

Chapter 10

The South African Law on Health Service Delivery: Conclusions and Observations

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10.1 Introduction

The delivery of health services in South Africa embraces a number of areas of law. It has not been possible to cover every area in a thesis such as this. The objective here is

a synthesis of the major areas of law impacting on health service delivery rather than a purely analytical study of the impact on health service delivery of the more obscure areas or minute and detailed analysis of technical points. Whilst fine analytical scrutiny has its place, there is great value in stepping back occasionally to survey the law from a panoramic perspective. It is the only way to approach concepts such as “health law” or “media law” that cut across many different aspects ranging from statutes to the common law and from international to domestic law. In terms of this approach the scope of the thesis is defined by the area of human society, in the present case health services delivery, to which law is applicable rather than the field of law itself such as public or private, contract or delict.

In this chapter the skeins of commonality that were identified in the preceding chapters are drawn together and highlighted. Also the flaws and weaknesses within the various areas of law are identified and considered and where appropriate, suggestions are made as to how they may best be remedied. Ultimately, the role of the courts in ensuring that constitutional values and principles irradiate the common law cannot be overemphasised. It is critical that the judiciary recognises, acknowledges and appreciates the pervasive and structural importance of the Constitution. Unfortunately this appreciation is still significantly lacking amongst some judges. The Constitution is perceived by many as having its own compartment within the larger legal system rather than as the new foundation by which the entire structure now stands (or falls).

There is a common thread running through the five areas of law that are covered in this thesis. Broadly speaking this thread is the Constitution and the values that it represents. Even within international law as a broad concept outside of national boundaries, the South African Constitution is a distinct point of focus. International law also clearly influenced the drafters of the Constitution despite the fact that they still came up with a legal grundnorm that is peculiar to the history and culture of this country. The Constitution in its turn mandates a conscious and continued application of international legal principles in a number of spheres, for example the interpretation of the Bill of Rights. It is the interface through which international law, by a process of osmosis, influences South African domestic law. As the foundation of South Africa’s domestic legal order, the Constitution is the primary sourcebook for the

application and interpretation of the common law, including the law of contract and of delict. Administrative law has become a constitutional construct in its own right whereas previously it was merely a patchwork of statutory and common law decisions that were far from homogenous. In a sense the Constitution therefore serves as the lodestar of the South African legal system, polarising and charging the principles of international law that enter into domestic law with the values, ideals and principles of the South African people. It also serves the same purpose for internal, domestic law, ensuring that, irrespective of the area of law concerned, the legal system in its entirety is a cohesive and integrated whole in conformity with constitutional values and principles. This said, it must be noted that law is a dynamic system. The work of the Constitution will never be complete. There will not be a time where it can be said that the domestic legal system is completely and finally aligned with the Constitution¹, neither will there be a time when constitutional law itself becomes static. That is not the nature of law. There will always be factual permutations that test its strength and push its boundaries. New developments in international law and increasing globalization will maintain the tensions between international law and domestic legal systems and ensure a process of continuous growth and development in legal structure and legal theory both within and outside of South Africa. It is for these same reasons that it is so important to maintain an internally coherent, unitary domestic legal system that accurately reflects the fundamental values and principles of South African society².

There are a number of statutes that specifically govern health service delivery most of which fall within the portfolio of the Minister of Health. They range from statutes governing health professionals and the practice of health care in various disciplines to those dealing with specific health care situations or products such as occupational diseases in mines and works, hazardous substances, human tissue and food and medicines. At present the delivery of health care services in the public sector is

¹ This is not by any means excuse for failure to make a concerted effort to ensure that the 'constitutionalisation' of the South African legal system is of the utmost significance and should be the conscious focus of every practising lawyer here and now. It is simply that in a factual situation in which there was a pre-existing system of law that took hundreds of years to develop, upon which another very different approach has suddenly been imposed, it is likely that the 'matching' or complete integration of every area of the older system with the new approach will take a very long time given that it is within human nature to resist change, that the development of law is as much a process of evolution as revolution, that the extent of legal exegesis necessary to achieve this is quite probably beyond the capabilities of a single generation in any event, and the fact that constitutional law itself is a dynamic concept.

² Simply put, if we know who we are, we can know what we want and where we are going and can ourselves exert an influence on developments on the international legal front that promote and further the national interest.

governed by the Health Act³. The administration of large sections of this statute was assigned to the provincial governments in 1994 but some remained with the National Department of Health. However the National Health Act⁴ was passed by Parliament in 2003 and will soon become operational. This Act will repeal the Health Act and become the central legislation on health service delivery in South Africa in both the public and private health sectors. Since each statute governing health service delivery is quite worthy of a thesis in itself and since the intention of this thesis was not to look at specific situations, products or services as dealt with in the various statutes, specific discussion of individual statutes has mostly been avoided. Where there is a statute that relates to the particular topic under discussion, mention of it has been made in passing and to alert the reader to the fact that it exists and has an impact in a particular area. This thesis focuses on certain aspects of the common law, such as the law of contract and the law of delict, because this tends to be the law upon which relationships between providers and patients - the interface of health services delivery - still largely depends and in terms of which claims in the courts are mostly decided.

