capacity to those over the age of fourteen years[230]. It is in keeping with more recent

229 It is submitted that it is possible to interpret section 3(1)(b) of the Act to mean that under certain circumstances a person may be sterilised even where he or she is under the age of 18 years and even though his or her physical health is not threatened because the section requires the panel to consider "all relevant information" of which the factors of age, physical health and availability of alternative methods of contraception are just a subset as indicated by the use of the word "including" in relation to these factors. However, practical experience has been that panels have been inclined to refuse sterilisations even in the face of very strong arguments in favour thereof where the person to be sterilised is under the age of 18 years and it was thus decided to amend the Sterilisation Act to ensure that the rights to dignity and psychological integrity of such persons are not compromised by such misinterpretation.

230 See Long G, 'Infans' *Lacus Curtius Roman Law (Smith's Dictionary, 1875)*. He notes that in the Roman law there were several distinctions of age which were made with reference to the capacity for doing legal acts:

1. The first period was from birth to the end of the seventh year during which time persons were called Infantes or Qui fair non possunt.
2. The second period was from the end of seven years to the end of fourteen or twelve years, according as the person was a male or a female, during which persons were defined as Qui fari possunt. The persons included in these first two classes were Impuberes.
3. The third was from the end of the twelfth or fourteent to the end of the twenty-fifth year, during which period persons were Adolescentes. Adulti. The persons included in these three classes were minores xxv annis or annorum, and were often for brevity's sake, called minores only[CURATOR]; and the persons included in the third and fourth class were puberes
4. The fourth period was from the age of twenty five during which persons were Majores.

He states: "The term Impubes comprehends Infans, as all Infans are Impuberes; but all Impuberes are not Infantes. Thus the Impuberes were divided into two classes; Infantes or thus under seven years of age, and those above seven, who are generally understood by the term Impuberes. Pupillus is a general name for all Impuberes not under the power of a father (Dig.50.tit.15s.239)."

See also Long G 'Impubes' *Lacus Curtius Roman Law (Smith's Dictionary, 1875)*. "An *infans* was incapable of doing any legal act. An *impubes*, who had passed the limits of *infantia*, could do any legal act with the *auctoritas* of his tutor; without such *auctoritas* he could only do those acts which were for his benefit. Accordingly such an impubes could stipulate (*stipulari*) but not promise (*promittere*); in other words, as Gaius (iii.107) expresses it, a *pupillus* could only be bound by the *auctoritas* of his tutor, but he could bind another without such *auctoritas*. But this remark as to *pupilli* only applies to those who had understanding enough to know what they were doing (*qui iam aliquem intellectum habent*), and not to those who were infants or *infanti proximi*, though in the case of the *infanti proximi* a liberal interpretation was given to the rule of law (*benigior juris interpretatio*), by virtue of which a *pupillus*, who was infanti proximus, was placed on the same footing as one who was pubertati proximus, but this was done for their benefit only (*propter utilitatem eorum*), and therefore could not apply to a case where the *pupillus* might be a loser (cf. Inst.iii.tit.19 s10 with Gaius, iii.108). An *impubes* was in the power of his father; for in the case of a *pupillus*, the *auctoritas* of the tutor was only allowed, in respect of the *pupillus* having property of his own, which a son in the power of his father could not have. In the case of obligationes ex delicto, the notion of the *auctoritas* of a tutor was of course, excluded, as such *auctoritas* was only requisite for the purpose of giving effect to rightful acts. If the impubes was of sufficient

thinking on the subject of legal capacity and the medical treatment of children in particular.[231] For the purpose of medical treatment the question of the consent of a minor

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capacity to understand the nature of his delict, he was bound by it; otherwise, he was not. In the case of a person who was *Pubertati proximus*, there was a legal presumption of such capacity; but still this presumption did not exclude a consideration of the degree of understanding of the impubes and the nature of the act, for the act might be such as either to be perfectly intelligible, as theft, or it might be an act which an impubes imperfectly understood, as when he was made the instrument of fraud. These principles were applicable to cases of *furtum, damnum injuria datum, injuria* and others; and also to crimes, in which the nature of the act mainly determined whether or not guilt should be imputed. An impubes could enter into a contract whereby he was released from a debt, but he could not release a debt without the auctoritas of his tutor. He could not pay money without his tutor; nor could he receive money without his tutor, at least it was not a valid payment because such payment was as a consequence, followed by a release to the debtor. But since the rule as to incapacity of an impubes was made only to save him from loss, he could not retain both the money and the claim. An impubes could not be a plaintiff or a defendant in a suit without his tutor...With the attainment of *pubertas*, a person obtained the full power of his property, and the *tutela* ceased: he could also dispose of his property by will; and he could contract marriage. According to the legislation of Justinian (Inst.i tit.22), pubertas, in the case of a male, was attained with the completion of the fourteenth and, in a female, with the completion of the twelfth, year. The Sabianini maintained that the age of pubertas was to be determined by physical capacity (habitu corporis), to ascertain which a personal examination might be necessary; the Proculiani fixed the age of fourteen complete, as that which absolutely determined the attainment of puberty (Gaius, i.196; Ulp.Frag.xi.28). It appears, therefore that under the earlier emperors there was some doubt as to the time when pubertas was attained, though there was no doubt that with the attainment of puberty, whatever that time might be, full legal capacity was acquired." http://www.ukans.edu/history/europe/ancient_rome.

231 See for instance the Children's Bill on http://www.welfare.gov.za which provides in section 13 that: "Every child has the right to: *(a)* have access to information on health promotion, sexuality, reproduction and the prevention of ill-health and disease; and
(b) confidentiality regarding his or her health status and the health status of a parent, care-giver or family member, except when maintaining such confidentiality is not in the best interest of the child.
Section 17 of the Bill stipulates that a child, whether male or female, becomes a major upon reaching the age of 18 years. Boonstra H and Nash E 'Minors and the Right to Consent to Health Care' *The Guttmacher Report on Public Policy* note: "The notion that many minors have the capacity and indeed the right to make important decisions about health care has been well established in federal and state policy. Many states specifically authorize minors to consent to contraceptive services, testing and treatment for HIV and other sexually transmitted diseases, prenatal care and delivery services, treatment for alcohol and drug abuse. and outpatient mental health care. With the exception of abortion, lawmakers have generally resisted attempts to impose parental consent or notification requirements on minors' access to reproductive health care and other sensitive services. Nevertheless the movement to "restore" parental rights and to legislate parental control over minors' reproductive health care decisions remains active." They point out that in the US, states have traditionally recognized the right of parents to make health care decisions on their children's behalf, on the presumption that before reaching the age of majority (18 in all but four states), young people lack the experience and judgment to make fully informed decisions. There have long been exceptions to this rule, however, such as medical emergencies when there is no time to obtain parental consent and in cases where a minor is emancipated by marriage or other circumstances and thus legally able to make decisions on his or her own behalf. In addition, courts in some states have adopted the so-called mature minor rule, which allows a minor who is sufficiently intelligent and mature to understand the nature and consequences of a proposed treatment to consent to medical treatment without consulting his or her parents or obtaining their permission. They state that: "Moreover, over the last 30 years, states have passed laws explicitly authorizing minors to consent to health care related to sexual activity, substance abuse and mental health care. Although some states give doctors the option of informing parents that their minor son or daughter has received or is seeking these services, these laws leave the decision of whether to inform the parents entirely to the discretion of the physician as to the best interests of the minor. This expansion of minors' authority over health care decisions was spurred in part by US Supreme Court rulings extending the constitutional right to privacy to a minor's decision to obtain contraceptives or to terminate an unwanted pregnancy. It also reflects a recognition on the part of lawmakers that while parental involvement is desirable, many minors will not seek services they need if they have to tell their parents." They observe that the Alan Guttmacher Institute has periodically reviewed state laws pertaining to minor's authority to consent to medical care and to make other important decisions without their parents' knowledge or permission. In 2004 its review was expanded to also take into account state court decisions and attorneys general opinions that affect young people's access to confidential services. The review conducted in July 2000, found the following:
Twenty-five states and the District of Columbia have laws or policies that explicitly give minors the authority to consent to contraceptive services.
Twenty-seven states and the District of Columbia have laws or policies that specifically authorize a pregnant minor to obtain prenatal care and delivery services without parental consent or notification.
All 50 states and the District of Columbia, specifically allow minors to consent to testing and treatment for STDs, including HIV (With respect to HIV, three states limit this authorization to testing only.) Forty-four states and the District of Columbia have laws or policies that authorized a minor who abuses drugs or alcohol to consent to confidential counseling and medical care. Laws in 20 states and the District of Columbia give minors the explicit authority to consent to outpatient mental health services.
No state explicitly requires parental consent or notification for any of these services. However two states - Texas and Utah – prohibit the use of state funds to provide contraceptive services to minors without parental consent. One state, Iowa, requires that parents be notified if their child receives a positive HIV test.
Boonstra and Nash note that in addition to laws and policies that permit minors to consent to specific services, 21 states have statutes that authorize minors to consent to general medical and surgical care, at least under some circumstances, such as having a child, being pregnant or having reached a certain age. In Alabama, for example, minors aged 14 and older may consent to general medical care; in South Carolina, they may do so at 16.

has proved problematic[232]. The legal basis of the transaction is clearly of particular relevance in this context since minors do not usually have contractual capacity. If health services may only be rendered on the basis of the law of contract then a minor does not have the capacity to obtain such services without the assistance of his or her guardian. This is clearly, however, not in keeping with the provisions of section 39 of the Child Care Act discussed previously. The dicta of the court in *Christian Lawyers* (No 2)[233] is in marked contrast to the legal position that prevailed even some five years ago[234]. The question is whether the judgment of the court should be restricted to the provisions of the Choice on Termination of Pregnancy Act concerning informed consent only in relation to terminations of pregnancy or whether it should logically be extended to other kinds of health care services. In principle it is difficult to see why the logic used by Mojapelo J in this judgment cannot be applied to most, if not all, other health care services for minors.

They point out that the one notable exception to the expansion of minors' decision-making authority on health care matters is abortion. Only two states – Connecticut and Maine - and the District of Columbia have laws that affirm a minor's ability to obtain an abortion on her own. Thirty one states have laws in effect that require the involvement of at least one parent in their daughter's abortion decision. In 16 of these states, a minor must have the consent of one or both parents; in the other 15 states, one or both parents must be notified prior to the abortion. They further note, however, that more than half of the states that require parental involvement for abortion permit a minor to make the decision to continue her pregnancy and to consent to prenatal care and delivery without consulting a parent. Furthermore states appear to consider a minor who is a parent to be fully competent to make major decisions affecting the health and future of his or her child even though many of these same states require a minor to involve her parents if she decides to terminate her pregnancy. In stark contrast to this restrictive approach to termination of pregnancy decisions, states allow minors to make other decisions that can have a lasting effect on their lives. For example, most states permit teenagers to drop out of high school without their parents' approval and despite the documented adverse effects associated with the lack of a diploma. Although all states require young people to stay in school at least to age 16 or 17, except in very limited circumstances, once that age threshold has been reached, the states generally impose no barriers to minors' deciding to leave. The most striking of all is that 34 states and the District of Columbia explicitly permit a minor mother to place her child for adoption without her own parents' permission or knowledge. In addition, 11 states make no distinction between minor and adult parents; in these states, it appears, the decision to relinquish her child for adoption rests with the young mother.

232 Boonstra and Nash fn 231 *supra* state that: "Establishing rules for minor's consent for medical care has been one of the more difficult issues to face policy makers. On the one hand it seems eminently reasonable that parents should have the right and responsibility to make healthcare decisions for their minor child. On the other it may be more important for a young person to have access to confidential medical services than it is to require that parents be informed of their child's condition. Minors who are sexually active, pregnant, or infected with a sexually transmitted disease (STD) and those who abuse drugs or alcohol or suffer from emotional or psychological problems may avoid seeking care if they must involve their parents. Recognizing this reality, many states explicitly authorize a minor to make decisions about their own medical care but balancing the rights of parents and the rights of minors remains a topic of debate."

233 *Christian Lawyers* (No 2) fn 199 *supra*

234 See for instance *S v Chipinge Rural Council* 1989 (2) SA 342 (ZS) the court stated that: "There is respectable authority for the proposition that majority is the criterion determining the existence of legal capacity in respect of consent or the voluntary assumption of risk. See Spiro *Law of Parent and Child* 4th ed at 192; Boberg *Delict: Principles and Cases* vol I at 731 - 2. But even if capacity to consent is not coextensive with capacity to contract, in the words of Professor Van der Walt in his work *Delict: Principles and Cases* para 34(h) at 54, the child must have '... the mental capability and maturity to evaluate responsibly the nature, and extent and implications of his consent or assumption of risk. The existence of legal capacity in this sense is therefore relative to the particular circumstances of the case and particularly to the nature of the interests involved and the seriousness of the harmful conduct involved. A child of 14 years may, eg, have the necessary legal capacity to consent to the destruction of her doll, but she would normally not have the necessary legal capacity to consent to medical treatment. Where the child does not have the necessary legal capacity, the guardian must act on behalf of the child.' See also Snyman *Criminal Law* at 101; Burchell and Hunt *South African Criminal Law and Procedure (General Principles)* 2nd ed vol 1 at 378.

The decision in *Christian Lawyers* (No 2)[235] illustrates the importance of not taking longstanding legal principles for granted and the need to constantly re-examine the statutory and common law in the context of the Constitution. The capacity of a minor to enter into a contract, at least for health care services, must be construed not only in terms of the common and statutory law on legal capacity but also with regard to the right of access of 'everyone' to health care services including reproductive health care. It may be unconstitutional to take the view that a minor lacks contractual capacity and therefore cannot have access to health care services without the assistance of his or her parents. This is putting the cart before the horse since contractual capacity is subject to the constitutional right of access to health care services. This is not to say that in every situation a minor's contract for health care services has to be upheld. Clearly issues of informed consent are highly relevant as is evident from the judgment of Mojapelo J in Christian Lawyers (No 2). It may be necessary in some instances to avoid the idea of contract altogether as a legal basis for the rendering of health care services to an unassisted minor. Presently this is possible on the basis of the provisions of the Child Care Act and in the case of terminations of pregnancy, the Choice on Termination of Pregnancy Act. The Children's Bill does not seem to have similar provisions but the National Health Bill does make some provision for informed consent in the context of health care services for minors. Due regard must also be had to the constitutional rights of 'everyone' to bodily and psychological integrity and to freedom and security of the person when considering the rendering of health care services to minors. Furthermore, it is the circumstances and capacity of the individual minor concerned, as opposed to minors as an amorphous group, that must be considered by those rendering health care services. Broad generalisations when dealing with specific patients on the basis of factors such as age, gender and health status are not only inadvisable, they may also be unconstitutional in a number of different aspects not least of which is unfair discrimination. The constitutional rights to dignity, to bodily and psychological integrity, to freedom and security of the person are powerful rights that cannot be ignored in the context of health service delivery and minors are entitled to these rights to no less a degree than anyone else.

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235 *Christian Lawyers* (No 2) fn 199 *supra*

2.5 The Right of Prisoners to Medical Treatment

The right of prisoners to medical treatment is reflected in section 35(2) of the Constitution which states that:

"Everyone who is detained, including every sentenced prisoner, has the right-

.....

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment;

(f) to communicate with, and be visited by, that person's-

.....

(iv) chosen medical practitioner".

The obvious question is whether this right of detained persons is yet another facet of the right of access to health care services or whether it is a discrete right which has no connection with the more general right expressed in section 27(1) of the Constitution. There are differences in the terminology used between the two sections. Section 35(2) refers to "medical treatment" whereas section 27(1) speaks of "health care services". Section 27 refers to the progressive realisation of the rights within available resources. Section 35 contains no such qualification. What is the difference between these two sections, if any, for practical purposes? Section 35(2) makes specific mention of a choice of medical practitioner whereas section 27(1) does not make any reference to providers of health care services.

The Cape High Court considered some of these questions of the case of *Van Biljon and Others v Minister of Correctional Services and Others*[236]

2.5.1 Van Biljon and Others v Minister of Correctional Services [237]

Facts

[236] *Van Biljon* 1997 (4) SA 441 (C) (*B and Others v Minister of Correctional Services and Others* 1997 (6) BCLR 789)

[237] *Van Biljon* fn 236 *supra*

The applicants were HIV positive prisoners who sought orders declaring, ***inter alia***, that 'the right to adequate medical treatment of the applicants and the prisoners infected with HIV, who have reached the symptomatic stage of the disease and whose CD4 counts are less than 500/ml, entitles them to have prescribed and to receive at state expense appropriate anti-viral medication'. Anti-viral medication had been prescribed for the first and second applicants but had not been provided to them by the prison authorities.[238]

It was argued for the respondents that convicted prisoners are entitled to the same standard of medical treatment as is provided for persons attending state institutions and that since ordinary persons attending provincial hospitals were not entitled to antiretroviral drugs for the treatment of HIV/AIDS due to budgetary constraints, neither were the prisoners. At the time, patients in provincial hospitals who were in the same condition as the applicants were not provided with antiretrovirals at state expense. Counsel for the applicants contended that, since the right to adequate medical treatment is guaranteed to prisoners in terms of the Constitution, prison authorities can never be heard to say that they are unable to provide such treatment as a result of budgetary constraints or lack of funds.

Judgment

The high court observed that:

"Once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment. I do not, however, agree with the proposition that financial conditions or budgetary constraints are irrelevant in the present context. What is 'adequate medical treatment' cannot be determined *in vacuo*. In determining what is 'adequate', regard must be had to, *inter alia*, what the state can afford. If the prison authorities should, therefore, make out a case that as a result of budgetary constraints they cannot afford a particular form of medical treatment or that the provision of such medical treatment would place an unwarranted burden on the state, the Court may very well decide that the less effective medical treatment which is affordable to the State must in the circumstances be accepted as 'sufficient' or 'adequate medical treatment'. After all, as was pointed out by Mr Scholtz, s 35(2)(e) of the Constitution does not provide for 'optimal medical treatment' or 'the best available medical treatment', but only for 'adequate medical treatment'."

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238 From headnote of *Van Biljon* fn 236 *supra*

Counsel argued, however, that the state owes a higher duty of care to HIV positive prisoners than to citizens who suffer from the same infection, in general. The court agreed with this argument on the basis that with reference to, *inter alia*, accommodation, nutrition and medical care, the Constitution itself draws a distinction between prisoners and people outside prison.[239]

The court held that the declarator sought by the applicants would compel medical doctors to prescribe some form of anti-viral medication and refused to make such order because it was not the function of the Court to make an order of that nature. It held that because anti-viral medication had in fact been prescribed for the first and second applicants on medical grounds, the question whether they were entitled to receive such therapy at state expense became an issue. The court said that although, in principle, lack of funds could not be an answer to a prisoner's constitutional claim to adequate medical treatment, 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, financial conditions and budgetary constraints were not irrelevant considerations: what amounted to 'adequate medical treatment' had to be determined with regard, *inter alia*, to what the state could afford. The court noted, with regard to the argument that the state owed a higher duty of care to HIV positive prisoners than to citizens outside prison suffering the same infection, that the Constitution itself drew a distinction between prisoners and those outside prison. It said that acceptance of the respondents'

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239 See *Van Biljon* fn 236 *supra* para53 p 457 onwards where the court observed that: "Unlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment. It is true that some HIV positive prisoners will, upon release, be dependent on the state for medical treatment. On the other hand, there are prisoners, like first applicant, who may well be able, upon their release, to earn an income which will enable them to afford anti-viral treatment or who will receive charitable assistance from their employers. As far as the latter category of prisoners is concerned, an inroad would be made upon their personal liberties if they were to be refused access to anti-viral treatment. Since such inroad cannot be described as a necessary consequence of incarceration, I do not believe that the refusal to provide these prisoners with anti-viral medication is consistent with the principles of our common law. In saying that I obviously do not intend to suggest that the standard of medical treatment for any particular prisoner should be determined by what he or she could afford outside prison. What I am saying, is that the standard of medical treatment for prisoners in general cannot be determined by the lowest common denominator of the poorest prisoner on the basis that he or she could afford no better treatment outside. As far as HIV prisoners are concerned, there is another factor which should, in my view, be borne in mind, namely that they are more exposed to opportunistic viruses than HIV sufferers who are not in prison. It is applicants' case that tuberculosis and pneumonia are prevalent in prison. Although respondents deny the prevalence of these particular opportunistic infections, they do admit that the overcrowded conditions in which prisoners are accommodated exacerbates the vulnerability of HIV prisoners to opportunistic infections. Even if it is, therefore, accepted as a general principle that prisoners are entitled to no better medical treatment than that which is provided by the state for patients outside, this principle can, in my view, not apply to HIV infected prisoners. Since the state is keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside, the adequate medical treatment with which the state must provide them must be treatment which is better able to improve the immune systems than that which the state provides for HIV patients outside. The conclusion that the standard of adequate medical treatment for HIV infected prisoners is not *per se* determined by what the state provides outside for HIV patients is in effect a conclusive answer to respondents' contention."

argument would mean, for example, that the fundamental right of prisoners to adequate accommodation, also provided for in s 35(2)(e), would entitle them to no better accommodation than that provided for people outside prisons, whereas it was a fact of life that there were many people in the country whose accommodation could not by any standard be described as adequate. The court found that to refuse prisoners, some of whom might upon their release be able to earn an income which would enable them to afford anti-viral treatment, access to anti-viral treatment would be an inroad on their personal liberties, which inroad could not be described as a necessary consequence of incarceration. It noted that the standard of medical treatment for prisoners in general could not be determined by the lowest common denominator of the poorest prisoner on the basis that he or she could afford no better treatment outside than that offered at state institutions and pointed out that due to prison conditions the state could even be said to be exposing prisoners to a greater risk of opportunistic infection than they would encounter outside of prison. On this basis it could be argued that the state was obliged to afford HIV positive prisoners medical treatment that was able to boost their immune systems and protect them from this risk. The court found that the applicants had established that anti-viral therapy was the only prophylactic and that the benefits of such treatment, in the form of extended life expectancy and enhanced quality of life, were such that the treatment claimed by them had to be regarded as no more than the 'adequate medical treatment' to which they were entitled in terms of s 35(2)(e) of the Constitution. It ordered the first and second respondents to provide the first and second applicants with the anti-retroviral drugs that had been prescribed for them.

Discussion

At first glance it might appear that the finding of the court in *Van Biljon* is to the effect (a) that prisoners have greater rights to medical treatment than other persons in society and (b) that this right of prisoners does have a certain minimum core content. These conclusions might be founded (a) upon the fact that the court held that prisoners were entitled to antiretroviral medication for HIV whereas patients of provincial hospitals were not so entitled due to budgetary constraints and (b) upon the discussion in the judgment of what is meant by 'adequate' medical treatment. These conclusions might lead to the further

conclusion that the right of prisoners to medical treatment is separate from and different to the right of everyone to health care services in terms of section 27(1) of the Constitution. It is submitted, however that such conclusions would be erroneously drawn for the following reasons.

The court in *Van Biljon* stated expressly that if the prison authorities had argued a lack of resources for the provision of antiretroviral medication, its finding may have been different.[240] This was recognised by the high court in *Soobramoney*[241] in a judgment which was subsequently upheld by the Constitutional Court, in the following terms:

"There remains for me to deal with one decision upon which the applicant's counsel relied and that is the recent decision in *Van Biljon and Others v Minister of Correctional Services and Others* 1997 (4) SA 441 (C) (*B and Others v Minister of Correctional Services and Others* 1997 (6) BCLR 789). In that case Brandt J held that s 35(2)(e) of the Constitution obliged the state to provide prisoners suffering from HIV with certain very expensive drugs at state expense. If prisoners are entitled to enforce their right to adequate medical treatment the same should apply to the applicant who after all, is not a criminal (so counsel argued). A careful reading of the judgment, however, reveals that it does not provide support for the applicant's case. It is clear that the question of budget constraints was argued - see 454C (SA) (801E (BCLR)) where the following is said: 'If HIV patients in provincial hospitals are to receive the combination therapy claimed by applicants, Mr Scholtz submitted, it would involve a prioritisation of resources in their favour. In view of the budget restrictions on the hospital services, such prioritisation would necessarily be at the expense of other patients dependent upon the provision of health care by the state. Such patients may include persons suffering from acute heart disease, cancer sufferers, children, the elderly, pregnant women and so on."

240 Van Biljon fn 236 *supra*. In fact what the court said at p 457 onwards was: [56] What respondents have shown through the affidavit of Dr Wood is that provincial hospitals cannot afford to provide all State patients who are HIV infected with the anti-viral treatment claimed by applicants. Dr Wood's motivation of this statement is - at least as far as Somerset Hospital is concerned - not disputed by applicants and, in fact, appears to be unanswerable. It appears from respondents' papers that the Department of Correctional Services is also subject to budgetary constraints. I agree with the submission by Mr Seligson, however, that no case is made out by respondents that, as a result of budgetary constraints, the Department of Correctional Services cannot afford to provide such anti-viral treatment for HIV positive prisoners who are eligible for this treatment. With regard to possible financial constraints, there is the further consideration of a cost-saving raised by applicants' experts to which respondents have, in my view, not given a conclusive answer. As appears from the aforegoing, it is contended by applicants' experts, on the basis of international research, that the administration of anti-viral therapy at an early stage is cost-effective in that the treating of opportunistic infections is significantly reduced. It is true that respondents' medical expert; Dr Wood, does not agree with the results of the international research. It is also true, as was submitted by Mr Scholtz, that this dispute between medical experts cannot be determined on motion papers. It does, however, stand to reason that the postponement of the costly treatment for opportunistic infections must result in some cost-saving, even if such saving does not exceed the cost of prophylactic anti-viral treatment, as appears to be suggested by the results of international research. From respondents' papers, it appears that they have disregarded the possibility of any cost-saving through anti-viral treatment. In these circumstances, the polycentric issue referred to by Mr Scholtz does not arise. If a proper case was made out by respondents that, due to the constraints of its own budget, the Department of Correctional Services simply cannot afford the medical treatment claimed by applicants, I might have come to the same conclusion as the English Court of Appeal in *R v Cambridge Health Authorities* ([1995 2 All ER 129 (CA)]) or I might have found that 'adequate medical treatment' for applicants is dictated by such budgetary constraints. From what I have already stated, it appears, however, that on the facts of this case it is not necessary for me to make a definite finding on these difficult issues."

241 *Soobramoney* fn 23 *supra*

In dealing with this argument the learned Judge at 454C--D (SA) (802E (BCLR)) says the following:

"I do not, however, agree with the proposition that financial conditions or budgetary constraints are irrelevant in the present context. What is 'adequate medical treatment' cannot be determined *in vacuo*. In determining what is 'adequate', regard must be had to, *inter alia*, what the State can afford. If the prison authorities should, therefore, make out a case that as a result of budgetary constraints they cannot afford a particular form of medical treatment or that the provision of such medical treatment will place an unwarranted burden on the State, the Court may very well decide that the less effective medical treatment which is affordable to the State must in the circumstances be accepted as 'sufficient' or 'adequate medical treatment'."

The learned Judge then concludes that the prison authorities had not made out a case on the papers that as a result of budgetary constraints they could not afford to provide the anti-viral treatment for the prisoners."

The court in *Van Biljon*[242] did not concede that the ambit of the right as it related to prisoners was greater than the right afforded to everyone else with regard to medical treatment. Rather it agreed that the state owed *a higher duty of care* to HIV positive prisoners and proceeded to give the reasons for this as being that the state itself, by incarcerating people, created a greater risk for them of exposure to opportunistic infections and at the same time nullified their ability or opportunity to work and earn enough money to obtain adequate treatment for their condition. Antiretroviral drugs are available in the private sector in which people can either belong to a medical scheme or can pay out of their own pockets for medical treatment. The approach of the court was that one could not say, in the absence of arguments around budgetary constraints, that prisoners must receive the same medical treatment as other people who are not incarcerated because other people who are not incarcerated are not necessarily exposed to the same risks of opportunistic infection and they have the further advantage of being free to work and pay for their medical treatment themselves. What the court was in effect saying is that the state cannot increase the risks to health of a certain sector of the population, whilst at the same time effectively restricting them in their ability to pay for their own medical treatment and then in the same breath argue that its obligations towards them are the same as for those members of the population to whom those risks and restrictions are inapplicable. It is not that the content of

242 *Van Biljon* fn 236 *supra*

the right of prisoners to access to health care services is substantially different to those of non-prisoners but rather that the fact of incarceration materially restricts their access to health care services and moreover exposes them to the risk of opportunistic infections which would not necessarily have been characteristic of their lifestyle outside of prison and which they could take steps to avoid outside of prison[243].

In view of the foregoing, it is submitted that it is not that the right of prisoners to adequate medical treatment that is materially different to the right of everyone to access to health care services. It is the context in which the right is exercised, or the circumstances in which the right holder finds himself, that results in a practical difference. *Van Biljon* highlights the fact that it is important to realise that the right to health care services is highly contextualised and always will be. Every judgment of the constitutional court on the subject of socio-economic rights and the wording of the rights in the Constitution itself points to this. In *Grootboom*[244], for instance, the court said these matters have to be decided on a case-by-case basis. If one considers the wording of section 27(1) in relation to the situation of prisoners, the judgment in *Van Biljon* is entirely consistent with the right of everyone to access to health care services. Incarceration carries an opportunity cost which affects a prisoner's access to health care services. The state is required in some way to make good on that opportunity cost and if available resources permit it, this means affording to prisoners treatment which is reasonably necessary for their condition and which they would have been able to buy outside of prison. The court and the counsel for the applicants stressed in *Van Biljon* that the applicants were not entitled to optimal treatment or the best possible treatment – only adequate treatment[245]. If one looks at the judgment as whole, another description for "adequate" might be "…reasonable legislative and other measures within its available resources…". The right of the poor with regard to access to health care services, when expressed in practical terms may seem different to those of the rich who can afford to pay for health care services or who do not have the same disease profiles. The rights of

243 *Van Biljon* fn 236 *supra*. The court observed at p 457 that: "Even if it is, therefore, accepted as a general principle that prisoners are entitled to no better medical treatment than that which is provided by the state for patients outside, this principle can, in my view, not apply to HIV infected prisoners. Since the state is keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside, the adequate medical treatment with which the state must provide them must be treatment which is better able to improve the immune systems than that which the state provides for HIV patients outside."

244 *Grootboom* fn 10 *supra*

245 *Van Biljon* fn 236 *supra*, p 455 para 49

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those in desperate need, vulnerable groups such as old people, the disabled and children, may find expression in very different ways to those of healthy young adults. This does not change the nature of the right. Everyone has the right of access to health care services and legally speaking, there can be no discrimination between different groups. However, the effects of the exercise of the right, its expression in differing circumstances, may well be different due to the different levels of risk and the nature of the specific need[246].

2.6 Conflicting Rights

The question of conflicting rights is a considerable subject in its own right and underpins many of the issues that have already been raised with regard to the unitary nature of the right of access to health care services and the interconnectedness of this right with other socio-economic rights. It is not proposed in this section to canvas the potential conflicts between various areas of the common law and the constitutional rights that relate to health care services but rather to examine more closely potential conflicts between other constitutional rights and the right of access to health care services *inter se*. A closer examination of the interface between the constitutional right of access to health care services and rights in other areas of law will be conducted at a later stage when these other areas of law as they relate to health care services are explored in more detail. The question for now is how does one reconcile conflicts between constitutional rights.

In *Van Zyl and Another v Jonathan Ball Publishers (Pty) Ltd and Others*,[247] the court observed that:

> "There is no hierarchy of rights set out in the Constitution. There is no precise formula for dealing with a tension between opposing rights. One right in chap 2 of the Constitution does not automatically trump another. At 17 of Personality Rights (op cit) Burchell states the following in dealing with the importance of the right to freedom of expression:
> 'Self-esteem, respect and individual privacy are aspects of what makes up the totality of human dignity. Freedom of expression does not trump all other individual rights - it is, like these other rights, subject to reasonable and justifiable limits which, in turn, must also reflect the dictates of freedom, equality, democracy and dignity.'

[246] This is consistent with the doctrine of transformative constitutionalism referred to elsewhere in this chapter.

[247] *Van Zyl* 1999 (4) SA 571 (W) p591-592

When competing rights are asserted, one must view the assertions and the clashes in context and against the circumstances of each case. See *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 607B et seq. Opposing parties in cases like the present will respectively assert equally emphatically and with great enthusiasm that either the right to dignity is a primary right or that the role of the media in a democratic society cannot be overstated. At 18 of Personality Rights (op cit) Burchell states the following: 'The balancing of rights and interests is the essence of the legal process and an adjudicator cannot avoid making difficult decisions. The appropriate balance between individual reputation, dignity and privacy and freedom of expression, for instance cannot be sidestepped.'"

The constitutional court recognised that there would be a need for the courts to balance competing rights as early as the *Certification* judgment[248]

In the health arena there is considerable scope for conflict. One example that the constitutional court has already resolved appears from the case of *Soobramoney*[249]. Sachs J observed with regard to the apparent conflict between the limitations imposed by the Constitution on the right to have access to health care services and the right to life that:

"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. As Stevens J put it: dying is part of life, its completion rather than its opposite. 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." [250]

The constitutional right to life clearly does not imply an unqualified and unlimited right of access to health care services for the continued postponement of death.

2.6.1 Children's Rights

Another highly emotive and controversial area is the interface between the right of children to have access to health care services and the child's right to bodily and psychological

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248 See *Ex Parte Chairperson Of The Constitutional Assembly: In Re Certification Of The Constitution Of The Republic Of South Africa*, 1996 (4) SA 744 (CC) p 792 para 55 where the court noted: "A further argument raised by the objectors was that NT 8(2) would bestow upon Courts the task of balancing competing rights which, they argued, is not a proper judicial role. This argument once again fails to recognise that even where a bill of rights binds only organs of State, Courts are often required to balance competing rights. For example, in a case concerning a challenge to legislation regulating the publication and distribution of sexually explicit material, the Court may have to balance freedom of speech with the rights of dignity and equality. It cannot be gainsaid that this is a difficult task, but it is one fully within the competence of Courts and within the contemplation of CP II."

249 *Soobramoney* fn 23 *supra*

250 *Soobramoney* fn 23 *supra* p784 para 57

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integrity contained in section 12 (2) of the Constitution. In South Africa there are children who live without an adult caregiver often as a result of the HIV and AIDS pandemic to which their parents and families have lost their lives. Older children take care of the younger ones in informal groups in outlying areas where there are no formal institutions in which these children can be accommodated. The question is what happens when these children require medical treatment? In circumstances where emergency medical treatment is required issues of consent are not usually problematic because the law caters specifically for emergency situations but consent does become a problem for routine medical attention such as all children require from time to time. A child's right to bodily and psychological integrity is no less than that of an adult and indeed children are more vulnerable to infringement of this right as evidenced by the high levels of child abuse in South Africa. This right would ordinarily be protected by means of the informed consent to treatment of the child by a parent or guardian. Where there is no parent or guardian what is the legal position? How does one implement the right to basic health care services of children in this situation? The obvious solution would be either to apply for a court order as the high court is the upper guardian of all minor children in South Africa or to request permission from the Minister of Health in terms of section 39 of the Child Care Act[251]. At the time of writing the Department of Social Development is busy with a draft Children's Bill which deals more comprehensively with the subject of medical attention for children than does the current legislation.[252] It remains to be seen whether its provisions will be more workable

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[251] Child Care Act fn 33 *supra*. According to this section -

"(1) If any medical practitioner is of opinion that it is necessary to perform an operation upon a child or to submit him to any treatment which may not be applied without the consent of the parent or guardian of the child, and the parent or guardian refuses his consent to the operation or treatment, or cannot be found, or is by reason of mental illness unable to give that consent, or is deceased, that practitioner shall report the matter to the Minister, who may, if satisfied that the operation or treatment is necessary, consent thereto in lieu of the parent or guardian of the child.

(2) If the medical superintendent of a hospital or the medical practitioner acting on his or her behalf is of opinion that an operation or medical treatment is necessary to preserve the life of a child or to save him or her from serious and lasting physical injury or disability and that the need for the operation or medical treatment is so urgent that it ought not to be deferred for the purpose of consulting the person who is legally competent to consent to the operation or medical treatment, that superintendent or the medical practitioner acting on his or her behalf may give the necessary consent.

(3) The person whose duty it is to maintain the child concerned shall be liable for the cost of any treatment of, or operation upon, the child in terms of subsection (1) or (2) as if the treatment had been given or the operation had been performed on his instructions.

(4) Notwithstanding any rule of law to the contrary-

(a)any person over the age of 18 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any operation upon himself; and

(b)any person over the age of 14 years shall be competent to consent, without the assistance of his parent or guardian, to the performance of any medical treatment of himself or his child."

[252] Section 135 of the Bill deals with consent to medical treatment and surgical operations in the following terms -

(1) A child may be submitted to medical treatment or surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4) or (5).

(2) (a) A child may consent, subject to paragraph (b), to medical treatment or a surgical operation, provided the child –

that those of the current legislation in addressing the needs of children. The draft Bill has not yet reached the stage where public hearings have been conducted by the relevant parliamentary portfolio committee. It is therefore likely to be considerably refined before it is finally passed. Consequently a detailed discussion of the Bill is not appropriate for present purposes.