Administrative and constitutional law in South Africa, the other two major areas of South African law that impact upon health service delivery, especially in the public sector, and upon which this thesis focuses, cannot be said to consist purely of common law. They are a blend of statutory and common law. The Promotion of Administrative Justice Act and the Constitution itself are central to any discussion of these two areas. Since the Constitution underpins all areas of law in South Africa, careful attention has been given to the treatment of constitutional principles in the context of the areas of the common law that have been covered. The chapter examining international law relating to health service delivery attempts to contextualise the South African legal system within a framework of international concepts and norms in order to ascertain how the former compares. Since international law is not insignificant in South Africa's constitutional legal dispensation it would have been inappropriate not to consider the position of international law with regard to health service delivery. For the sake of completeness passing reference is sometimes made to statutes that govern more specific areas of

³ Health Act No 63 of 1977

⁴ National Health Act No 61 of 2003

health law such as the Medicines and Related Substances Act⁵ or the Medical Schemes Act⁶ but this is more in order to highlight a particular point concerning health service delivery than to examine the statute itself in any depths.

The common law in South Africa tends to be developed piecemeal by the courts in the sense that although the principle of *stare decisis* prevails, there is seldom any attempt to cross reference the principles of different areas of law in order to resolve particular cases. In fact the courts in the past have stoutly rejected arguments that might have the effect of hybridising legal principles and concepts developed in one area with those of another. This thesis is critical of such an approach on the basis that since all law must be interpreted and applied with reference to the Constitution, there should be common policies and concepts informing all areas of law relating to a particular field. The preference is for an outcomes based approach to the application and interpretation of law. In the context of health service delivery in particular, it is demonstrable that a rigidly compartmentalised approach to law, which focuses on the means rather than the end, can lead to illogical and unfair decisions. Internal consistency is necessary not only within but across legal disciplines. From a practical perspective too, people do not limit themselves in their daily activities to particular legal areas. In a context such as health service delivery many different legal principles often converge upon a single situation. Consequently, the approach in this thesis to law is based on this reality. Such people are not concerned with whether a particular activity falls within the realm of the law of contract, delict or administrative law and for the most part, neither are their patients. To them, any law that affects the delivery of health services is relevant and the question is what law or laws govern any given situation. Law is therefore treated as a means to an end rather than an end in itself.

On the whole it would appear that there is still much work to be done in terms of the recognition of constitutional principles relating to the law of health service delivery within other branches of law such as the common law of contract and delict. The Supreme Court of Appeal in particular has on a number of occasions demonstrated a surprising lack of cognisance of central constitutional themes. This leads one to the realisation that, ten years into South African democracy and the constitutional legal

⁵ Medicines Act No 101 of 1965

⁶ Medical Schemes Act No 131 of 1998

order, the process of ‘constitutionalising’ the major part of the South African common law is going to take longer than some might have hoped. South African law lags behind other countries in terms of revised thinking around the purpose of the law of contract, consumerism and the complexity of business and other human relationships in the twenty first century. It is in many ways a reflection of the socio-economic disparities between different levels of South African society. The older, apartheid tempered, approach to law, based on how people who are relatively wealthy would bargain and conduct their affairs, can still be seen existing side-by-side with one of the most progressive, legally elegant constitutions in the world. Wealth is, after all, power. If one’s perception of the power of the individual is based upon an assumption of a certain level of wealth, this will inform the approach one takes when adjudicating matters between contracting parties in terms of the law of contract. If one sees the primary purpose of law as a brake upon transformation - as maintaining the *status quo* in terms of power distribution, or of attacking post-apartheid systems and structures so as to carry a particular historical bias into the present – this view will undoubtedly emerge in the manner of its application. Conversely if one regards law as a vehicle for positive transformation of society and as a means of promoting equality and freedom for all of its members, this will also be reflected in the manner in which the law is applied⁷. One sees a mix of these two approaches to law across the South African judiciary and across the different types of courts. Since the judiciary is a reflection of larger society, this is hardly surprising.

There is much that is admirable about the South African law relating to health service delivery. Compared to the “pie-in-the-sky” of international law, it offers a far more pragmatic and tangible promise of the realisation of human rights goals. It holds a reassurance that socio-economic rights in South Africa are real and enforceable. At the same time, the standard applied to the conduct of government with regard to these rights is one of reasonableness. Whilst some may argue that reasonableness is itself a vague concept that can mean just about anything, it is submitted that reasonableness allows scope for many different points of view, for the possibility of justification of one’s actions from a position of power, for variances based on circumstances, for

⁷ In *Bel Porto School Governing Body And Others v Premier, Western Cape, And Another* 2002 (3) SA 265 (CC) for instance the constitutional court observed: “It is true that, in determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively. It is also true in a country such as ours, that faces immense challenges of transformation, that we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly.”

argument within the bounds of human weakness and capability that a particular act or omission should be condoned or upheld in law. The concept of reasonableness, it is submitted, covers a multitude of sins in a manner that promotes justice and equality. Reasonableness asks one to think about the consequences of one's actions, to take account of the needs and views of others and to make informed and rational decisions. It implies a standard of objectivity against which one's actions are assessed that is neither impossible to work with nor biased on emotional grounds in favour of a particular view. The concept of reasonableness pervades South African law. It is as much in evidence in constitutional law as it is in the law of contract, the law of delict and administrative law. It is a universal theme capable of lending consistency to law as a whole. In the context of health service delivery, as in law, reasonableness is a very relevant concept. It dictates, for instance, the lengths to which one should go to save a life, the extent of the personal sacrifice one must make to help another, the precautions one must take when administering a dangerous drug, the nature and scope of the information to be given to a patient when seeking his informed consent, the standard of care to be adopted in treating a patient, the nature of the particular surgical procedure chosen to address a particular health condition and the acceptability to society of certain contractual terms.

Reasonableness also suggests and promotes another central tenet of law – fairness. Undue favouring of one person's interests over another is a concern not only of constitutional, administrative⁸ and common law but also of those involved in the field of health care rationing and health service delivery. How does one allocate resources in a manner that is fair and equitable? On what basis does one decide that this patient gets renal dialysis and that one does not? Systems of triage on fields of war and in hospital trauma units alike are concerned with issues of fairness. In the health sector, fairness can literally be a matter of life or death. Fairness in law involves not only a balancing of the interests of the parties concerned but also a balancing of the different rights in the Bill of Rights, a balancing of the constitutional values of equality and freedom and the necessary limitation of constitutional rights⁹. An irrational bias in favour of one right against another could lead to injustice just as surely as an irrational

⁸ *Bongoza v Minister of Correctional Services and Others* 2002 (6) SA 330 (Tk)

⁹ *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C)

bias in favour of one party against the other since constitutional rights are interrelated and interdependent.

Fairness in turn, is closely associated with equality. For instance unfair discrimination constitutes a denial of equality¹⁰. Equality as a legal concept is context dependent. In the context of health care one does not promote equality by prescribing the same treatment for all irrespective of their health status and health condition. Instead, one achieves equality in health care by addressing the different health problems of everyone in such a manner as to ensure that at the end of the day that they are all as healthy as possible¹¹. Equitable decisions are those that take into account the concerns of all of the parties involved and that deal with them from the perspective of equality. Fairness is a concern of the common law of contract¹² and the law of delict¹³ as well as constitutional¹⁴ and administrative law¹⁵. Flexibility according to context is inherent within the concept of fairness¹⁶.

¹⁰ *S v Botha en Andere* 1994 (4) SA 799 (W); *Bezuidenhout v Bezuidenhout* 2003 (6) SA 691 (C)

¹¹ In *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* 2001 (4) SA 511 (SCA) Zulman JA noted: "Lord Mustill summarised the duty of a public official or body to act fairly in these lucid terms: 'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.' [*Doody v Secretary of State for the Home Department and Other Appeals* [1993] 3 All ER 92 HL; [1994] 1 AC 531])"

¹² *Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd* 1979 (2) SA 56 (A); *Thompson v Scholtz* 1999 (1) SA 232 (SCA); *Lubbe v Volkskas Bpk* 1991 (1) SA 398 (O); *Bouygues Offshore and Another v Owner of the MT Tigr and Another* 1995 (4) SA 49 (C)

¹³ *Midway Two Engineering & Construction Services v Transnet Bpk* 1998 (3) SA 17 (SCA); *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA); *Saaiman and Others v Minister of Safety and Security and Another* 2003 (3) SA 496 (O); *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA)

¹⁴ "The common-law principle of fairness is reflected in s 33(1) of our Constitution" per Zulman JA *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* (fn 11 *supra*)

¹⁵ *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA)

¹⁶ Zulman JA stated in *Chairman, Board on Tariffs and Trade, and Others v Brenco Inc and Others* (fn 11 *supra*): "There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts. As Sachs LJ pointed out in *Re Pergamon Press* ([1971] 1 Ch 388 (CA)) ([1970] 3 All ER 535): 'In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. . . . It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate . . . the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.'" See also *Bongoza v Minister of Correctional Services and Others* 2002 (6) SA 330 (Tk) and *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C)

There is another common thread that binds the legal system throughout that is also implied by reasonableness – rationality. There has to be a reason for acting or refraining from acting in a particular way. What is more, the reason must be within the boundaries of common human understanding so that it would constitute a valid reason in the minds of others in similar circumstances. In other words, rationality implies a reason within a framework. A court or government department that gives reasons for its decision which are not based on any commonly understood conceptual framework is acting irrationally. Rationality is reason anchored within a common perception of reality.

The decisions of the judiciary, the actions of the executive¹⁷, the Acts of the legislature must be reasonable, fair¹⁸, equitable and rational. Many of these precepts have been introduced or reinforced by the Constitution. The word ‘reasonable’ occurs some thirty two times in the Constitution, the word ‘fair’ eleven times, while the word ‘equitable’ occurs some sixteen times and ‘equality’ occurs some seventeen times. The word ‘justice’ occurs some fifty four times. These statistics are indicative of the preoccupations of the Constitution with deeper social values and fundamental legal norms.

10.2 International Law

¹⁷ *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA)

¹⁸ *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* fn 7 *supra* - Mokgoro J and Sachs J stated: “There are circumstances where fairness in implementation must outtop policy” and “The objective of judicial intervention under that section is to secure compatibility with fundamental notions of fairness in relation to the exercise of administrative power. Once it has been established that conduct is inconsistent with the Constitution the Court, in addition to declaring such conduct to be invalid to the extent of its inconsistency, may make any order that is just and equitable. Thus, it would not be just and equitable to remedy unfairness to some by imposing unfairness on others. On the other hand, the constitutional rights of some cannot be withheld simply because of some potential knock-on effect on others. The test is one of fairness, not legality.” and “Unlike questions of legality, where the exercise of a power either is lawful or it is not, fairness can be a matter of degree. In this respect we can do no better than repeat what Steyn J recently said in *R v Secretary of State for the Home Department, Ex parte Pierson*: ‘It was suggested that severance would involve “a rewriting” of the policy statement. This is a familiar argument in cases where the circumstances arguably justify a court in saying that the unlawfulness of part of a statement does not infect the whole. The principles of severability in public law are well settled. . . . Sometimes severance is not possible, eg a licence granted subject to an important but unlawful condition. Sometimes severance is possible, eg where a bye (sic) law contains several distinct and independent powers one of which is unlawful. Always the context will be determinative. In the present case the power to increase the tariff is notionally severable and distinct from the power to fix a tariff. . . . It is an obvious case for severance of the good from the bad. To describe this result as a rewriting of the policy statement is to raise an objection to the concept of severance. That is an argument for the blunt remedy of total unlawfulness or total lawfulness. The domain of public law is practical affairs. Sometimes severance is the only sensible course.’” [Footnotes omitted]