Another aspect of this problem of protecting the rights of children is the issue of child abuse and choice on termination of pregnancy. There is evidence that due to the high levels of sexual abuse of children, many teenage pregnancies are the result of incest or rape by a guardian, parent or other family member who would, in normal circumstances be called upon to give consent for the medical treatment of that child. If the child is in a situation where she is pregnant with the parent's or guardian's or family member's child and wishes to terminate the pregnancy without the knowledge or involvement of that person, most people would argue that the child should have the right to do so – that the responsible person has demonstrated that he or she is not fit to take decisions concerning the welfare of the child. The Choice on Termination of Pregnancy Act does not define a woman as being of any particular age. This has been challenged at the time of writing by an interest group which maintains that the constitutional rights and interests of children are not being served by allowing them to undergo terminations of pregnancy in the absence of the support,

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(i) is at least 12 years of age; and
(ii) is of sufficient maturity and has the mental capacity to understand the benefits, risks and social implications of the treatment or operation.
(b) A child may not consent to a surgical operation in terms of paragraph (a) without the assistance of –
(i) the parent of the child; or
(ii) the primary care-giver of the child.
(3) The parent or primary care-giver of a child may subject to section 43 consent to the medical treatment of or a surgical operation on the child if the child is –
(a) under the age of 12 years; or
(b) over that age but is of insufficient maturity or does not have the mental capacity to understand the benefits, risks and social implications of the treatment or operation.
(4) The superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent, may consent to the medical treatment of or a surgical operation on a child if –
(a) the treatment or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability; and
(b) the need for the treatment or operation is so urgent that it cannot be deferred for the purpose of obtaining consent that would otherwise have been required.
(5) A child and family court may consent to the medical treatment of or a surgical operation on a child if –
(a) the child has been abandoned; or
(b) the parent or primary care-giver of the child –
(i) refuses to give consent or to assist the child in giving consent;
(ii) is physically or mentally incapable of giving consent or assisting the child in giving consent;
(iii) is deceased; or
(iv) cannot readily be traced.
(6) No parent or primary care-giver of a child may refuse to assist a child in terms of subsection (2) (b) or withhold consent in terms of subsection (3) by reason only of religious or other beliefs, unless that parent or primary care-giver can show that there is a medically accepted alternative choice."

guidance and advice of their parents, guardians or adult family members. The matter has not yet been heard by the court.

2.6.2 HIV Positive Patients and Sexual Offenders

Another area of conflict of rights is that of health workers who deal with patients who are possibly HIV positive. Some patients know of their HIV positive status but many do not. If a health worker is accidentally exposed to HIV infection in an occupational incident he or she is in a similar position to a person who has been sexually assaulted by a person who is HIV positive. They have both been involuntarily exposed to the virus. The Department of Justice is busy with a draft Bill at present which makes provision for the compulsory HIV testing of alleged sexual offenders. This is a further instance of the legislative balancing of rights in favour of the victims of sexual assault to bodily and psychological integrity against the rights of alleged sexual offenders to privacy and bodily and psychological integrity. There seems to be growing recognition for the need to balance the rights of health care workers and victims of sexual assault against those of persons with whom they have been involved and who may have infected them with HIV. In the case of children, section 136 of the draft Children's Bill deals specifically with testing of children for HIV[253]. These

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253 "(1) No child may be tested for HIV except when –
(a) this is in the best interest of the child and consent has been given in terms of subsection (2); or
(b) the test is necessary in order to establish whether –
(i) a health worker may have contracted HIV due to contact in the course of a medical procedure involving contact with any substance from the child's body that may transmit HIV; or
(ii) any other person may have contracted HIV due to contact with any substance from the child's body that may transmit HIV, provided the test has been authorised by a court.
(2) Consent for a HIV-test on a child may be given by –
(a) the child, if the child is –
(i) 12 years of age or older; or
(ii) under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test;
(b) the parent or care-giver, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
(c) a designated child protection organisation arranging the placement of the child, if the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test;
(d) the head of a hospital, if –
(i) the child is under the age of 12 years and is not of sufficient maturity to understand the benefits, risks and social implications of such a test; and
(ii) the child has no parent or care-giver and there is no designated child protection organisation arranging the placement of the child; or
(e) a child and family court, if –
(i) consent in terms of paragraph (a), (b), (c) or (d) is unreasonably withheld; or
(ii) the child or the parent or care-giver of the child is incapable of giving consent."

provisions are likely to be controversial especially on the subject of testing in order to establish whether a health worker may have contracted HIV due to contact in the course of a medical procedure involving contact with any substance from the child's body that may transmit HIV. In effect this section is seeking to balance the constitutional rights of health workers to bodily and psychological integrity against those of the child to privacy. Those opposed to involuntary or compulsory testing for HIV argue that if universal precautions against infection are routinely undertaken then it should not be necessary to force a patient to undergo an HIV test. They also point out that if a health professional is accidentally exposed to HIV infection in a work related incident, he or she is likely to opt for HIV prophylaxis even if the patient in question tests negative for HIV due to the existence of a window period for sero-conversion in which a patient can still infect someone else with HIV but does not test positive for the virus. However it is not the intention to discuss the draft Children's Bill in this chapter but merely to highlight some of the issues concerning the balancing of the rights involved in the rendering health care services.

2.7 Rationing of Health Care Services and the Limitation of Rights

The rationing of health care services is a complex subject that embraces many more areas than just that of law. It is implicit in a world of limited resources and often explicit in decisions involving the allocation of resources. It involves questions not only of constitutional law but also of the law of contract, administrative law and even the law of delict. Since this chapter is dealing only with the constitutional law aspects of health services delivery, it is only in this context that the rationing of health care services will be discussed here. Rationing and access are two sides of the same coin. Rationing, properly applied, can improve access at a certain level since it can ensure more equitable distribution of resources so as to include people who previously had no access at all. However, it clearly has the potential to reduce access and whether or not this is a good thing depends a great deal upon the values and beliefs of the society in which it is effected. In the South African context, the term 'values' brings the discussion back to the Constitution. It is clear that

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The Compulsory Testing of Alleged Sexual Offenders Bill (B10-2003) provides for the victim of an alleged sexual offence to apply to a magistrate for the compulsory testing for HIV of the alleged offender. If the offender is a minor, the Bill when it becomes law, will allow a magistrate to grant an order allowing him to be tested for HIV.

rationing decisions involving health will be judged against the rights in the Bill of Rights and the Constitution holds considerable potential for usefully informing rationing decisions. Since the Constitution awards a right of access to health care services, any limitation of this right would have to be in accordance with the provisions of the Constitution relating to the limitation of rights. Furthermore, because the right of access to health care services must be seen within the context of the other rights in the Bill of Rights, one must consider how the implementation of a right of access to health care services could restrict the other rights contemplated by the Constitution. It is necessary to establish whether there is any case law on this subject from which guidance may be obtained. It is also necessary to explore the entities which may either explicitly or implicitly ration access to health care services and on what basis. That rationing is implicit in the system itself is reflected by the observation of the court in *Soobramoney*[254], subsequently quoted with approval in *Grootboom*[255], that the content of the right is limited by the available resources. It is submitted, however, that this type of implicit rationing should rather be viewed in the context of the scope of a right rather than as a justifiable limitation of the right, i.e. rationing *per se*, since no right is absolute or unbounded[256]. They are all limited in their scope. It is submitted that the concept of the scope of a right is slightly different to the justifiable limitation of that right as contemplated in section 36 of the Constitution since 'scope' envisages an initial or original state of the right in a given set of circumstances whereas justifiable limitation implies a narrowing or restriction of the scope of the right so as to decrease the area included within

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254 *Soobramoney* fn 23 *supra* para 11, p 771"What is apparent from these provisions is that the obligations imposed on the state by ss 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled."

255 *Grootboom* fn 10 *supra* at para 46, p 70

256 In *Soobramoney v Minister Of Health, Kwazulu-Natal* fn 82 *supra*, Combrinck J noted that: "The case made out by the applicant mirrors what at present seems to be a popular conception that the rights created in the Bill of Rights are absolute and can be exercised and enjoyed without limitation. This is of course not so. The rights are by s 36(1) limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. The rights are also limited by the rights of others. A right extends only so far as the point to where it does not infringe upon another person's right." In *Qozeleni v Minister Of Law And Order And Another* 1994 (3) SA 625 (E), the court noted at p 640 that: "The fundamental rights protected by the chapter are enumerated (ss 8-32), but they are not absolute rights. Apart from the possibility of these rights conflicting with each other in a given situation, they are all also subject to a general limitation clause (s 33) and may even in certain closely prescribed circumstances be suspended under a state of emergency (s 34). Any alleged breach of the fundamental rights set out in chap 3 therefore necessitates a two-pronged enquiry (leaving aside for the moment the possibility of suspension under a state of emergency), viz, firstly, whether there has been an infringement of the right, and, secondly, if so, whether that infringement of the right is justified in terms of the limitation clause (s 33)". See also *Rudolph And Another v Commissioner For Inland Revenue And Others NNO* 1994 (3) SA 771 (W) at p 74 in which Goldblatt J observed that: "Firstly, it must be recognised that the rights and freedoms guaranteed by the Constitution are not absolute. These rights and freedoms may be limited by laws which are not contrary to s 33(1) of the Constitution."

its original boundaries[257]. This argument would seem to be supported by the observations of Woolman[258] in his criticism of the language of *Makwanyane*[259] and the final Constitution with regard to limitation of rights.

2.7.1 Constitutional Aspects

The Constitution makes provision for situations in which it is necessary to limit the rights in the Bill of Rights in section 36[260].

It has been observed that rights can be violated by administrative conduct on the part of the state and that legitimate reasons for depriving an individual or group of people access to a particular socio-economic right (for example non-compliance with a means test for social assistance) must be justified under the general limitation clause[261]. It is important to note that the wording of section 36 stipulates that the rights may only be limited in terms of a *law* of general application. The question is whether administrative action itself can ever limit constitutional rights in terms of the wording of section 36. Although administrative action is taken in terms of a law of general application the question is whether the meaning of the phrase "in terms of" in section 36 encompass administrative action "in terms of" a law of general application or whether it was the intention that it could only be the "terms of" the law of general application that limit the right. It would seem that administrative

257 This distinction has been recognised by the constitutional court in *Bernstein And Others v Bester And Others NNO* (fn 43 *supra*) in which Ackermann J observed at p 792: "As will be seen in the following paragraphs, this echoes to some extent the approach of the United States Courts in determining the existence of a 'reasonable expectation of privacy', but it must of course be noted that the above comment was in regard to the limitation and not the scope of the right in question."

258 See Woolman, fn 264 *infra*

259 *Makwanyane* fn 2 *supra*

260 Section 36 stipulates that:
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in ss (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

261 Liebenberg in Chaskalson *et al* fn 67 *supra* at p41-29

action in terms of a law of general application is capable of limiting a right as contemplated in section 36 of the Constitution. The court in *Dawood*[262] stated that:

"It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the immigration officials and the DG by ss 26(3) and (6) is constrained by the provisions of the Bill of Rights and, in particular, what factors are relevant to the decision to refuse to grant or extend a temporary permit. If rights are to be infringed without redress, the very purposes of the Constitution are defeated."

From the foregoing it is clear that while the court did not raise the question of whether or not administrative decisions were capable of limiting rights in terms of the wording section 36 it dealt with the matter of the exercise of discretionary powers authorised in terms of the law of general application stating that there should be express constraints in the legislation so that those exercising the power know what is relevant to its exercise. The argument is clearly that where legislation gives an official discretionary powers the scope of which includes the power of limitation of a right then the discretionary powers must be exercised in accordance with section 36. Presumably the power to limit the right can be either express or implied in the legislation.

In *S v Makwanyane*[263] the constitutional court observed that[264]:

"Our Constitution deals with the limitation of rights through a general limitation clause. As was pointed out by Kentridge AJ in Zuma's case, this calls for a 'two-stage' approach, in which a broad

[262] *Dawood* fn 12 *supra*

[263] *Makwanyane* fn 2 *supra* at p435-436 (footnotes omitted)

[264] Woolman S, 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution', (1997) 13 *SAJHR* 102 is critical of the language in both *Makwanyane* and the final Constitution saying that it seems to confuse the steps of fundamental rights analysis and fails to understand that not every limitation question involves questions of proportionality. He notes that: "The first question the Makwanyane court says we should ask is what is the nature of the right that is limited, and its importance to an open and democratic society based upon freedom and equality? The final Constitution rehearses this language with the more telegrammatic injunction that we reflect upon the nature of the right. The problem is this. In two-stage fundamental rights analysis, the inquiry into the nature of the right limited and its importance in an open and democratic society based upon freedom and equality occurs at the first stage of analysis. The fundamental rights stage. Although I do not defend an absolutely rigid distinction between rights analysis and limitation analysis, the second distinction between rights analysis and limitation analysis – the limitation stage- directs our attention primarily, if not exclusively, to the reasonableness and justifiability of a limitation in an open and democratic society based upon human dignity, freedom and equality. Consideration of the nature and scope of the right is something that should already have taken place. To engage the question of a right's nature a second time would seem to invite analytical confusion."

rather than a narrow interpretation is given to the fundamental rights enshrined in chap 3, and limitations have to be justified through the application of s 33. In this it differs from the Constitution of the United States, which does not contain a limitation clause, as a result of which courts in that country have been obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves. Although the 'two-stage' approach may often produce the same result as the 'one-stage' approach, this will not always be the case...It is not whether the decision of the State has been shown to be clearly wrong; it is whether the decision of the State is justifiable according to the criteria prescribed by s 33. It is not whether the infliction of death as a punishment for murder 'is not without justification', it is whether the infliction of death as a punishment for murder has been shown to be both reasonable and necessary, and to be consistent with the other requirements of s 33. It is for the Legislature, or the party relying on the legislation, to establish this justification, and not for the party challenging it to show that it was not justified."

The court further observed concerning the criteria for limitation of the right that:

"The criteria prescribed by s 33(1) for any limitation of the rights contained in s 11(2) are that the limitation must be justifiable in an open and democratic society based on freedom and equality, it must be both reasonable and necessary and it must not negate the essential content of the right."[265]

It said that:

"the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators."[266].

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265 *Makwanyane* fn 2 *supra* at p 436

266 *Makwanyane* fn 2 *supra* p 436. The court proceeds to an examination of Canadian law and points out that: "In a frequently cited passage, Dickson CJC described the components of proportionality as follows: "There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R v Big M Drug Mart Ltd* at 352. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". (*R v Oakes* 1986 19 CRR 308 ([1986] 1 SCR 103; (1986) 26 DLR (4th) 200 (SCC); [1987] LRC (Const) 477)). In *S v Zuma* 1995 (4) BCLR 401 (CC) at para 35 the court cautioned against the attachment of overmuch importance to the test in the Oakes case saying that the Oakes criteria may well be of assistance to our courts in cases where a delicate balancing of individual rights against social interests is required. "But s33(1) itself sets out the criteria which we have to apply and I see no reason, in this case at least, to attempt to fit out analysis into the Canadian pattern."
The question of the role of the courts in altering or reviewing policy decisions of another branch of government arises in this context as well. Chaskalson P notes at p 437-438 that: "The second requirement of the Oakes test, that the limitation should impair the right 'as little as possible', raises a fundamental problem of judicial review. Can, and should, an unelected court substitute its own opinion of what is reasonable or necessary for that of an elected legislature? Since the judgment in *R v Oakes*,

Woolman[267] notes that the limitation clause has a fourfold purpose. He says that firstly it functions as a reminder that the rights enshrined in the Constitution are not absolute. The rights may be limited where the restrictions can satisfy the test laid out in the limitation clause. Secondly, he says, the limitation clause indicates that rights may *only* be limited where and when the stated objective behind the restriction is designed to reinforce the values which animate this constitutional project. Those values include openness, democracy, freedom and equality, as well as the more specific values reflected in the individual rights themselves. Thirdly, say Woolman, the test set out in the limitation clause allows for open and candid consideration of competing government, public, private and constitutional interests. That is the limitation clause should provide a mechanism for weighing or balancing competing fundamental values against one another. Fourthly, he says, the limitation clause represents an attempt to solve the problem of judicial review by establishing a test which determines the extent to which the democratically elected branches of government may limit constitutionally protected rights and the extent to which an unelected judiciary may override the general will and write the law of the land. He observed that by making the guidelines for judicial nullication of majoritarian decisions reasonably precise the drafters hoped to provide at least a partial solution to the problem of judicial review.

Woolman[268] has commented that the limitations clause in the final Constitution differs in two important respects from that in the interim Constitution. Firstly, it removes the justificatory requirement that a limitation be necessary for certain classes of rights and freedoms. He notes that all limitations on the rights and freedoms enshrined in the new Bill of Rights must simply be reasonable and justifiable in an open and democratic society based upon human dignity, equality and freedom in order to pass constitutional muster.

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the Canadian Supreme Court has shown that it is sensitive to this tension, which is particularly acute where choices have to be made in respect of matters of policy. In *Irwin Toy Ltd v Quebec (Attorney-General)*, Dickson CJ cautioned that courts 'must be mindful of the legislature's representative function'. In *Reference Re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, it was said that 'the role of the Court is not to second-guess the wisdom of policy choices made by . . . legislators'; and in *R v Chaulk*, that the means must impair the right 'as little as is reasonably possible'. Where choices have to be made between 'differing reasonable policy options', the courts will allow the government the deference due to legislators, but '(will) not give them an unrestricted licence to disregard an individual's Charter Rights. Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down." (footnotes omitted)

267 See Chaskalson *et al* fn 67 at p12-1 to p12-2

268 Woolman fn 264 *supra*

Secondly, it removes the "shall not negate the essential content of the right requirement". Woolman observes that this means that courts need no longer concern themselves with the apparently recondite determination of what constitutes the inviolable core of any given right.

In a discussion of the relevant factors in section 36(1) of the Constitution, Woolman complains that the order or these factors does not reflect accurately the proper order of factors for the purpose of limitation analysis. He says that the express ordering of the factors may lead the courts to ask the wrong questions at the wrong time and then observes that the first factors and second factors – the nature of the right which has been infringed and that importance of the purpose of the limitation – are both well placed. It is with the third factor, according to Woolman, that the problems begin. This factor is the nature and extent of the limitation. He asserts that this factor is misplaced and that it should be placed last, inviting as it does, cost-benefit analysis, arguing that the fourth factor – the relation between the limitation and its purpose – belongs after the second factor. Once the legitimacy of the objective is established, says Woolman, it makes sense to ask whether the means employed to achieve the objective are rationally related to achievement of the objective. Woolman alleges that it is not at all clear what the *Makwanyane* court or the drafters mean by the 'nature... of the limitation', saying that they seem to be concerned that an apparently justifiable limitation – one which serves a legitimate end, employs means rationally connected to that end and reflects one of the least restrictive means possible for achieving that end – does not impose costs or burdens upon the rights-holder(s) which far outweigh the benefits said to flow to other members of society. He says that this enquiry is the only one which compares directly the competing and often incommensurable values at stake and is also an enquiry bound to put the court under the greatest political pressure. It asks the court to revisit the compromise of social interests struck by the co-ordinate branches of government. It is submitted that this point is nicely illustrated by the situation facing the court in the *TAC* case although the question of justifiable limitation of rights was not expressly discussed in the judgement. Woolman observes that various constitutional goods are incommensurable with one another and that equality is not reducible to freedom and dignity is not the same thing as expression. He predicts that there will be situations in

which constitutional goods will urge independent and irreconcilable claims upon us: in such situations we will have to choose between incommensurable goods and then goes on to give some topical examples, illustrating that the balancing of rights and interests is very often a matter of personal preference depending upon one's ideological point of view.

2.7.2 Limitations of rights in the health care context

In the context of health there is a considerable potential need to limit the rights of persons in order to preserve and protect health and to protect the users of health care services. Thus there is legislation which –

- regulates the practice of various health professions including the qualifications people must have in order to practice as health professionals, compulsory community service upon qualifying as professionals including where such community service must be carried out, questions of how they may advertise and the manner in which they must conduct their practices;[269]
- regulates the donation, acquisition storage supply and use of human tissue for various purposes;[270]

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[269] Health Professions Act 1974 (Act No 56 of 1974), Nursing Act 1978 (Act No 50 of 1978), Pharmacy Act 1974 (Act No 53 of 1974), Allied Health Professions Act 1982 (Act No 63 of 1982), Dental Technicians Act 1979 (Act No 19 of 1979) There is soon to be a Traditional Health Practitioners Act as well. At the time of writing it is being processed through Parliament. It is clear from the dates of this legislation that it precedes the 1996 Constitution by many years and that its provisions have not been tested in terms of litigation against the Bill of Rights which illustrate the fact that the alignment of South African law with constitutional principles is an ongoing process. This legislation has been amended from time to time, in some cases after the Constitution came into effect but not all of these amendments have been substantially significant. The Pharmacy Act is probably a notable exception in that in 1997 certain amendments were proposed which would open up access to ownership of pharmacies by non-pharmacists. The other exception is the Health Professions Act which compels dispensing doctors to obtain a licence from the Director-General. Davis, Cheadle and Haysom (fn 124 *supra*) after pointing out at p305 that the limitation provisions of the South African Constitution were drawn from the Canadian Charter of Rights and Freedoms refer at p313 to a Canadian case *Rocket v Royal College of Dental Surgeons of Ontario* (1990) 71 DLR (4th) 68 in which regulations governing the dental profession prohibited dentists from advertising. They observe that the Canadian Supreme Court had no difficulty in asserting the 'pressing and substantial' interest in regulating the profession and preventing irresponsible and misleading advertising on matters not susceptible to verification but found that the complete ban on advertising was a disproportionate means to effect this objective. It said that dentists should be able to 'advertise their hours of operation and the languages they speak, information which would be useful to the public and present no serious danger of misleading the public or undercutting professionalism…Moreover the value served by free expression in the case of professional advertising is not purely the enhancement of the advertiser's opportunity to profit…[t]he public has an interest in obtaining information as to dentist's office hours, the languages they speak and other objective facts relevant to their practice-information which [the law[prohibits dentists from conveying by advertising. Useful information is restricted without justification. The court held it was satisfied by these considerations that the adverse effect of infringement of the freedom of expression in this case outweighs the benefits conferred by the legislation.

[270] Human Tissue Act No 65 of 1983

- restricts the freedom of people to smoke where they please and the ability of suppliers of tobacco products to sell tobacco products and advertise such products as they choose;[271]
- restricts the location, nature and types of services of various kinds of health establishments;[272]
- how and by whom medicines may be sold;[273]
- who may own a pharmacy and under what conditions[274].

Much of this legislation highlights the points made by Woolman about choices in the balancing of constitutional rights and interests. In view of Woolman's observations, the concept of balancing of rights and interests is possibly overly simplistic. In its regulation of health professionals and health care goods the legislation offsets the restriction of supply against the need for public safety, academic and professional freedom and freedom of expression and commercial activity against public health and freedom and security of the person. These constitute value choices which may or may not be constitutional, depending upon a wide variety of circumstances. It is precisely due to the idea of the balancing of rights that a potentially boundless number of possibilities for constitutionally based litigation exists with regard to each of these statutes. The concept of balance implies a situation centred approach. What constitutes a balance in one situation may not necessarily

271 Tobacco Products Control Act No 83 of 1993

272 The National Health Act, at the time of writing has not yet been proclaimed effective by the President. It contains provisions for certificates of need in terms of which the Director-General has the power to decide where a health establishment may be constructed as well as whether any modifications to existing health establishments may be made. The Health Act No 63 of 1977 which is currently in force also makes limited provision in terms of regulations, for a certificate of need type process in the issuing of licences for private hospitals and some of the provinces, such as KwaZulu-Natal, which have enacted their own legislation also make provision for certificates of need to control health establishments.

273 The Medicines and Related Substances Control Act, 1965 (Act No 101 of 1965). An amendment to this Act in 1997 which becomes operational in May 2003 makes provision for the licensing of dispensing doctors and other health professionals who wish to sell medicines and restricts the power of such professionals to do so by compelling them to attend and pass a course to be established by the Pharmacy Council. Prior to this legislation dispensing doctors were able to dispense without such a licence. An amendment to the Health Professions Act which works in tandem with these provisions of Act 101 of 1965 and which compels dispensing doctors to obtain a licence to dispense medicines. The relevant section, 52 of the Health Professions Act, reads as follows:

" Dispensing of medicines

(1) A medical practitioner, dentist or other person registered in terms of this Act-

(a) may compound or dispense medicines only on the authority and subject to the conditions of a licence granted by the Director-General in terms of the Medicines and Related Substances Act, 1965 (Act 101 of 1965);

(b) shall not be entitled to keep an open shop or pharmacy.

(2) For the purposes of this section 'open shop' means a situation where the supply of medicines and scheduled substances to the public is not done by prescription by a person authorized to prescribe medicine." This is clearly a limitation of the right to pursue a trade, occupation or profession in terms of section 22 of the Constitution. The argument of the legislature is that it is justified. Whether or not it will be challenged on the basis of section 36 of the Constitution remains to be seen.

274 Pharmacy Act, 1974 (Act No 53 of 1974)

constitute a balance in another. The number of permutations of practical situations involving this legislation, the fact that cases of infringement of rights must usually be considered on their own merits and that generalisations are seldom possible, that one is often dealing with incommensurables, could lead to a situation in which, for a particular set of circumstances a particular law of general application does not constitute a justifiable limitation of rights but for another set of circumstances, it does. One cannot help but feel that within this paradigm, or lack thereof, the question of whether a limitation of rights is justifiable in terms of section 36 resembles a lottery. If the right combination of facts happens to proceed to litigation, the courts will decide that the limitation is unjustifiable despite numerous other factual combinations in which the limitation is uncontentious and justified. In other words, if constitutional validity of a particular provision or enactment is relative, one can never state with absolute certainty that such a provision or enactment is constitutional. It is a question of constitutionality of the effect or result of the limitation in each individual case rather than the constitutionality of the limitation itself.

2.7.3 Case Law

Interestingly there have been relatively few instances of significant[275] litigation against the state, challenging the legislation mentioned above, since the 1996 Constitution came into effect. The most pertinent case is that of *Minister of Health and Another v Maliszewski and Others* discussed below.

2.7.3.1 Minister of Health and Another v Maliszewski and Others [276]

Facts

275 In another case the Pharmaceutical Manufacturer's Association sought to challenge a perceived limitation of rights imposed by Act 90 of 1997, the Medicines and Related Substances Control Amendment Act, was settled out of court in favour of the state. The legislative principle that was contested remains unchanged. Another case, involving the 1993 Constitution, was against the state and the registrar of medicines who operates in terms of the Medicines and Related Substances Control Act No 101 of 1965. This case, *Reitzer Pharmaceuticals (Pty) Ltd v Registrar Of Medicines And Another* 1998 (4) SA 660 (T) is discussed further below.

276 *Maliszewski* 2000 (3) SA 1062 (SCA)

In this case, the Minister of Health appealed against a decision of the Transvaal division of the High Court in favour of 11 plaintiffs who had all obtained their medical qualifications outside South Africa and whose applications for full registration were denied on the ground that they had not written the Council's examination for full registration[277]. The plaintiffs argued that the Council's decision was unfair and unreasonable. In terms of the Medical, Dental and Supplementary Health Service Professions Act[278] as it read on 29 October 1997 (the date on which proceedings had been instituted) a medical doctor who had qualified overseas and whose qualifications were not accredited as being on a par with those of South Africa could be granted limited registration in terms of s 26. Those who had been granted such limited registration could qualify for full registration if, having met the requirements prescribed by s 28(1)(b) and (c), they passed the examination for full registration (EFR), a practical, clinical and oral examination similar to that set for South African medical students at the end of their final year of training. In order to facilitate the return of South African exiles and their spouses who had studied and qualified as medical practitioners while abroad, a special dispensation, under which the normal requirements for the recognition of foreign qualifications was eased, operated between April 1991 and the end of 1991. The special dispensation was a once-off concession to returning exiles, there being no intention of introducing a lasting change to the normal rules governing the recognition of a foreign qualification or of introducing a general practice. As the class of intended beneficiaries did not lend itself to simple definition, the dispensation also applied to foreigners who were not spouses of South African citizens but who had acquired South African citizenship by naturalisation before the cut-off date. Those who sought registration under the special dispensation had to qualify and apply for it before the end of 1991. The special dispensation departed from the normal rules governing the recognition of foreign qualifications in a number of respects, including the careful assistance and monitoring of candidates during their period of practice under limited registration, their qualifying for full registration after one year's practice under limited registration, and, if their heads of department certified them to be sufficiently competent for full registration, their not being required to do the EFR. The respondents, all medical doctors who had passed their primary

277 When the case initially began the 1993 Constitution was applicable. By the time it reached the supreme court of appeal, the 1996 Constitution had come into effect and the court had to decide under which constitutional dispensation the case should be decided. It concluded that it had to be decided under the 1993 Constitution.

278 Health Professions Act fn 269 *supra*

medical examinations at certain overseas universities before emigrating to South Africa, had been granted limited registration by the second appellant council, which form of registration permitted them to work only in the public service. All had since become permanent residents and had acquired South African citizenship after 31 December 1991. They sought an order in a Provincial Division compelling the appellants to register them as medical practitioners without restrictions, without their being required to do the EFR, as it was only with full registration that they would be able to enter private practice as general practitioners. They contended that, on the basis of their qualifications and experience, they were entitled to equal treatment with South African-born citizens or foreigners who had acquired South African citizenship and who had been able to benefit from the special dispensation.

Judgment

In its judgment the Supreme Court of Appeal began by acknowledging that: "The appellants are entrusted with the function of administering the health services in the Republic of South Africa."[279] It observed that in terms of section 28 of the Medical and Dental and Supplementary Health Professions Act (now called simply 'the Health Professions Act'), doctors like the respondents who had only limited registration could qualify for full registration provided they met the following requirements:

(1) In terms of s 28(1)(b) they must have held limited registration for at least two years.

(2) In terms of s 28(1)(c)(i) they must, while so registered, have practised in South Africa for at least two years, of which at least one year must have been at a public health facility approved by the Council.

(3) In terms of s 28(1)(c)(ii) they must submit a certificate by the head of the health facility at which they practised certifying that they are 'competent and of good character'.

(4) In terms of s 28(1) they could then apply to the Council to sit for the EFR. In terms of s 28(2) the EFR had to be an examination designed to ascertain whether the practitioner –

[279] *Maliszewski* see fn 276 *supra* at p 1066

'(a) possesses professional knowledge and skill which is of a standard not lower than that prescribed in respect of medical practitioners . . . in the Republic;

(b) has sufficient knowledge of the laws of the Republic applying to medical . . . practice . . . ; and

(c) is proficient in at least one of the official languages of the Republic'.

The court noted further that the EFR could be taken at any South African medical school. Only after the practitioner passed the EFR and complied with all the other requirements was he or she entitled to full registration (s 28(4))[280].

It acknowledged that in order to accommodate South African exiles returning home, the state and the council had introduced a temporary special dispensation for registration. Those who sought registration under the special dispensation had to qualify and apply for it before the end of 1991. The special dispensation was made subject to a cut-off date because it was intended to be a once-off concession to returning exiles. The court found that there was no intention to introduce a lasting change to the normal rules that govern the recognition of foreign qualifications, nor to introduce a policy to be followed in all future cases, nor to introduce a general practice[281].

The respondents abandoned their initial attack on the invalidity or unconstitutionality of any provision of the Act or the regulations. On their behalf it was also conceded that they were not entitled to full registration (and to the relief sought) merely by relying on the provisions of the Act and the regulations[282].

The court held[283] that:

"There is no basis for extending the provisions of the special dispensation to the respondents. The special dispensation, by its very terms, is not applicable to them. They cannot rely on an extension of it because it created no entitlement on which to rely; it did not establish a policy or general practice binding the Council in respect of future cases, nor could it be said to have created a reasonable or legitimate expectation on the part of the respondents that they would be able to rely

280 *Maliszewski* fn 276 *supra* at p 1068
281 *Maliszewski* fn 276 *supra* at p 1070
282 *Maliszewski* fn 276 *supra* at p 1072
283 *Maliszewski* fn 276 *supra* at p 1073-1074

on it or benefit from it. The respondents always knew what the requirements for full registration, applicable to them, were. They had either to pass the EFR or to approach the Council under s 4(g) to recognise their qualifications as being equal, either wholly or in part, to any prescribed qualifications. For individuals in the position of the respondents these requirements are neither onerous nor unfair. It follows that the respondents have failed to prove a basis for the application of the equality principle and thus of compelling the Council to grant them full registration."

It is important to note that the court commented that although the cut off date was somewhat arbitrarily chosen, as with all similar exemptions or exceptions or special dispensations, it was not done so unreasonably or unfairly and it was established and made known by the Council. When the special dispensation came to an end the full registration criteria became applicable. The court also observed[284] that the special dispensation:

"did not establish a policy or general practice binding the Council in respect of future cases, nor could it be said to have created a reasonable or legitimate expectation on the part of the respondents that they would be able to rely on it or benefit from it. The respondents always knew what the requirements for full registration, applicable to them, were. They had either to pass the EFR or to approach the Council under s 4(g) to recognise their qualifications as being equal, either wholly or in part, to any prescribed qualifications. For individuals in the position of the respondents these requirements are neither onerous nor unfair."

Discussion

In the last few observations of the court quoted above are some important guiding principles for setting policy, especially for once-off situations, in a way that avoids exploitation of the situation by the unscrupulous.

1. Arbitrariness does not necessarily equate to unfairness or unreasonableness where the circumstances are such that it is unavoidable to some degree.

2. Neither the dispensation nor the cut-off of the dispensation violated the principles of equality and there was no discrimination against the plaintiffs[285]. During and after the dispensation the same rules applied to everyone.

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[284] *Maliszewski* fn 276 *supra* at p 1073 - 1074

[285] In *Maliszewski* (fn 276 *supra*) at p 1073 the court noted at that: "Against the aforegoing it needs to be stated, as far as the equality argument is concerned, that the respondents have been treated on the same basis as all the other foreign doctors immigrating to South Africa who have acquired citizenship after December 1991. Thus viewed, there is no discrimination against the respondents. Nor is there discrimination against them vis-à-vis South African citizens by birth who qualified elsewhere but sought registration after December 1991 in South Africa: they have to pass the prescribed examination (unless they qualified in certain countries whose standards of training were by regulation accredited as being on a par with those of South Africa - which

3. The dispensation was communicated and established in such a way that it did not establish policy or general practice binding on the Council in respect of future cases.

4. The nature and limits of the dispensation[286] were clearly defined, thus ensuring that the intention of the Council to create a once-off situation for a limited period of time was established.

5. No legitimate expectations were created in the minds of the plaintiffs that they would or could benefit from the dispensation.

It is submitted that the golden thread in *Maliszewski*, and the reason for the state's success, is the clarity of the Council's intentions and the fact that they were obviously communicated to relevant persons coupled with an absence of unfairness or unreasonabless.

Another case, *Reitzer Pharmaceuticals*[287] highlights the possibility that it is not only express, detailed and conscious limitations of rights that can be problematic but also the limitation of rights through the formulation of legislation that is either overbroad or too vague or both. The facts of the case are given below together with the main points of the judgment.

2.7.3.2 Reitzer Pharmaceuticals (Pty) Ltd v Registrar Of Medicines[288]

Facts

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is not the case with the respondents). The only basis for the reliance on the equality principle lies in a comparison of the respondents, who acquired citizenship after December 1991, and other foreign doctors in their position who acquired citizenship before that date."

286 The court in *Maliszewski* (fn 276 *supra*) at p 1073 pointed out that: "As explained above, the special dispensation was a relaxation of the normal requirements for full registration for a limited group of individuals and for a limited time with a clear cut-off date. It amounted to a clearly defined exemption from the EFR. For the very reason that the Council did not wish to establish the special exemption as a general rule of practice or to create expectations, the cut-off date was established and made known."

287 *Reitzer* fn 275 *supra*

288 *Reitzer* fn 275 *supra*

In this case, the applicant pharmaceutical company sought an order referring to the Constitutional Court the question of whether the definition of 'medicine' in s 1 of the Medicines and Related Substances Control Act 101 of 1965 (the Act), read with sections 14 and 19 of that Act, was in conflict with the provisions of s 26(1) of the Constitution of the Republic of South Africa Act 200 of 1993 which deals with the right to freely engage in economic activity. It also sought an order, pending the decision of the Constitutional Court, interdicting the respondents from preventing it from manufacturing, selling and distributing one of its products called Florex. This was a dried yeast product prescribed by doctors and used by patients as an anti-diarrhoeal as an adjunct to antibiotic therapy, the (as yet unproven) theory being that it would restore the flora in the intestines destroyed by the use of antibiotics. The product was sold in pharmaceutical dosages in capsule form. All anti-diarrhoeals which were not available for sale immediately before 5 July 1968 were called up for registration in terms of a resolution of the Medicine Control Council, approved by the second respondent, the Minister of Health, and published in the Government Gazette of 5 July 1968. Florex had not been available for sale before that date and had therefore been called up for registration. Sales of medicines subject to registration but which have not been registered are prohibited by s 14 of the Act. The applicant's case was that Florex was a dietary supplement, not a medicine, and would therefore not have been subject to registration under the Act save for the over-broad definition of 'medicine' in s 1. Although at the time of the application no medicinal claims were being made in the advertising and packaging material, at the time of its launch the Florex label had indicated that it was intended 'for concurrent use with antibiotic therapy . . . or as prescribed by your doctor'. Further indications that the applicant regarded Florex as an anti-diarrhoeal were, *inter alia*, that it regarded Inteflora, a product manufactured, sold and used for a similar purpose, as a competitor and the manner in which Florex had been marketed on the applicant's behalf. The applicant's attack on the definition of 'medicine' was primarily directed at the word 'used' in the introductory phrase on the grounds that, for example, even water would fall under the definition of 'medicine' if it were used to treat or cure thirst.[289]

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289 From headnote *Reitzer* fn 275 *supra*

The respondents contended that the applicant itself conceded that the regulation and control of medicines, properly defined, is necessary and that its only complaint was that the definition of a medicine was too wide, so that the Act controls substances that are not really medicines. The respondents argued that Florex was so clearly and so obviously a medicine, whichever way one wished to define medicines, that it must and will fall within any reasonable definition of the word, and even the dictionary meaning thereof. Consequently, even if the Constitutional Court should declare the whole of the definition of medicine invalid Florex would still be a medicine - as understood in the ordinary grammatical sense of the word - and subject to registration, with the result that the declaratory order sought by the applicant would not be decisive of the real dispute between the applicant and the respondents, viz whether or not Florex should be registered as a medicine.

Judgment

The court did not accept the respondents' contention. It observed that the objection raised by the respondents was squarely dealt with in *Gooding v Wilson*[290]. That case concerned the constitutional validity of a Georgia statute making it a misdemeanor for any person, without provocation, to use to or of another, and in his presence, 'opprobrious words or abusive language, tending to cause a breach of the peace'. The conviction was based on the defendant's remarks to police officers while the defendant was participating in a picketing protest against the war in Vietnam. It quoted Mr Justice Brennan, delivering the opinion of the US Court as follows:

"It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution . . . the transcendentant (sic) value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity". . . . This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.
'Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or

290 *Gooding v Wilson* 405 US 518; 31 L Ed (2d) 408

unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. The result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights.' *Coates v City of Cincinnati. . . .*".

The court pointed out that the doctrine of over-breadth and vagueness are distinct but related concepts and quoted with approval from a judgement of the Canadian Supreme Court[291] which said that:

"Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. As the Ontario Court of Appeal observed in *R v Zundel* (1987) 29 CRR 349 . . . cited with approval by Gonthier J in *R v Nova Scotia Pharmaceutical Society* . . . the meaning of a law may be unambiguous and thus the law will not be vague; however, it may still be overly broad. Where a law is vague, it may also be overly broad, to the extent that the ambit of its application is difficult to define. Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a Legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective. Overbreadth analysis looks at the means chosen by the State in relation to its purpose. In considering whether a legislative provision is over broad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate."

At 209 Cory J said the following:

"In determining whether s 179(1)(b) is overly broad and not in accordance with the principles of fundamental justice, it must be determined whether the means chosen to accomplish this objective are reasonably tailored to effect this purpose. In those situations where legislation limits the liberty of an individual in order to protect the public, that limitation should not go beyond what is necessary to accomplish that goal."

The court of appeal noted that a similar approach was adopted by the Constitutional Court in striking down the Indecent or Obscene Photographic Matter Act 37 of 1967 in which it was plainly recognised by the court that there were certain forms of obscenity which would justify a prohibition even on their possession. This did not prevent the Court from striking down the statute as a whole. The court quoted with approval the following words of Didcott J in *Case and Another v Minister of Safety and Security and Others*; *Curtis v Minister of Safety and Security and Others*[292]:

291 *R v Heywood* 24 CRR (2d) 189 (SCC) at p 208

292 *Case and Another* 1996 (3) SA 617 (CC)

"Such questions do not arise at present and are best left unanswered until some future case confronts us with them. But the trouble one now has with s 2(1) is that it hits the possession of other material too, material less obnoxious and sometimes quite innocuous which we cannot remove from its range while it lasts because the parts of s 1 giving it that effect are not satisfactorily severable from the rest."

It then proceeded to consider the prospects of success and looked *inter alia* at the purpose of the Medicines and Related Substances Control Act[293]. In doing so it referred to the words of Kriegler AJA, as he then was, in *Administrator, Cape v Raats Röntgen and Vermeulen (Pty) Ltd*[294]:

"It would be advisable to pause for reflection lest the wood become obscured by the trees. Manifestly the Act was put on the statute book to protect the citizenry at large. Substances for the treatment of human ailments are as old as mankind itself; so are poisons and quacks. The technological explosion of the twentieth century brought in its wake a flood of pharmaceuticals unknown before and incomprehensive to most. The man in the street - and indeed many medical practitioners - could not cope with the cornucopian outpourings of the worldwide network of inventors and manufacturers of medicines. Moreover, the marvels of advertising, marketing and distribution brought such fruits within the grasp of the general public. Hence an Act designed, as the long title emphasizes, to register and control medicines. The enactment created a tightly meshed screening mechanism whereby the public was to be safeguarded: in general any medicine supplied to any person is, first, subject to stringent certification by experts; then it has to be clearly, correctly and comprehensively packaged and labelled and may only be sold by certain classes of persons and with proper explanatory information; to round it out detailed mechanisms for enforcement are created and ancillary measures are authorised."

The court ruled that the limitation does not negate the essential content of the right in question and that it was reasonable and justifiable for 'medicine' to be defined widely."[295] On the strength of the foregoing, the temporary interdict sought by the applicant was refused.

Discussion

It is submitted that the interests of the public represented by the legislation and which were sought to be protected by the legislation were highly influential of the court's decision not to grant the interdict and to tolerate an extremely broad definition of a medicine. Thus a provision which may be very broad in its scope, and might even be regarded as overbroad

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293 Act No 101 of 1965

294 *Administrator, Cape v Raats Röntgen and Vermeulen (Pty) Ltd* 1992 (1) SA 245 (A) at 254B–E

295 *Reitzer* fn 275 *supra* at p 684

in other circumstances, can be saved by the weight and nature of the public interest it seeks to protect. The rigorous nature of the court's examination of both the definition of 'medicine' and the relevant constitutional principles is indicative, however, of the level of judicial caution that is applied to questions of over broadness and vagueness of legislative provisions that have an impact on constitutional rights. In this case the right in question was of freedom of economic activity because the definition of a medicine, when read in conjunction with another provision of the Medicines Control Act that prohibited the sale of medicines unless they were first registered in terms of the Act, had the effect of significantly restricting the freedom of economic activity in relation to medicines.

It is surprisingly difficult to define a medicine legislatively particularly when one starts looking at the question of whether a substance is a nutritional supplement and also given the fact that certain substances when applied or used in a certain way could constitute a medicine and at other times, not. For instance, common salt (sodium chloride) can be used as a medicine in certain circumstances. The natural element of the periodic table, iodine, is usually a solid and has many different applications only some of which are medicinal. It is when it is combined with certain other substances for use in the treatment of wounds, hyperthyroidism or medical diagnostics, that it becomes a medicine. In terms of the general regulations to the Medicines and Related Substances Act, a wound dressing is also a medicine despite the fact that when most people think of medicines they think of potions and pills. Certain chemicals that occur naturally within the human body are also classified as medicines for example, testosterone, oestrogens and prostaglandins since they are used as medicines in the treatment of illness. Vitamins can be either dietary supplements or medicines depending upon the purpose for which they are used and their dosage strengths. There is also the question of active pharmaceutical ingredients (APIs) and the 'packaging', in the form of the other inactive ingredients, with which they are sold for use by patients. A tablet for example consists of a combination of the API and the inactive ingredients. An API on its own, may or may not be a 'medicine' depending upon whether it is in a form that is suitable for use as such by a patient since a medicine is a substance that is "*used* or purporting to be *suitable for use* or manufactured or sold *for use* in-

(a) the diagnosis, treatment, mitigation, modification or prevention of disease, abnormal physical or mental state or the symptoms thereof in man; or

(b) restoring, correcting or modifying any somatic or psychic or organic function in man" [writer's italics]

It is clear from the foregoing that the concept of a medicine is highly complex and technical matter that depends on the circumstances of its use and the purpose for which it is sold. The Act refers to medicines and scheduled substances the latter being defined as "any medicine or other substance prescribed by the Minister under section 22A".

It is submitted with respect that the decision of the court was constitutionally correct in this case because it weighed up the interests concerned and came to the conclusion that the balance was in favour of a wide definition of a medicine. The constitutional right to freedom of economic activity in the interim constitution has been replaced in the Constitution with a right to *freely choose* a trade, occupation or profession. It is significant that the drafters of the Constitution saw fit to make such a change. One can no longer speak of a constitutional right to freedom of economic activity in the broad sense as one could when the interim constitution was still in place. The Constitution expressly states that the practice of a trade, occupation or profession may be regulated by law. Furthermore, the right to freely choose one's trade occupation or profession in the Constitution is limited to citizens. Since only natural persons can become citizens the right does not available to juristic persons. In any event, it is submitted that given the existence and regular application and enforcement of legislation such as the Competition Act[296], the Consumer Affairs, (Unfair Business Practices) Act[297] and the various pieces of provincial legislation concerning consumer affairs[298], not to mention the common law of contract, it is submitted that a broad right to freedom of economic activity is notional at best.

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296 Competition Act No 89 of 1998

297 Consumer Affairs Act No 71 of 1998. In *Janse Van Rensburg No and Another v Minister Of Trade and Industry And Another NNO* 2001 (1) SA 29 (CC) the constitutional court held that section 8(5)(a) of the Act was unconstitutional but it the Act itself still stands. The court in this case suspended its order of constitutional invalidity for twelve months in order to give the legislature an opportunity to rectify the defect in the section.

298 See for instance Consumer Affairs (Unfair Business Practices) Act No 8 of 1996 (Limpopo Province); Consumer Affairs (Unfair Business Practices) Act No 5 of 1998 (Eastern Cape Province); Consumer Affairs (Unfair Business Practices) Act No 7 of 1996 (Gauteng Province); Consumer Affairs (Unfair Business Practices) Act No 14 of 1998 (Free State); Consumer Affairs (Unfair Business Practices) Act No 4 of 1996 (North West Province)

2.7.3.3 *Affordable Medicines Trust and Others v Minister of Health* [299]

Facts

The relief sought by the applicants initially entailed an extensive challenge to various sections of the Medicines and Related Substance Act[300] as amended and regulation 18 of the General Regulations[301] to that Act on the basis of their constitutionality. At the core of the relief sought by the applicants was a ruling by the court that the legislative provisions that medical practitioners may not dispense medicines without a licence issued by the Director-General of Health was unconstitutional and thus invalid. At the hearing the relief sought by the Applicants was narrowed down to the following –

1. That section 22C(1)(a) of Act 101 of 1965 was unconstitutional and invalid inasmuch as it refers to "on the prescribed conditions".

2. That Regulations 18(3)(b),(f),(g),(h) and (i), 18(4), 18(5), 18(6) and 20 of the General Regulations were unconstitutional and invalid.

Section 52 of the Health Professions Act[302] was amended by the Health Professions Amendment Act[303] to the effect that a medical practitioner could only dispense medicines on the authority and subject to the conditions of a licence granted by the Director-General in terms of the Medicines and Related Substances Act. The applicants objected to the fact a medical practitioner's dispensing licence is coupled to a particular premises arguing that doctors has for centuries held the right to dispense medicines as part of their practice. This was subject in principle to regulation by the Health Professions Council but in practice only a register was kept by the Council with no further regulatory requirements imposed. The applicants argued that section 22C(1) of the Medicines Act was silent on the question of

299 *Affordable Medicines Trust* unreported at the time of writing. Case number 1908/2004 in the Transvaal Provincial Division of the High Court. Judgment dated 02 July 2004.
300 Act No 101 of 1965
301 General Regulations published in Government Gazette No 24727 on 10 April 2003.
302 Health Professions Act No 56 of 1974
303 Health Professions Amendment Act No 89 of 1997

premises associated with the licence and that the Minister of Health was effectively making law which adversely affected the rights of health professionals and their patients. The respondents argued that the provisions of the Health Professions Act did not sufficiently regulate the 11000 or so practitioners whose names were on the register as being dispensers of medicines. It argued that there were no standards, norms or guidelines to ensure that dispensing medical practitioners complied with or adhered to good dispensing and compounding practices and that a number of unacceptable practices, including bonussing, sampling of medicines and receipt of unacceptable incentives by dispensers of medicines occurred. This led to inappropriate prescribing, compounding and dispensing of medicines, increased costs of healthcare to the public and resulted in widespread bad dispensing practices. The applicants argued that if the legislature intended to limit a practitioner's right to dispense medicines to particular premises it should have said so in the relevant statutes. They argued that the regulatory provisions as they stood offended against the rule of law and the principle of legality. The stated government purpose of the licensing process is to increase access to medicines that are safe for use by the public.

Judgment

Kruger AJ observed that it is trite that one of the pillars on which the South African democratic dispensation is based is the principle of separation of powers and that as a general point of departure courts will be loath to enter into the fray of legitimate government policy. He stated that it is not for a court to adjudicate upon or apply value judgments with regard to the contents of government policy. At the same time, the principles of transparency and accountability constitute values which underpin the entire fabric of the Constitution. Herein, he said, lies a marked difference between the old order and the current dispensation. In the latter the formulation of policy is subject to public scrutiny and input and the end product is susceptible to assessment by the public. Public officials whether politicians or civil servants must be held responsible for their policies by the public. Kruger AJ noted that accountability in this sense forms part of the political process and it is not for the courts to interfere with policy matters under the guise of accountability. He observed that the respondents in their answering papers provided ample detail regarding the process which was followed and which resulted in the government

policy at issue and that the constitutional requirements of transparency and accountability had been complied with. The merits or de-merits of the policy that ensued were therefore immaterial, said Kruger AJ, for purposes of the constitutional challenges to be adjudicated upon. He stated that the remaining question was whether it could be said that the existence of a legitimate government purpose had been proven. In a nutshell the stated government purpose was to increase access to medicines that are safe for use by the public. Kruger AJ observed that this constitutes a legitimate government purpose[304]. The court noted that the applicants alleged in essence that the envisaged system of licensing with particular reference to the coupling of a licence to specific premises, is not rationally connected to the stated government purpose and that the licensing of premises was introduced for the first time by way of regulation 18, which the first respondent purportedly made in terms of section 22C(1). It noted further that the applicants alleged that regulations 18(3) and 18(4) where they refer to licensed premises are unconstitutional, that regulation 18 was unconstitutional inasmuch as the Minister had no power to make them and that substantial parts of the regulations are invalid on the grounds of vagueness or arbitrariness.

Kruger AJ pointed out that it was evident that the General Regulations were made in terms of the empowering section of the Medicines Act, namely section 35. The latter, *inter alia* makes provision for the making of regulations regarding storage, sale or use of medicines in respect of safety, quality and efficacy, the conditions under which medicines or scheduled substances may be sold and generally for the efficient carrying out of the objects and purposes of the Act. Hence, said the court, the Minister has comprehensive powers to make regulations on any aspect pertaining to the safety, quality and efficacy of medicines including their storage, keeping, use, sale, supply and the like. Kruger AJ stated that it is self-evidence that premises where medicines are kept or stored should adhere to certain minimum requirements and should be controllable as such. Even under the previous

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304 Kruger AJ noted the reference by Chaskalson P in *S v Solberg; S v Negal; S v Lawrence* (fn 137 *supra*) where he referred with approval to a passage from *Carmichael, Attorney General of Alabama v Southern Coal and Coke Co* 310 US 495 [1937] at 510, at [43]: "A State legislature, in the enactment of laws, has a widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious or, that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

regulatory regime which only registered dispensing medical practitioners, they were required in terms of section 52(1)(a) of the Health Professions Act to confirm the address from which they would dispense. In their replying affidavit the applicants had also confirmed that the register kept in terms of section 52(1)(a) of the Health Professions Act regulates "technical aspects such as appropriate premises, adherence to statutory requirements, the storage of medicines etc." Kruger AJ observed that the fact that the applicants concede that dispensing practices should be properly controlled appears from the statement made in the replying affidavit where the deponent states that issues such as the appropriate premises, adherence to statutory requirements and the storage of medicines are matters of which a patient would have no knowledge "but which would need to be regulated and controlled in the public interest". He noted further that the applicants elsewhere made mention of the need for adequate dispensing controls and conditions and that they support the governments' goals to ensure that high quality and appropriate medicines are safely distributed from clean and suitably equipped dispensing premises by properly trained dispensers. They also supported the regular inspection of premises to ensure that good dispensing practice is maintained. The court concluded that the principle of a known and identifiable address where medicines are kept is thus not foreign or new, even to the old dispensing, neither did the applicants contest that regular inspection and proper control go hand in hand with the safe supply of medicines from clean and suitably equipped dispensing premises. Thus, said the court, requirements regarding "licensed premises" are fully compatible with these facts in the context of section 35 of the Act.

Kruger AJ noted that the applicants relied heavily on what they referred to as "as symbiosis between section 22C(1)(a) and the regulations". This "symbiosis" was allegedly borne out by way of the express reference in Regulation 18(1) to section 22C(1). He observed that section 22C(1) in essence deals with the empowerment of the Director-General to issue a licence to compound and dispense medicines. Regulation 18(1) does no more than confirm that an application for a licence to dispense or compound medicines should be directed at the Director-General. It is in that sense, said the court, that the reference to section 22C(1) as it appears in regulation 18(1) should be understood. Consequently, Kruger AJ found that he could not agree with the submission on behalf of the applicants that the relevant

regulations were not made in terms of section 35 of Act 101 of 1965 but as per regulation 18(1) they were made in terms of section 22C(1) of the Act. The court held that the regulations in general and regulation 19 in particular were made by the Minister in terms of section 35 of the Medicines Act. Thus the proximate cause of the alleged infringement did not lie in section 22C(1)[305].

The court noted that it is within the power of parliament to determine what scheme should be adopted to attain the stated government purpose. The core issue is where the impugned provisions (which include the "prescribed conditions") are rationally related to the stated government purpose. The latter includes the provision of medicines that are safe for use by the public. That in turn, by necessary implication implies the regulation of premises from which medicines are dispensed. That indeed, said the court, is what the legislation and the scheme brought about by it intend to address and achieve. It held that there was a clear rational relationship between the stated government purpose and the impugned legislation to the extent that the scheme brought about by the latter is clearly aimed at the provision of medicines that are safe for use by the public, and which will *inter alia* only be provided from identified premises which are controllable. The court noted that in terms of section 1 of the Medicines Act, "prescribed" is defined as "prescribed by or under the Act". The term "this Act" is defined to include "any regulation". The latter means "a regulation made and enforced under this Act". The term "on the prescribed conditions" therefore means conditions made or enforced under the Medicines Act. Thus, said the court, the fact that regulation 18(3)(b) provides for that the exact location of the premises where compounding and/or dispensing will be carried out must form part of the application at the utmost differs only in degree from the former position in terms of section 52(1)(a) of the Health Professions Act. In terms of the latter the medical practitioner has to confirm the address from which he or she will dispense. Whether providing such an address could or could not be regarded as a "condition" said that court, is a matter of degree. At the very least, stated Kruger AJ, the higher threshold brought about by the new dispensation did not render the impugned provisions irrational vis-à-vis the legitimate government purpose. On the contrary, not only was the condition that the exact location of the premises (where

305 The court referred in this regard to *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) at 205C-E paragraph [21].

compounding and/or dispensing will be carried out) rationally related to the stated government purpose, it did not differ materially from the old dispensation to the extent that it did not introduce a wholly new and foreign element. Read with regulation 18(7), said the court, it made perfect sense. The court held that the words in section 22C(1)(a) "on the prescribed conditions" read with the contents of regulation 18 are rationally related to the stated government policy.

Kruger AJ noted that the regulations were made in terms of section 35 of the Medicine Act and not in terms of section 22C(1)(a). This section, he said, provides ample scope for the Minister to make regulations. He stated that the purpose of regulations is to spell out detail which, should it have been included in empowering legislation would render the alter cumbersome or which, by the very nature of the legislation itself could conveniently be dealt with by way of regulations without attempting to empower the relevant Minister to supersede Parliament's legislative function or to assume legislative powers which due to their very nature reside with Parliament. In the current instance the court found that the Minister did not assume Parliament's residual legislative powers, nor did she exceed the powers bestowed on her by section 35 to make regulations; the impugned parts of the regulations fall squarely, said the court, within the parameters imposed by section 35 regarding issues on which the Minister is empowered to make regulations. The court observed that the legislature probably appreciated that the conditions to be imposed might be of a specialised nature which required certain skills and expertise which would be more appropriately dealt with by those possessed of such skills and expertise. It held that the conditions imposed by the Minister, in consultation with the specialist body (the Medicines Control Council) were foreseen by the legislature to be of a nature which would not, in the ordinary course of events be conveniently dealt with by the Legislature itself. For this reason said the court it took the view that the Minister did not exceed her powers in making the regulations which couple the doctors' right to dispense medicines to licensed premises.

With regard to regulation 19 the court observed that it required very little imagination to envisage that circumstances prevailing at different proposed dispensing premises may differ considerably. The circumstances of a busy city practice would be substantially different to

those in some far off corner in the Karoo or the Limpopo Province. It may be easier, said the court, for the dispensing doctor in a remote rural area to provide particulars with regard to the existence of other licensed health facilities in the vicinity of the premises from where the compounding and dispensing of medicines is intended to be carried out; to give a description of the geographic area to be served by the applicant; or to provide demographic considerations including disease patters and health status of the users to be served. On the other hand, the city practitioner would find it relatively simply to describe the geographic area to be served by herself by naming the suburb/s served by the practice, but may experience some difficulties in estimating the number of health care users in that geographical area. The court stated that circumstances would dictate the particularity with which the requested information could be provided. Kruger AJ held that it did not follow that the information requested was necessarily arbitrary or capricious in nature. He observed that it is trite that words and expressions used in an enactment must be interpreted according to their ordinary meaning as well as in the light of their context. The latter is not limited to the language of the rest of the enactment but extends to the subject matter thereof, its apparent scope and purpose and within limits, its background. Where the language itself appears to admit of more than one meaning, one may from the beginning consider the context and the language to be interpreted together.[306] The court said that taking into consideration the wide variety of circumstances that may prevail between different applicants from different cities, towns or parts of the country, the regulations must of necessity be phrased in a way in which, when responded to by the different "categories" of dispensing doctors, will provide the relevant decision-maker with sufficient material in order to be able to come to an informed decision. Kruger AJ said he found it hard to conceive that information which is to be supplied for the purposes envisaged by the regulations and in particular, Regulation 18(4), could be phrased in a more specific or normative way taking into consideration that the factors relevant to the decision to be made are so numerous and varied. He said it would have been extremely difficult (if not impossible) for the legislature as well as for the executive to have been more specific. To have attempted to identify potentially extreme variables in terms of narrow and specific criteria would not only have been impractical but well nigh impossible. He noted that the

306 The court referred to *Jaga v Dönges N.O. and Another* 1950 (4) SA 653 (A) at 662G-663A in this regard.

criteria in the regulations apply equally to all applicants and taking into consideration his or her prevailing circumstances each applicant could, to the best of his or her ability, provide the required information. The overarching objective is to increase access to medicines that are safe for use by the public. Kruger AJ then analysed in further detail the provisions of regulation 18(4)(a), 18(4)(b), 18(4)(c) and (d), 18(4)(e) and 18(4)(f), 18(5), 18(6) and 20. he observed with regard to the whole of Regulation 18(4) that it was evident that none of the factors referred to therein was decisive, of its own, of the decision to grant or refuse a licence and that clearly the objective was to attain an overall picture regarding the issues mentioned within the context of the overarching government purpose. He said that within the stated context the impugned provisions were clearly not intended to establish rigid norms or standards, nor to elicit rigid responses. They are phrased in a general way for reasons which are intended to elicit generalised responses with a view to enable the decision-maker to construe a general impression. Within that context, said the court, it did not regard any of the impugned provisions as arbitrary, vague or capricious or not objectively ascertainable with regard to the overall objective they were devised to attain. Kruger AJ said that it should further be borne in mind that should an applicant be aggrieved by the outcome of his or her application, the law provides for the means to address any alleged injustice. He said it was important to bear in mind that discretionary powers may be broad[307]

The court then went on to examine the alleged infringement of rights and noted that the constitutional challenge was narrowed down considerably compared to the initial attack on the licensing system *en bloc*. The main bone of contention was the coupling of a dispensing licence to particular premises. It noted that certain rights in the Bill of Rights had been relied upon by the applicants, namely the right to equality in terms of section 9, the right to practice their profession freely in terms of section 22, the right to dignity in terms of section 10, the right to freedom of movement in terms of section 21 and the right to property in

[307] The court referred in this regard to *Dawood and Others v Minister of Home Affairs* fn 12 *supra* at 969 B-C para [53] where it was stated: "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly when the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made."

terms of section 25. The allegation was that the coupling of the licence to dispense medicines to licensed premises unjustifiably interferes with these rights in a manner that cannot be justified having regard to the provisions of section 36 of the Constitution. In addition the applicants contended that the coupling of a practitioner's licence to dispense to a particular premises constitutes and infringement of patients' rights, eg the right of choice from whom she wishes to receive medicine or will receive medicine in the future. The upshot was that the alleged infringement interfered with the patient's right to choose a particular practitioner and her right to enter into a private contractual relationship with such practitioner. The applicants alleged that this was an affront to the patient's dignity.

The court noted that section 22 of the Constitution provides that:

"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law"

It stated that the content of the right in section 22 is the right to choose a trade, occupation or profession within the framework of any lawful regulation which controls its practice[308]. Kruger AJ pointed out that the government may control the practice of a trade, occupation or profession provided that any restrictions on the practice must be rational. He noted that the fact that section 22C of the Medicines Act introduces a licensing system for the dispensing of medicine by medical practitioners was not challenged per se and that the applicants aver that there is a conceptual difference between regulating and limiting. They argued that the impugned legislation goes beyond mere regulation and that it limits under the guise of regulation. The respondents contended that the impugned provisions did no more than regulate and that it is legitimate to regulate the practice of a profession so as to prevent harm to the general public, that public health is an important community interest

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[308] The court referred to *Van Rensburg v South African Post Office Ltd* 1998 (10) BCLR 1307 (A) and *S v Solberg: S v Negal; S v Lawrence* (fn 137 *supra*). In *Solberg* the court held that: "Certain occupations call for particular qualifications prescribed by law and one of the constraints of the economic sphere is that persons who lack such qualifications may not engage in such occupations. For instance nobody is entitled to practise as a doctor or a lawyer unless he or she holds the prescribed qualifications and the right to engage 'freely' in economic activities should not be construed as conferring such a right on unqualified persons. Nor should it be construed as entitling persons to ignore legislation regulating the manner in which particular activities have to be conducted, provided always that such regulations are not arbitrary." In *Van Rensburg* it was stated that: "The important point is that the Post Office Act does not place any absolute or unqualified barrier to the appellant's choice of a lawful trade, occupation or profession. It does not more than put reasonable controls into place on the conduct of the postal service, controls which have regard to the economic necessities of our times. This does not violate the appellant's section 22 rights".

that calls for regulation and that the orderly dispensing of safe medicines is crucial for the health of those who receive and consume such medicines. The applicants contended that legal practitioners have a constitutionally protected right to dispense medicines, that such right had been historically established, that a medical practitioner has had a right to be registered as a dispensing doctor in terms of section 52(1)(a) since 1984, that the said section gave recognition to the right of medical practitioners to dispense (should they comply with the requirements for registration) so that the section merely gave that right a statutory context by requiring a name to be entered in the register. As such it merely constituted statutory confirmation of the right of doctors to dispense and the right of patients to receive medicine; none of the restrictions envisaged by the new system applied. The respondents argued that where the protection of public health is in issue, a more rigorous form of protection has been considered to be more appropriate by the legislature and given effect to by the executive. Although section 52(1)(a) of the Health Professions Act allowed a medical practitioner whose name was entered in a register to compound and dispense medicines such medical practitioners were not adequately regulated; there were no standards, norms or guidelines to ensure that they complied with or adhered to good dispensing and compounding practices. The coupling of the licence to dispense with a particular premises addresses those needs. The issue is not whether medical practitioners have a right to dispense for some or other reason but whether the impugned legislation in the first instance exceeds the boundaries of lawful regulation. Only if the answer to the latter question is in the affirmative, does the question regarding the possible curtailment of rights arise.

The court held that the issue was whether the impugned provisions limited the rights claimed by the applicants to the extent that they infringed any of these rights. In the view of the court the impugned provisions did no more than regulate the practice of dispensing and did not infringe the medical practitioner's rights to choose to practise as a medical practitioner or to choose to dispense medicines as part of his or her practice, albeit at an identified premises. The court stated that medical practitioners were not barred from applying for and being granted a licence entitling them to do so. It found that the overarching consideration is one of a legitimate government purpose regarding which a

particular scheme was devised by the legislature and to which the executive has given effect within lawful and valid bounds. It was the view of the court that issues regarding possible limitation of rights need not be considered at all as none of the rights relied on had been infringed upon. Consequently, said the court, whether the stated government purpose could have been achieved by less intrusive means fell outside of the ambit of its judgment. It held that it was not for the court to express an opinion regarding the state's preference for the scheme of licensing or to speculate with regard to better ways of attaining the stated government purpose.

The court found with regard to the alleged encroachment on patient's rights that no such encroachment had occurred. The fact that some patients may suffer a certain degree of inconvenience as a result of the way in which medical practitioner's rights to dispense are regulated does not result in the conclusion that a patient's dignity is being impaired on that his or her right to enter into a contractual relationship with a doctor of his or her choice is encroached upon to an extent which would render such encroachment unconstitutional. It said that to hold thus would be to extend the boundaries of patients' rights to an unrealistic Utopia.

The court concluded that the application should be dismissed on all grounds relied on by the applicants.

Discussion

The appellants in this case lost sight of a number of well established points of law with regard to the manner in which legislative requirements can and must be construed and applied. The law does not require the impossible of people[309]. Where it is objectively

[309] In *Gassner NO v Minister Of Law And Order And Others* 1995 (1) SA 322 (C) Van Zyl J observed that: "A substantial amount of academic discussion has been directed at the applicability of the maxim *lex non cogit ad impossibilia* in criminal law. See Joubert (ed) *The Law of South Africa* vol 6 para 55-9 at 45-6; van Oosten F F W 'Die Aard en Rol van die Stelreël Lex non Cogit ad Impossibilia in die Strafreg' in (1986) 49 *THRHR* 375-410 (an article containing an interesting discussion of the legal nature of the maxim as a defence and with a useful resumé of relevant comparative law); Burchell and Hunt *South African Criminal Law and Procedure* 2nd ed (1983) vol I at 351-4; De Wet and Swanepoel *Strafreg* 4th ed (1985) at 92-4; Visser and Vorster *General Principles of Criminal Law through the Cases* 3rd ed (1990) at 234-40; Snyman *Strafreg* 3rd ed (1992) at 62-5. See also Goldstein E L 'Onmoontlikheid in die Suid-Afrikaanse Strafregsisteem' in (1966) 29 *THRHR* at 366-8 and the discussion by Ellis J of *S v Mxhosa* 1986 (1) SA 346 (C) in (1986) *De Jure* at 393-7. In his discussion of the maxim *lex non cogit ad impossibilia*, Broom *A Selection of Legal Maxims* 10th ed (1939) at 162 translates it as: 'The law does not compel a man to do

impossible for an applicant for a dispensing licence to supply certain information he or she cannot be expected to do so. Administrative officials are required to act reasonably in taking administrative decisions[310]. They are also required to act reasonably in interpreting and implementing legislation. They are obliged to give reasons for their decisions both generally in terms of the Promotion of Administrative Justice Act[311] and in terms of the Medicines And Related Substances Act[312]. There appeared to be an assumption or belief on the part of the applicants that the Director-General would act unreasonably in enforcing the relevant provisions of the Act and the regulations and that the intention was to refuse as many applications for dispensing licences as possible. The only alternative is that they were simply trying to attack the relevant legislative provisions on every possible front.

The Constitution itself recognises the power of the state to regulate the practice of a trade, occupation or profession. The argument of the appellant that regulation does not mean limitation is specious since it is an inherent quality of regulation that it sets boundaries or

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that which he cannot possibly perform.' The word 'law' is used here in a general sense and is apparently not restricted to 'a law' in the sense of a statutory enactment. I do not believe that this is an accurate translation, since 'law' in a general sense would usually be rendered as *ius* rather than *lex*. That *lex* does in fact refer to a statute or a law appears from Broom's (*loc cit*) equating the said maxim with *impotentia excusat legem*, in the sense that the inability to perform or comply with an obligation imposed by a legal provision excuses such failure to perform or non-compliance. This is the meaning accorded to *impotentia excusat legem* in the English case of *Eager v Furnivall* (1881) 17 ChD 115 at 121 (per Jessel MR). A better approach than that of Broom may be found in Craies on Statute Law 7th ed (1971) at 268, where it is said: 'Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, *Lex non cogit ad impossibilia*, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse.' This approach appears to have been acceptable in English law and has been applied in South African decisions from as early as 1880. I refer in this regard to *Hay v The Divisional Council of King William's Town* (1880) 1 EDC 97 at 100, where Smith J says: '. . . [W]hen a duty is imposed upon anyone by law, there must always be an implied condition that it is in his power to perform it. *Lex non cogit ad impossibilia* and *impotentia excusat legem* (Coke on Littleton), are very old maxims of law.'" The court noted further that: "In *John Roderick's Motors Ltd v Viljoen* 1958 (3) SA 575 (O) at 577H-578A the maxim is rendered as *lex non cogit ad impossibilia aut inutilia*, the *inutilia* presumably referring to 'unreasonable things' or, simply, 'unreasonableness'. In this context *inutilia* is certainly not synonymous with *impossibilia* in that unreasonableness need not give rise to or even suggest impossibility. Smit AJP appears to have relied on Maxwell on *The Interpretation of Statutes* 8th ed (1937) at 322 as a source for this rendition of the maxim. Counsel for the applicant referred the learned Judge to the ninth edition (1946) at 387. Neither of these editions was available to me but in the 12th edition by P St J Langan (1969) at 326 the maxim is cited without the addition of the words *aut inutilia*, in the context of intentions attributed to the Legislature when none is expressed."

See also *Montsisi v Minister Van Polisie* 1984 (1) SA 619 (A)

310 *Ampofo And Others v MEC For Education, Arts, Culture, Sports And Recreation, Northern Province, and Another* 2002 (2) SA 215 (T) Ngoepe JP, Hussain J and Basson J held that: "Reasonable administrative action in terms of s 33 of the Constitution has also been held to mean that a functionary (such as the department) is obliged to make decisions that are rationally justifiable (*Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241)). The Department cannot therefore be obliged to exercise its discretion in a particular manner merely because it has done so in the past. It is required to exercise its discretion in a rational and unfettered fashion. As stated earlier, a legitimate expectation cannot be relied upon to force a functionary to act unlawfully or contrary to its statutory duties."