Whilst the Constitution makes a number of references to international law¹⁹ discovering what is encompassed by the term ‘international law’, especially with regard to rights relating to health care services, is easier said than done. There are a number of international conventions to which South Africa is a party or a signatory which impact upon discussions of the law relating to health services delivery in South Africa. They are the Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on the Rights and Welfare of the Child and the African Charter on Human and Peoples’ Rights. However the point is made in chapter one of this thesis that these instruments of international law have not expressly or directly been enacted in South African legislation neither have they been applied down to the last detail by the constitutional court. A notable example of the latter is the court’s refusal to interpret the socio-economic rights in the Bill of Rights of the South African Constitution, including the right of access to health care services, with reference to a ‘minimum core’ of obligations as contemplated by the ICESCR Committee. In General Comment No 14 the Committee on Economic, Social and Cultural Rights has stated that the realization of the right to health requires that the state ensure equality of access to a system of health care and provide health services without discrimination. Accessibility in turn, has four overlapping dimensions: non-discrimination, physical accessibility, economic accessibility (affordability) and information accessibility²⁰. The National Health Act embodies these principles of accessibility to a large extent²¹. However when they are interpreted and applied by the

¹⁹ In sections 35, 37, 39, 198, 199, 200, 201, 231, 232 and 233

²⁰ Human Rights Watch ‘VII: South Africa’s Obligations Under International and National Law’
<http://www.hrw.org/reports/2004/southafrica0304/7.htm>

²¹ National Health Act fn 3 *supra*. Thus with regard to economic accessibility section 3 of the Act provides:

- (1) The Minister must, within the limits of available resources—
 - (a) endeavour to protect, promote, improve and maintain the health of the population;
 - (b) promote the inclusion of health services in the socio-economic development plan of the Republic;
 - (c) determine the policies and measures necessary to protect, promote, improve and maintain the health and well-being of the population;
 - (d) ensure the provision of such essential health services, which must at least include primary health care services, to the population of the Republic as may be prescribed after consultation with the National Health Council; and
 - (e) equitably prioritise the health services that the State can provide.
 - (2) The national department, every provincial department and every municipality must establish such health services as are required in terms of this Act, and all health establishments and health care providers in the public sector must equitably provide health services within the limits of available resources.
- and section 4 provides:
- (1) The Minister, after consultation with the Minister of Finance, may prescribe conditions subject to which categories of persons are eligible for such free health services at public health establishments as may be prescribed.
 - (2) In prescribing any condition contemplated in subsection (1), the Minister must have regard to—
 - (a) the range of free health services currently available;
 - (b) the categories of persons already receiving free health services;



courts, it may not be with more than a passing reference to the provisions of the international conventions referred to earlier, since the National Health Act is not specifically enacting these conventions. Whilst they may have an influence in the manner in which the Act is interpreted, it is submitted that the South African courts are more likely to interpret the Act with reference to the Constitution and other relevant legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act, the Promotion of Administrative Justice Act and the Promotion of Access to Information Act²². The constitutional right of access to health care services is part of a matrix of rights created in the Bill of Rights and other provisions of the

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- (c) the impact of any such condition on access to health services; and
(d) the needs of vulnerable groups such as women, children, older persons and persons with disabilities.
- (3) Subject to any condition prescribed by the Minister, the state and clinics and community health centres funded by the state must provide—
- (a) pregnant and lactating women and children below the age of six years, who are not members or beneficiaries of medical aid schemes, with free health services;
 - (b) all persons, except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases, with free primary health care services; and
 - (c) women, subject to the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996), free termination of pregnancy services.

With regard to information accessibility section 6 of the Act provides that –

- (1) Every health care provider must inform a user of—
- (a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
 - (b) the range of diagnostic procedures and treatment options generally available to the user;
 - (c) the benefits, risks, costs and consequences generally associated with each option; and
 - (d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.
- (2) The health care provider concerned must, where possible, inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user's level of literacy and section 10 of the Act stipulates that –
- (1) A health care provider must provide a user with a discharge report at the time of the discharge of the user from a health establishment containing such information as may be prescribed.
- (2) In prescribing the information contemplated in subsection (1), the Minister must have regard to—
- (a) the nature of the health service rendered;
 - (b) the prognosis for the user; and
 - (c) the need for follow-up treatment.

A discharge report provided to a user may be verbal in the case of an outpatient, but must be in writing in the case of an inpatient

and section 12 of the Act provides that –

The national department and every provincial department, district health council and municipality must ensure that appropriate, adequate and comprehensive information is disseminated on the health services for which they are responsible, which must include—

- (a) the types and availability of health services;
- (b) the organisation of health services;
- (c) operating schedules and timetables of visits;
- (d) procedures for access to the health services;
- (e) other aspects of health services which may be of use to the public;
- (f) procedures for laying complaints; and
- (g) the rights and duties of users and health care providers.