See also *Mahambehlala v MEC for Welfare, Eastern Cape, and Another* 2002 (1) SA 342 (SE)

311 Act No 3 of 2000

312 Section 22C(4) of Act No 101 of 1965 specifically states that: " When the Director-General or the council, as the case may be, grants or refuses an application for a licence-

(a) written notice shall be given of that fact to the applicant; and

(b) in the event of the refusal of an application, the applicant shall be furnished with the reasons for such refusal."

parameters for the conduct or activity being regulated. A boundary is a limitation. Such boundaries may be set in a number of different ways, for instance by defining a particular term as inclusive of some aspects and exclusive of others, by outright prohibition of certain activities, by imposing conditions or defining the circumstances in which certain actions must or must not be taken. Regulations may not always limit constitutional rights as envisaged by section 36 of the Constitution since constitutional rights may not always be in issue. However, where the constitutional right itself includes a recognition that it may be regulated or controlled in some way, by implication this means that it is inherent to the right itself that its exercise can be limited and is subject to government control[313]. If one wants to split hairs one can talk about the limitation of the power to exercise a right as opposed to the limitation of the right itself but such detailed analysis is seldom likely to take matters much further given that the courts have already said that the rights in the Bill of Rights are not absolute[314]. One can have unlimited power to exercise a limited right or limited power to exercise a very board right. To speak in such terms, is however to draw false distinctions as is illustrated when one takes the spectrum to its extremes – i.e. one can have so little power to exercise the widest possible right that it can seldom if ever be exercised or every power to exercise a right which is so devoid of content that it is meaningless. Either way one ends up with nothing. In any event section 36 of the Constitution refers to limitation of the rights in the Bill of rights while section 22 states that the practice of a trade occupation or profession may be regulated by law. If one looks at the wording of section 22 more closely the right is not to *practice* any trade, occupation or profession freely. This possibility is expressly excluded by the second sentence in section 22. The first sentence embodies a right to *choose* the trade occupation or profession freely. The right is thus a right to take a decision as to which trade, occupation or profession to

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313 See for instance *South African Post Office Ltd v Van Rensburg and Another* fn 308 *supra*

314 *Soobramoney* fn 23 *supra*. In *De Reuck v Director Of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 389 (W) the court noted that: "In *Hudson County Water Co v McCarter* (209 US 349 (1908) at 355) the following was stated: 'All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighbourhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.' The reason why all rights are not absolute is perfectly articulated in the judgment of Laws LJ in Gough (*Gough and Another v Chief Constable of the Derbyshire Constabulary* ([2001] 4 All ER 289 (QB) at 319e) in the following dictum: 'To give effect to the right's uttermost assertion - its logical extreme - would alike confound the right's moral credentials and its practical utility. The reason is, first, that the claim of moral authority for any right given by the general law rests upon the fact that the right belongs to every citizen, as do all other things thus given; so that in any particular case, where there is a clash of interests, it is inherent in the nature of the right itself that the individual who claims its benefit may have to give way to the supervening weight of other claims. And secondly, the right's practical utility rests upon the fact that there can be no tranquillity in the state without a plethora of unruly individual freedoms, which will be measured in the language of rights; anything else looks tyranny in the face without blinking, so that in any particular case, to crown the possessors of one such right and consign the others beneath the throne, will sooner or later undercut the community fabric.'"

follow. A limitation of this right, it is submitted would be one that interferes with that freedom of choice and not necessarily with the manner, place, or time or any other conditions in or under which, once that choice has been made, the trade, occupation or profession is practised[315]. Interference with this right may be seen in the refusal of education authorities to allow a person to enrol for a particular course or an unreasonable

[315] In *City Of Cape Town v Ad Outpost (Pty) Ltd And Others* 2000 (2) SA 733 (C) the court noted: "Section 22 appears to be modelled on s 4(1) of the German Basic Law, which provides that all Germans have the right freely to choose their occupation and profession, their place [of] work, study or training. The practice of an occupation or profession may be regulated by law. See De Waal *et al Bill of Rights Handbook* at 368–74. The German Courts have interpreted s 12 to provide a considerable amount of constitutional protection for commercial activities. See Currie D *The Constitution of the Federal Republic of Germany* at p 300 and Kommers D P *Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed) at 270 et seq. Thus in the Pharmacy Case 7 BVerfGE 3771 (Kommers at 274) art 12 (1) was interpreted to empower a legislature to regulate the practice as well as the choice of an occupation. Regulations dealing with the latter are greatly circumscribed by the article. The practice of an occupation which is the relevant issue in the present case may be 'restricted by reasonable regulations predicated on considerations of the common good'. Cited in Kommers at 277. See also the Chocolate Candy case 53 B VerfGE 135...."

Davis J distinguished German article 12 from the South African section 22 in these words: "There is always a great danger in the uncritical employment of foreign law in the process of domestic constitutional interpretation. Notwithstanding that art 12 and s 22 are similar in wording, the latter must be interpreted in the context of the South African constitutional text and its own pedigree. Thus, in my view, the interpretation of s 22 must take account of the difference of wording between s 22 of the Constitution and s 26 of the interim Constitution. The difference is manifest as follows:

(a) the right contained in s 22 is granted to citizens only;

(b) a more specific formulation of choice of trade, occupation, profession is replaced by a more general phrase, namely engagement in economic activity; [Writer's note: It is the other way around. In section 22 of the Constitution, the general provisions of the Interim Constitution are replaced the specific provisions of the Constitution]

(c) the use of every citizen requires that the provision is aimed at the individual rather than at the juristic body.

The purpose of s 22 would thus appear to be to ensure that regulations which control a citizen's right to choose a trade and occupation or profession should be implemented in a rational manner. As Jones J said in J R 1013 *Investments CC and Others v Minister of Safety and Security and Others* 1997 (7) BCLR 925 (E) at 930B–E: 'We have a history of repression in the choice of a trade, occupation or profession. This resulted in disadvantage to a large number of South Africans in earning their daily bread. In the pre-Constitution era the implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions on where and how long they could reside in particular areas, the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races, are examples of past unfairness which caused hardship. The result was that all citizens in the country did not have a free choice of trade, occupation and profession. Section 22 is designed to prevent a perpetuation of this state of affairs.' In my view s 22 introduces a constitutional protection to be enjoyed by individual citizens as opposed to juristic bodies. The right ensures that each citizen will have the right to choose how to employ his or her labour and skills without irrational governmental restriction. It is not a provision which should be extended to the regulation of economic intercourse as undertaken by enterprises owned by juristic bodies which might otherwise fall within the description of economic activity." The important point to note is that section 22 cannot be construed as a right to freedom or economic activity - otherwise it could not have been restricted to private individuals as Davis J opined. It is a right to choose a trade, occupation or profession. Furthermore, Davis J held that it is a right to employ labour or skills without *irrational* governmental restriction.

See also *Röseman v General Council Of The Bar Of South Africa* 2004 (1) SA 568 (SCA) in which Streicher JA held: "Counsel submitted that the division of work between the professions was arbitrary and irrational and constituted an unreasonable limitation on his client's right to practise his profession now enshrined in s 22 of the Constitution. But that begs the question. The appellant has the right to become an attorney or an advocate but he has no right to redefine the limits of either profession. He cannot complain that he is not being permitted the free exercise of his right if he is unwilling to practise within the acknowledged or accepted scope of the profession." This case dealt with the issue of the so-called 'split bar' in legal practice in South Africa. In the context of dispensing doctors, the limits of the profession with regard to the dispensing of medicines were refined by section 22C(1) of the Medicines and Related Substances Act No 101 of 1965. The definition of the limits of a profession is clearly within the capacity of the legislature which may devolve certain of the details of this exercise to the executive or to a statutory professional body. The court referred in this case to the dicta of Cameron JA in *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at 763G where he said: '(I)t is in the public interest that there should be a vigorous and independent Bar serving the public, which, subject to judicial supervision, is self-regulated, whose members are in principle available to all, and who in general do not perform administrative and preparatory work in litigation but concentrate their skills on the craft of forensic practice. Streicher JA held: "There can, in my view, be no doubt that one of the objects of the referral practice is to ensure that administrative and preparatory work in litigation is handled by attorneys who are trained and organised to do so, thereby enabling advocates to concentrate their skills on the craft of forensic practice. It follows that a proper use of the referral practice serves the public interest. It follows, furthermore, on the other hand, that to allow advocates to accept instructions by attorneys to conduct litigation on behalf of a client from beginning to end, i.e. to do all the administrative and preparatory work in respect of litigation, would not serve the public interest and would constitute an abuse of the referral practice."

legislative or policy provision which restricts admission to a particular trade or profession – for example purely to keep the numbers down or to avoid competition for existing practitioners. In the present context, it is significant that the courts have held that agreements in restraint of trade, which impose all kinds of restrictions in terms of where a person may practice a trade occupation or profession, are not *per se* unconstitutional[316]. It is submitted that if the courts are prepared to uphold contractual arrangements in which section 22 rights are restricted it is difficult to see why in principle, they should not uphold legislative provisions which have the same effect, provided of course that the tests of reasonableness and rationality are satisfied. The Harmful Business Practices Act[317] is a case in point. De Waal *et al*[318] point out that in *Janse van Rensburg NO v Minister van Handel en Nywerheid*[319] the applicants challenged the Act as a violation of the occupational freedom right. According to the court, the purpose of the Act was acceptable. The court held that: "It is a praiseworthy governmental objective to protect consumers from exploitation". According to the court, the definition of 'harmful business practice' was not vague. The Act permitted a Committee to propose guidelines for definition of the term

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316 See *Fidelity Guards Holdings (Pty) Ltd T/A Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) in which Liebenberg J observed: "Whether a covenant in restraint of trade was unconstitutional in the light of the provisions of s 26 of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) received the attention of the Courts. In *Waltons Stationery Co (Edms) Bpk v Fourie en 'n Ander* 1994 (4) SA 507 (O) it was held that covenants in restraint of trade were not excluded by s 26 and that the *Magna Alloys* case *infra* still reflected the positive law. The decision was subsequently followed in *Kotze en Genis (Edms) Bpk en 'n Ander v Potgieter en Andere* 1995 (3) SA 783 (C) and *Knox D'Arcy Ltd and Another v Shaw and Another* 1996 (2) SA 651 (W). The following remarks by Van Schalkwyk J in *Knox D'Arcy Ltd and Another v Shaw and Another* (*supra* at 660C - D/E) are, although he was then concerned with the provisions of s 26 of Act 200 of 1993, still apposite. 'The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions. As long as there is no overriding principle of public policy which is isolated thereby, the freedom of the individual comprehends the freedom to pursue, as he chooses, his benefit or his disadvantage.' And at 660I - 661A: 'It is generally regarded as immoral and dishonourable for a promissor to breach his trust and, even if he does so to escape the consequences of a poorly considered bargain, there is no principle that inheres in an open and democratic society, based upon freedom and equality, which would justify his repudiation of his obligations. On the other hand, the enforcement of a bargain (even one which was ill-considered) gives recognition to the important constitutional principle of the autonomy of the individual.' Insofar as a restraint is a limitation of the rights entrenched in s 22, the common law as developed by the Courts, in my view, complies with the requirements laid down in s 36(1). Any party to any agreement where a restraint clause is regarded as material is free to agree to include such a clause in the agreement and the common law in this regard is therefore of general application. In terms of the common law restraint clauses are only enforceable if they are not in conflict with public policy. In this regard the relevant principles were set out by Rabie CJ in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897I - 898A as follows: '(4) Dit is 'n beginsel van ons reg dat ooreenkomste wat teen die openbare belang is, nie afgedwing kan word nie, en 'n mens sou dus kon sê dat 'n ooreenkoms wat iemand se handelsvryheid inkort teen die openbare belang, en dus onafdwingbaar is, indien die omstandighede van die betrokke geval sodanig is dat die Hof van oordeel is dat die afdwing van die ooreenkoms die openbare belang sou skaad.
(5) Dit is in die openbare belang dat ooreenkomste wat vryelik aangegaan is, nagekom moet word. Dit is egter ook, in die algemeen gesê, in die openbare belang dat iedereen hom vir sover moontlik vryelik in die handels- en beroepswêreld moet kan laat geld. Dit kan aanvaar word dat in beperking van 'n persoon se handelsvryheid wat onredelik is, waarskynlik ook die openbare belang sou skaad indien die betrokke persoon daaraan gebonde gehou sou word.'
From the aforegoing it seems to me that if a restraint clause is found to be enforceable after application of the principles laid down by the Courts, the requirements of s 36(1) will have been met.

317 Consumer Affairs (Unfair Business Practices) Act No 71 of 1998

318 De Waal *et al* fn 2 *supra*

319 *Janse van Rensurg No v Minister van Handel an Nywerheid* 1999 (2) BCLR 204 (T)

which would be published by the Minister. This helped to concretise the abstract concept of a harmful business practice. The parallels with *Affordable Medicines Trust*[320] are obvious. It is submitted that the purpose of the Unfair Business Practices Act is very much akin to that of the governmental purpose in requiring health professionals other than pharmacists to obtain a licence to dispense medicines.

De Waal *et al*[321] note that it is arguable that the second sentence applies only to measures that regulate occupational freedom without denying choice or access to an occupation. On this argument, they state, section 22 is a right freely to choose a trade, occupation or profession. This right to choose a trade, occupation or profession cannot be limited except by law of general application that is justifiable in terms of the criteria laid down in section 36. They note that the second sentence then adds little to the scope of the right by prohibiting regulation of the practice of an occupation other than by law and state that choice and practice of an occupation are not conceptually distinct, but rather 'constitute poles of a continuum'. It is submitted that De Waal et al do not accurately convey the content of the second sentence in interpreting it as prohibiting the regulation of the practice of an occupation other than by law. It is submitted that this is not the thrust of the second sentence. Prohibition does not feature in the second sentence. The object of the second sentence is to qualify the right that is awarded in the first. The first awards the right to freely choose and occupation, trade or profession. The second cautions that the practice of the occupation trade or profession chosen can be regulated by law. The first sentence should not therefore be interpreted to mean that people can choose to do anything they want by way of a trade, occupation or profession without limitation or reference to law. As it turns out the drafters of the Constitution were wise in inserting the second sentence because there is a large number of occupations that the law does not permit people to pursue at all – most notably those that fall within the realm of criminal activity. There are, however more subtle issues that manifest within the health service delivery context. It is submitted for instance that the right in section 22 cannot be exercised in the context of health service delivery without due regard for patient safety and wellbeing. They state that both are

320 *Affordable Medicines Trust* fn 299 *supra*
321 De Waal *et al* fn 2 *supra*

afforded protection from arbitrary regulation by section 22. By the same token, this would mean, they say, that both choice and practice are subject to the internal qualification and observe that it is implausible to argue that the internal qualification will not apply when regulation of the practice of an occupation also impacts on access to or choice of that occupation. This will almost always be the case. The better interpretation is therefore that the internal qualification in principle applies to restrictions on entry, choice and practice of an occupation. De Waal *et al* state in interpreting the internal qualification, emphasis should be placed on the term 'regulation' which refers to a rational ordering or organising of a certain trade, occupation or profession. A measure which attempts to close down a certain profession or trade cannot qualify as a regulation, but many measures that restrict access to a profession may qualify on this basis. For example the practice of certain professions (lawyers, doctors) is routinely regulated in order to protect the interests of the general public. It is submitted that this goes to the heart of the regulation versus limitation argument submitted by the applicants in *Affordable Medicines Trust*[322]. De Waal *et al*[323] refer to the dicta of Chaskalson P in *S v Lawrence; S v Negal; S v Solberg*[324] that:

"Certain occupations call for particular qualifications prescribed by law and one of the constraints of the economic sphere is that persons who lack such qualifications may not engage in such occupations. For instance, nobody is entitled to practise as a doctor or as a lawyer unless he or she holds the prescribed qualifications, and the right to engage 'freely' in economic activity should not be construed as conferring such a right on unqualified persons; nor should it be construed as entitling persons to ignore legislation regulating the manner in which particular activities have to be conducted..."

They note that the meaning of 'regulation' may be illustrated with reference to the *South African Post Office* case[325] in which the court accepted that section 7 of the Post Office Act *prima facie* violated the right to freedom of occupation but then concluded that the section merely regulated the 'practice of the trade of running a postal service by law and therefore did not offend section 22. De Waal *et al* comment that the court was perhaps too eager to accept that the measure was a regulation in the true sense since protecting the Post Office against competition cannot qualify as regulation.

322 *Affordable Medicines* fn 299 *supra*
323 De Waal *et al* fn 2 *supra*
324 *S v Lawrence* fn 137 *supra*
325 *SA Post Office* fn 308 *supra*

The *Affordable Medicines Trust* case[326] demonstrates a number of issues not least of which is the level of resistance by the health professions to change intended to benefit and protect the public. The fiduciary aspects of the provider-patient relationship have been demonstrated by the circumstances of this case, to be largely non-existent for many South Africa health professionals. They failed to do the necessary course and to apply for licences within the allotted time period in the full knowledge that this would be to the detriment of their patients, choosing instead to pinning their hopes on a court decision which they could not predict. The costs of compliance were not prohibitive, the course was available online in a self-study format and gave recognition to prior learning. Despite this many registered for the course too late to meet the deadline, even after extensions of time were effectively granted by the court. They found it convenient in their arguments in court to use patient interests to justify their failure to comply with the law, apparently refusing to appreciate that access to health care services is more than just mere availability and also entails safety and efficacy. They at first attempted to attack the government by way of a court action claiming that the Department of Health did not have the necessary infrastructure in place to implement the relevant legislative provisions. When it became apparent that this line of attack was not going to yield the desired results they produced a plethora of constitutional arguments that in the end boiled down to the very narrow issues outlined by Kruger AJ in his judgment. The legislation that imposed the dispensing licence requirement was passed by parliament in 1997 some six years before the initial litigation was instituted. It was only when government commenced with its implementation in 2003 that litigation commenced. The belatedness of the reaction by the applicants to legislative provisions which, in their view, were unconstitutional from inception is inexplicable. They also changed the direction of their arguments a few times during the course of the two sets of litigation, giving the distinct impression that what they wanted was a way out rather than confirmation of a point of legal principle. The arguments of the applicants as stated in the judgment of Kruger AJ were paper thin in the light of the other cases referred to in the discussion above. Pharmacists and pharmacy owners are subjected to similar regulations in terms of which they have to observe good pharmacy practice and the premises are inspected. In terms of

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[326] *Affordable Medicines* fn 288 *supra*

section 22(1) of the Pharmacy Act[327], "A person authorised in terms of section 22A to own a pharmacy shall in the prescribed manner, specifying the prescribed particulars, apply to the Director-General for a licence for the premises wherein or from which such business shall be carried on and the Director-General may be entitled to issue or refuse such licence on such conditions as he or she may deem fit". Section 22(4) stipulates that: "A pharmacy shall, subject to such conditions as may be prescribed, be conducted under the continuous personal supervision of a pharmacist, in accordance with good pharmacy practice as determined in the rules made by the council". The Director-General issues the licence for the pharmacy which is tied to the premises. The competence of the pharmacist is established through training recognized by Pharmacy Council, the body within which the necessary expertise resides. The dispensing of medicines falls most specifically within the purview of the professional skill and knowledge of the pharmacy profession. It is for this reason that the course on dispensing for other health professionals in terms of the Medicines and Related Substances Act had to be approved by the Pharmacy Council. The licensing of dispensing doctors to dispense medicines is associated with the premises from which the medicine is to be dispensed for the same reasons that the licence to own a pharmacy is associated with the premises. The objection of the applicants to the licensing of dispensing of medicines in association with particular premises given the stated government purpose to ensure safety ignores the fact that medicines must be kept under certain very specific conditions if they are to retain their efficacy and safety. The applicants were also apparently oblivious of the difference between *bona fide* medical practitioners running established, hygienic medical practices and those itinerant purveyors of snake oil more commonly referred to as charlatans and mountebanks. Application for leave to appeal has been lodged in respect of both the constitutional court and the supreme court of appeal, the idea being that if the appeal is not heard in the former it will be heard in the latter. Whatever the appeal court decides, one thing is clear. The practice of medicine in South Africa appears to have lost its human face quite some time ago.

2.7.4 Rationing By Medical Schemes

[327] Pharmacy Act No 53 of 1974

The Medical Schemes Act[328] governs the manner in which medical schemes, which are not for profit entities, fund medical expenses. In the past, and to a large extent still currently, medical scheme expenditure is significantly concentrated within the private health sector although the situation is changing with certain relatively recent legislative and regulatory amendments which are designed to encourage explicit[329] utilisation by medical scheme members of public health facilities. In terms of section 29 of the Act, medical schemes must provide in their rules for *inter alia* –

"The terms and conditions applicable to the admission of a person as a member and his or her dependants, which terms and conditions shall provide for the determination of contributions on the basis of income or the number of dependants or both the income and the number of dependants, and shall not provide for any other grounds, including age, sex, past or present state of health, of the applicant or one or more of the applicant's dependants, the frequency of rendering of relevant health services to an applicant or one or more of the applicant's dependants other than for the provisions as prescribed."[330]

and

"the scope and level of minimum benefits that are to be available to beneficiaries as may be prescribed."[331]

Medical schemes may not ration prescribed minimum benefits that are obtained from a public hospital[332]. They are required to pay the costs of such treatment in full and may not cancel or suspend a member's or his or her dependent's membership except on limited grounds that are unrelated to the health profile of the member or dependent.[333] In terms of

328 Medical Schemes Act No 131 of 1998

329 The public health sector has operated for many years as a safety net for medical scheme members in the sense that when their benefits run out or the cost of a particular health care intervention is not covered by their medical scheme then they resort to the public health sector for treatment. This has resulted in adverse selection practices by medical schemes that has been referred to as 'dumping' of private patients onto the public sector for the high cost levels of care such as are typically required by the chronically ill and the elderly. The regulations to the Medical Schemes Act (dated 20 October 1999, Regulation Gazette No 6652, Notice No R 1262) contain an explanatory note to the prescribed minimum benefits package which states that one of the objectives of the package is "to avoid incidents where individuals lose their medical scheme cover in the event of serious illness and the consequent risk of unfounded utilisation of public hospitals."

330 Section 29(1) (n) of Act No 131 of 1998

331 Section 29(1) (o) of Act No 131 of 1998

332 In terms of section 29(1)(p) of Act No 131 of 1998, "No limitation shall apply to the reimbursement of any relevant health service obtained by a member from a public hospital where this service complies with the general scope and level as contemplated in paragraph (o) and may not be different from the entitlement in terms of a service available to a public hospital patient."

333 "In terms of section 29(2) of Act No 131 of 1998, medical scheme shall not cancel or suspend a member's membership or that of any of his or her dependants, except on the grounds of-
(a) failure to pay, within the time allowed in the medical scheme's rules, the membership fees required in such rules;
(b) failure to repay any debt due to the medical scheme;
(c) submission of fraudulent claims;
(d) committing any fraudulent act; or
(e) the non-disclosure of material information."

the regulations[334] any benefit option that is offered by a medical scheme must reimburse in full, without co-payment or the use of deductibles, the diagnostic, treatment and care costs of the prescribed minimum benefit conditions specified in Annexure A of the regulations in at least one provider or provider network which must at all times include the public hospital system. The power of medical schemes to ration access to health care services by capping the amounts of expenditure on certain types of service is therefore only with regard to those services falling outside of the prescribed minimum benefits package. If they select the public hospital system as a preferred provider they may be able indirectly to ration to a limited extent, access to services by means of that choice since services which are not available in the public hospital system cannot, by definition form part of the benefit package. An example of this is the fact that in public hospitals premature babies weighing under one kilogram are not usually ventilated because their prognosis is poor and there is the usual scarcity of resources. In the private sector no such restrictions apply. The question is whether a medical scheme is obliged to pay for the ventilation of a premature neonate in terms of the minimum benefits package and the answer that is generally given is in the negative since the minimum benefits package follows public health sector treatment protocols and norms. If a prescribed minimum benefit is unavailable in the public hospital system, however, schemes are obliged to pay for that service in the private health sector regardless of the cost.

2.7.4.1 Constitutional Issues

The question of whether the rationing by a medical scheme of access to health care services is constitutional is dependent upon whether the right of access to health care services as set out in section 27(1) applies as between private persons. This subject is discussed elsewhere under the question of the horizontal application of constitutional rights. However it should be noted here that the answer to this question must, in practice depend upon the circumstances prevailing within the health system generally. For instance if one assumes that the state takes a decision to completely privatise the provision of health services so that it becomes purely a funder of health services rather than a supplier and that all health

334 Fn 329 *supra* Regulation 8

services must therefore be delivered within the private sector, the constitutional right of access to health care services and the obligation of the private sector to provide those services changes the focus and the obligations of the private sector dramatically. Admittedly it could be argued that the obligations of the private sector in such a model may be primarily contractual in terms of an agreement between a state owned funder and the private sector or even legislative if the model was implemented in terms of some form of enacted social health insurance system and that the primary constitutional obligation to provide access to health care services would rest with the state. If one accepts the system itself as legitimate, however, then the state can effectively transfer to the private sector at least some of its constitutional responsibility to provide the services to the private sector to the extent that there is funding within state coffers for the services in question. This is not to suggest that the state can contract out of its ultimate constitutional obligations as stated in section 27(2) but it is submitted that the wording of section 27(2) is sufficiently broad as not to impose upon the state a particular method for the fulfilment of its obligations as contemplated therein. The state is simply obliged to take reasonable legislative and other measures to achieve the realisation of the right within its available resources.

In terms of a different scenario, assume that for some reason the public health sector dwindles away to an almost insignificant level due to factors outside of the control of the state – for instance an unwillingness on the part of health professionals to work in the public sector for reasons that relate to more than just remuneration e.g. professional independence etc. The state has the funding for health care services but does not have the capacity to deliver them. It is submitted that it would be difficult for the private sector to refuse to negotiate with the state for the provision of health care services to persons who would under other circumstances have been public sector patients. This difficulty would rest on the basis of the constitutional right of access to health care services. As stated previously a right of access does not mean 'free of charge to everyone'. It does not imply that the private sector has no right to charge for services rendered. In fact any other conclusion would make nonsense of the validity of the existence of the private sector. The private sector does not exist simply to be in business and to recover the costs of doing business. It exists to make profits. It competes for shareholding as much as it competes for

customers. If a private hospital group makes better profits than its competitors this is good for business because it is able to attract more interest in terms of shareholding. The value of its shares goes up which means it is attractive to investors and its survival in the longer term is assured.

2.7.5 Rationing By The State

Rationing by the state can take a number of different forms, not all of them obvious. In a system in which resources are limited there is always rationing of services whether implicit or explicit. The treatment protocols set and used by the state as considered in *Soobramoney*[335] are an example of explicit rationing. Certificate of need systems such as that contained in the National Health Act[336] and the restriction of the entry of foreign health professionals into South Africa in order to practice may constitute less obvious forms of rationing. Most decisions relating to rationing of health care services are likely to be controversial given the nature of the services. There is a worldwide shortage of organs for the purpose of organ transplantation. A policy that favours citizens and permanent residents on the list for organ transplantation is bound to come under the spotlight sooner or later as is a policy that favours HIV negative organ transplant candidates over HIV positive ones. The legally acceptable bases for rationing have been canvassed in the previous discussion of *Soobramoney*. However it is appropriate to consider some of the specific issues raised in the context of certificate of need and foreign health professionals since these two tropics involve the interface of the constitutional right of freedom to pursue a trade, occupation or profession as contained in section 22 of the Constitution and so take the rationing debate further.

2.7.5.1 Certificate of Need

[335] *Soobramoney* fn 23 *supra*

[336] Act No 61 of 2003

The draft National Health Act[337] makes provision for certificates of need to be issued to all health establishments. The considerations for the granting of a certificate of need, over and above the operational requirements and standards for a particular type of health establishment, relate to demographic issues such as the health needs of the population that is intended to be served by the proposed establishment, its geographical location, the proximity of existing health establishments offering the same services or services that are a substitute for the proposed service etc. Systems of certificate of need represent a form of rationing of health care services in the sense that they restrict the freedom of health care professionals and other persons in the business of the provision of health care services from setting up shop where they please. In South Africa there is a tendency for service providers to accumulate in heavily populated urban areas to the extent that there is maldistribution of health care services. This problem is not unique to South Africa as many countries which have large, relatively sparsely populated rural areas have to deal with the problem of ensuring the availability of health care services to people in these areas. Apart from inequitable distribution of health care services, an oversupply of service providers in urban areas creates its own problems in terms of overservicing of patients, perverse incentives and inappropriate provision of health care services, for example, based on the supplier's need to sell a certain quantity of a certain type of medicine rather than what would be the best and most suitable treatment for the patient's health condition.

In the sense that a certificate of need system attempts to redress problems relating to inequitable distribution of health care services it can be seen not as a system of rationing but rather an administrative tool to promote equitable distribution of health care services in order to ensure that people who may not previously have had access to certain health care services now do. From the foregoing it is clear that certificate of need issues cut across health economics at both macro and micro levels in that they require a balancing of the needs of a particular community with those of the larger population of a province or even the nation as a whole. The certificate of need concept comprises a form of health care market regulation in which the laws of supply and demand are only a part of the equation.

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[337] National Health Act fn 336 *supra*

It also has the potential to create competition between the private and public health sectors. Consider a situation in which a large privately owned hospital group decides to build a hospital in a particular area with a limited market for the services it proposes to provide at that hospital. Suppose that in the same area there is a public sector hospital which, for various reasons is not providing adequate health care services to the local population of the kind proposed by the private hospital group. If the public sector hospital, which is operating on a fee retention system, is not operating at full capacity due to poor management but has the potential to render most if not all of the services proposed by the new private sector hospital, what should the decision be concerning the private hospital group's application for a certificate of need for a new private hospital? The latter will be operating in direct competition with the existing public sector hospital which has for some years now enjoyed its own small monopoly in the delivery of these services. The issues raised by this question illustrate the potential impact of a system of certificate of need on competition within the health market generally whether between private and public sector or the private sector *inter se*. As such it may be argued that it constitutes unconstitutional interference in a person's right to pursue his or her chosen profession or occupation.

Whether or a system of certificate of need is constitutional can be dealt with on two fronts namely, the question as to whether it constitutes a justifiable limitation of the rights contained in section 22 of the Constitution but also whether the regulation by way of a certificate of need system is within the ambit of the provision in section 22 which allows for a trade, occupation or profession to be regulated by law. They are both likely to canvass the legitimacy of the concept of certificate of need in general rather than the validity of a particular decision not to grant a certificate of need which is likely to be in the arena of administrative rather than constitutional law[338]. The certificate of need process as it is envisaged in the National Health Act will cover not only hospitals and other large facilities but the consulting rooms of individual doctors, physiotherapists, dentists, psychologists and other health professionals. Depending upon the criteria on which certificate of need decisions are based, a dentist could find himself unable to practice in the small town where he grew up because there are already sufficient dentists practising there. The certificate of

[338] Section 36 states that the rights in the Bill of Rights may only be limited by *a law of general application* to the extent that the limitation is reasonable and justifiable in an open and democratic society.

need rationale is intended to encourage this dentist to set up practice in a town where there is a shortage of dentists in order to improve the access of the population to health care services.

The question therefore arises as to whether a certificate of need system is justifiable in light of the government's obligation to ensure the progressive realisation of the right of access to health care services within available resources. The argument from the side of government would be that in order to ensure the progressive realisation of the right of access to health care services within available resources it cannot rely only on strategies to increase the available resources but must also look at methods for ensuring the more effective and efficient utilisation of the resources that are available. One can have sufficient numbers of general medical practitioners within the country but if they all set up practice in the major cities with the result that the rural towns and villages do not have access to their services, then it could be argued that the state is not fulfilling its constitutional obligations to ensure access to health care services within available resources. The tension is between the right of a private individual to practice his or her profession or occupation in the location of his or her choice and the obligation of government contained in section 27(2) of the Constitution. As stated previously section 22 of the Constitution gives a right of freedom to *choose* a trade, occupation or profession but allows for the regulation of the *practice* of such trade, occupation or profession.

Section 26 of the interim Constitution provided as follows:

"(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all provided such measures are justifiable in an open and democratic society based on freedom and equality."

In considering these provisions Chaskalson P observed in *S v Lawrence; S v Negal; S v Solberg*[339] that:

"The requirement that the measures be justifiable in an open democratic society based on freedom and equality means that there must be a rational connection between means and ends. Otherwise the measure is arbitrary and arbitrariness is incompatible with such a society."

(At para [41].) Chaskalson P then went on to say:

"Section 26 should not be construed as empowering a court to set aside legislation expressing social or economic policy as infringing "economic freedom" simply because it may consider the legislation to be ineffective or is of the opinion that there are other and better ways of dealing with the problems. If s 26(1) is given the broad meaning for which the appellants contend, of encompassing all forms of economic activity and all methods of pursuing a livelihood, then, if regard is had to the role of the courts in a democratic society, s 26(2) should also be given a broad meaning. To maintain the proper balance between the roles of the Legislature and the courts s 26(2) should be construed as requiring only that there be a rational connection between the legislation and the legislative purpose sanctioned by this section."[340]

The differences between the Interim Constitution and the Constitution concerning the section 26 and section 22 rights have already been canvassed. The former refers more generally to economic freedom whereas the latter has been narrowed down to a right to freely choose a trade, occupation or profession.

The right contained in section 22 is a right only of natural persons[341]. In the health care context this distinction is somewhat artificial given the fact that health care professionals can and in many cases do form juristic persons as a basis from which they pursue their professions. Pharmacy is a prime example. Many, if not most, pharmacists in South Africa practise under the umbrella of a close corporation or a company. In terms of the legislation on pharmacy, up until very recently[342], only pharmacists could have shares in a company that offers pharmacy services. Private hospitals invariably operate as companies. It is also open to other health professionals to create juristic persons from which to conduct their

339 *S v Lawrence* fn 137 *supra*

340 Quoted with approval in *City of Cape Town v Ad Outpost (Pty) Ltd and Others* (fn 315 *supra*)

341 Although Section 8(4) of the Constitution states that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person, section 22 refers specifically to 'citizens'. Juristic persons are not usually embraced by the term 'citizen'.

342 Section 22A of the Pharmacy Act allows for the opening up of ownership of pharmacies to non-pharmacists. The regulations required to effect the principles in this section were promulgated in 2003.

practices. The upshot of the decision in *Ad Outpost*[343] is apparently that if one wants to conduct a hospital business, which can most effectively be run as a company, then one must either forfeit the right to choose this trade or occupation freely as contained in section 22 or one must forfeit the benefits of operating as a juristic person rather than a sole trader. The alternative, if one is seeking to rely on the rights conferred by section 22, is to conduct the litigation in the name of the individual shareholders rather than in the name of the juristic person. A group of doctors wishing to own and run a hospital as a company cannot, in the name of the company, claim the right to freely choose this trade or occupation when, for instance, attacking a decision not to grant a certificate of need for the hospital, but these same *doctors* can, in their individual capacity, attack a decision not grant them a certificate of need for their consulting rooms on the basis of section 22. The only difference is the legal vehicle they have chosen for their business[344].

2.7.5.2 Foreign Health Professionals

It is worth noting that the section 22 right is accorded only to citizens and not to 'everyone' as are so many of the other rights in the Constitution. This has the implication in the present context that foreign health care professionals, theoretically, may be legitimately prohibited from practising medicine in South Africa by South African law or in terms of a certificate of need process. This aspect of section 22 was discussed by the constitutional court in the

343 *Ad Outpost* fn 315 *supra*

322 See however, De Waal, Currie and Erasmus, fn 2 *supra* in their discussion of the application of the Bill of Rights at p40-41state that the constitutional court has rejected an all-or-nothing approach observing that it is prepared to extend the protection of fundamental rights such as the right to privacy, to juristic persons, but with a reduced level of protection on the basis that they are not capable of human dignity which forms the core of many of the fundamental rights. It would seem from their discussion of the issue that the test is the extent to which juristic persons are used by individuals for the collective exercise of their fundamental rights. They give the example that while it is difficult to see how some organs of state such as Parliament will ever be able to rely on the protection of the Bill of Rights, the South African Broadcasting Corporation or corporate entities such as universities which are set up by the State for the purpose of inter alia realising fundamental rights should be in a different position with regard to rights such as freedom of speech. They suggest that in the case of privately owned juristic persons it is not the size or the activities of the juristic person that are decisive but the relationship between the activities of the juristic person and the fundamental rights of the natural persons who stand behind the juristic person. Juristic persons thus become worthy of protection, they say, when they are used by natural persons for the collective exercise of their fundamental rights.

Woolman in Chaskalson *et al* fn 67 *supra* at p 10-8 acknowledges that certain rights by their nature are simply inapplicable to juristic persons but at 10-9 states that: "Other rights must apply to corporations if their presence in the text is to be even partially vindicated." He comments that it is difficult to imagine the rights to property and economic activity belonging to natural persons and not to juristic persons and states that "Even in a regulated market economy, corporations must be able to form some strong expectations about what kind of property they can hold and transfer." This said he notes that giving equality rights to corporations so that they can pursue economic ends not only diminishes these values but could also lead to a weak equality jurisprudence and that the judicial deference paid to legislative restrictions on commercial concerns may 'infect' the closer judicial scrutiny accorded other equality concerns. Woolman argues that this restrictive approach should be rejected because it artificially suppresses questions worth asking such as: are some corporations discriminated against in some circumstances? (at p10-10).

certification judgment[345]. In subsequent judgments, however, the court has departed significantly from the more conservative position expressed in the certification judgment especially in respect of permanent residents[346].

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345 *Ex Parte Chairperson Of The Constitutional Assembly: In Re Certification Of The* 1997 (2) SA 97 (CC) at para 17 onwards where it noted that: "An objection, made by the Black Sash Trust, that was not raised before relates to AT 22 (a *verbatim* repetition of NT 22), the relevant part of which provides:

'Every citizen has the right to choose their trade, occupation or profession freely.'

The contention is that the right of occupational choice extended to citizens by AT 22 is a 'universally accepted fundamental right' which should be extended to everyone, i.e. irrespective of citizenship, in order to comply with CP II. The objection is foundationally flawed and it serves little purpose to cite, as the objector does, examples in international human rights instruments ostensibly extending the right of occupational choice to citizens and non-citizens alike. We say 'ostensibly' because the instruments cited do not upon proper analysis bear such an unqualified meaning.

The European Convention for the Protection of Human Rights and Fundamental Freedoms embodies no such right to occupational choice. Nor does the International Covenant on Civil and Political Rights ('ICCPR'). Article 12.4 of the ICCPR provides that '(n)o one shall be arbitrarily deprived of the right to enter his own country'. The right, in terms of the ICCPR, to enter a particular country is accordingly reserved for nationals only. This would reserve to States Parties the right to regulate nationality, citizenship or naturalisation. There does not appear to be anything in these instruments which would prohibit States Parties when regulating these matters from imposing suitable conditions, which would not otherwise conflict with the instruments, limiting the rights of non-nationals in respect of freedom of occupational choice.

Article 6.1 of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') ostensibly recognises the right of 'everyone' to 'the opportunity to gain his living by work which he freely chooses or accepts'. But this right would be subject to what has been said in the preceding paragraph. Even more important is the fact that Article 2.3 of ICESCR itself allows developing countries 'with due regard to human rights and their national economy' to 'determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals'. It is subject to the even broader qualification in art 2.1 which makes it clear that the right in question is not fully enforceable immediately, each State Party only binding itself 'to the maximum of its available resources' to 'achieving progressively the full realisation of the rights recognised in the present Covenant'. In no way do we intend to denigrate the importance of advancing and securing such rights. We merely point out that their nature and enforceability differ materially from those of other rights.

The European Social Charter part I (1) which states that ("e)veryone shall have the opportunity to earn his living in an occupation freely entered upon' must be evaluated in the same light. The introduction to part I makes clear that the obligation on Contracting Parties in respect of this right goes no further than 'accept(ing) as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised'. The instruments discussed do not support the proposition that non-citizens are entitled to be treated on the same footing as citizens in regard to the freedom of occupational choice. [21] This distinction is in fact recognised in the United States of America and also in Canada. There are other acknowledged and exemplary constitutional democracies where the right to occupational choice is extended to citizens only, or is not guaranteed at all. One need do no more than refer to India, Ireland, Italy and Germany. CP II, as we made plain in the CJ, requires inclusion in a bill of rights of 'only those rights that have gained a wide measure of international acceptance as fundamental human rights'. The fact that a right, in the terms contended for by the objector, is not recognised in the international and regional instruments referred to and in a significant number of acknowledged constitutional democracies is fatal to any claim that its inclusion in the new South African Bill of Rights is demanded by CP II. It follows that the objection must be rejected."(Footnotes omitted)

346 See for instance *Larbi-Odam And Others v Member Of The Executive Council For Education (North-West Province) And Another* fn 130 *supra*. Regulation 2(2) of the Regulations regarding the Terms and Conditions of Employment of Educators (GN R1743 of 13 November 1995) (the regulations) provide that no person shall be appointed as an educator in a State school in a permanent capacity, unless he or she is a South African citizen. The first respondent, as part of a rationalisation process, advertised posts held by foreign teachers temporarily employed in the North-West province, and issued such teachers with notices purporting to terminate their employment. The appellants (eight foreign teachers temporarily employed in the North-West Province, some of whom had permanent residence status) applied to the Bophuthatswana Provincial Division of the Supreme Court for an order declaring reg 2(2) invalid on the grounds that it constituted unfair discrimination in contravention of s 8(2) of the interim Constitution (the Constitution of the Republic of South Africa Act 2000 of 1993). The application was dismissed. The applicants appealed to the constitutional court which held that: "Because citizenship is an unspecified ground, the first leg of the enquiry requires considering whether differentiation on that ground constitutes discrimination. This involves an inquiry as to whether, in the words of Harksen, '. . . objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner'.

I have no doubt that the ground of citizenship does. First, foreign citizens are a minority in all countries, and have little political muscle. In this respect, I associate myself with the views expressed by Wilson J in the Canadian Supreme Court in Andrews v Law Society of British Columbia that: 'Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among 'those groups in society to whose needs and wishes elected officials have no apparent interest in attending'.

(Citation omitted.)

Second, citizenship is a personal attribute which is difficult to change. In that regard, I would like to note the following views of La Forest J, from the same case: "The characteristic of citizenship is one typically not within the control of the individual and, in

The effect of the decision of the constitutional court in *Larbi Odam*[347] is that permanent residents must be treated in the same way as citizens for purposes of employment opportunities. Since "employment opportunities" is simply another translation for "trade, occupation of profession", it would seem that the rights of permanent residents in this regard are the same as those ascribed to citizens in section 22 of the Constitution. Only temporary residents may not choose their trade, occupation or profession in South Africa and so presumably they might be capable of being legitimately excluded in terms of a certificate of need process from operating a health establishment. The problem with the present state of the law is that permanent residence status is relatively easier to obtain than citizenship but comes with most of the significant constitutional rights and benefits of citizenship. If there is little or no benefit in becoming a citizen (provided that one is not interested in a political career or in the right to vote) because most of the same rights can be enjoyed by permanent residents, and permanent residence status is relatively easy to come by, then it becomes very difficult to control or regulate an influx of foreigners all with an eye to making large amounts of money in an already crowded private health sector, often for transmission to their extended families in their countries of origin. At the same time, the public sector, where foreign doctors could be deployed to considerable advantage, must

this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs.'
This general lack of control over one's citizenship has particular resonance in the South African context, where individuals were deprived of rights or benefits, ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race. Many became statutory foreigners in their own country under the Bantustan policy, and the Legislature even managed to create remarkable beings called 'foreign natives'. Such people were treated as instruments of cheap labour to be discarded at will, with scant regard for their rights, or the rights of their families." The constitutional court in *Larbi-Odam* does not seem to have considered the case before it in light of section 22 of the Constitution at all but rather decided it on the basis of unfair discrimination. Mokgoro J stated: "I hold that reg 2(2) constitutes unfair discrimination against permanent residents, because they are excluded from employment opportunities even though they have been permitted to enter the country permanently. The government has made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner is a detraction from that commitment. Denying permanent residents security of tenure, notwithstanding their qualifications, competence and commitment is a harsh measure. " (at para 25 p 759) He also stated that: "Permanent residents should, in my view, be viewed no differently from South African citizens when it comes to reducing unemployment. In other words, the government's aim should be to reduce unemployment among South African citizens and permanent residents. As explained above, permanent residents have been invited to make their home in this country. After a few years, they become eligible for citizenship. In the interim, they merit the full concern of the government concerning the availability of employment opportunities. Unless posts require citizenship for some reason, for example due to the particular political sensitivity of such posts, employment should be available without discrimination between citizens and permanent residents. Thus it is simply illegitimate to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent residents of posts they have held, in some cases for many years, is too high a price to pay in return for increasing jobs for citizens." (at para 31 p760-761; footnotes omitted). This judgment could be seen as nullifying to an extent the express reference in section 22 of the Constitution to 'citizens'. The constitutional court in *Larbi-Odam* (fn 130 *supra)*, without reference to section 22 of the Constitution, seems itself to have taken the decision that it referred to in the certification judgment in its observation that Article 2.3 of ICESCR itself allows developing countries 'with due regard to human rights and their national economy' to 'determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals' and has paid scant attention to its comment that "The instruments discussed do not support the proposition that non-citizens are entitled to be treated on the same footing as citizens in regard to the freedom of occupational choice." See also *Dawood* fn 12 *supra*

347 *Larbi Odam* fn 130 *supra*

choose between employing health professionals who are temporary residents, and running the risk that they will often sooner rather than later attempt to obtain permanent residence status with a view to entering private practice, or not having sufficient numbers of health professionals to deliver services because many local health professionals do not wish to work in the public health sector at all. In reducing the already narrow legal gap between permanent residents and citizens the constitutional court has rendered South Africa a highly accessible and attractive location for the nationals of many less prosperous and less developed countries.

The *Dawood*[348] case goes even a step further in that it essentially allows people who are temporary residents but who are married to South African permanent residents and citizens the right to apply for permanent residence from within South Africa on the understanding that such permanent resident status will be granted unless there is good reason not to. It is the experience of the national Department of Health that many foreign health professionals who enter the country marry South African permanent residents and citizens expressly with a view to obtaining permanent resident status. The result is that the public sector in employing foreign health professionals on a temporary basis is, in the long term creating a point of entry into the private health sector for these same professionals in an environment where in many instances there are already sufficient numbers of local professionals to render the services. With the introduction of certificate of need processes, South African citizens who are private sector health professionals will be competing with foreign health professionals for prime locations in which to pursue their chosen trade, occupation or profession.

2.8 Emergency Medical Treatment

The right not to be refused emergency medial treatment is specified in section 27(3) of the Constitution[349]. The elements of the right require closer examination. Questions also arise as to the structuring of section 27. Does the available resources restriction contemplated in

348 *Dawood* fn 12 *supra*

349 "No-one may be refused emergency medical treatment."

section 27(2) of the Constitution necessarily apply to this provision? The structuring of section 27 as a whole is such that section 27(2) is sandwiched between section 27(2) which expressly uses the word "right" and section 27(3) which does not. Section 27(2) refers to "these rights" Which rights are "these rights"? If section 27(2) had been intended to refer to the provision concerning medical treatment then why was the order not reversed? Why was section 27(2) not placed as the final provision in the section rather than the penultimate one if the intention was that it should apply to both health care services and emergency medical treatment? If one has to consider the question from a pragmatic perspective, however, then surely emergency medical treatment must also be limited by the availability of resources? If there are no resources for emergency medical treatment then how can the position be different to a situation in which there are no resources for the provision of health care services generally? In fact is not emergency medical treatment a subset of "health care services" or must the phrase "health care service" be read as excluding emergency medical treatment altogether? These questions will be explored in more detail below and in the discussion of the *Soobramoney* case[350].

2.8.1 No-one may be refused

The right is couched in the negative. The high court pointed out in *Soobramoney*[351] that section 27(3) was not so much creating a right to emergency medical treatment as a right not to be refused emergency medical treatment[352]. This does not necessarily mean, however, that there must be no balancing of the rights of one emergency victim with those of another. Even if Soobramoney's condition had classified as a medical emergency, if there were other patients who stood a better chance of survival due to a general health status superior to that of Soobramoney, and there were limits as to how many patients could be treated, it is possible that Soobramoney would still not have been eligible for treatment since he was

350 *Soobramoney v Minister of Health, Kwazulu-Natal* fn 23 *supra*

351 *Soobramoney* fn 23 *supra*

352 See *Soobramoney* fn 23 *supra* where the court noted that: " The applicant contends that the same limitation does not apply to emergency medical treatment. As pointed out by counsel for the respondent s 27(3) does not create a right to emergency medical treatment. It prohibits anyone from refusing emergency medical treatment." The constitutional court in *Soobramoney* fn 23 *supra*, at p 774 also emphasised that the right is stated in the negative. It said: "Section 27(3) itself is couched in negative terms - it is a right not to be refused emergency treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities."

not a candidate for a kidney transplant which was the main criteria used by the provincial health authorities to prioritise patients with chronic renal failure for dialysis. The legal principle that 'no-one' may be refused emergency medical treatment is qualified and must remain qualified[353]. It is no more absolute than the other rights in the Bill of Rights and is apparently just as affected by the availability of resources as the right to health care services in section 27(3)[354].

As medical doctors are wont to point out, in real life, many of them, especially those working in trauma or emergency units in major hospitals are faced with situations every day in which they must prefer the interests of one patient over the other. A scientific method of prioritising medical attention to multiple injured known as triage is used in emergency medical departments throughout the world. Triage, a sorting or classification of patients based on their levels of medical urgency was first developed as a military term and used in wartime. The French used "triage" in the early 19th century to decide who would be taken from the battlefields to be treated and who would be left behind. Over the next century the practice was further developed in armies throughout the world and during World War 1 improved outcomes of some battle injuries were accredited to appropriate triage. It comprises a brief clinical assessment that determines the time and sequence in which patients should be seen in the emergency department or, if in the field, the speed of transport and choice of hospital destination. Triage in a disaster is neither perfect nor democratic. Patients who are severely injured and not expected to survive are the most difficult to categories[355]. The question as to where triage fits in the practice of South African medicine in the light of the constitutional directive that no one may be refused emergency medical treatment raises some interesting questions. Some practical examples of triage in emergency departments are:

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353 See *Soobramoney* fn 23 *supra* where Chaskalson P observed at 777 that: "But the state's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services" and "There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."

354 See further discussion below.

355 See Derlet RW 'Triage' http://www.emedicine.com.emerg/topic670.htm. The cardinal question which no-one seems comfortable in articulating is whether one utilises valuable time and resources on a critically injured patient who has less than a 20% chance of survival when that same time and those resources could be used to save another patient who is also likely to die in the interim but who stands an 80% chance of survival if attended to immediately. If one attends to the first patient first the chances are that two people will die whereas if one attends to the second first the chances are that only one will die.

A 55 year old man presented to the emergency department complaining of abdominal pain. He stated that he thought his condition was secondary to eating too much greasy fast food too rapidly. As the emergency department was busy the patient was sent to the waiting room after his blood pressure, pulse, respiration rates and temperature had been taken. Two hours later, the patient's friend complained that he looked pale and had increasing weakness. The patient's friend was told that the emergency department was overcrowded. Three hours after triage, the patient collapsed in the emergency department waiting room. He was brought into the emergency department hypotensive and was taken to surgery where he died of a ruptured aortic aneurysm.[356]

A 43 year old woman presented to the emergency department complaining of a headache. The patient had normal vital signs except for a temperature of 101.2F. The emergency department was very busy and overcrowded. Since this patient seemed no worse than the others, and the triage nurse has seen many patients that day whose symptoms included headache, she sent the patient to the waiting room. Four hours later another patient came to the triage desk stating that the woman, who was still in the waiting room, was having a seizure. A repeat temperature 5 hours after the initial presentation was 104.5 F and she was admitted to hospital with a diagnosis of meningitis.[357]

The above examples may not found a claim in terms of the law of delict as it is traditionally understood because it is quite possible that the triage nurse in each case did not act negligently. What about the patient's constitutional right not to be refused emergency medical treatment? Is making a patient wait in a busy crowded waiting room tantamount to a denial of his constitutional right? The answer to this question, it is submitted, is to be found in the judgment of the Durban High Court in *Soobramoney*[358] in which Combrinck J observed that:

"I consider that the section must be interpreted in such a way that it is implicit in the words 'emergency medical treatment' that such treatment is possible and available. It could surely not have been the intention of the Legislature that irrespective of the costs and whether or not funds were available and irrespective of whether the treatment was available the persons requiring emergency medical treatment had to receive such treatment. So, for instance, if a hospital had an intensive care unit which was full and an emergency patient arrived would it be obliged to move one of its patients out so as to accommodate the emergency patient? Alternatively, is the state obliged to build additional intensive care units, procure additional dialysis machines, ventilators, heart-lung machines and other life-saving equipment to enable it to cater for all the patients requiring emergency medical treatment? It could surely not have been the intention of the Legislature that the right to access to health care was subject to the constraints of the state's resources and that a patient could be refused treatment but when his or her condition reached a critical stage and emergency treatment was required, the state then had to provide it irrespective of the cost."

356 Derlet fn 355 *supra*

357 Derlet fn 355 *supra*. These examples are from the United States.

358 *Soobramoney* fn 82 *supra* at p439-440

This said, perhaps there is scope for an argument that there could, in certain circumstances, be a responsibility on the hospital whose emergency unit is full to refer the patient to an alternative emergency facility and possibly even arrange for him to be transported there by ambulance if it such transport is available.

2.8.2 Emergency

How does one define a situation as one of 'emergency'? If it is defined too broadly then the emergency department simply becomes more crowded and its resources more thinly stretched in treating people who could possibly afford to wait. Who decides when the patient is suffering from a condition requiring 'emergency' medical treatment, as opposed to just 'medical treatment'? Laypersons may perceive a situation as an emergency when in fact, from a medically trained person's point of view it is not. In the US there has been considerable debate on this subject and even, in some cases, legislation in an attempt to resolve the issue. In South Africa, it is submitted, the test is likely to be objective rather than subjective for purposes of determining whether a health facility has in fact violated a person's constitutional rights in turning him away when he came seeking treatment or in rendering health care services but not with the urgency dictated by an emergency. Since a health facility in the public sector is unlikely to turn a patient away unless it is full to capacity or does not have the resources to render the services required, and since in terms of *Soobramoney*[359] these are acceptable reasons for not rendering emergency medical treatment, the question is more likely to arise in the private health sector where a patient is turned away because he cannot demonstrate that he has the ability to pay.

2.8.2.1 Horizontal Application

It is submitted that in looking at whether a person's constitutional rights were violated in this context, a court is likely first to consider the question of whether the right to emergency

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[359] *Soobramoney* fn 23 *supra*

medical treatment is of horizontal application or not. Liebenberg[360] contends that the right is horizontally applicable when read with section 8(2) of the Constitution[361]. It follows that if a private facility does have the right to claim payment for emergency treatment after the event then the logic of turning someone away because they are unable to pay at the time of the emergency is likely to constitute a violation of the right. In practice, however, the right to demand payment is not always capable of fulfilment due to the circumstances of the patient. Private hospitals and health care professionals are often obliged to write off significant amounts of money due to non-payment by patients for any number of reasons. Sometimes the cost of pursuing the debt is more than the debt itself. Debts also prescribed after three years so there is limited time in which to track the debtor and interrupt prescription. In a situation where an indigent person arrives on the doorstep of a private hospital requiring emergency medical treatment, the power of the hospital to demand payment is not likely to be of much assistance in aiding the hospital to recoup the costs of treatment. The only viable strategy, from a cost containment perspective, is to render sufficient treatment necessary to stabilise the patient and then transfer him or her to a public health facility as soon as possible[362].

It is submitted that the manner in which section 27 of the Constitution has been structured is also conducive to an interpretation that the right is horizontally applicable as is the fact that the right has been couched in the negative in section 27(3). Section 27(2) is sandwiched between section 27(1) which deals with the right of access to health care services and section 27(3) dealing with the right not to be refused emergency medical

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360 Davis *et al* (fn 124 *supra*) at p 358. She states that "As health care services are not yet universally available and are subject to progressive realisation under section 27(2), the protection of this right extends only to situations in which a patient is 'refused' emergency medical treatment owing to a lack of money, race or other exclusionary practices. This subsection also does not confer a right to 'free' emergency medical treatment. Although a patient may not be turned away from a medical facility owing to a lack of funds, the costs of the treatment may be recovered later."

361 Section 8(2) states that: "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." See also De Waal, Currie and Erasmus, fn 2 *supra* at 450 where they note that: "We have argued elsewhere that the right may be applied horizontally, entailing a duty for private hospitals. The right does not extend to routine medical treatment and it does nor guarantee free services. Emergency treatment may not be refused because of lack of funds, but payment for treatment may be sought after the treatment has been provided."

362 This does not always work well in practice as the public hospital in question argues that it does not have beds or some other resource necessary to treat the patient or simply refuses to take him or her for reasons that are not expressed at the time. It obviously pays private hospitals to have a healthy and co-operative relationship with the local public hospitals if they are to manage the problem of presented by a constitutional obligation to render what can amount to costly emergency medical treatment and still remain profitable. The other alternative is to negotiate with the state some kind of fee in respect of indigent patients which covers the costs of rendering the necessary services. It is only in an ideal world that private hospitals can survive on charity.

treatment. The reason for this was probably the intention on the part of the drafters that section 27(2) applies only to the rights contemplated in section 27(1) and not to those contemplated in section 27(3). If it had been intended that the phrase 'these rights' in section 27(2) must be applicable to section 27(3) rights then it would have been much more logical to place the wording contained in section 27(2) at the end of the section rather than in the middle. Liebenberg argues, presumably for this reason, that "Unlike the general right of access to health care services (sic) is not subject to the qualifications of progressive realisation and resource constraints."[363] It is submitted, with respect, that whilst this may have been true on the wording and structure of section 27(2) alone, it is not correct in light of the judgment in *Soobramoney*[364].

In view of the judgment in *Soobramoney*, if a court concludes that the right is of horizontal application, it is likely to proceed to questions of reasonableness in deciding whether or not there was an infringement of the right by a private sector health care provider. Did the health care professional in turning the patient away do so because he could not pay? What kind of medical treatment would have been reasonably necessary under the circumstances? Could the patient have been stabilised at relatively low cost to the private provider before being transferred to a public health facility? Was the private provider already so busy that it could not cope with another patient? If the right is of horizontal application, it is submitted

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363 *Davis et al* fn 124 *supra* at p 358

364 *Soobramoney* fn 23 *supra* at para 20, 774 Chaskalson P states that: "A person who suffers a sudden catastrophe which calls for immediate medical attention, such as the injured person in *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (supra), should not be refused ambulance or other emergency services *which are available* and should not be turned away from a hospital *which is able to provide* the necessary treatment. * What the section requires is that remedial treatment that is necessary *and available* be given immediately to avert that harm." (writer's emphasis) See also the words of Combrinck J in the judgment of the court *a quo* where he comments at p 439 -440 that: "As pointed out by counsel for the respondent s 27(3) does not create a right to emergency medical treatment. It prohibits anyone from refusing emergency medical treatment. I consider that the section must be interpreted in such a way that it is implicit in the words 'emergency medical treatment' that such treatment is possible and available. It could surely not have been the intention of the Legislature that irrespective of the costs and whether or not funds were available and irrespective of whether the treatment was available the persons requiring emergency medical treatment had to receive such treatment. So, for instance, if a hospital had an intensive care unit which was full and an emergency patient arrived would it be obliged to move one of its patients out so as to accommodate the emergency patient? Alternatively, is the State obliged to build additional intensive care units, procure additional dialysis machines, ventilators, heart-lung machines and other life-saving equipment to enable it to cater for all the patients requiring emergency medical treatment? It could surely not have been the intention of the Legislature that the right to access to health care was subject to the constraints of the State's resources and that a patient could be refused treatment but when his or her condition reached a critical stage and emergency treatment was required, the State then had to provide it irrespective of the cost." See also the observations of De Waal, Currie and Erasmus, fn 2 *supra* at p 449 to 450 where they state that: "The state's duty under s 27(3) is 'not [to] refuse ambulance or other emergency services *which are available*' and not to turn a person 'away from a hospital *which is able* to provide the necessary treatment'. This available- and-able qualification makes it clear that s 27(3) does not create a positive constitutional obligation on the state to ensure that emergency medical facilities are made available so that no-one in an emergency situation can be turned away. Section 27(3) is therefore a right not to be arbitrarily excluded from that which already exists." In this context, they refer to Scott C & Alston P 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise' (2000) 16 *SAJHR* 206, at p 236.

that refusal to treat a patient on the grounds of his or her ability to pay is likely to constitute a violation of the patient's constitutional rights. Given the fact that private providers are unlikely to want to pay for emergency medical treatment for the indigent out of their own pockets and profits, they are likely to try and recoup these costs in a number of ways, the most obvious being from private patients who can afford to pay for private facilities. They may also attempt to conclude agreements with the state in terms of which they are remunerated a basic fee for the treatment of such cases. Either way, the horizontal application of the right not to be refused emergency medical treatment probably has significant cost implications for the state and private consumers of health care services alike. The impact on the private health sector of the horizontal application of the right not to be refused emergency medical treatment depends largely upon the scope of the right. If the court in *Soobramoney* had found that urgent treatment for chronic illnesses falls within the scope of emergency medical treatment it could potentially have put the private health sector out of business even with its ability to charge patients for its services. Billing is something quite unrelated to a patient's ability to pay. If the meaning of the phrase emergency medical treatment is too wide, it will impose an onerous burden on private providers of health care services such that they may not be able to remain in business.

2.8.2.2 Soobramoney

In the case of *Soobramoney*[365] the constitutional court had reason to consider the nature of emergency medical treatment as opposed to health care services as contemplated in section 27(1) of the Constitution. The facts of *Soobramoney* have already been canvassed previously in this chapter. For present purposes it must be noted that the applicant argued that the renal dialysis treatment he required fell into the category of emergency medical treatment as envisaged in section 27(3) of the Constitution as opposed to health care services generally and that the respondent could therefore not refuse to give it to him. Chaskalson P stated that:

[365] *Soobramoney* fn 23 *supra*

"The words 'emergency medical treatment' may possibly be open to a broad construction which would include ongoing treatment of chronic illnesses for the purpose of prolonging life. But this is not their ordinary meaning, and if this had been the purpose which s 27(3) was intended to serve, one would have expected that to have been expressed in positive and specific terms"

pointing out[366] that:

"The purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the bill of rights, but this is not always the case, and the context may indicate that in order to give effect to the purpose of a particular provision 'a narrower or specific meaning' should be given to it."

The constitutional court, after considering foreign law with regard to the right to life in general and to emergency medical treatment in particular, made the important observation[367] that:

"In our Constitution the right to medical treatment does not have to be inferred from the nature of the State established by the Constitution or from the right to life which it guarantees. It is dealt with directly in s 27. If s 27(3) were to be construed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfil its primary obligations under ss 27(1) and (2) to provide health care services to 'everyone' within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the State for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. In my view, much clearer language than that used in s 27(3) would be required to justify such a conclusion."

It was the view of the constitutional court that section 27(3) requires that remedial treatment that is necessary and available be given immediately to avert that harm[368] and that the purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. The court found that the applicant's situation did not fall within the scope of section 27(3) and that it therefore had to be considered in the light of the resources available to the state in terms of section 27(1).

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366 *Soobramoney* fn 23 *supra* at 772 -773

367 *Soobramoney* fn 23 *supra* at 773-774

368 *Soobramoney* fn 23 *supra* p 774

The constitutional court, it is respectfully submitted, correctly refused in *Soobramoney* to blur the lines between ordinary health care services and emergency medical treatment. Sachs J[369] observed that:

"The special attention given by s 27(3) to non-refusal of emergency medical treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with the unforeseeable catastrophes which could befall any person, anywhere and at any time. The values protected by s 27(3) would, accordingly, be undermined rather than reinforced by any unwarranted conflation of emergency and non-emergency treatment such as that argued for by the appellant."

The court was of the view that an emergency involves some sudden or unexpected catastrophe which calls for immediate medical attention[370].

Even though the treatment required by the applicant in *Soobramoney*, was necessary for his survival this did not necessarily mean that it constituted emergency medical treatment. The Durban High Court took the view that:

"In any event, the applicant, in my view on the facts, cannot rely on the provisions of s 27(3). He has been suffering from the diseases mentioned for some years. He has not contracted a sudden illness or sustained unexpected trauma. It is true that if he does not receive the treatment he will die. Unfortunately, that is the position with all persons who suffer from long term disease. So, for instance, a person who has cancer may suffer from the disease for a number of years, but will eventually reach the stage where within days he will die. It is then an emergency situation for him but it is not the emergency that, in my view, the Legislature had in mind in s 27(3)."[371]

There were really two issues in *Soobramoney*[372]. The first related to the question of what constitutes emergency medical treatment as contemplated in section 27(3) of the Constitution. The second related to whether the state can be compelled to provide health care services, as contemplated in section 27(1) of the Constitution, to the terminally ill, regardless of the availability of resources or perhaps on the basis that the available resources should first be used to treat the terminally ill first and thereafter, any resources that are left can be used to render health services to everyone else.

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369 *Soobramoney* fn 23 *supra* at p 781-782

370 *Soobramoney* fn 23 *supra*. Chaskalson P at para 20 p 774

371 *Soobramoney* fn 82 *supra* at p 439-440

372 *Soobramoney* fn 23 *supra*

It is submitted that unlike many of its critics[373], the Constitutional court in a sound and highly rational judgment was able to take a clear sighted and unemotional approach to the harsh realities of the real world in which all resources are limited and come to a conclusion that difficult decisions regarding the allocation of resources are not always best made by the courts.[374] It is submitted that if emergency medical treatment had been too widely construed by the constitutional court in this critically important judgment, not only would the obligations of the state have been skewed in favour of the treatment of terminal illness as suggested by Chaskalson P but the practical significant of the rights to both emergency medical treatment and health care services, as well as the distinction drawn in the Constitution between them, would have been undermined to the point where South Africa could have found itself in the same position as Venezuela – with court orders that impose upon the state impossible obligations and the content of the right to health care services has no meaning for those who need it most.[375] In the words of Sachs J in *Soobramoney*,[376] "The values protected by s 27(3) would, accordingly, be undermined rather than reinforced by any unwarranted conflation of emergency and non-emergency treatment such as that argued for by the appellant."

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373 See for instance the comments of Burchill R in 'Soobramoney v Minister of Health (Kwa-Zulu-Natal)' at http://www/nottingham.ac.uk/law/hrlc/hrnews/march98/SOOBRAM.HTM who states that the constitutional court judges in Soobramoney "have failed to provide any insight as to the circumstances which will allow for a right to health care to be 'most fairly and effectively enjoyed'" and then proceeds to the usual debate on government spending on defence versus health care and stating that "Have decisions been made rationally and in good faith in determining the allocation of resources necessary to have a healthy society? It would be interesting to see what Chaskalson P had in mind concerning a holistic approach to government spending" It would appear that Burchill feels that the South African constitutional courting its omniscient role should have undertaken a review of the entire budget of the South African government in deciding Soobramoney's case and that perhaps it should have directed that some of the expenditure devoted to defence matters should have been redirected by the court to save Mr Soobramoney. De Waal, Currie and Erasmus, fn 2 *supra* at p139 refer to the constitutional court's "most controversial use of contextual interpretation to date in *Soobramoney v Minister of Health (Kwazulu-Natal)*".

374 As Chaskalson P (fn 23 *supra*) observed at p776 onwards "Although the problem of scarce resources is particularly acute in South Africa this is not a peculiarly South African problem. It is a problem which hospital administrators and doctors have had to confront in other parts of the world, and in which they have had to take similar decisions. In his judgment in this case Combrinck J refers to decisions of the English Courts in which it has been held to be undesirable for a court to make an order as to how scarce medical resources should be applied, and to the danger of making any order that the resources be used for a particular patient, which might have the effect of denying those resources to other patients to whom they might more advantageously be devoted. The dilemma confronting health authorities faced with such cases was described by Sir Thomas Bingham MR in a passage cited by Combrinck J from the judgment in *R v Cambridge Health Authority, ex parte B*:
'I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the Court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.'" (footnotes omitted)

375 See the discussion of the case of *Cruz Bermudez, et al v Ministerio de Sanidad y Asistencia Social* in chapter 1 of this thesis.

376 *Soobramoney* fn 23 *supra* para 51 at p 782

2.8.2.3 EMTALA

Whilst it is not the intention within this thesis to conduct a comparative study of the law relating to emergency medical treatment of South African and foreign jurisdictions, it is worth reflecting on some of the issues concerning the concept of 'emergency' in relation to health care services that have arisen in the United States if only to anticipate some of the complications which may accompany questions concerning emergency medical treatment in South Africa. The Constitution moreover permits South African courts to consider foreign law in terms of section 39 (1)(c) when interpreting the Bill of Rights. The debate about what constitutes emergency medical treatment or an emergency medical condition is fraught with complexity if the American experience is anything to go by. Firstly there is the question of what is an emergency and who decides that it is and the nature of the treatment to be provided[377]. A further question is whether the provision of section 27(3) is in a sense not self-defeating because if left untreated for too long, many health conditions do become medical emergencies requiring emergency medical treatment? If the available resources limitation applies only to health care services and not to emergency medical treatment then

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[377] Combrinck J in *Soobramoney* (fn 82 *supra*) gave at least a partial answer to this question when he noted at p 437 onwards that: "Insofar as the present case is concerned however, I am of the view that it is not the function of the Court to decide who shall and who shall not receive the required medical treatment. It is for the medical practitioners to make these decisions. They are qualified, whereas I am not, to decide on clinical grounds which patient will benefit the most from the treatment. The Court will only interfere if the doctors involved have exercised their judgment unreasonably, arbitrarily or have discriminated against a patient. In this regard I am in complete accord with the remarks of Balcombe LJ in the case of *Re J* (a minor) (wardship: medical treatment) a judgment of the Court of Appeal reported in [1992] 4 All ER 614 at 625g:
'I would also stress the absolute undesirability of the court making an order which may have the effect of compelling a doctor or health authority to make available scarce resources (both human and material) to a particular child, without knowing whether or not there are other patients to whom those resources might more advantageously be devoted. Lord Donaldson MR has set out in his reasons the condition of J and his very limited future prospects. The effect of the order of Waite J, had it not been immediately stayed by this court might have been to require the health authority to put J on a ventilator in an intensive care unit, and thereby possibly to deny the benefit of those limited resources to a child who is much more likely than J to benefit from them.' I find further support in the obiter remarks of Hoffmann LJ in *Airedale NHS Trust v Bland* a judgment of the Court of Appeal reported in [1993] 1 All ER 821 at 857b–d: 'I said that there were two distinctions between the prohibition on violating the person and the duty to provide care and assistance. So far I have mentioned only one. The second is that while the prohibition on violation is absolute, the duty to provide care is restricted to what one can reasonably provide. No-one is under a moral duty to do more than he can or to assist one patient at the cost of neglecting another. The resources of the national health service are not limitless and choices have to be made. This qualification on the moral duty to provide care did not enter into the argument in this case at all. The *Airedale NHS Trust* invited us to decide the case on the assumption that its resources were unlimited and we have to do so. But one is bound to observe that the cost of keeping a patient like Anthony Bland alive is very considerable and that in another case the health authorities might conclude that its resources were better devoted to other patients. We do not have to consider such a case, but in principle the allocation of resources between patients is a matter for the health authority and not for the courts.'
In that case the patient was a victim of the Hillsborough football ground disaster. He suffered a severe crushed chest injury which resulted in brain damage and left him in a persistent vegetative state. The issue was whether medical treatment could be withdrawn and the patient allowed to die." It is submitted that what the court was in effect saying was that even in emergency medical circumstances, the decision of medically trained staff to prioritise certain patients over others cannot be faulted except where they are acting unreasonably. It is submitted that a decision that a particular patient does not in fact require emergency medical treatment at all because the condition from which he or she is suffering is not an emergency is a similar one. It can only be faulted where the medical personnel in question acted unreasonably or arbitrarily or in a discriminatory fashion.

this is a way in which the available resources limitation can be circumvented?[378] Another question is what is the bare minimum that should be done in the emergency? What is the nature of the emergency services that are required and is it the same irrespective of the nature of the facility involved in the situation?

The federal Emergency Medical Treatment and Active Labour Act, otherwise known as EMTALA, uses the term "emergency medical condition" and defines it as follows[379]:

"Emergency medical condition" means –

A. a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances, and/or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected to result in:
   (i) Placing the health of the individual (or with respect to a pregnant woman, the health of a woman or her unborn child[380]) in serious jeopardy;
   (ii) Serious impairment to bodily functions;
   (iii) Serious dysfunction of any bodily organ of part;
B. with respect to a pregnant woman who is having contractions:
   (i) that there is inadequate time to effect a safe transfer to another hospital before delivery; or
   (ii) that the transfer may pose a threat to the health or safety of the woman or the unborn child"[381]

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378 The court pointed out in *Soobramoney* (fn 82 *supra)*, however that "In the Constitution itself the Legislature recognises that the rights which it affords the citizen are not absolute and are limited by the funds available" and that "It could surely not have been the intention of the Legislature that the right to access to health care was subject to the constraints of the State's resources and that a patient could be refused treatment but when his or her condition reached a critical stage and emergency treatment was required, the State then had to provide it irrespective of the cost." It is further submitted that once the condition of a patient is stabilised and there is no longer an immediate threat to life or of serious impairment of bodily organs or functions, the medical treatment required can no longer be regarded as emergency medical treatment and that the person who has received the emergency treatment that was immediately necessary to save his life or health reverts to section 27(1) status in terms of his or her entitlement to health care services.

379 The definition seems to have changed relatively recently to include psychiatric disturbances and/or symptoms of substance abuse. Some sources still cite a previous wording which does not include these aspects – only severe pain.

380 In South African constitutional law the unborn child is not recognised as a person and therefore holds no constitutional rights (see discussion of what is a child elsewhere in this chapter).