With regard to physical accessibility the Bill creates a licensing system in chapter 6 based on need which will regulate the distribution of health establishments throughout the country in accordance with the criteria specified in the chapter.

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Act No 4 of 2000, Act No 3 of 2000 and Act No 2 of 2000 respectively. As noted below, although section 233 of the Constitution requires courts when interpreting legislation to prefer an interpretation that is consistent with international law over one that is inconsistent with it, international law is generally not helpful when it comes to the level of detail required to resolve specific situations. Furthermore, it is submitted that where the Constitution is not on all fours with international law on a particular issue, the provisions of the Constitution will take precedence as demonstrated by the approach of the Constitutional court to minimum core content of socio-economic rights. A further problem is that it is not entirely clear what is meant by international law. It is fairly obvious that public international law and customary international law are included but it is not so obvious that private international law and *jus cogens* are also intended. The Constitution does not define the term 'international law'. Furthermore, where the provisions of public international law themselves conflict, as can happen with international trade agreements and conventions on human rights from time to time, the dilemma is which international law must the courts prefer. The answer, it is submitted lies in domestic law and more specifically the Constitution. The courts will always revert to the Constitution, as the foundation of the South African legal system, when resolving matters involving socio-economic rights.

Constitution which means that it has to be considered in the context of that matrix and a balancing exercise has to be undertaken in the event of a conflict of rights.

Section 231(4) of the Constitution states that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. The International Health Regulations are the only international agreement that has so far been expressly enacted into law falling within the portfolio of the Minister of Health²³. Since international law binds nation states rather than their individual subjects, international law is unlikely to have direct application within South Africa. However, it clearly can and does exert a strong influence on how legislation within South Africa is formulated and interpreted and, because of the provisions of section 39(1)(b) of the Constitution, is also a factor that cannot be ignored by the judiciary when interpreting the Bill of Rights. It is not, however, only international agreements to which South Africa is a party that inform the domestic legal system. As Dugard²⁴ points out, fears that international human rights law might be narrowly construed to cover only clear rules of customary law, and those human rights conventions to which South Africa is a party, were dispelled by the decision of the constitutional court in *S v Makwanyane and Another*²⁵. The judiciary is enjoined in section 233 of the Constitution when interpreting any legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Moreover, section 233 of the Constitution provides that customary international law *is* domestic law where it is not inconsistent with the Constitution or an Act of Parliament. The problem with international law, especially public international law, is that it sometimes suffers from vagueness as to the practical details necessary for its implementation. The costing of

²³ The International Health Regulations Act 28 of 1974 specifically defines 'the International Health Regulations' as the International Health Regulations adopted by the World Health Assembly at Boston on 25 July 1969, and set out in the Schedule.

²⁴ Dugard *J International Law: A South African Perspective* at p 264

²⁵ *Makwanyane* 1995 (3) SA 391 (CC) where Chaskalson JP stated at p 413: "In the context of s 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chap 3 can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, 49 the European Commission on Human Rights, and the European Court of Human Rights and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of chap 3." [Footnotes omitted]

legislative measures and the assessment of the resources and infrastructures necessary to implement law are usually neglected aspects of domestic legal systems - especially in developing countries. This is even more true of international law. If it is no small task to quantify the financial and operational implications of domestic law it is almost impossible to do so with regard to international law. The wealthy, developed countries of the world seldom if ever talk directly about the costs of implementing international human rights instruments but readily speak, for instance, of the minimum core of socio-economic rights that should obtain within poverty-stricken developing countries.

Despite the fact that the approach of public international law to health care services is much broader and more comprehensive than that of the South African legal system in that the former recognises the right to health rather than just a right of access to health care services, it is submitted that the approach of the latter is preferable for a number of different reasons. Some of these are apparent in the judgments of the constitutional court dealing with the concept of the minimum core contents of socio-economic rights²⁶. The court in these cases preferred to look at whether the state had acted

²⁶ Thus in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) the constitutional court observed that: "It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information. The determination of a minimum core in the context of the right to have access to adequate housing presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by s 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a Court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right." (Footnotes omitted)

In *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) the constitutional court stated that: "In effect what the argument comes down to is that ss 26 and 27 must be construed as imposing two positive obligations on the state: one an obligation to give effect to the s 26(1) and s 27(1) rights; the other a limited obligation to do so progressively through 'reasonable legislative and other measures, within its available resource'. Implicit in that contention is that the content of the right in ss (1) differs from the content of the obligation in ss (2). This 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*. 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

reasonably in the circumstances – a very pragmatic and far more tangible approach to socio-economic rights than that postulated by international law. International law, in terms of the minimum core concept, attempts to set a universal benchmark against which all efforts to achieve the realisation of the right to health are to be measured, irrespective of the resources available to a particular country or the circumstances of the individuals whose rights are affected. Whilst such an approach might be appropriate for international law – especially public international law - since its main objective as law seems to be to set norms and standards for various national legal systems to live up to, it is not so useful when it comes to the implementation of more or less the same principles within a domestic legal system. The primary object of the South African domestic legal system is not so much to set norms and standards as it is to ensure that the state fulfils its constitutional obligation to respect, protect, promote and fulfil the rights in the Bill of Rights with regard to the terms in which the Constitution is written. Unlike international law, domestic law must have teeth when it comes to the resolution of specific cases in which particular circumstances obtain with regard to identifiable individuals. It is submitted that the approach of South African domestic law, and more particularly South African constitutional law, to the question of the right of access to health care services has far more meaning and significance for those individuals seeking to enforce that right than do the precepts of international law with its top-down, minimum core approach that is not anchored to the realities of each particular situation. The scarcity of resources is one such reality. A socio-economic right which does not take realities of this nature into account ends

'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, and 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 sState 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 *Grootboom* reliance was also placed on the provisions of the Covenant. Yacoob J held that in terms of our Constitution the question is 'whether the measures taken by the state to realise the right afforded by s 26 are reasonable'.

Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under s 26(2), and not as a self-standing right conferred on everyone under s 26(1). He said that a "purposive reading of ss 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 ss 26 and 27 on a progressive basis." [Footnotes omitted]

up being hollow and largely unenforceable. The circumstances of the particular case are another reality. It is not enough, said the court in *Grootboom*²⁷ that the measures taken by the state though statistically successful, fail to respond to the needs of those most desperate. The rights of the individual are of paramount importance in considering South African constitutional rights. This does not mean that the rights of the individual must always take precedence over the rights of the collective or of other individuals²⁸. However the statement of the court in *Grootboom* referred to earlier and in other cases²⁹ demonstrates the focus in constitutional law on the individual. Sachs J noted in *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of*

²⁷ *Grootboom* fn 26 *supra*. Yacoob J observed at p 69 “Furthermore, the Constitution requires that 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 may not pass the test.”

²⁸ The decisions of the courts in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 430 (D) and *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) and in *Park-Ross And Another v Director: Office For Serious Economic Offences* 1995 (2) SA 148 (C) where the court stated: “While a purposive approach to the interpretation of the Constitution may be required, it does not mean that the rights of individuals entrenched in the Constitution are absolute or limitless or that limitations to such rights are not accepted (see *Rudolph and Another v Commissioner for Inland Revenue and Others NNO* 1994 (3) SA 771 (W) at 774D). It is self-evident that limitations must exist. As stated in the *Corpus Juris Secundum* vol 16A para 451 (at 465-6), in respect of the United States Constitution, they must ‘at times give way when they are in conflict with rights granted for the protection, safety and general welfare of the public. . . .’ Restrictions on (individual) rights are permissible if reasonable and designed to accomplish a purpose properly within the purview of the police power” are sufficient evidence of this.

²⁹ *S v Makwanyane And Another* fn 25 *supra*: “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....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....But human dignity is important to all democracies. In an aphorism coined by Ronald Dworkin, ‘Because we honour dignity, we demand democracy’. Its importance was recognised too by Cory J in *Kindler v Canada (Minister of Justice)* (1992) 6 CRR (2nd) 193 (SCC) at 237 in which he held that ‘(i)t is the dignity and importance of the individual which is the essence and the cornerstone of democratic government’. [Footnotes omitted]

Ferreira v Levin No And Others; Vryenhoek And Others v Powell No And Others 1996 (1) SA 984 (CC): “Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own. It is likewise the foundation of many of the other rights that are specifically entrenched. Viewed from this perspective, the starting point must be that an individual’s right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others.”

Harksen v Lane NO and Others 1998 (1) SA 300 (CC): “We have interpreted s 8(2) as a clause which is primarily a buffer against the construction of further patterns of discrimination and disadvantage. Underpinning the desire to avoid such discrimination is the Constitution’s commitment to human dignity. Such patterns of discrimination can occur where people are treated without the respect that individual human beings deserve and particularly where treatment is determined not by the needs or circumstances of particular individuals, but by their attributes and characteristics, whether biologically or socially determined.”

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC): “The presence of s 31 in the Bill of Rights may be understood as a product of the two-stage negotiation process resulting in the adoption of the final Constitution, in which one of the concerns was how community rights could be protected in a non-racial parliamentary democracy based on universal suffrage, majority rule and individual rights. Constitutional Principle (CP) XI 18 declared that the diversity of language and culture should be acknowledged and protected and conditions for their promotion encouraged. CP XII stated that collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, should be recognised and protected. The Constitution complies with these Principles in a number of different ways. Thus, language rights and rights of belief are first spelt out fully as individual rights in ss 15 and 30, even though they have a community dimension and are frequently exercised in a community setting.”

1995³⁰ that a review of literature by leading authors in the field suggested that over the years there had been a firm movement from the concept of tolerance of religious and other minorities, to that of protection of national groups, to that of guaranteeing rights of individuals. This observation may be true of rights relating to religion but does not necessarily seem to be the case with regard to international rights relating to health care. Article 12(2) of the International Covenant on Economic, Social and Cultural Rights states that:

“The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

The four factors listed above are not, it is submitted, concerned so much with the rights to health of individuals but rather the health of the collective that can be measured in terms of statistics.