381 Examination and treatment for emergency medical conditions and women in labor 42 USC 1395dd (1986) http://www.medlaw.com/statute.htm; and http://www.emedicine.com/emerg/topic860.htm

EMTALA was enacted in 1986 as part of the Consolidated Omnibus Budget Reconciliation Act of 1985 primarily in response to concern that some emergency departments across the country refuse to treat indigent uninsured patients or inappropriately transferred them to other hospitals, a practice known as 'patient dumping'.[382] The mischief it sought to address is thus similar in nature to the mischief that section 27(3) of the Constitution seeks to address. EMTALA requires hospitals that participate in Medicare to provide a medical screening examination to any person who comes to the emergency department, regardless of the individual's ability to pay. Unlike the right in section 27(3) it apparently applies only to hospitals but there is a similarity in that it is likely that in terms of the Constitution, emergency medical treatment will have to be rendered regardless of the ability to pay. In terms of EMTALA if the medical screening reveals that the patient has an emergency medical condition as defined, then the hospital must provide treatment to stabilize the condition or provide for an appropriate transfer to another facility. If the hospital is unable to stabilize the condition, it must provide for transfer to another medical facility. The delaying of the medical screening examination and the stabilization of the patient in order to enquire into his or her ability to pay is prohibited. EMTALA obliges a hospital to accept a patient from a transferring hospital if it can provide the specialized care the patient needs and to report any inappropriate transfers. The regional offices of the Department of Health and Human Services' (HHS) Centers for Medicare and Medicaid Services (CMS) are responsible for investigating complaints of alleged EMTALA violations and forwarding confirmed violations to HHS' Office of Inspector General (OIG) for possible imposition of civil monetary fines[383]. The GAO commented in its report that the overall impact of EMTALA is difficult to measure because there are no data on the incidence of patient dumping before its enactment and the only measure of current incidence – the number of confirmed violations - is imprecise. Hospital and physician representatives told the GAO that more people were coming to emergency departments with non-urgent conditions as a result of EMTALA. The provider representatives said that patients who face financial or other barriers to care used emergency departments as their primary health provider because

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382 United States General Accounting Office Report to Congressional Committees "Emergency Care: EMTALA Implementation and Enforcement Issues" June 2001 available at http://www.emtala.com

383 United States General Accounting Office Report fn 382 *supra*

they know they will receive care there. EMTALA requires that a medical screening examination must be conducted on every patient who requests examination or treatment for a medical condition. This illustrates one of the problems of mandatory emergency medical treatment. One first has to establish that it is an emergency medical condition and the only way of doing this is usually to examine the patient. If the majority of seriously ill patients present to the emergency room of a hospital and the law requires that they must all be examined before they can be reclassified as non-emergencies, this has the potential to severely interfere with the delivery of emergency medical treatment to those patients that are in a genuine emergency situation. Even if the patient presents with medical records it is not safe to assume that his condition is as reflected in the records since some time may have elapsed between the compilation of the record and the examination to establish whether it is an emergency situation or not. Some emergencies are fairly obvious but there are others that are not. What is the position where a hospital turns a patient away without even seeing him or her for example it refuses to take transfer of the patient from another health facility?[384] Yet another question is the extent to which secondary risks associated with emergency medical conditions are included in the term emergency medical treatment.[385]

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384 In *St Anthony Hospital v United States Department of Health and Human Services* the US Court of Appeals (tenth circuit) had to consider such a situation. The judgment was handed down on 28 August 2002. St Anthony's Hospital had been fined for violation of EMTALA provisions against 'reverse-dumping' i.e. refusal to accept an appropriate transfer of a patient or to treat a patient who does not have medical insurance. The fine was imposed by the Department of Health and Human Services and the Departmental Appeals Board upheld the violation finding whereupon St Anthony's applied for review of the decision to the Court of Appeals. The facts were that a 65 year old male patient was involved in a motor vehicle accident on a highway outside of Oklahoma City in April 1995. He was taken that afternoon to the emergency room at Shawnee Regional Hospital, a small hospital about 35 miles outside of Oklahoma City that lacked the ability to perform many complex medical procedures. Almost two hours later, the patient was diagnosed with a neurological injury and his transfer was arranged to University Hospital in Oklahoma City. As he was boarded onto an ambulance another doctor arrived at the emergency room and was briefly informed of the patient's injury and that was being transferred to University Hospital because his back was broken. En route to the other hospital the patient's condition deteriorated and the ambulance was forced to return to Shawnee. In hindsight it was discovered that the patient had actually suffered from a life threatening traumatic injury to his abdominal aorta which shut off the flow of blood to his lower extremities. The doctor on duty examined the patient and immediately became concerned about his condition as he was extremely cyanotic from his umbilicus throughout his lower extremities and had no sensation from his umbilicus down. He had no pulse in his femoral arteries or feet. The doctor knew that the injury was life threatening and that the patient needed surgery. He also knew that Shawnee was not equipped to deal with that type of injury and so determined that he had to be transferred by airlifting him to University Hospital. He spoke to University Hospital over the telephone and was informed that it did not have the capacity to accommodate the patient because it already had two emergency surgeries to perform. A search for another hospital was conducted and the search included a call to St Anthony, a large modern hospital in Oklahoma City with state of the art surgical facilities. A thoracic and vascular surgeon working at St Anthony's refused to take the patient who was eventually transferred to Presbyterian Hospital in Oklahoma City. In an investigation, St Anthony was found to possess the specialized facilities, as well as the capacity, to treat the patient and that none of its operating rooms where in use that evening. St Anthony's was fined $25 000. The Appeal Board affirmed the finding and increased the penalty to $35 000. The court observed that given that the patient suffered from an unstabilized emergency medical condition and that Shawnee lacked the ability to perform the complex medical procedure needed, EMTALA imposed on Shawnee an obligation to effect an appropriate patient transfer to another medical facility. The court also said that it had considered the degree of culpability and found it to be substantial. St Anthony Hospital was aware of the critical condition of the patient and the need for his transfer. The hospital's on-call physician refused to come in to perform surgery on the multiple trauma patient despite the fact that the hospital had both the capacity and the capability to treat him and that the hospital inappropriately permitted the on-call physician to make the final decision for the hospital as to whether or not the hospital would accept the patient. The Court denied St Anthony hospital's request to have the agency's determination modified or set aside. (available at http://www.kscourts.org.ca10.cases/2002/08/00-

In terms of EMTALA a pregnant woman who is having contractions is considered to be in an "emergency medical condition" if there is not enough time to safely transfer the woman

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9529.htm) In the South African context, the liability of a private hospital for refusal of emergency medical treatment in the circumstances of the present case would be limited due to the fact that the surgeon in question is unlikely to be an employee of the hospital. In the private sector, medical specialists that use private hospital facilities are seldom if ever, employed by the hospital. This could have the result that a private hospital is unable to compel any doctor to perform the surgery including the doctor who initially refused to do it. The question is whether there would be a duty on the private hospital to attempt to find a doctor who is prepared to do the surgery or whether it should try to arrange for transfer of the patient to a public hospital which does employ doctors and can render the required services. The private hospital could not be held liable for the resident surgeon's refusal to operate on the grounds of vicarious liability because it is not his employer. It could not be held liable for failure to perform the surgery using other personnel because the personnel that private hospitals tend to employ in South Africa are nurses and administrative staff who are certainly not qualified to perform vascular surgery. In the public sector the situation would be considerably different because it does employ doctors and it can issue instructions to a doctor to perform an operation in appropriate circumstances if need be or locate another doctor who can do the surgery. As an employer it can be held vicariously liable for its employee's refusal to provide emergency medical treatment. The question is whether the obligation to provide emergency medical treatment extends to a juristic person, in view of the fact that in terms of the decision in *Ad Outpost* (fn 315 *supra*) juristic persons do not generally enjoy protection of the constitutional right to pursue a trade, occupation or profession. There seems to be some kind of incongruity in a situation where they do not enjoy such a right but are at the same time constitutionally obliged to perform the exact same services that would be protected by the right to follow a trade, occupation or profession. A complicating factor is that in the private sector, the persons who can provide the specialised surgical or other medical treatment are not the juristic persons owning the hospitals but rather the health professionals who use the facilities. Indeed some private hospitals do not even run their own trauma units (emergency rooms) but let out the trauma facility within the hospital to medical doctors who specialise in emergency medicine.

385 In *Reynolds and Another v MaineGeneral Health* the United States Court of Appeals (First Circuit) had to interpret the scope of coverage under EMTALA for secondary risks associated with emergency medical conditions. In that case, the deceased, William D Reynolds was driving a car that collided head-on with another vehicle. As a result of the accident Reynolds suffered various injuries including several fractures of bones in his lower right leg and left foot. He was taken immediately by ambulance from the accidence scene to the emergency room in Kennbec Valley Medical Center (now known as the MaineGeneral Medical Center). After an emergency room nurse had triaged Reynolds he was examined by a doctor who took an oral medical history and ordered a series of laboratory tests, X-rays and an abdominal CT scan. After consideration this information the doctor determined that Reynolds suffered from multiple trauma to his lower right leg, including a probable open fracture of the right tibia and fibula and possible fracture of the left foot as well as a possible intra-abdominal injury. He requested consultations from a surgeon and an orthopaedic surgeon, the latter taking another oral medical history. Reynolds was transferred to the operating room where the orthopaedic surgeon performed a closed reduction and intramedullary rodding of the right tibia fracture and a closed reduction and percutaneous pinning of the left second, third and fourth metatarsal neck and head fractures. Following surgery Reynolds was admitted to the hospital floor where the hospital staff monitored his condition and he began receiving physical therapy. He was subsequently returned to the operating room for closure of his right lower leg wound and the next day he was discharged from hospital. Five days later he died of a massive pulmonary embolism that emanated from the deep veinous thrombosis (DVT) at the fracture site of his right leg. A witness said that she had overheard Reynolds informing an employee of the hospital that his family had a blood clotting problem on his father's and brother's side of the family whenever they had a trauma. Several family members also said that they had told a MaineGeneral employee in the hospital room after Reynolds underwent surgery that he had a family history of hypercoagulability. His widow filed a complaint that MaineGeneral had failed to screen Reynolds appropriately for DVT and that they had failed to stabilise him for DVT before releasing him. The court had to determine the precise scope of the hospital's duty to screen for risks or related conditions associated with or aggravated by an emergency medical condition. The appellants argued inter alia that the DVT was a 'symptom' as contemplated in the definition of 'emergency medical condition' in EMTALA but the court did not accept this argument saying that it was not supported by statutory text or case law. It noted that in another case, *Correa v Hospital San Francisco* 69 F. 3d 1184, 1192 (1st Cir.1995), symptoms of nausea and dizziness which are not normally associated with an emergency medical condition might well herald an emergency medical condition in the case of a hypertensive diabetic. In such a case the symptoms were coupled with a history of hypertension and diabetes. The court distinguished Correa's case saying that at the time of the examination Correa was experiencing the symptoms of a pathological condition that were communicated to the staff of the emergency room whereas in Reynold's case he was not experiencing any symptoms of DVT that he expressed to anyone at MaineGeneral. The court seems to be relying on the use of the wording 'manifesting' in the definition of medical emergency condition in EMTALA and saying that Reynolds was not manifesting the symptoms of DVT when he was being examined. The appellants also argued that the duty to screen did not stop after an initial screening but 'should be tolled, in effect, until after the traumatic injuries had been treated and clotting was more likely to have begun.' The court noted that EMTALA is a limited anti-dumping statute and not a federal malpractice statute and that the avowed purpose of EMTALA was not to guarantee that all patients are properly diagnosed, or even to ensure that they receive adequate care but instead to provide an 'adequate first response to a medical crisis for all patients and to send a clear signal to the hospital community that all Americans, regardless of wealth or status, should know that a hospital will provide what services it can when they are truly in physical distress. It is interesting to note that one of the key factors behind EMTALA is equality, a very prominent value in the South African Constitution and section 27(3) is aimed at supporting the principle of equality with regard to emergency medical treatment. Liebenberg in Davis *et al* fn 124 *supra* observes at p 358 that "As health care services are not yet universally available and are subject to progressive realisation under s 27(2), the protection of this right extends only to situations in which a patient is refused emergency medical treatment owing to a lack of money, race or other exclusionary practices." Available at http://www.law.emory.edu/1circuit/jul2000/99-2153.01a.html

prior to delivery or a transfer would pose a threat to the woman or her unborn child[386]. It is not clear at this point whether the same approach will be adopted with regard to the constitutional right to emergency medical treatment especially in view of the fact that in South Africa it is highly likely that hundreds of women still give birth outside of medical facilities in their cultural homes assisted by traditional birth attendants. It is likely that the circumstances of each case of a woman in labour will determine whether or not the situation does necessitate emergency medical treatment. It is submitted that even a woman living in an urban area attended to by a general practitioner or a gynaecologist and who always intended to have her baby in an urban hospital may not necessarily be considered to be a medical emergency simply because she goes into labour in a shopping mall and there are no anticipated or actual complications with the birth process. She might be in need of some assistance at the birth and a relatively quiet and private place to do so but the question of whether a normal birth is a condition which requires 'emergency medical treatment' as contemplated in the Constitution is a matter for debate. By the same token it seems illogical to treat a woman in labour in a rural village who is being attended to by a traditional birth attendant (midwife) as an emergency when it was planned that she would have the baby in this way and there are no complications. Onset of labour can be a sudden and unexpected event (although the extent to which it is unexpected is debatable) and some women do give birth after only short periods of labour but that it constitutes a medical emergency in every case is unlikely. Health care services of some kind may certainly be necessary but not necessarily emergency medical treatment. However, if a woman presents at a hospital and she is in labour and her medical records and attending doctor are not available, it may be wise to examine her in order to establish whether or not she is an emergency case because there can be complications which may well necessitate emergency medical treatment such as a Caesarean section. Giving birth is not always a life-threatening situation but it can be. The key question is whether the situation is in fact an emergency or simply requires health services that are available and necessary for the process to run smoothly and to watch for potential complications.

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[386] *Medical Staff Leader Handbook* at www.estespark.org/materials2002.2003/dana.point/hadded.sna.383.04.policyAnn.PDF

By contrast with EMTALA, the Constitution does not define 'emergency medical treatment' which does not make for a great deal of certainty for those who are obliged to provide it. The KwaZulu-Natal Health Act No 4 of 2000[387] does not define emergency medical treatment but defines emergency medical services as follows:

"emergency medical services" means emergency medical services prescribed by regulation and included in the package of basic essential health services;"

Section 29(3) of that Act states that: "A person employed by a public health care establishment or private health care establishment who turns away a person requiring emergency medical services in terms of subsection(1) is guilty of an offence."

The use of the term 'emergency medical services', as opposed to 'emergency medical treatment', tends to get around the argument that any attempt to define emergency medical treatment as contemplated in the Constitution will end up being unconstitutional as the Constitution itself has left it open. The reference to the Constitutional concept of emergency medical treatment is oblique but nonetheless substantial as evidenced by the fact that failure to provide emergency medical services in KwaZulu-Natal is an offence. The approach to emergency medical treatment in the National Health Act is simply to restate the constitutional right. No regulations have yet been made on the subject of emergency medical treatment.

2.8.3 Medical Treatment

This phrase raises the question of who is liable to render the emergency medical treatment. For instance does it extend to first aid by persons who are not medically trained but have done a course in first aid? Does it extend to everyone in the crowd of people in the restaurant in which a patron is suffering a heart attack who know how to do cardio pulmonary resuscitation? Does it only apply to those who are medically trained and who are on duty at the time when the services are required? It thus also raises the question of an

[387] Gazette KWN No 5560, Notice No 4, dated 13 September 2000

obligation to treat a person in an emergency irrespective of whether the medical professional concerned is on duty or not. The well-worn example is that of the general practitioner who is on his way to a concert one evening and who sees that a motor vehicle accident has just happened and emergency medical services are yet to arrive at the scene. Leibenberg[388] argues that as the scope of the right is confined to 'medical' treatment it only binds those persons and institutions qualified to administer such treatment, including doctors, nurses and paramedics. A narrow interpretation is more in keeping with the traditional reluctance of the South African common law to impose upon the person in the street a positive duty to interfere in the affairs of another[389]. It must not be forgotten, however, that the values that are enshrined in the Constitution must inform the common law and not the other way around. Considerations of public policy even at common law have lead to the imposition of liability for omissions in cases such as that of *Ewels*[390]. The fact that the Constitution stipulates that no one may be refused emergency medical treatment as opposed to conferring a right to emergency medical treatment does suggest that a general obligation to rescue was not intended. Refusal implies that there is some kind of request for assistance. The question is whether, in the event that a person is unable to

388 Davis *et al* fn 124 *supra* at p358-359

389 Strauss SA *Doctor, Patient and the Law* p 90 observes that there is no legal duty upon a person to rescue another, even if it could be expected of him, on purely moral grounds, to act positively to prevent the damage (he refers in footnote 5 to *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 596H). He notes that a duty to come to the rescue of another may arise from contract (eg in the case of the man who joins a municipal fire department as fireman, or the man who joins a hospital as ambulance driver or paramedic) or from statute (eg the duty imposed upon doctors, dentists and nurses who attend a child who has apparently been ill-treated or abused). He does state that, quite apart from these situations a duty to rescue may by common law arise from circumstances in which the parties, i.e. the person in distress and the would-be rescuer find themselves. He observes that in the case of *Minister van Polisie v Ewels* the Appellate Division gave recognition to this duty in the context of defining the limits of delictual liability for a non-feasance: in essence an omission is wrongful where the circumstances are such that the omission would not only evoke moral indignation but also that the convictions of society would require that the omission be regarded as wrongful. Applied to the medical situation, says Strauss, it is not difficult to conceive of circumstances in which there would clearly be a legal duty on the part of doctors, nurses and other medically qualified persons to come to the rescue of accident victims by means of medical aid. He submits that a duty to rescue someone by means of medical treatment will not arise where there is danger for the potential rescuer. However at p25 in a discussion of *Ewels* he points out that: "It is therefore clear that out law has evolved from its older, highly individualistic stance to a viewpoint reflecting a health social responsibility. A court may now well hold a doctor liable for harm suffered by an injured or ailing person, where the doctor was aware of his condition and unreasonably refused or failed to attend. The word 'unreasonably' must be emphasised." The facts of the case in *Ewels* were that the plaintiff was unlawfully assaulted by an off-duty policeman in the presence of other policemen who were on duty and failed to take any action to assist the plaintiff. The question was whether the Minister of Police could be held vicariously liable for this omission. It is submitted that the arguments in favour of the vicarious liability finding in *Ewels* are extremely strong because of the nature of a policeman's work – to protect the public and to prevent or stop crimes from being committed. The policeman who failed to act were on duty. They failed to perform an essential function of their work in failing to prevent an unlawful assault. Those employed for the purpose of protection of members of the public failed to protect a member of the public. In cases where medical practitioners, especially those in private practice, are on vacation or are attending a social function for recreational purposes the arguments that they should go to the assistance of a person who is ill or injured in their surroundings are not as strong as those in *Ewels*. This is not to say that no liability can be imposed on them for failing to assist – only that the chances of them being found liable for an omission are very much dependent upon the circumstances. If the same private medical practitioner is in his rooms on a lunch break before seeing the next patient and a person staggers in who has just been shot in a drive by shooting the chances are greater that such a medical practitioner would be held liable for an omission to assist the wounded person.

390 *Ewels* fn 389 *supra*

make that request because they are unconscious or so badly injured that they are unable to speak, means that a failure to give them emergency medical treatment does not constitute a refusal and is thus not a violation of section 27(3). Clearly this cannot be the case. A request for assistance in an emergency could be tacit or implied in certain circumstances and it is likely that a refusal to assist a person in such circumstances will constitute a violation of the section 27(3) right - particularly if the refusal is unreasonable. In the example given previously of the general practitioner on his way to an evening function who sees a motor vehicle accident on the other side of a highway there is still a probability that if he drives on without offering assistance this will not necessarily constitute a violation of the section 27(3) right. Such examples are, in reality of limited value, however in that the only principle they really serve to illustrate is the importance of the circumstances of each particular case. If one changes just one detail of the story – for instance that the doctor is employed by the provincial emergency medical services to assist motor vehicle accident victims on roads within the province – the initial conclusion may be significantly revised.

2.8.4 Intellectual Property Rights and Access To Technology

There is significant potential for conflict of rights in the arena of intellectual property where an inventor of a new drug or a medical device or a similar health care invention wishes to commercially exploit the intellectual property rights in that invention. The more vital the invention is for the saving of life or the curing of a disease and the relative availability of other treatments for the same condition can contribute greatly to the tension between a right of access to health care services on the one hand and the right of a patentee to exploit an invention on the other. Such tension can assume international significance as it did when the Pharmaceutical Manufacturers Association challenged the provisions of the Medicines and Related Substances Control Amendment Act No 90 of 1997 concerning parallel importation. The United States of America put South Africa on its so-called Watch List of countries against which it considered imposing sanctions. The case was eventually settled out of court but it attracted considerable global attention.

2.8.4.1 Patents on Medicines

The question of patents on medicines will be dealt with in this chapter only from the perspective of the constitutional right of access to health care services and what this implies with regard to intellectual property rights in medicines. Many of the international debates in this area have centred around access to HIV/AIDS drugs for obvious reasons but the principles and issues involved relate to many different medicines used to treat various health conditions. As stated previously there is a tension between the law on intellectual property and society's interest in promoting and protecting the development of intellectual property on the one hand and the law on access to health care services and society's interest in ensuring the general health and well-being of the population on the other.

The Patents Act[391] is the relevant intellectual property legislation in South Africa insofar as the patenting of medicines is concerned. Section 4 of the Act stipulates that:

"A patent shall in all respects have the like effect against the State as it has against a person: Provided that a Minister of State may use an invention for public purposes on such conditions as may be agreed upon with the patentee, or in default of agreement on such conditions as are determined by the commissioner on application by or on behalf of such Minister and after hearing the patentee."

Section 25 of the Patents Act governs what the subject matter of a patent[392]. Generally speaking, a patent may be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture.

Subsection (9) of section 25 affects patents for medicines in particular. It states that:

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391 Patents Act No 57 of 1978

392 According to section 25 -

(1) A patent may, subject to the provisions of this section, be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture.

(2) Anything which consists of-
  (a) a discovery;
  (b) a scientific theory;
  (c) a mathematical method;
  (d) a literary, dramatic, musical or artistic work or any other aesthetic creation;
  (e) a scheme, rule or method for performing a mental act, playing a game or doing business;
  (f) a program for a computer; or
  (g) the presentation of information,

shall not be an invention for the purposes of this Act.

"In the case of an invention consisting of a substance or composition for use in a method of treatment of the human or animal body by surgery or therapy or of diagnosis practised on the human or animal body, the fact that the substance or composition forms part of the state of the art immediately before the priority date of the invention shall not prevent a patent being granted for the invention if the use of the substance or composition in any such method does not form part of the state of the art at that date."

Subsection (11) of section stipulates that an invention of a method of treatment of the human body by surgery or therapy or of diagnosis practised on the human or animal body shall be deemed not to be capable of being used or applied in trade or industry of agriculture.

The effect of these provisions is that medicines or therapeutic substances, which are capable of being used or applied in trade or industry or agriculture, are patentable but that methods of surgical, therapeutic or diagnostic treatment are not. The result is that a holder of patent rights in a medicine is entitled to exploit those rights for the duration of the period of the patent which is usually twenty years. In the case of a medicine, however, this period can be significantly reduced by the amount of time that it takes to have the registration of a medicine approved by the medicines regulatory authority which, in South Africa, is the Medicines Control Council (MCC) established in terms of the Medicines and Related Substances Act[393]. In terms of this Act a medicine may not be sold in South Africa unless it has been approved and registered by the MCC.

The effect of a patent is described in section 45(1) of the Patents Act[394] as follows:

"The effect of a patent shall be to grant to the patentee in the Republic, subject to the provisions of this Act, for the duration of the patent, the right to exclude other persons from making, using, exercising, disposing or offering to dispose of, or importing the invention, so that he or she shall have and enjoy the whole profit and advantage accruing by reason of the invention."

Section 56(1) of the Patents Act provides that any interested person who can show that the rights in a patent are being abused may apply to the commissioner in the prescribed manner

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393 Fn 226 *supra*

394 Fn 319 *supra*

for a compulsory licence under the patent. What constitutes abuse is set out in section 56(2) of that Act.[395]

The subject of compulsory licensing in the context of intellectual property rights is often a contentious one since it usually allows the state in certain circumstances to override the intellectual property rights in goods needed for instance to deal with national crises or states of emergency. Compulsory licensing provisions usually attempt to achieve by means of legislation, an acceptable balance between society's real interest in encouraging inventors and its need for those inventions to be readily available to address matters of national interest. This subject will be canvassed in more detail in a subsequent chapter.

Questions as to the legitimacy of the interests of holders of intellectual property rights in medicines when weighed against the constitutional right of access to health care services will be discussed in more detail in another chapter as this is an area in which the interface between international law and international regulatory institutions on the one hand and national law and national regulatory institutions on the other is fairly extensive and needs to be explored in some depths. Intellectual property rights in medicines are very often a cost factor of the medicine since the patent holder is seeking to recover the costs of research and development on a particular drug within the limited lifespan of the patent while it still has the exclusive right to exploit its invention. Issues concerning the balancing[396] of interests in

[395] "(2) The rights in a patent shall be deemed to be abused if-

(a) the patented invention is not being worked in the Republic on a commercial scale or to an adequate extent, after the expiry of a period of four years subsequent to the date of the application for the patent or three years subsequent to the date of the application for the patent or three years subsequent to the date on which that patent was sealed, whichever period last expires, and there is in the opinion of the commissioner no satisfactory reason for such non-working;

(b) ......

(c) the demand for the patented article in the Republic is not being met to an adequate extent and on reasonable terms;

(d) by reason of the refusal of the patentee to grant a licence or licences upon reasonable terms, the trade or industry or agriculture of the Republic or the trade of any person or class of persons trading in the Republic, or the establishment of any new trade or industry in the Republic, is being prejudiced, and it is in the public interest that a licence or licences should be granted; or

(e) the demand in the Republic for the patented article is being met by importation and the price charged by the patentee, his licensee or agent for the patented article is excessive in relation to the price charged therefor in countries where the patented article is manufactured by or under licence from the patentee or his predecessor or successor in title."

[396] On the subject of balancing of constitutional rights, values or interests, Woolman 'Out of Order? Out of Balance?' fn 256 *supra* points out somewhat pessimistically that balancing at its best often involves terminological confusion and its worst it is an impossible undertaking, pointing out that we value things in qualitatively different ways and each good is valued in our own and its own particular way. He says that we do not value things in quantitative terms: intensity or utility. Citing Walzer M, *Spheres of Justice* (1985) he observes that goods, like people, have shared meanings in a society, because goods, like people, are a product of social, political, economic, educational, religious and linguistic practices which generate meaning. It is the shared meaning or understanding of a good which determines or should determine, its movement and distribution. He says that according to Walzer, when the meanings of social goods are distinct, their distributions must be autonomous. That is, for each good there exists a set

this area can become acute, particularly with regard to lifesaving drugs that are effective in dealing with large scale public health problems such as HIV/AIDS and there has been extensive debate on a number of different levels at this place where public and private international law collide. They will be canvassed in due course in the chapter dealing with medicines regulation and control.

2.9 Reproductive Health Care

The phrase 'reproductive health care' is expressly included in the section 27(1) right of access to health care services. It is therefore necessary to consciously consider what implications it has for the rendering of health services and the constitutional obligations of the state and others in this regard. It is clearly important in this context to explore the subject of reproductive rights[397] and the controversial issue of human cloning a topic upon which just about everyone who surfs the internet has written their views. There are at least two possible reasons for the express inclusion of reproductive health care in the section 27(1) right of access to health care services, depending on whether the reference to reproductive health care was intended to widen the concept of health care services to include services which would not ordinarily be regarded as such or whether it is a subset of health care services that was intentionally highlighted to emphasise health care for women in the area of reproduction. An example of the former is the artificial insemination of a fertile healthy woman with the sperm of a donor because her husband is infertile. This procedure is not designed to cure or remedy the husband's infertility and it is not really a health care service to the wife as there is nothing wrong with her. In human rights terms it is a procedure which is assisting the couple to exercise their reproductive rights. It may at first glance seem to be a highly contrived interpretation that the reference to reproductive rights was included in order to emphasise the health of women but when one takes into account the fact that as a concept, "reproductive rights was originally formulated by women activists, or better say, women's groups involved with health issues such as reproductive health, and that it contains a radical critique of patriarchal society and the dominant

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of criteria and procedures deemed to be appropriate for their distribution. Woolman says that Walzer's view may need to be qualified and that the demands of justice are in fact more complex than Walzer's account allows.

[397] On this topic see further Albertyn C 'Reproductive health and the right to choose: Policy and law reform on abortion' in *Engendering the Political Agenda: a South African Case Study* C Albertyn *et al* (eds) CALS 1998

development model (Vuola 1998,11)"[398], such interpretation is not as contrived as it may sound. Women in male dominated societies, which includes just about all of the cultural groupings in South Africa, historically and even in many instances right up to the present day, have tended notoriously to get the short end of the stick when it comes to balancing the reproductive rights of men against theirs[399]. Aitken[400] points out that in its 1993 *World Development Report*, the World Bank estimated that 34% of the burden of disease of reproductive age women in developing countries is due to reproductive health problems and that reproductive health problems account for 60% of the burden of disease for women in Africa. He states that it is hardly surprising therefore that prenatal delivery care, treatment of STDs and family planning are all included in the minimum essential package of clinical services recommended in the *World Development Report*.

It is submitted that the second interpretation, i.e., that the reference to reproductive health care is in acknowledgement of the prejudice suffered by women in this area and constitutes an express undertaking to remedy the situation is the more likely of the two possible reasons for it. This does no, of course, mean to say that men are not entitled to reproductive health care the same as women. Their right of access to reproductive health care is no less than that of women.

2.9.1 Reproductive Rights

The Constitution does not expressly refer to reproductive rights. Section 27(1) says that everyone has the right to have access to health care services including reproductive health care. The right to bodily and psychological integrity also has a bearing on reproductive

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398 Ollila J in *'Womens Reproductive Rights'* www.mv.helsinki.fi/home/jmollila/essay.htm notes that at least three types of reproductive rights can be distinguished: (1) the freedom to decide how many children to have and when to have them; (2) the right to have information and means to regulate one's fertility; and (3) the right to "control one's own body" (Dixon, Meuller, 1993, 12)".

399 Ollila, fn 398 *supra*, notes that: "Male-gendered institutions of government, religion and the health professions have justified intervention in women's reproductive self-determination by invoking their own principles of public order, morality and public health. There are still laws against contraception and abortion in many countries; women lack control over their sexual and reproductive lives and the overall quality of reproductive health care is poor. Also the statistics show the interconnection between poverty, lack of reproductive rights and women's mortality."

400 Aitken IW 'Decentralization and Reproductive Health' Department of Population and International Health, Harvard School of Public Health, June 24 1998 www.reprohealth.org

issues since it is specifically recognised that this right includes the right to make decisions concerning reproduction[401]. Significantly, there were objections to this section of the Bill of Rights on the grounds that it opens the way for abortion[402]. The Choice on Termination of Pregnancy Act[403] refers in its preamble to the promotion of reproductive rights. As with the right to health, reproductive rights are thus a derivative of other fundamental constitutional rights such as the right to privacy, the right to freedom and security of the person, and the rights to dignity, access to health care services and information[404]. This section concentrates on reproductive rights in the narrow sense in order to more closely examine that aspect of the right of access to health care services dealing with reproductive health care. It must be stressed that although discussions of reproductive rights usually focus on the reproductive rights of women[405] and related issues, reproductive rights are not gender specific and are of fundamental importance to both men and women.

2.9.2 Reproductive health care in relation to reproductive rights

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401 According to section 12 (2) of the Constitution "Everyone has the right to bodily and psychological integrity, which includes the right-
(a) to make decisions concerning reproduction; "

402 See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of The Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para [59] where it was observed that:
" NT 12(2) provides that:
'Everyone has the right to bodily and psychological integrity, which includes the right -
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.'
Objection was taken to this provision in the NT on the grounds that it opens the way to abortion. The objector argued that the proper interpretation of CP II permits the CA to increase the rights contained in the IC, but prohibits it from reformulating rights in a way that would detract from the protection conferred by the IC. The objector further argued that there are two provisions in the NT which effectively reduce the protection afforded the foetus by the IC. The first is NT 12(2) and the second is the omission of a provision equivalent to IC 33(1)(b). IC 33(1)(b) provides that any limitation of a right contained in the IC 'may not negate the essential content of the right'. The objector argued that the omission of this right may render it more probable that abortion will be held to be constitutional. It should be emphasised that this Court's current task is not to determine whether the NT permits abortion or not but to decide whether or not the NT complies with the CPs. The relevant CP in this case is CP II which requires the CA to include within the NT all 'universally accepted fundamental rights, freedoms and civil liberties'. Beyond that the CPs give the CA a wide discretion to determine which rights should be included in the NT and how they should be formulated."

403 Fn 35 *supra*

404 "In their narrowest sense reproductive rights demand respect for women's bodily integrity and decision-making in an environment that is free from abuse, violence and intimidation. They are also said to require access to voluntary, quality reproductive and sexual health information, education and services. Viewed more broadly reproductive rights may be linked to the provision of such social economic necessities as food shelter, childcare and education." O'Sullivan and Bailey in Chaskalson *et al*, fn 67 *supra*, p16-1 onwards.

405 Chaskalson *et al* (fn 67 *supra*) in discussing reproductive rights in Chapter 16 state at 16-1 that, "This chapter concentrates exclusively on abortion because it is at present the sole focus of the constitutional debate over reproductive rights. We would hope that as the rights interests and values underlying the debate are discussed in the context of women's lives in South Africa, the complex content of a right to reproductive health will not be overshadowed by the single issue of abortion."

It is submitted that the term "reproductive health care" refers to those health services connected with reproduction and the right to make decisions concerning reproduction. The term 'health services' not only means medical treatment but also relates to health education and information[406]. This is nowhere more true than in the context of reproductive rights. Since the decision to reproduce implies the right to decide not to reproduce, reproductive health care must include services concerning contraception and termination of pregnancy as much as it includes services relating to fertility, conception and giving birth. If "reproductive health care" is taken as referring to health services connected with reproduction and the right to make decisions concerning reproduction then the right to reproductive health care embraces a wide range of health care services relating to contraception, conception, fertility, infertility, pre-natal, perinatal and postnatal care, gynaecological services, advice on and treatment of sexually transmitted diseases, artificial insemination and other methods of artificial conception and fertilisation, and the extraction, storage and utilisation of human reproductive tissue such as oocytes and spermatozoa, human gonads etc.

The question of the right of access to reproductive health care may be most obvious in issues of termination of pregnancy but there are other areas of law in South Africa in which it does arise although perhaps not as noticeably. The Prescribed Minimum Benefits Package in the regulations to the Medical Schemes Act[407] makes provision for the treatment of infertility as part of the mandatory services that medical schemes are required to provide as part of their benefit plans[408]. The Act defines a "relevant care service" as:

"any health care treatment of any person by a person registered in terms of any law, which treatment has as its object-

(a) the physical or mental examination of that person;

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406 Chaskalson et al fn 60 *supra* at 16-16 point out that :"Article 10 (h) of the Women's Convention states that women have the right to 'specific educational information to help to ensure the health and well-being of families, including information and advice on family planning'. Lack of access to information about reproductive health will prevent women from exercising their right to reproductive decision-making, which includes making informed choices, and this will consequently limit the control that they have over their bodies."

407 Fn 328 *supra*

408 Code 902M of the Package (Diagnosis: Infertility) provides for surgical and medical treatment. Due to the high costs of certain fertility treatments there is at the time of writing a proposed amendment to the regulation which has been published for public comment and which restricts such treatment to: " (a) hysterosalpingogram (b) the following blood tests: a. Day 3 FSH/LH b. Oestradiol c. Thyroid function (TSH) d. Prolactin e. Rubella f. HIV g. VDRL h. Chlamydia i. Day 21 Progesterone (c) laparoscopy (d) hysteroscopy (e) surgery (uterus and tubal) (f) manipulation of ovulation defects and deficiencies (g) semen analysis (volume; count; mobility; morphology; MAR-test) (h) basic counselling and advice on sexual behaviour, temperature charts etc. (i) treatment of local infections." Gazette No 23379, Government Notice No 540, Regulation Gazette No 7344, 30/04/2002.

(b) the diagnosis, treatment or prevention of any physical or mental defect, illness or deficiency;
(c) the giving of advice in relation to any such defect, illness or deficiency;
(d) the giving of advice in relation to, or treatment of, any condition arising out of a pregnancy, including the termination thereof;
(e) the prescribing or supplying of any medicine, appliance or apparatus in relation to any such defect, illness or deficiency or a pregnancy, including the termination thereof; or
(f) nursing or midwifery,

and includes an ambulance service, and the supply of accommodation in an institution established or registered in terms of any law as a hospital, maternity home, nursing home or similar institution where nursing is practised, or any other institution where surgical or other medical activities are performed, and such accommodation is necessitated by any physical or mental defect, illness or deficiency or by a pregnancy;"

The term 'relevant health service' is used in the Act in the definition of the term "business of a medical scheme" and is central to this latter concept[409]. This definition indicates that the giving of advice in relation to a pregnancy as well as termination of a pregnancy is regarded as health care treatment for the purpose of coverage by medical schemes. Infertility also fits into this definition as it is a physical defect as contemplated in sub-paragraph (b) of the definition. Medical schemes are entitled to limit their benefits to the extent that they fall outside of the prescribed minimum benefits package. As pointed out previously even the prescribed minimum benefits package imposes some limitation on the nature and extent of fertility treatment. What about the obligations of government in the public sector? Are they greater than those of medical schemes, the same or less? Would the public health sector be obliged to provide the same levels of fertility treatment as those which medical schemes must provide or can it legitimately provide fewer or less technologically advanced reproductive health care services due to resource constraints? One would have to examine the rationale behind the prescribed minimum benefits package in order to answer such questions. If the rationale is to ensure the same level and nature of health care services to patients in the private sector as to those in the public sector then the answer is clearly "yes". A similar answer would be given if it were a question of ensuring that the purpose was to ensure that private health sector patients have access to a basic package of services that are considered fundamental to health. However, if the reason is

409 According to section 1 of Act No 131 of 1998,"business of a medical scheme" means the business of undertaking liability in return for a premium or contribution-
(a) to make provision for the obtaining of any relevant health service;
(b) to grant assistance in defraying expenditure incurred in connection with the rendering of any relevant health service; and
(c) where applicable, to render a relevant health service, either by the medical scheme itself, or by any supplier or group of suppliers of a relevant health service or by any person, in association with or in terms of an agreement with a medical scheme;"

rather to prevent the avoidance of liability for certain high risk conditions by medical schemes and to reduce the strain on public sector resources then the answer may not be as clear cut. Whilst equity arguments are strong it is a harsh economic reality that people who can afford to fund their own health care services are able to 'buy' more than those who cannot. These differentials are evident even within individual medical schemes which provide a range of options ranging from low cost offering the most basic health care benefits in the form of the prescribed minimum benefits package only to relatively high cost which includes a considerable number of benefits over and above those of the prescribed minimum benefits package. What is available in the private sector, especially in terms of advanced, and expensive health technology may not always be available in the public sector due to resource constraints. These issues serve to highlight interesting dichotomies within the public and private health sectors relating to rationing, the utilisation of available resources and equity in access to health care services.