The focus of international law thus seems to be more at the macro, collective, level rather than at the micro, individual level when it comes to the right to health. This is understandable since it applies to nation states rather than the individual citizens of those nation states. Domestic law, however, must be binding upon individuals if it is to have any significance or impact upon the manner in which people conduct their affairs. It seems that the primary difference between the approach of the South African legal system and that of international law³¹ to the realisation of socio-economic rights is that the former favours a bottom-up approach whereas the latter favours a top-down approach. The value of the bottom-up approach is that it is a more rational and pragmatic method of ensuring the development of domestic law that is capable of realistically addressing the wide variety of individual needs in South Africa

³⁰ *Ex Parte Gauteng Provincial Legislature* 1996 (3) SA 165 (CC)

³¹ To the extent that international law could be said to have an internally consistent approach.

concerning access to health care services. While concepts such as minimum core may be of direct relevance in homogenous societies with more equitable distributions of wealth and resources, and similar cultural values and beliefs, it is submitted that the diversity of South African society in itself renders the concept problematic in a local context. The available resources in each situation are different. Furthermore different situations call for different kinds of resources at different levels of availability. They do not only vary across parameters such as urban versus rural, public versus private and socioeconomic levels but they also vary in terms of the disease profiles of various populations, the health needs of people in various geographical areas, genetic and cultural differences, community size and type, age groupings etc. At the individual level there are even more variables such as the health status, age, socio-economic status, level of familial or community support, literacy and educational levels, gender etc. Unfair discrimination can be the result of a policy that treats everyone the same since in the health care context, the needs of everyone are not the same. It is submitted that the South African Constitution's emphasis on equality renders the minimum core approach of international law unworkable and in many instances unreasonable because health service delivery has to be personalised to meet the needs of each unique individual.

Public international law still has a significant way to go before it reaches any internal consistency on the general international law front with regard to views on matters such as health care and access to goods and services necessary for the maintenance, preservation and promotion of mental and physical health that, according to international law, is the right of every person. Some of the hottest international legal debates in recent years are represented by the widely differing stances of two international organisations – the World Health Organisation and the World Trade Organisation³². The former actively supports the supply of medicines and other health

³² In 2002 the World Health Organisation and the World Trade Organisation published a document entitled 'WTO Agreements and Public Health: A Joint Study by the WTO and WHO Secretariat'. In the foreword Dr Gro Harlem-Brundtland and Mike Moore of the WHO and WTO respectively note that: "As the world becomes increasingly integrated, it becomes less and less possible for different policy areas to be handled independently of each other. The linkage between trade and health has been the focus of much debate: real concerns should be dealt with and any misunderstandings should be clarified based on sound evidence and rigorous analysis... In both the WHO and the WTO questions of trade and public health feature high on the agenda, and significant advances have been made in the recent past. The endorsement by the international community of the Doha Declaration on the TRIPS Agreement and Public Health is a very visible expression of governments' commitment to ensuring that the rules-based trading system is compatible with public health interests." It is stated in the report that: "While the WTO Agreements explicitly allow governments to take measures to restrict trade in pursuing national health policy objectives, the emphasis in WTO rules is on how policies are pursued without questioning the underlying objective." The Report considers each of the WTO Agreements and their relevance to health. The Report states with regard to the TRIPS Agreement that: "The areas of



care products to developing countries at little or no cost to those countries whilst the interests of the latter lie in the maximisation of the global profits of multinational organisations and the exploitation by them to the full of their hard won intellectual property. Medicines, and to a lesser extent medical devices, are often at the forefront of these debates. Specific international law can have an impact on domestic law. One of the major objections of the Pharmaceutical Manufacturer's Association to the