2.9.3 The Ability to Reproduce

If reproductive rights are implicit in the constitutional Bill of Rights then the question arises as to what extent the inability to reproduce should be treated as a medical condition. This is an old question in a different context since it relates to the question of the rationing of access to health care services. Due to the fact, however, that infertility is usually not life-threatening and does not, except in extreme cases, affect an individual's ability to function in and contribute to society, combined with the fact that treatment of infertility can be extremely expensive, there is a tendency to downplay the right of access to health care services for infertility in favour of the more life threatening and physically disabling health conditions. To put it differently, decisions relating to the rationing of health care resources are likely to place treatment for infertility somewhere at the bottom of the hierarchy of health care services that must be provided. For this reason, techniques such as artificial insemination and *in vitro* fertilization are not often considered part of the standard package of health care services in either the public or the private health sectors although they are probably more easily available in the latter.

Reproductive rights raise some highly controversial issues with regard to not only the question of the right to life but also human dignity, access to technology and the extent to which rationing or denial of such access is legitimate. Should HIV positive people receive medical treatment aimed at promoting conception for instance? What about people with scientifically identified genetic abnormalities which can be passed on to their children and which cause severe disease or disability? Marriage laws often prohibit marriages between people whose degrees of consanguinity are too close in order to avoid genetic disorders caused by inbreeding. This could be said to be a justifiable limitation of the right to reproduce. The subject of reproductive rights is also likely to come to the fore in discussions around human cloning and the genetic manipulation of human tissue. Human cloning in its reproductive sense can be regarded as a kind of fertility treatment since it offers the opportunity of reproducing to someone who cannot do so in the usual way. It is simply a further step at the end of the spectrum of methods of assisted reproduction[410].

2.9.4 Assisted Reproduction

Fertility treatments which enhance the natural fertility of a person or cure their infertility is only one way of addressing difficulties with reproduction. There are other more extreme methods ranging from artificial insemination by husband (AIH), artificial insemination by donor (AID), in vitro fertilisation, freezing of human embryos and surrogate motherhood. Are these forms of treatment included in the right of access to health care services including reproductive health care? They are all relatively expensive procedures which very often have to be repeated a few times before being successful. Strauss[411] points out that in South African law, of the two methods of artificial insemination (AID and AIH) the latter type particularly raises complex legal questions. It is not the intention to explore these legal questions in this chapter in any depths since it involves more than just constitutional law and the right to health care services, including as it does the question of contractual

410 Andrews LB in 'Embryos Under the Knife' points out that "Each step along the way, from sperm donation to in vitro fertilisation to surrogate mothers to embryo research, we have gradually yet inexorably moved closer and closer towards engineering human life to fulfill individual desire." http://dir.salon.com/health/feature/2000/08/21/stem_cell/index.html

411 Strauss, *Doctor, Patient and the Law: A Selection of Practical Issues*

arrangements, concepts of parenthood, the legal status of the child, the right of the child to support (which has already been previously discussed in relation to section 28 of the Constitution) and aspects of statutory law[412].

At present artificial insemination is regulated in South Africa by the Human Tissue Act[413]. The donation of gametes is strictly controlled, the term 'gamete' being defined in the Human Tissue Act as meaning either of the two generative cells essential for human reproduction. No one except a medical practitioner or someone acting under his or her supervision may remove or withdraw a gamete from the body of a living person for the purposes of artificial insemination. This does not adversely affect the constitutional right of access to reproductive care any more than does any other legislation restricting certain activities to health care professionals and regulating the qualifications and standards of services of those professionals.

As a result of an investigation into the legal position of illegitimate children in 1985 by the South African Law Commission the Children's Status Act[414] was enacted to provide *inter alia* for a situation in which children are the product of artificial fertilisation. Section 5 of that Act regulates the effect of artificial insemination.[415] Artificial insemination has thus been a legally and morally acceptable means of assisted reproduction in South Africa for some time. A more relevant question from the perspective of constitutional law involving the right of access to reproductive care and reproductive rights is whether a lesbian couple can insist on one partner being artificially inseminated so that they may have a child. This issue is complicated by the fact that the sperm donor must, in terms of the regulations to the

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412 See Strauss *Doctor, Patient and the Law: A Selection of Practical Issues* at p181 onwards. See also Van Oosten *International Encyclopaedia of Laws*, Vol 3 Medical Law – South Africa

413 Fn 270 *supra*

414 Act No 92 of 1987

415 It provides as follows: (1)(a) Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination."
The definition of artificial insemination is given in the Act as follows – " 'artificial insemination" in relation to a woman –
(a) means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or
(b) means the placing of the product of a union of a male and female gamete or gametes which have been brought together outside the human body in the womb of that woman,
for the purposes of human reproduction."

Human Tissue Act[416] give a comprehensive written consent including consent to a physical examination and interview by a doctor; the taking of samples of gametes for the purpose of testing, analysing or processing; certain personal details (excluding his name, date of birth and ID number) being made available to the ultimate recipient; certain person details including his family history being made available to the doctor who will perform the artificial insemination; and certain confidential details regarding himself being made available to the Director-General, National Health and Population Development. The question is whether the donor must give consent to the use of his sperm in a situation in which the child will be raised by a same-sex couple. Is it necessary for him to know these details? In other words must the consent be specific and relate to use of the sperm by a named woman who is known to the sperm donor but who is not his wife? Strauss speaks of the "recipient and her husband" in his discussion of the provisions of the regulations to the Human Tissue Act. It is submitted that in the light of recent judgments in the constitutional court involving the constitutional rights of homosexual persons[417] a lesbian couple with a consenting sperm donor could not constitutionally speaking be refused artificial insemination on the basis of the homosexual nature of their relationship. Should the Human Tissue Act stipulate or imply otherwise then it will be necessary to amend that Act accordingly. Another potentially controversial area affecting reproductive rights is the right of a single woman to artificial insemination. Constitutionally speaking it is submitted that a single woman who wants to have a child without being involved in a sexual relationship, has a constitutional right to artificial insemination provided that she can afford the procedure and that the donation of the sperm is in conformity with legal provisions relating to the control of human tissue and gametes. The right to reproduce attaches to individuals and not only to pairs of individuals and is based on the constitutional right to freedom and security of the person - a very personal and private right in terms of its exercise.

The issue of surrogate motherhood and male homosexual couples is more problematic due to the legal complexities of surrogate motherhood *per se*. The South African Law

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416 Government Notice R1182 of 20 June 1986

417 *National Coalition For Gay And Lesbian Equality And Others v Minister Of Home Affairs And Others* 2000 (2) SA 1 (CC) and *Satchwell v President of Republic of South Africa and Another* 2002 (6) SA 1 (CC); *National Coalition For Gay And Lesbian Equality And Another v Minister Of Justice And Others* 1999 (1) SA 6 (CC); *V v V* 1998 (4) SA 169 (C)

Commission produced a *Report on Surrogate Motherhood* in 1992[418] which describes surrogate motherhood as:

"an arrangement whereby one woman undertakes for financial or compassionate reasons to bear a child by means of artificial fertilisation for another person or persons with the intention of handing over the child born as a result thereof to such person or persons with the intention that the child become their legitimate child."

According to the report, the term "surrogate mother" refers to the woman who bears the child rather than the woman who rears the child. Surrogate motherhood in constitutional terms, amounts to the exercise of the right to freedom and security of the person for the benefit of a third party. If surrogate motherhood were to be restricted or prohibited by law it is submitted that it would therefore have to be in accordance with section 36 of the Constitution in order to be valid since it would constitute a limitation of the right to freedom and security of the person. The Law Commission Report notes that it can probably be safely assumed that many surrogacy arrangements have been concluded and fulfilled without problems and publicity. It points out that surrogacy agreements only cause a public outcry when something goes wrong and the parties involved come before a court, for example when the parties want to contest custody, determine guardianship or establish the parentage of the child. According to the Commission, surrogacy arrangements gives rise to questions such as who is the child's real mother; what is the legal status of the surrogate, the commissioning mother, the natural father or any donor; who has custody of the child; must the commissioning parents adopt the child even if it is biologically their child; can the surrogate consent to adoption; must the maxims *mater semper certa est* (the identity of the mother is always certain) and *pater est quem nuptiae* demonstrant (the father is he whom the marriage points out) apply to the surrogate and her husband; whose consent is required for a surrogacy agreement; and should the surrogate mother receive compensation? Most importantly, will a surrogacy agreement be recognised as a valid agreement and, if so, how will it be enforced?

From a constitutional perspective, to the extent that surrogate motherhood constitutes a waiver of the surrogate mother's right to freedom and security of the person (depending

418 *Report on Surrogate Motherhood* Project 65, 1992

upon the terms of the surrogacy agreement, she may agree to give up some of her rights to make decisions concerning her pregnancy) is a surrogacy agreement valid? This is a general question which relates to the possibility of waiver of constitutional rights rather than being related specifically surrogate motherhood. It is submitted that the question of whether a person can agree to waive, or more appropriately, limit their constitutional rights and freedoms depends very much on the values espoused by the Constitution and public policy. It also depends on the nature and extent of the limitation and the nature of the right. In the context of health care services, a right of access to health care services may be temporarily waived by a person insisting on being discharged from a particular hospital where he or she has been receiving treatment. This could also be argued simply as a choice not to exercise a particular right but it is submitted that a waiver is in many instances exactly that. A clause in restraint of trade in an employment contract is a choice on the part of the employee, in signing the contract, not to exercise his or her right to freedom of movement and freedom to pursue a chosen profession or trade. A professional boxer who steps into a boxing ring for a fight must inevitably, by implication, be accepting certain restrictions or limitations of his right to bodily and psychological integrity.

The South African Law Commission proposed a Bill on Surrogate Motherhood to regulate the consequences of human reproduction by artificial fertilisation of women acting as surrogate mothers[419]. It appears not to have made it to the statute books which could be explained by the fact that it apparently runs contrary to the constitutional reproductive rights of unmarried and homosexual persons and persons who have never been married. Section 4 stipulates that no person except a husband and wife who are lawfully married to each other and who act jointly as a couple shall be competent to conclude a surrogate motherhood agreement. Section 3 is contrary to the reproductive rights of persons who have never been married since only women who ate married, divorced or widowed may act as surrogate mothers. Generally speaking the draft Bill is highly restrictive of the constitutional right to freedom and security of the person and may not pass muster in terms of section 36 of the Constitution. The report of the South African Law Commission predates even the interim Constitution and it is therefore not surprising that there was no

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[419] Government Gazette No 16479 of 14 June 1995.

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discussion of constitutional legal principles. However the rights to freedom and security of the person, bodily integrity, autonomous moral agency and self-determination, which predate the Constitution[420] and do have an impact on surrogacy appear not to have been canvassed in any detail by the Commission.

In the final analysis surrogate motherhood is about the deployment of existing technologies in a manner which impacts upon social values and public policy rather than the utilisation of developing technologies to artificially create a human being. In the comments of the Israel Medical Association to the South African Law Commission[421]:

- Surrogacy is not a new science or technology. It merely entails the use of existing technology namely, gamete donation, in vitro fertilisation and embryo transplantation. Therefore the novelty of the method does not lie in the medical but in the legality and moral nature thereof.
- The ethical questions arising are –
  The right of a woman over her own body;
  The right of a couple to procreate;
  The rights of the surrogate mother as though she may only be the hostess mother she has a right and responsibility to raise the child due to he greater biological and psychological involvement in the birth of the child;
  The interests of a child who is not conceived in his own interests but to satisfy the needs of others; and
  The potential exploitation of the woman

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[420] See for instance *Mabaso v Felix* 1981 (3) SA 865 (A); *Clarke v Hurst No And Others* 1992 (4) SA 630 (D); *Castell v De Greef* 1994 (4) SA 408 (C) at p 409 in which the court notes: "It is clearly for the patient, in the exercise of his or her fundamental right to self-determination, to decide whether he or she wishes to undergo an operation, and it is in principle wholly irrelevant that the patient's attitude is grossly unreasonable in the eyes of the medical profession: the patient's right to bodily integrity and autonomous moral agency entitles him or her to refuse medical treatment." *Duncan v Minister Of Law And Order* 1986 (2) SA 805 (A) in which the court observed at p806 that: "Policy requires that the defendant in an arrest case should bear a full onus, for the reasons set out in Mabaso's case at 873C - F and because the rights to bodily integrity and liberty are the most fundamental of a person's absolute natural rights (see Mabaso's case at 875D). See also *Brand v Minister of Justice and Another* 1959 (4) SA at 714G - H; *Newman v Prinsloo and Another* 1973 (1) SA at 126H - 127G and Mabaso's case *supra* at 873H." In *Maqungu And Another v Assistant Magistrate, Whittlesea, And Another* 1977 (2) SA 359 (E) the court observed at p 362: "The liberty of the individual, I must stress, is an important aspect of our civilisation and of our society and is not lightly to be interfered with. Where a court has deliberately accorded official recognition to an accused's right to liberty by the granting of bail, it should be reluctant thereafter to interfere unless convincing facts are placed before it to make it alter its views" and in *S v Barber* 1979 (4) SA 218 (D) at p 219 "It is well known, of course, that, when a court is required to exercise the discretion which it has to allow a detained person on bail, the court in effect has to balance the detainee's right to liberty against the interests of justice."

[421] See the SALC Report fn 399 *supra* at p116 to 117 as summarised by the SALC

It is submitted that the use of the word 'ethical' to describe the questions in the second bullet point above is somewhat misleading since most of these questions relate as much to points of law as they do to ethics. If it is remains the view of the authorities that surrogate motherhood should be regulated, this will now have to be done with specific reference to the constitutional rights to freedom and security of the person. Whether surrogate motherhood falls into the category of reproductive care as envisaged in section 27(1) of the Constitution is irrelevant in the sense that surrogate motherhood *per se* is not about reproductive care but rather the extent of reproductive rights. In this sense it is located more appropriately in discussions around the constitutional right of freedom and security of the person contemplated in section 12 of the Constitution. As a legal topic, it falls largely outside of the scope of reproductive health care services since a pregnant mother whether she is a surrogate or not is entitled to reproductive care in terms of the Constitution. The techniques used in surrogate motherhood such as artificial insemination by donor and *in vitro* fertilisation are also it is submitted more suited to discussions of section 12 rights than section 27 rights since if they fall within the scope of section 12 rights – in other words they are based upon and supported by the rights in section 12 of the Constitution – no other logical conclusion can be reached but that they must in principle be included within the scope of the right of access to reproductive care bearing in mind the qualifications of section 27(2) of the Constitution with regard to progressive realisation and the availability of resources.

2.9.5 Sterilisation

The converse to the positive aspect of reproductive health care is contraception, sterilisation and ultimately abortion. The right to be sterilised like the right to be artificially inseminated is based rather more upon the right to freedom and security of the person as contemplated in section 12 of the Constitution than the section 27(1) right to reproductive care since if one accepts that a person has a right to security in and control over their own body as stated in section 12(2) (b) then the question of whether or not they have a right to medical

procedures for the purpose of sterilisation is in principle resolved and it becomes merely a question of the available resources of the state as to whether or not a person can undergo a sterilisation procedure. The right to human dignity can also have a bearing on the issue of sterilisation especially in the case of mentally disabled persons. The sterilisation of persons under the age of 18 years is a loaded topic and the issue of the sterilisation of the mentally disabled is even more so. When a mentally disabled person under the age of 18 years presents with a problem that can be resolved through sterilisation health professionals strat to get uncomfortable. The Sterilisation Act, as stated previously is currently being amended so as to make it clear that while the reproductive rights of mentally disabled persons under the age of 28 years must be respected and protected, their other constitutional rights, such as the right to human dignity and psychological integrity must also be taken into consideration when the question of their sterilisation arises.

2.9.6 Human Cloning

Cloning is the controversial topic of the day for a number of reasons and the governments of many countries are at this stage opposed to it to a greater or lesser degree. It is much more of a reproductive rights and freedom and security of the person issue than a right to health services issue for the same reasons as in surrogate motherhood and artificial insemination. Unlike surrogate motherhood, however, it is a new technology that is developing at such speed that the law is unlikely to catch up for a while yet. It has the potential for the manipulation, utilisation and, ultimately, abuse of a person's genetic material without his or her consent or even knowledge. Since genetic makeup is in many ways as unique as a fingerprint, it can be seen as relating in a fundamental way to the identity and personality of a specific human being. As such it impacts upon the constitutional rights of dignity, privacy, and freedom and security of the person and by definition therefore, their reproductive rights[422]. Generally speaking cloning for therapeutic

[422] Cloning is seen as diminishing the value of human individuality and as violating basic norms of respect for human life and the integrity of the human species. *Voluntary Moratorium on New Reproductive and Genetic Technologies*, pronounced by the Minister of Health at the National Press Theatre, Ottawa, July 27 1995, Government of Canada; *Projet de loi fédérale sur la procréation médicalement assistée* (LPMA) 1996, a. 2m and 36; Law No 94-653, 29 July 1994 on Respect for the Human Body, (1994) 45 (4) IDHL 498,a. 16-4

purposes is considered more acceptable than cloning for reproductive purposes. Article 1 of the *Resolution on Reproductive Technologies and the Protection of the Human Person* of the International Law Association states that "considering the dignity inherent in all human beings... any research or manipulation of human genetic material shall be for therapeutic purposes and shall be subject to the approval and control of an ethics committee."[423] Therapeutic cloning relates to the right of access to health care services since its purpose is not to create another human being but to grow organs and other tissue for use in the treatment of disease and for similar therapeutic purposes.

There are many different scientific techniques which fall under the broad generic term of "cloning" and in order to explore the legal aspects of cloning as it relates to the right of access to health care services including reproductive health care, one must first consider what is meant by 'cloning'[424]. In the now famous case of Dolly the sheep a quiescent adult mammary cell was placed in the unfertilised ovum of a sheep in which the nucleus had been removed. The subsequent embryo was transferred into a surrogate mother sheep where it proceeded to divide as an embryo and was born genetically identical to the done sheep except for the mitochondrial DNA which came from the ovum of the donor.[425] This is a different technique to that used in embryo twinning or splitting.[426] Due to the fact that there are a number of different scientific techniques which can apparently lead to the reproductive cloning of a human being it is difficult to regulate the issue at present[427].

423 *Resolution on Reproductive Technologies and the Protection of the Human Person*, adopted at the 63rd Conference of the International Law Association (Warsaw, August 21-27, 1988, (1990) 41 (4) IDHL 723.

424 Jordaan DW 'Human Reproductive Cloning: A Policy Framework for South Africa' 119 *SALJ* 2002 p 294 describes two techniques associated with human cloning as being "cell mass division" and " nuclear substitution" and explains the difference between them. He observes that two distinctions can be drawn: in the first place between inter- and intra-generational cloning and secondly between reproductive and non-reproductive cloning. "Intra-generational cloning is when the individuals who share the same genetic identity are born in the same generation, while inter-generational cloning refers to the situation where such individuals are born in different generations. Reproductive cloning is cloning that is aimed at the birth of an individual who is genetically identical to someone in her or her own or in a previous generation. Non –reproductive cloning is cloning that is limited to the un vitro phase – ie the cloned embryos are not implanted in utero."

425 *Nature*, 1997, v385, February 27, p 810-811

426 Knoppers BM *Cloning Human Beings – Cloning: An International Comparative Overview*, commissioned paper, University of Montreal. Available at www.georgetown.edu/research/nrcbl/nbac/pubs/cloning2/cc7.pdf

427 Knoppers (fn 426 *supra*) points out at G-7 that often countries with an explicit prohibition on human cloning cover embryo splitting or twinning but not the technique that was used to create Dolly. She gives as an example the 1995 Infertility Treatment Act of the State of Victoria in Australia. It bans cloning as well as the attempt to clone with penal sanctions but defines cloning as "to form, outside the human body, an embryo that is genetically identical to another embryo or person" (article 3). According to Knoppers, the *German Embryo Protection Law* prohibits artificially causing a human embryo to develop with the same genetic information as another embryo, fetus, living person or deceased person and attaches penal sanctions. Knoppers notes that depending on how the phrase "causes a human embryo to develop" in interpreted, this definition "may or may not cover "Dolly"." On the other hand, she observes that the highly specific 1990 Human Fertilization and Embryology Act of the United Kingdom, which proscribes "replacing a nucleus of a cell of an embryo with a nucleus taken from a cell of any embryo, person

The antipathy of many nations towards reproductive cloning does not necessarily extend to individual citizens of those states. It has been observed that if the federal government of the United States chooses to regulate or even ban cloning, that action might be challenged on a number of constitutional grounds – as violating scientists' First Amendment freedom of inquiry or as violating a couple's or individual's constitution right of privacy or liberty to make reproductive decisions[428]. In the USA, the right to make decisions about whether to have children is constitutionally protected under the constitutional right to privacy and the constitutional right to liberty. This is a similar basis to the South African constitutional rights to privacy and freedom and security of the person. In *Eisenstadt v Baird*[429] the US Supreme Court commented that "if the right to privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[430] The South African jurisprudence on the subject is not highly developed largely because the constitutional rights that found reproductive rights are relatively new but it is useful to consider the views of courts in other jurisdictions which recognise similar rights in order to get an idea of what the thinking is on the subject[431]. Section 39 of the Constitution permits South African courts to consider foreign case law in interpreting the rights in the Bill of Rights and the constitutional court has referred to the decisions of

or subsequent development of an embryo" may also not be inclusive. The Canadian Bill on reproductive technologies seeks to make it a criminal offence to "manipulate an ovum, zygote or embryo for the purpose of producing a zygote or embryo that contains the same genetic information as a living or deceased human being, or, zygote, embryo or foetus". Whilst this may cover the Dolly technique it does not allow for developments in technology that may render the use of embryonic and reproductive tissue as a source of tissue unnecessary if adult cells can be used for the same purpose.

428 Andrews LB *Cloning Human Beings: The Current and Future Legal Status of Cloning*, commissioned paper Chicago-Kent College of Law. Available at http://www.georgetown.edu/research/nrcbl/nbac/pubs/olining2/cc6.pdf

429 *Eisenstadt* 405 U.S. 438 (1972)

430 Quoted by Andrews (fn 428 *supra*) at F-6.

431 Jordaan (fn 424 *supra*) explores the ethical and legal considerations of human reproductive cloning. He observes that the Bill of Rights explicitly guarantees the right to reproductive freedom in terms of section 12(2) of the Constitution and notes that reproduction is neither synonymous with, nor dependent on sexual intercourse. On this basis he argues that a prospective parent has a prima facie right to decide to use cloning as a means of reproduction but acknowledges that the right can be limited if sufficient cause is shown in accordance with the limitation clause of the Bill of Rights. He lists the main objections that could be raised as identity, genetic diversity, human dignity, freedom and safety and discusses each of them in turn. He concludes by saying that all of the objections that relate to a permanent aspect of human reproductive cloning have been indicated as false: "human reproductive cloning in the context of the family will not *per se* compromise human dignity, freedom or the child's development of a personal identity and will have an infinitesimally small effect on genetic diversity and might even enrich social diversity". In Jordaan's view the only valid objection to human reproductive cloning is the matter of safety which is not necessarily of a permanent nature and the safety objection does provide sufficient case to place a moratorium on human reproductive cloning. He qualifies this by saying that research may within the near future invalidate the safety objection and that such a moratorium must therefore be only temporary. The safety objection, according to Jordaan is based on the fact that human reproductive cloning is still untested and animal experiments are still in their infancy. In accordance with the bio-ethical principle of beneficence, human reproductive cloning should not be attempted unless it is certain that the risk of birth defects associated with human cloning would not be greater than that associated with sexually conceived children.

American courts in a number of instances[432]. According to Andrews, a federal district court has indicated that the right to make procreative decisions encompasses the right of an infertile couple to undergo medically assisted reproduction, including in vitro fertilization and the use of a donated embryo[433]. Some legal analysts have suggested that the constitutional right to make reproductive decisions free from unnecessary governmental intrusion covers the decision of a couple to undergo cloning. However other legal analysts have noted that the unprecedented step of creating a child with only one genetic progenitor would be such a fundamental change in the way humans "reproduce" that it would not be constitutionally protected[434]. Andrews points out that even if a restriction on cloning were found to infringe upon an individual's or a couple's right to make reproductive decisions, the government could justify the restriction if it had a compelling state interest and the restriction is imposed in the least restrictive manner possible. She argues that the potential physical and psychological risks of cloning an entire individual are sufficiently compelling to justify the banning procedure and comments that certain uses of cloning – such as the creation of a clone as a source of spare organs – would likely be banned by the Thirteenth Amendment prohibition of slavery and involuntary servitude. In South African law, a clone created in order to provide spare organs would have the same constitutional rights as any other human being and therefore could not be exploited for this purpose. Section 36 of the Constitution allows the limitation of rights by law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including *inter alia* the importance of the purpose of the limitation, the nature and extent of the limitation and less restrictive means to achieve the purpose. The legal position in South Africa with regard to cloning for reproductive purposes is thus potentially the same as that in the United States although the views on cloning itself may differ between the two countries.

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432 In *Christian Lawyers Association of SA and Others v Minister of Health and Others* (fn 21 *supra*) for instance, the court applied the American decision of *Roe v Wade* (410 U.S. 113 (1973)). Examples of other cases in which the South African courts have made reference to American decisions are *S v Makwayane and Another* (fn 2 *supra*); *Bernstein and Others v Bester and Others NNO* (fn 43 *supra*); *Soobramoney v Minister of Health, Kwazulu-Natal* (fn 23 *supra*); *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (fn 57 *supra*); *Friedman v Glicksman* (fn 185 *supra*).

433 Andrews fn 428 *supra* at F-6. The case referred to is that of *Lifchez v Hartigan* F. Supp. 1361 (N.D.Ill.) aff'd without opinion, sub nom., *Scholberg v Lifchez*, 914 F.2d 260 (7th Cir. 1990), cert. Denied, 498 U.S. 1069 (1991).

434 Andrews, fn 428 *supra*. Robertson J, *Statement to the National Bioethics Advisory Commission*, March 14, 1997, 83 and Annas G, *Testimony on Scientific Discoveries and Cloning: Challenges for Public Policy*, before the Subcommittee on Public Health and Safety, Committee on Labor and Human Resources, United States Senate, March 12, 1997, 4 respectively.

With regard to therapeutic cloning, particularly, the legal position in South Africa may be very different to that in the United States. Andrews observes that the use of cloned cells and tissue for research purposes other than the creation of a child would not be protected by the constitutional rights of privacy and liberty that protect reproductive decisions. Consequently a governmental regulation or ban of such research would not have to have such stringent justification. It would be constitutional so long as it was rationally related to an important governmental purpose. In South Africa, there is a constitutional right of access to health care services and this might well include aspects of cloning for therapeutic purposes, especially if it were the only treatment available and widely recognised as being appropriate for the purpose[435]. The view that therapeutic cloning *per se* is not necessarily a health care service any more than the activities around the research and development of a new drug constitute the drug itself could be of some relevance in constitutional questions involving cloning. It could, for instance, be argued that a health care service directly involves another human being as opposed to medical research activities which may or may not be of benefit to the health status of human beings. If one takes the view that unfettered medical research of all kinds must be permitted and encouraged by the state because medical research invariably carries the potential of improved access to health services or improved health services *per se*, this would not only lead to all kinds of human rights abuses in the field of medical research but would also present an unbalanced view of the rights and values contained in the Constitution. Cloning at this stage, as a collective term for the wide variety of scientific and laboratory activities that are involved in the artificial production of an embryo or embryonic cells or the scientifically forced evolution of stem cells into more specialised tissue, seems more of a precursor to health care services than a health service in its own right. It is a means to an end rather than an end in itself. Perhaps with time when cloning techniques are well established and the production of human tissue for various therapeutic purposes is the equivalent of having a dental technician make up a dental crown or bridge, one could regard therapeutic cloning as a health service with a greater degree of certainty.

In *van Biljon* (fn 228 *supra*) the court observed that "What has been established on the papers in this case is: (a) that although there is as yet no cure for the HIV virus, the internationally recognised 'state of the art' medical treatment for HIV infected patients is anti-viral medication."

It is submitted that as far as a prohibition on cloning for reproductive purposes is concerned its legitimacy would have to be argued on the basis of a justifiable limitation of rights in terms of section 36 of the Constitution if cloning if cloning is within the scope of the right to reproduce. Whilst this may sound somewhat tautologous this is not necessarily the case since there may be scope for the argument that cloning process is so far removed from the process of human reproduction that it does not qualify as such in terms of any of the values of an open and democratic society. The central importance of the right to human dignity in the South African Constitution is also likely to have a strong bearing on any discussion of a prohibition on reproductive cloning since some of the objections to reproductive cloning referred to previously have been on the basis of the fact that it denies or adversely impacts upon human dignity.

It is submitted that with time questions of identity (or rather physical identification) would become of central importance in a society in which reproductive cloning took place on a significant and largely unregulated scale and that Jordaan's[436] dismissal of the identity objection to cloning is overly simplistic. It deals with only one aspect of the highly complex subject of identity in a civilised society. There is a real sense in which society is functionally dependent upon physical identity as a marker or trigger for all kinds of controls, sanctions, privileges and purposes ranging through competence to drive a motor vehicle to criminal investigation processes and proof of guilt to personal security and banking systems to proof of parenthood and familial relationships. It is submitted that if reproductive cloning were to be permitted it would necessitate the introduction of powerful controls over human tissue so as to avoid the cloning of someone without his or her knowledge or consent. The physical identity of film stars, famous sportsmen and women and musicians is a jealously guarded aspect of their personality rights and may even in some cases constitute intellectual property. This is an aspect of reproductive cloning for future consideration. A child that is unwittingly saddled with a genetic identity that is the same as that of international terrorist or serial killer could be severely prejudiced

[436] Jordaan (fn 424 *supra*) argues apparently on the basis that monozygotic twins are a natural phenomenon that is no more and no less desirable that non-twins that there is no right to genetic uniqueness and that indeed the concept of such a right would be offensive to monozygotic twins. He argues that monozygotic twins, although they share the same genetic structure clearly demonstrate that while people who share the same genetic structure may be very similar in many respects, they nevertheless differ sufficiently to leave no doubt about their individual identity.

throughout his or her life. It is not inconceivable that in a society that freely practises human reproductive cloning over a significant period of time, a criminal justice system might become virtually impossible because the moment that evidence is introduced to show that the accused is a clone or there are insufficient controls over human tissue in society such that the chances are high that he could be a clone, especially within the same generation, proof of guilt beyond reasonable doubt could become problematic. Even systems of ownership of property are often dependent upon the capacity to physically identify the owner. Jordaan in his dismissal of the identity argument against reproductive cloning fails to take into account the frequency of the occurrence of monozygotic twins relative to the frequency of births of non-identical persons. Monozygotic twins are not less desirable than non-twins because they are a comparatively rare occurrence. Furthermore, they are seldom if ever inter-generational. The identity objection rests on questions of balance and of degree. If the balance in society shifts in favour of individuals who have a genetic replica of themselves concurrently in existence, questions of identity would become problematic in just about every facet of human social and commercial life. The foregoing discussion may read like something from a science fiction novel but the power to generate identical human beings should not be underestimated in terms of its potential impact. With the passage of time the potential impact of the exercise of such power increases exponentially if it is allowed to be exercised indiscriminately and on a large scale.

It is not necessarily a valid assumption that many people would prefer sexual intercourse as a means of procreation given the choice between sexual reproductive means and non-sexual reproductive means. After all, they can enjoy sexual relations without reproducing. There may be considerable numbers of people who ardently desire to raise what they consider to be perfect offspring based upon notions of perfection as suggested or even dictated by mass media and personal idolisation of prominent politicians, actors, musicians and sportspeople and who have the means to make their dreams a reality. There are many people, reproductive cloning aside, who even now would like their children to resemble a famous sportsperson or actor for financial reasons. The psychosocial implications of reproductive cloning alone have the potential to significantly alter the fabric of human society. It is submitted that human tissue is presently far too readily available in society as a whole to be

able to reassure individuals that they will not be reproductively cloned against their will or without their consent. Until such assurances can be given there is good reason for strict control, if not outright prohibition, of reproductive cloning. In principle cloning, whether for therapeutic or reproductive purposes, is simply a further step in the continual advancement of technology which will no doubt with time become a more acceptable concept to many people. In a controlled environment, which ensures that it is not abused, therapeutic cloning in particular has significant potential value for the health and wellbeing of humans generally.

2.10 National vs Provincial Government Obligations

The Constitution organises the responsibilities between the three spheres of government in terms of the Schedules[437] and mandates co-operative government between them in section 41[438]. The three spheres of government are referred to in section 40 subsection (1) of which states that:

"In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated."[439]

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437 Schedule 4 details functional areas of Concurrent National and Provincial Legislative Competence. Health services, housing, welfare services and education all fall into Part A of this Schedule. The conclusion to be drawn is that both the national government and the provincial governments have a responsibility for socio-economic rights. Municipal health services fall into Part B of Schedule 4. The national and provincial spheres have concurrent legislative competence over municipal health services to the extent set out in section 155(6)(a) and (7) of the Constitution. Schedule 5 details functional areas of exclusive provincial legislative competence.

438 In terms of subsection (1) of this section: "All spheres of government and all organs of state within each sphere must-
(a) preserve the peace, national unity and the indivisibility of the Republic;
(b) secure the well-being of the people of the Republic;
(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(d) be loyal to the Constitution, the Republic and its people;
(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
(f) not assume any power or function except those conferred on them in terms of the Constitution;
(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
(h) co-operate with one another in mutual trust and good faith by-
(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) voiding legal proceedings against one another."

439 De Waal, Currie and Erasmus fn 2 *supra* note at p23 that: "Chapter 3 is aimed primarily at promoting a co-operative form of federalism instead of a competitive form of federalism... In co-operative forms of federalism the different levels of government share the same responsibilities. The Constitution usually allocates legislative and executive powers concurrently to the central and provincial government." They observe that the practice is that the central legislature usually adopts framework legislation

The national executive is given the power in section 100[440] to intervene when a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, to ensure fulfilment of the obligation. It was perhaps in view of this section that the court observed in *Grootboom* that:

"The national government bears the overall responsibility for ensuring that the state complies with the obligations imposed upon it by s 26."[441]

It is submitted that this statement is equally true in respect of the obligations of the state in terms of section 27. Section 146 of the Constitution provides for the event of a conflict between national and provincial legislation in a functional area listed in Schedule 4[442] as follows:

(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
   (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.
   (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing-
      (i) norms and standards;

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and then leaves the details to be filled in by the provinces and the local governments to suit their own particular circumstances. They say that more often than not the sharing of responsibility translates into an arrangement in which framework laws and policies are made centrally and the laws are completed and executed at the provincial level. This arrangement has the advantage of securing uniformity across the country while allowing the provincial authorities to adapt the details to suit local implementation. The loss of the provinces own law making powers is then compensated for by providing them with opportunities to participate in the national legislative process. It is submitted that in the area of health services at least, although some provinces are more active and progressive than others, there is small doubt that they have not relinquished their legislative capacity.

440 "When a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-
(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
(b) assuming responsibility for the relevant obligation in that province to the extent necessary to-
   (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
   (ii) maintain economic unity;
   (iii) maintain national security; or
   (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole."

441 *Grootboom* fn 10 *supra* para 66 p79

442 Cameron AJ has pointed out in *Ex Parte President Of The Republic Of South Africa: In Re Constitutionality Of The Liquor Bill* 2000 (1) SA 732 (CC) at para 48 p760 that: Whereas the Constitution makes provision for conflicts between national and provincial legislation falling within a functional area in Schedule 4, and between national legislation and a provincial constitution, the sole provision made for conflicts between national legislation and provincial legislation within the exclusive provincial terrain of Schedule 5 is in s 147(2), which provides that national legislation referred to in s 44(2) prevails over Schedule 5 provincial legislation. This suggests that the Constitution contemplates that Schedule 5 competences must be interpreted so as to be distinct from Schedule 4 competences and that conflict will ordinarily arise between Schedule 5 provincial legislation and national legislation only where the national Legislature is entitled to intervene under s 44(2)." (footnotes omitted)

(ii) frameworks; or
(iii) national policies.
(c) The national legislation is necessary for-
(i) the maintenance of national security;
(ii) the maintenance of economic unity;
(iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
(iv) the promotion of economic activities across provincial boundaries;
(v) the promotion of equal opportunity or equal access to government services; or
(vi) the protection of the environment.

(3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that-
(a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
(b) impedes the implementation of national economic policy.

(4) When there is a dispute concerning whether national legislation is necessary for a purpose set out in subsection (2) (c) and that dispute comes before a court for resolution, the court must have due regard to the approval or the rejection of the legislation by the National Council of Provinces.

(5) Provincial legislation prevails over national legislation if subsection (2) or (3) does not apply."

The Constitution does not define the term 'health services' and it does not define the term 'municipal health services' either. This creates something of a problem for the three spheres of government when it comes to budgeting. In order to be able to budget for health services, it is necessary to know where one's responsibility begins and ends. In the case of municipal health services the national and provincial spheres of government have concurrent legislative competence to the extent set out in section 155(6)(a) and (7). These sections require that each province must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and by legislative and other measures must –

(a) provide for the monitoring and support of local government in the province; and
(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

They also state that the national government, subject to section 44 and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1).

The fact that municipal health services are mentioned separately in Part B of Schedule 4 and that the legislative power over them by the national and provincial spheres of government is restricted implies that they must be different from health service as listed in Part A of Schedule 4 in terms of which no restrictions are imposed[443]. However the matter is not as simple as this Cameron AJ points out in the *Liquor Bill* case[444] that:

"The Constitution-makers' allocation of powers to the national and provincial spheres appears to have proceeded from a functional vision of what was appropriate to each sphere and, accordingly, the competences itemised in Schedules 4 and 5 are referred to as being in respect of 'functional areas'. The ambit of the provinces' exclusive powers must, in my view, be determined in the light of that vision. It is significant that s 104(1)(b) confers power on each province to pass legislation 'for its province' within a 'functional area'. It is thus clear from the outset that the Schedule 5 competences must be interpreted as conferring power on each province to legislate in the exclusive domain only 'for its province'. From the provisions of s 44(2) it is evident that the national government is entrusted with overriding powers where necessary to maintain national security, economic unity and essential national standards; to establish minimum standards required for the rendering of services; and to prevent unreasonable action by provinces which is prejudicial to the interests of another province or to the country as a whole. From s 146 it is evident that national legislation within the concurrent terrain of Schedule 4 that applies uniformly to the country takes precedence over provincial legislation in the circumstances contemplated in s 44(2), as well as when it:

(a) deals with a matter that cannot be regulated effectively by provincial legislation;
(b) provides necessary uniformity by establishing norms and standards, frameworks or national policy;
(c) is necessary for the protection of the common market in respect of the mobility of goods, services, capital and labour, for the promotion of economic activities across provincial boundaries, the promotion of equal opportunity or equal access to government services or the protection of the environment.

From this it is evident that where a matter requires regulation *inter-provincially*, as opposed to *intra-provincially*, the Constitution ensures that national government has been accorded the necessary power, whether exclusively or concurrently under Schedule 4, or through the powers of intervention accorded by s 44(2). The corollary is that where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated *intra-provincially*." (writer's emphasis)

The trouble with health care services is that it can be extremely difficult to determine in practice which of them should be regulation inter-provincially as opposed to intra-

443 Cameron AJ noted in *In Re Constitutionality Of The Liquor Bill* (fn 442 *supra*) at para 50 p 760 that: "It follows that, in order to give effect to the constitutional scheme, which allows for exclusivity subject to the intervention justifiable under s 44(2), and possibly to incidental intrusion only under s 44(3), 87 the Schedule 4 functional competences should be interpreted as being distinct from, and as excluding, Schedule 5 competences. That the division could never have been contemplated as being absolute is a point to which I return in due course."

444 *In Re Constitutionality Of The Liquor Bill* (fn 442 *supra*)

provincially due to their often polycentric nature[445]. As explained by the court in *van Biljon's* case:

"What is meant by polycentric decisions has also been described as follows with reference to the image of a spider's web:
'A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions. This would certainly occur, for example, if the double pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centred" - each crossing of the strands is a distinct centre for distributing tensions.'"[446]

On the subject of the power of the legislative competence of provinces in respect of local government matters the constitutional court observed in the *Certification judgment* at paras 375 to 377 that:

"There is another respect in which provincial powers and functions in respect of LG have been altered. In IC sch 6 there is listed a broad functional area of legislative competence termed 'Local Government, subject to the provisions of chap 10'. Within this broad sphere, and subject to national legislative overrides, provincial governments are free to legislate directly in relation to all LG matters. In the NT, however, specific functional areas of legislative competence in relation to LG are detailed in NT schs 4 and 5. Other legislative competences not dealt with in the NT may be assigned to the provinces by national legislation in terms of NT 104(1)(b)(iii). This restricted list-based provincial competence contained in the NT stands to be compared with the unenumerated potentially concurrent legislative powers afforded provinces under the IC. It is a difficult comparison to make. Notwithstanding that the lists of LG matters in parts B of NT schs 4 and 5, respectively, are extensive, it must be recognised that the enumerated list approach must, to some extent, be more restrictive than a loosely defined area of competence. This must mean that the NT attenuates the manner in which the legislative power is exercised. We conclude that to this extent provincial powers have been diminished in the NT. In respect of NT sch 5 matters, however, this diminution falls to be further gauged in the context of the measures safeguarding provincial power that are found in NT 76 read with NT 44(2). Under the latter, Parliament can intervene in NT sch 5 matters only when it is necessary to achieve the objectives set out in NT 44(2)(a)-(e). Such legislation is subject to the mechanism of NT 76(1), in terms of which the will of the NCOP, the institutional locus of provincial interests at national level, can be overborne only by a two-thirds majority of all the members of the NA. The greater constraint placed upon the national Legislature

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[445] Cameron AJ fn 442 *supra* highlights the nature of these difficulties in relation to Schedule 4 and Schedule 5 competencies which are at least separated by a different Schedule whilst health care services appear in a single Schedule in terms of which provinces and national government have concurrent legislative competence: "That Schedule 4 legislation may impact on a Schedule 5 functional area finds recognition on one reading of s 44(3). Whatever its true reading this provision was not designed to undermine the Schedule 5 competences. They retain their full meaning and effect, except where encroachment by national legislation would in fact be 'reasonably necessary for, or incidental to' the effective exercise of a Schedule 4 power. Since, however, no national legislative scheme can ever be entirely water-tight in respecting the excluded provincial competences, and since the possibility of overlaps is inevitable, it will on occasion be necessary to determine the main substance of legislation and hence to ascertain in what field of competence its substance falls; and, this having been done, what it incidentally accomplishes. This entails that a Court determining compliance by a legislative scheme with the competences enumerated in Schedules 4 and 5 must at some stage determine the character of the legislation. It seems apparent that the substance of a particular piece of legislation may not be capable of a single characterisation only and that a single statute may have more than one substantial character. Different parts of the legislation may thus require different assessment in regard to a disputed question of legislative competence." (footnotes omitted)

[446] *Van Biljon* fn 236 at p 454

by the NT in respect of NT sch 5 matters has to be weighed against the attenuation of competences brought about by the listing of functions. A further relevant factor in the weighing process is to be found in NT 164. Pursuant to this provision all matters not dealt with under the NT may be prescribed by national or provincial legislation, the latter within the framework of national legislation. This power to prescribe residual LG matters may well be significant. Not only are provincial legislatures competent to so prescribe but the function of national legislation is restricted to regulation. It is adequate for present purposes to state that the term 'regulate' connotes a broad managing or controlling rather than a direct authorisation function. Thus Parliament is entitled, in relation to provincial legislative power under NT 164, to establish the general framework within which such power is to be exercised. This leaves room for provinces to determine details of LG matters within that framework and to legislate for them."[447]

It is worth noting that whilst Schedule 4 lists functional areas of concurrent national and provincial *legislative* competence, no mention is made of 'executive competence'. The court in *Executive Council, Western Cape Legislature, And Others v President Of The Republic Of South Africa And Others*[448] pointed out that:

"The provinces are given executive competence by s 144(2) over:
'. . . all matters in respect of which such province has exercised its legislative competence, matters assigned to it by or under s 235 or any law, and matters delegated to it by or under any law'."

The constitutional court in *Ex Parte Chairperson Of The Constitutional Assembly: In Re Certification Of The Constitution*[449] seems to regard executive competence as a concomitant of the legislative competence referred to in Schedule 4. It observed that:

"In the CJ we took into account that in terms of the IC the provinces have legislative and *executive* competence in respect of education" (writer's emphasis). Chaskalson *et al* point out that constitutionally, provincial executive authority is derived from three sources:
(1) exercised provincial legislative competence;
(2) powers delegated to the province by any law, and
(3) powers assigned to the province"[450]

The legislative competence of a province is only exercised when the province enacts legislation.

The legislative system for health care services as contemplated in the Constitution is itself polycentric in that municipalities have legislative and executive competence over municipal

[447] *Certification judgment* fn 59 *supra* at p 882-883
[448] *Executive Council, Western Cape Legislature* 1995 (4) SA 877 (CC)
[449] *Ex Parte Chairperson Of The Constitutional Assembly* 1997 (2) SA 97 (CC) at para 170 p152
[450] *Chaskalson et al* fn 67 *supra* at p 4-4

health services[451]. Municipal health services are not defined but their boundaries will influence the scope of health care services since presumably whatever is not a municipal health service is a health service as contemplated in Part A of Schedule 4. Provinces and national government have concurrent legislative competence over health services. However, a province only has executive competence over health services if it has exercised its legislative competence over health services or powers have been assigned to it or delegated to it in terms of any law. One cannot therefore assume that all of the provinces have executive competence over all areas of health services within the province. Some provinces have enacted health legislation whilst others have not.[452] National government has a concurrent legislative competence with provinces over health services. The national government has not yet enacted framework legislation with respect to health services whereas quite a few of the provinces have done so intra-provincially. In terms of section 156(4) of the Constitution national and provincial governments must assign to a municipality "by agreement and subject to any conditions" the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government if that matter would be most effectively administered locally and the municipality has the capacity to administer it. So municipalities can actually be responsible, on a contractual basis for health services that are more than just municipal. The web becomes even more complicated when one considers that in terms of section 84(1)(i) of the Local Government: Municipal Structures Act[453], district municipalities (Category C municipalities in terms of section 155 of the Constitution) are responsible for municipal health services but local municipalities (Category B municipalities in terms of section 155 of the Constitution) are the ones that are currently providing health services although they

451 Section 151(2) of the Constitution states that the executive and legislative authority of a municipality is vested in its Municipal Council. Section 151(3) of the Constitution provides that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation as provided for in the Constitution". Section 151(4) stipulates that the national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

452 See for instance the KwaZulu Natal Health Act No 4 of 2000; the Free State Hospitals Act No 13 of 1996; the Free State Provincial Health Act No 8 of 1999; the Eastern Cape Health Act No 10 of 1999; the Western Cape Health Facilities Boards Act No 7 of 2001; the Western Cape Health Act Amendment Act No 6 of 2002; the Eastern Cape Provincial Health Act No 10 of 1999; the Northern Province Health Services Act No 9 of 1999; the Health Laws Rationalisation Act No 11 of 1995 of the North West Province. See also the Assignment to the Provinces of the Health Act, 1977 under section 235(8) of the Constitution of the Republic of South Africa 1993 in terms of which the President assigned the administration of the Health Act 1977 (Act No 63 of 1977) excluding those provisions (if any) of the said Act which falls outside the functional areas specified in Schedule 6 to the Constitution or which relate to matter referred to in paragraphs (a) to (e) of section 126 (3) of the Constitution, to a competent authority within the jurisdiction of the government of a province mentioned in section 124 (1) of the Constitution designated by the Premier of the province concerned.

453 Act No 117 of 1998

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have to be specifically empowered to do so in terms of section 84(3)(a) of the Local Government: Municipal Structures Act. Thus although the national government is ultimately responsible for ensuring that the constitutional obligations of the state with regard to section 27 of the Constitution are fulfilled, the provincial and municipal spheres of government have their own unique and original powers and responsibilities with regard to health services and it is not simply a matter of national government being able to enact legislation or go in and take control of the delivery of health services that fall within the scope of the powers awarded by the Constitution to provinces and municipalities. This makes for a complex dynamic in the area of health services between national, provincial and local spheres of government which renders it inevitable that the national Minister of Health is likely to be cited as a respondent in all litigation involving health care services irrespective of the level of involvement of the national department of health in the circumstances of the case.

Although the national department of health does not presently regard the direct provision health care services as its core function due to the fact that the provinces own the resources such a hospitals, clinics and pharmaceutical depots necessary to provide these services and that the provinces are providing them, it is submitted that if the national sphere of government is to be ultimately responsible for the fulfilment of the rights contemplated in section 27 of the Constitution, then it must, in the absence of a power to compel the provision of health care services by a province, retain the power to render those services at national level. Proclamation 152 of 1994 which assigned certain functions of the Health Act No 63 of 1977 to the provinces recognised this in its exclusion of section 14 of that Act from the assignment. In terms of section 14(1)(a) of the Health Act:

"(1)In addition to the functions entrusted to the Department of Health by any other law, the functions of the said Department shall, subject to the provisions of this Act, be-

(a) with due regard to health services rendered by provincial administrations and local authorities, to co-ordinate health services rendered by the said Department and to provide such additional services as may be necessary to establish a comprehensive health service for the population of the Republic of South Africa;"

There is a mirror provision in section 16(1) of the Act which deals with the functions of the provinces which requires them to take into consideration the services rendered by the national department and other provinces and local authorities.

The National Health Bill which is intended to repeal the Health Act of 1977 is being processed at the time of writing and a detailed discussion of its provisions is thus not presently possible.

It is important to note with regard to section 100 that it is the national executive that must invoke its provisions. The national department of health or even the Minister of Health does not have the power to intervene directly in terms of this section if a province is failing to provide health care services. The national executive may issue a directive detailing the shortcomings of the province and how they can be addressed and may assume the functions of the province on limited grounds. The manner if any in terms of which the directive contemplated in section 100 may be enforced is a delicate subject. The fact that the constitution provides for the assumption of responsibility for the relevant obligation in the province by the national executive tends to suggest that this is the constitutionally acceptable method of enforcement of the directive. Section 41 stipulates specifically that the spheres of government must avoid legal proceedings against one another. It also requires them to assist and support one another. The section provides that national legislation may regulate the process established by this section but to date no such legislation has been forthcoming.

2.11 Horizontal Application of The Right To Health Care Services

The question of the horizontal application of the right to health care services has been touched on many times in the course of this chapter. Since the horizontal application of rights is a recurring theme involving private individuals and other entities within the private sector, it will arise as a topic in other chapters that relate to obligations between such parties. Consequently an attempt will be made in this section to identify only some of the key principles leaving more detailed and case specific discussions for later. The question of

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the extent to which the constitutional rights involving health care services are enforceable against health care service providers in the private sector is clearly of vital interest to those providers. Unlike public health facilities and providers they are not funded by the fiscus and they must make sufficient profit from health care delivery to make it worth their while, and in the case of juristic persons, their investors' and potential investors' while, to continue to do so. If the contribution of the private health sector in South Africa to health service delivery is regarded as valuable and worthy of preservation, then the horizontal application of the right to health care services must be seen against this backdrop and in the context of the need for a balancing of the right to 'trade' in health care services and the rights of consumers of health care services.

The question of the horizontal application of rights has been the subject of some debate in the context of both the interim Constitution and the final Constitution and the section in the interim Constitution was changed in order to make more explicit the idea that the rights in the Bill of Rights are capable of horizontal application in certain circumstances[454]. Section 8(2) stipulates that a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable taking into account the nature of the right and the nature of any duty imposed by the right. In terms of section 8(3), when applying the provisions of the Bill of Rights to a natural or juristic person in terms of subsection (2) a court in order to give effect to a right in the Bill, must apply, or of 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). De Waal *et al*[455]note that there are five general considerations regarding the interpretation of section 8(2) that must be kept in mind from the outset.

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[454] See the comments of Davis *et al* (fn 124 *supra*) at p 30 where they state that: " In the earlier work we stated what we thought was the obvious – Chap 3 applied to all law. We thought it uncontroversial and accordingly did no more than briefly describe the background debate and explain the mechanics of section 7(2) [of the interim Constitution] and why it was that we thought the Chapter applied to the common law and customary law. We were wrong on several counts. Our rendition of the debate was contested by Du Plessis LM and Corder H in *Understanding South Africa's Traditional Bill of Rights*, Juta & Co Ltd, Kenwyn 1994 at p 112 *seq*. The issue was hotly contested in the press and academic journals. The courts were evenly divided until the Constitutional Court decided the issue in *Du Plessis & others v De Klerk and Another* 1996(5) BCLR 658 (CC). The majority court took an opinion opposite the one advanced in this book" and at p 43 where they observe that: "The application provisions of the Chapter 2 of the Bill of Rights has been subjected to far more dramatic change that any other provision of Chapter 3 of the Interim Constitution. Whatever the interpretation placed on s8, it now will have some form of horizontal application." See also the observation of Liebenberg in Chaskalson *et al* (fn 43 *supra*) at 41-45 where she states that:" One of the profound changes introduced by the final Constitution is in respect of the application of the Bill of Rights to private parties."

[455] De Waal *et al* fn 2 *supra* at p 55

"1. Section 8(2) states that a 'provision' may apply to private conduct[456]. It does not say that a 'right' may apply to private conduct. It is therefore possible, and quite reasonable that some of the provisions of the Bill of Rights may apply to the conduct of a private person or juristic persons while other provisions in the same section (and pertaining to the same right) will not apply to such conduct. For example, the right of access to health care services s27 (1) and (2)) probably does not apply horizontally.[For the reason that the duty imposed by the right is too burdensome to impose on private individuals] However, the right not to be refused emergency medical treatment (s27(3)) probably does apply horizontally…

2. Questions concerning the horizontal application of the Bill of Rights cannot be determined *a priori* and in the abstract. Although this is not explicitly stated, whether a provision in the Bill of Rights applies horizontally also depends on the nature of the private conduct in question and the circumstances of a particular case. This explains why section 8(2) states that a provision in the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable. The extent to which a provision is applicable can only be determined by reference to the context within which it is sought to be relied upon…. However, a resort to context or the circumstances of a particular case should not be used to frustrate the clear intention of the drafters of the 1996 Constitution to extend the direct operation of the provisions of the Bill of Rights to private conduct. It is not permissible to argue, for example, that it is only when private persons find themselves in a position comparable to the powerful state that s 8(2) binds them to the Bill of Rights. It may be that most private or juristic persons do not have the capacity to infringe human rights in a manner and on a scale comparable to the state. But any interpretation of s 8(2) must avoid relying on such gross generalizations. The subsection was after all included to overcome the conventional assumption that human rights need only be protected in vertical relationships.

3. The purpose of a provision is an important consideration in determining whether it is applicable to private conduct or not… [T]he purpose of the right to human dignity does not necessarily demand differentiation between the state and private conduct.

4. The nature of any duty imposed by the right must be taken into account. This recognises that private or juristic persons are often primarily driven by a concern for themselves. On the other hand the state is supposed to be motivated by a concern for the well-being of society as a whole. The application of the Bill of Rights to private conduct should not undermine private autonomy to the same extent that it places restrictions on the sovereignty of government. This consideration is of particular importance when it comes to the

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456 Davis *et al* (fn 124 *supra*) observe at p 47 that: "Based on the inclusion of the word 'judiciary' in s (8)(1), and the significance given to that word by the Constitutional Court in the judgment of Kentridge AJ in the *Du Plessis* case, [*Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC)] it can be argued that the conclusion reached by Mahomed DP with regard to horizontality, namely, that the horizontal application will apply to all private relationships is correct, even if Kriegler J could find liberal philosophical support for the conclusion that there are a range of relationships which should fall outside of the law. If the notion of judiciary in s 8(1) now implies that the Chapter applies to all law, the addition of section 8(2) appears to extent the ambit beyond the law to the conduct of private persons. Section 8(2) now asks of a court that it investigate all private relationships to ascertain whether a constitutional right is applicable to such a relationship. A person who previously had no right against another, might now enjoy such a right as the Constitution alters the nature of the private relationship." This has far-reaching implications. In the case of the right of access to health care services for instance it might be possible to ground a constitutional claim of violation of this right in the absence of the negligence required to ground a claim in delict for the same omission or act and in the absence of the existence of a contract for those health services. The conduct of a private hospital in delivering health care services to a patient must not only be judged against the contract it has with that patient but must also be scrutinised to determine whether there was any violation of a constitutional right that came into play in the relationship. Davis *et al* comment that: In this way the relationship between s 8(1) which applies to all law and s 8(2) which applies to private relationships becomes coherent and consistent. There is a mandatory application of the Bill of Rights to all forms of law in terms of section 8(1) but a discretionary application to private relationships in terms of s 8(2), the discretion being bounded by the inquiry into the issue of suitability."

imposition of duties which entail the spending of money.[457]Since the conduct of private persons has to funded from their own pockets, the same duties may not be imposed on them as can be imposed on an organ of state which relies on public funds. For example a private hospital cannot, unlike a state hospital, be saddled with the duty to provide every child with basic health care services (s 28(1)c)).

5. In some instances indications are found in the Bill or Rights itself as to whether a particular right may be applied to private conduct or not...Also it can be said that the nature of the duties imposed by the right to have legislative and other measures taken to protect that environment (s24(b)), to realize the right to housing (s26), the right to health care, food, water and social security (s27) and the right to education (s29) would normally result in them not being applicable to private conduct..."

The judgment of the constitutional court in *Du Plessis v De Klerk*[458], which will be considered in greater detail in a subsequent chapter caused quite a stir[459]in legal academic circles when the court found that, for the purposes of the interim Constitution, the Bill or Rights applied only vertically. It set out some guidelines as follows:

- A private litigant may not invoke a right guaranteed in the Bill of Rights against another.
- A private litigant may, however, argue that a statute or executive act relied upon by the other private party is invalid because it is inconsistent with the Bill of Rights;
- Acts or omissions on the part of government may be attacked by a private litigant as being inconsistent with the Bill of Rights in any dispute with an organ of government due to the fact that the Bill of Rights also applies to common law.

The furor that this judgment caused in legal circles will be canvassed in a subsequent chapter when discussing the application of the Bill of Rights in the private sphere. It is

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457 In the context of health services this is nowhere more apposite than in the situation of pharmaceutical research and development which is very much the domain of private enterprise. If it becomes apparent to pharmaceutical manufacturers that drugs for the treatment of HIV/AIDS are not profitable because of the pressure exerted by governments and activists or the application of the right of access to health care services to bring the prices down to the point where it is no longer feasible to research, develop or manufacture or supply such drugs, and they cease to do so the very aim that such activity seeks to achieve will be defeated at inconceivable cost to society. The private sector cannot be compelled to invest money in unprofitable enterprises for the greater good.

458 *Du Plessis* fn 456 *supra*

459 Davis *et al* fn 124 *supra* at p 30 observe that "The issue was hotly contested in the press and in academic journals. The courts were evenly divided until the Constitutional Court decided the issue in *Du Plessis and Others v De Klerk and Another* 1996(5) BCLR 658 (CC). The majority of the court took an opinion opposite the one advanced in this book."
See also Cheadle H and Davis D 'The Application of the 1996 Constitution In The Private Sphere' (1997) *SAJHR* 44 who canvas the debates in some detail.

sufficient to note at this point that the application provisions of the interim Constitution in this regard were subject to significant alteration in the final Constitution[460].

It is not inconceivable that in certain circumstances the right of access to health care services could be horizontally applicable. Previously, the picture was painted of a scenario in which the state decides that the best way to ensure access to health care services is to become a funder of health care services leaving the supply side to the private sector. In such a situation the patient has nowhere else to go but the private sector and even though this arrangement may have been established in terms of a contract between the state or relevant legislation, it is submitted that the patient's constitutional right of access to health care services in such an environment may well be enforceable against health establishments and professionals within the private sector as much as against the state. As a further example, it is likely that in a situation where a certain highly specialised form of treatment which has been shown to be successful, i.e. it is not in the experimental stages, is in limited supply due to a shortage of doctors skilled in the technique and the only physician in the country who is capable of administering the treatment to a particular patient refuses to do so on the grounds that as a private practitioner he can choose which patients he sees, it may be possible to argue on behalf of the rejected patient, that the latter has a constitutional right to those services. This would be particularly so if one assumes that the patient is prepared to pay, that he is unable to travel obtain the treatment elsewhere, that the physician's schedule is not such that he cannot accommodate another patient, and that his refusal is based purely on the fact that he does not have a good relationship with this particular patient. In the case of health services there is often an opportunity cost in choosing one particular health care provider over another because of time constraints in receiving a particular kind of treatment. It is also possible that certain types of treatment are only available in the private sector and that once a course of treatment has commenced it must be pursued to its full conclusion in order to avoid further jeopardy to the patient's health. A patient could effectively find himself 'locked in' to a particular course of treatment which is only available from a particular provider In such situations, it is submitted that discontinuation of the treatment for no good reason could in certain circumstances ground a

460 See Davis *et al* fn 124 *supra* at p 43 where the authors observe that the application provisions of the Chapter 2 of the Bill of Rights has been subjected to far more dramatic change than any other provision of Chapter 3 of the Interim Constitution.

constitutional claim in terms of the right of access to health care services. It is further submitted that there is scope for argument that, in much the same way as is contemplated in terms of the law of delict[461], once a particular health care provider assumes the responsibility of providing health care services to a particular patient, that patient acquires a constitutional right of access to health care services against the provider concerned, especially in circumstances where transfer of the patient to another facility or medical practitioner is not feasible for some reason. For example where the only hospital, which is a private hospital, in a relatively isolated small town serving a rural community takes into its care a chronically ill patient who is too ill to be transferred to another facility, it is submitted that the patient concerned may well have a constitutional right of access to health care services against that facility. This does not mean that the patient is not obliged to pay for those services but rather that in taking him in the facility has forfeited its power as a private operator to refuse to provide him with the health care services he needs. In summary, it is submitted that it more likely that a private entity will incur a constitutional obligation consistent with the right of access to health car services as contemplated in section 27(1) of the Constitution in relation to situations involving respecting or protecting the right as opposed to promoting and fulfilling it[462].

If one considers the composite right to health as opposed to the simple right to health care services then the argument is even stronger that the right is applicable horizontally since the rights to dignity, equality and freedom are not only rights but also human values central to the Bill of Rights and the Constitution[463]. As observed previously the right to dignity is

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461 See *Magware v Minister Of Health NO* 1981 (4) SA 472 (Z) in which the court held at p 477 that: "It is clear that there was a moral and professional duty to act reasonably towards the plaintiff. It seems to me that, on the facts, once the defendant's employees had undertaken treatment and had engaged in applying the plaster of Paris cast, there was set up a special relationship between defendant's employees, the casualty medical staff, and the plaintiff, different from the relationship between the plaintiff and a disinterested stranger. The plaintiff was in the care of the defendant's medical staff." Interestingly this was an application of the principles of *Ewels* (fn 376 *supra*) which was based significantly on considerations of public policy. Since the relationship between public policy and constitutional values is symbiotic in the sense that constitutional values must inform considerations of public policy and that considerations of public policy will undoubtedly have some influence on the way that constitutional values are interpreted and applied, the decision in *Magware* is of relevance in the South African legal context and within the new constitutional legal order despite the fact that it was decided in another country in terms of a different legal dispensation.

462 This is supported by the observations of De Waal *et al* (fn 2 *supra*) at p 45 to the effect that the 1996 Bill of Rights recognises that private abuse of human rights may be as pernicious as violations perpetrated by the state. For this reason the Bill of Rights is not confined to protecting individuals against the state. In certain circumstances the Bill of Rights protects individuals against abuses of their rights by other individuals"

463 See section 1(a) which states that the Republic of South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and also Section 7(1) of the Constitution which states 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."

significant to a right to health and is one of the simple rights that contributes to the composite right to health. As de Waal *et al* point out[464] the right to dignity protects an individual against assault on his or her dignity from any source, whether private or public. In similar vein the right to an environment that is not harmful to health or well-being in terms of section 24 of the Constitution and which is another of the simple rights that comprises the right to health cannot reasonably be said to be applicable only to the state. It would be senseless to prevent only the state from polluting the environment when the major sources of environmental pollution are likely to be located within private industry. The state in South Africa does not own a great many factories or industrial plants or mining operations in comparison to the private sector. Whilst it may be true that rights such as socio-economic rights, requiring legislative measures in order to realise them are likely to be primarily the responsibility of the state, as it is obvious that only the state can legislate, it is submitted that it would be a mistake to assume that this absolves the private sector from all responsibility in respect of those rights. The fact that section 24(b) encapsulates the right to have the environment protected through reasonable legislative and other measures does not detract from the fact that in section 24(a) everyone has the right to an environment that is not harmful to their health or well-being. Similarly, the right of everyone to have access to health care services in terms of section 27(1) sits in a separate subsection to the obligation of the state to realise the right through legislative and other measures within its available resources. It is submitted that obstruction by private persons of someone's right of access to health care services could well constitute a violation of the right. The question as to what kinds of behaviour could be viewed as obstructive is a question of the facts and circumstances of each case but, it is submitted, could include deliberate misinformation such that a patient does not seek required health care services, illegal strike action by health personnel that results in the unavailability of health services, the failure on the part of a private medical practitioner to refer an illiterate and seriously ill patient to a public health facility at which the required health services are available, the wilful and malicious destruction of the only road that leads to a rural hospital or even the failure on the part of a private contractor to adequately repair the road, failure on the part of a private hospital to maintain backup power supplies in the case of a power failure such that the ventilators in

464 De Waal *et al* fn 2 *supra* at p56

the intensive care unit suddenly fail etc. Although it is clear that in many cases the examples given above will found claims in terms of the law of delict or of contract it is submitted that the constitutional right of access adds another legal dimension to such claims. It remains to be seen how these and other situations will be dealt with by the courts and the litigants themselves in practice. It is submitted that, generally speaking, implicit in all rights of access is a freedom and that when that freedom is obstructed, curtailed or restricted in a material way there is usually the potential for recourse in terms of the law that granted that freedom. The Constitution, as the law that epitomises the protection of human rights and freedoms in South Africa, should be no different in this respect.

Liebenberg[465] notes that: "In determining whether a right is 'applicable' regard must be had to (1) explicit textual references…; (2) horizontal applicability as a 'necessary implication' of the right…; and (3) whether the nature of the right and the duty it imposes is 'capable' and 'suitable' for horizontal application…". In *Holomisa v Khumalo And Others*[466] the court stated:

> "However, I am of the view that s 8(2) does create space for an interpretation and a conclusion, at least in certain situations, that s 15 is horizontally applicable. When Kentridge AJ wrote the judgment in *Du Plessis and De Klerk*, there was nothing expressly stated in the interim Constitution about the direct horizontal application of rights. Therefore the general position had to be determined, and was found to be that chap 3 of the interim Constitution did not have a general direct horizontal application. Yet Kentridge AJ left the door open for an argument that certain provisions could be horizontally applicable. These would have to be in the nature of exceptions, however. Therefore the test is whether horizontal application is a necessary implication. Section 8(2) makes it quite clear that provisions of the Bill of Rights bind natural and juristic persons, as a general rule, if and to the extent that such a provision is applicable. Horizontal application is therefore wholly possible and plausible as far as the wording of the Constitution is concerned. …As indicated earlier, the indirect horizontal application of rights in the Bill of Rights, or the development of the common law in accordance with the spirit, etc of the Bill of Rights, occurs in both Constitutions (in terms of s 35 of the interim Constitution and s 39 of the final Constitution). I earlier indicated that I do not regard the differences between s 35 and s 39 as sufficiently relevant to warrant a radically different result as far as the issue in this case is concerned. The relevant question is how significant the distinction is between the indirect horizontality of s 35 or s 39 and the direct horizontality allowed for by s 8 of the final Constitution."

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465 Chaskalson *et al* fn 67 *supra* at p 41-45

466 *Holomisa* 2002 (3) SA 38 (T) at p 59 and p 67

Liebenberg makes the point that the wording of section 8(2) makes it clear that a particular right may be only partially applicable to a dispute between private parties and that some of the duties imposed by the particular right may thus be capable of binding private parties while others may not be stating that:

"Cheadle and Davis oversimplify the matter by arguing that the socio-economic rights in ss 26 and 27 will not apply to private parties given the textual signals and 'the potentially onerous nature of such a duty on private persons'. This argument may be persuasive to some extent in respect of the positive duties 'to protect, promote and fulfill' socio-economic rights. However, it does not persuade in respect of the negative duty 'to respect' socio-economic rights. It is eminently 'suitable' and indeed essential for the effective protection of socio-economic rights that private parties are bound to respect the negative duties flowing from the right."[467]

She notes further that the possibility also exists that at least some of the positive duties imposed by the socio-economic rights may bind private parties.

"For example it may be argued that the recognition of children's socio-economic rights in s28(1)(c) read with s28(1)(b) augments the common-law duty of support owed to children. Thus it could be extended, in appropriate circumstances, to parties that do not currently have this duty under the common law, for example the parents of the father of a child born out of wedlock…Section 27(3) requires that 'no-one' may be refused emergency medical treatment. This formulation strongly suggests a horizontal application. According to this interpretation private clinics, hospitals and ambulance services are under a duty to provide emergency medical treatment when this is requested from them. A failure to accord a horizontal interpretation to this right would undermine the substantive protection underpinning s28(3) and the right to life in s11."

The present writer is in respectful agreement with the views of Liebenberg. They accord with the eminently logical approach of transformational constitutionalism and with the wording of section 8(2) of the Constitution itself. They are also in keeping with the observations of the constitutional court in the *Certification Judgement*[468] to the effect that at the very least, socio-economic rights are capable of negative protection from improper invasion. It has been observed previously that the law does not operate in a vacuum and only acquires meaning when it is grounded in the facts of particular circumstances. This is equally true of the Bill of Rights. When this is combined with the fact that a provision of the Bill of Rights can apply to private conduct and then not necessarily completely but also partially it opens up an infinity of permutations in terms of the ways in which the Bill can

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[467] Chaskalson *et al* fn 67 *supra* at p41-45 to p41-46

[468] *Certification judgment* fn 59 *supra*

affect and impact upon the relationships between private entities. It would be a very intrepid lawyer indeed who asserts that a particular category of rights, such as socio-economic rights, can never be horizontally applicable.

In *Amod v Multilateral Motor Vehicle Accidents Fund*[469] the constitutional court makes the very important point that:

"Section 8(2) makes the Bill of Rights binding on natural and juristic persons 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. Section 8(3) requires Courts in giving effect to s 8(2) to 'apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right' and also empowers the Courts to develop 'rules of the common law to limit the right, provided that the limitation is in accordance with s 36(1)'. The development of a coherent system of law may call for the development of the common law under s 35(3) of the interim Constitution and s 39(2) of the 1996 Constitution to be done in a manner consistent with the way in which the law will be developed under s 8(2) and (3) of the 1996 Constitution."

It is submitted with respect that the statement of the constitutional court quoted above is illustrative of the vastness of the potential for legal development and transformation within the South African legal system that has been opened up by the Constitution.

2.12 Summary and Conclusions

It is evident from the size and scope of this chapter that the impact of the Constitution on the delivery of health services is far reaching and profound. The question of the existence of a right to health *per se* was explored in some depths. Whilst it is clear that a right to health could be inferred from the interconnectedness of such constitutional rights the right to bodily and psychological integrity, equality, freedom and security of the person, environmental rights, life etc, the value of such a right in the South African context is limited given the fact that one is required in terms of the Constitution to consider its individual elements which are expressly stated therein. Considerations of the elements of the various rights that relate to health care services as contained for instance in sections 27, 28 and 35 of the Constitution demonstrate the complexity of these rights and the importance of analysing them in both their constitutional and factual contexts when

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469 *Amod* 1998 (4) SA 753 (CC) at para 31, p 765

applying them in practice. The jurisprudence on the subject of the right of access to health care services is still in its infancy but when viewed in the wider context of judgments on socio-economic rights still provides some extremely valuable and thoughtful guidelines and dicta that can be of assistance to policymakers and the executive branch of government in their attempts to fulfil their constitutional obligations with regard to such rights. The scope of this chapter emphasizes the fact that it is impossible not to take cognisance of the Constitution when making decisions involving the delivery of health care services whether in terms of rationing of health care, the nature and extent of the health care services to be provided, the rights of health care professionals to practice their professions or questions of intellectual property in health care goods. The manner in which the distinction between emergency medical treatment and health care services generally has been tentatively drawn by the constitutional court is encouraging and useful and whilst there will no doubt be further litigation involving questions of emergency medical treatment the foundations seem to be firmly in place for further constructive efforts on the part of the judiciary. All in all one gets the impression that South African constitutional law in the area of access to health care services is coming along nicely and that the project of transformative constitutionalism, although it still has a long way to go, is well under way. In the chapters that follow the importance and the significance of the Constitution to other areas of law involving the delivery of health care services will be an obvious leitmotif as is only fitting and proper for the foundation stone of a new legal order.

The discussions in the preceding chapters have covered the legal aspects of health service delivery from a largely theoretical perspective as opposed to that of the legal practicalities involved at the interface between the provider of health care services and the patient. The subsequent chapters will consider in more detail the latter aspect and the legal vehicles by means of which the delivery of health services takes place. Administrative law is a particularly important vehicle for the delivery of health services especially in the public health sector, given that administrative justice is a constitutional right. Consequently administrative law as it relates to health service delivery is the subject of the next chapter.