intellectual property covered by the TRIPS Agreement that are relevant to health include: patents; trademarks including service marks, which are relevant, for example, to combating counterfeit drugs; and undisclosed information, including trade secrets and test data. In respect of each of these areas, the Agreement sets out the minimum standards of protection that must be adopted by each Member. Each of the main elements of protection is defined, namely the subject matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The standards build on those in the main pre-existing WIPO Conventions, substantive provisions of which are incorporated into the Agreement by reference. While the focus here is on patents, this is only one part of the TRIPS Agreement. One of the purposes of the TRIPS Agreement is, for instance, also to provide for more effective international cooperation against counterfeiting, including international trade in counterfeit goods, such as drugs... Patent protection for pharmaceutical products is an area where the problem of finding a proper balance is particularly acute - namely, between the goal of providing incentives for future inventions of new drugs and the goal of affordable access to existing drugs. It is especially important from a social and public health point of view that new drugs and vaccines to treat and prevent diseases are generated, and that the incentives provided by the patent system effectively promote this. Precisely because of the social value of the drugs so generated, they need to be widely accessible as quickly as possible. The patent system provides for, on the one hand, exclusive rights granted to inventors of new drugs, and, on the other hand, the requirement that for a new drug to benefit from such rights (to be patentable), it must be new, involve an inventive step, be industrially applicable and be fully disclosed, and further that after a term of protection the invention will fall into the public domain and become free and useable by all. In addition, the TRIPS Agreement contains several other provisions enabling governments to implement their intellectual property regimes in a manner which takes account of immediate and longer-term public health considerations. Article 8 explicitly recognizes the right of WTO Members to 'adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.' Furthermore, the TRIPS Agreement provides for certain exemptions from patentability, the possibility to make limited exceptions to patent owners' exclusive rights, compulsory licensing, and parallel importation. International conventions before TRIPS did not usually specify the minimum standards for patents. Over 40 countries provided no product patent protection for pharmaceuticals prior to the launching of the negotiation of the TRIPS Agreement and some 20 WTO Members still did not do so by the time of the conclusion of the TRIPS negotiations. A few of these countries did not provide process protection in this area as well. The duration of patents was less than 20 years in many countries. TRIPS rules require WTO Members to provide patent protection for any invention, whether a product (such as a medicine) or a process (such as a method of producing the chemical ingredients for a medicine), while allowing certain exceptions. Patent protection has to last at least 20 years from the date the patent application was filed. As in other WTO Agreements, non-discrimination is a core TRIPS principle. With some exceptions, Members must not discriminate on the basis of the nationality of persons or companies (Articles 3, 4 and 5). In addition, Members cannot discriminate between different fields of technology in the availability and enjoyment of patent rights. Nor can they discriminate in these areas on the basis of the place of invention and whether products are imported or locally produced. As the TRIPS Agreement does not define the terms "new", "inventive step" and "non-obvious", national patent laws vary in how they construe these terms for the purposes of evaluating patent applications. Patentability standards which are too lax can make it possible to obtain protection for relatively minor innovations. Some concern has been expressed that this can facilitate what is sometimes referred to as "evergreening" of pharmaceutical patents, meaning that improved versions of the original drug may stay under patent protection even after the original version has fallen into the public domain. Very strict criteria may make it more difficult for small and medium-sized enterprises to use the patent system, especially in developing countries. Regarding eligibility for patenting, governments can refuse to grant patents for three reasons that may relate to public health: (a) inventions whose commercial exploitation needs to be prevented to protect human, animal or plant life or health; (b) diagnostic, therapeutic and surgical methods for treating humans or animals; (c) plant and animal inventions other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. Under the TRIPS Agreement, governments can make limited exceptions to patent rights provided certain conditions are met. These exceptions must not "unreasonably" conflict with the "normal" exploitation of the patent and must not unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interest of third parties (Article 30). A range of exceptions may be covered by this provision. For example, many countries provide for a "research" or "experimental use" exception to allow researchers to use a patented invention for research, in order to understand the invention more fully. In addition, Article 30 permits countries to allow manufacturers of generic drugs to use the patented invention, without the patent owner's permission and before the patent protection expires, for the purpose of obtaining marketing approval from public health authorities. Generic producers are thus able to market their versions almost as soon as the patent expires. This provision is sometimes called the "regulatory exception" or "Bolar" provision, and has been upheld as conforming with the TRIPS Agreement in a WTO dispute ruling: in a report adopted on 7 April 2000, a WTO dispute settlement panel stated that Canadian law was consistent with the TRIPS Agreement in allowing manufacturers to do so."

Medicines and Related Substances Control Amendment Act³³ was that it allowed the violation of the TRIPS Agreement by the South African government. The matter was eventually settled out of court with the National Department of Health retaining its legislation intact. This is an example of the way in which international law as contained in international agreements can impact upon South African domestic law relating to health service delivery. The hotly contested amendment allowed for parallel importation of medicines by the South African government. To date the state has not invoked this particular provision of the Act. It is submitted that as a developing country, the South African legal system is most likely to run into conflict situations with international law on the medicines front. The manufacturers of pharmaceuticals are largely multinational organisations operating in global markets and they are the ones most likely to invoke international trade agreements in order to counter a legislative innovation or policy directive of the National Department of Health.

The WTO and the WHO note in their joint report that putting WTO rules into practice can raise difficult questions for health policy makers. For example, what happens when, for a given hazard, there is uncertainty about the risk? This poses a challenge for regulatory action, and responses to uncertainty and risk are likely to be different in different countries. Among the factors to be considered may be the trade-restrictiveness and efficacy of the measure to achieve the level of health protection sought. The WHO has developed International Health Regulations in the interests of infectious disease control. In the report it is noted that in exceptional circumstances, infectious disease control may require trade or travel restrictions. In the past, disease outbreak control concentrated on quarantines or trade embargoes. In recent years, a combination of sensitive early warning surveillance systems, rapid verification procedures and international response networks, epidemic preparedness plans and stockpiles of essential medicines has reduced the need to employ trade embargoes or travel restrictions. The Report states that to the extent trade restrictions are used, they should be time-limited and try to minimize disruption to international trade. This is one of the fundamental principles underlying the WHO's current revision of the International Health Regulations. The renewed International Health Regulations will

³³ Medicines Amendment Act 90 of 1997

serve as the legal framework for the WHO's efforts to prevent disease epidemics from spreading globally. The historic purpose of the International Health Regulations is to "ensure the maximum security against the international spread of diseases, with a minimum interference with world traffic." This purpose will continue in the new International Health Regulations.

In the Report³⁴ it is stated that specific measures used to control infectious diseases, whether adopted by national governments, or recommended by WHO in the performance of its IHR duties, may be subject to WTO rules if they affect trade in goods or services. Which rules are relevant will depend on the circumstances of the particular case. For example, while sanitary measures to halt the spread of a food- or animal-borne infectious disease could have a substantial trade impact and would be covered by the SPS Agreement, it is unlikely that regulatory action aimed at mitigating such risks - whatever the pathway or nature of the disease - would run contrary to WTO rules. It is clear from this that the right to health, as envisaged by the WHO³⁵ is something potentially quite different when mitigated by WTO Agreements. The right to health, it seems, must not interfere unduly with world trade³⁶.

The first chapter of this thesis identifies the different kinds of international law and their relevance to and influence upon South African domestic law in terms of sections 231, 232 and 233 of the Constitution. The point is made in this chapter that consistency is a prerequisite of a rational and clearly principled domestic legal system. The lack of consistency in international law is not only within public international law but it is also evident within the *jus cogens* and customary international law. These areas of international law seem to be lacking in clear beacons of common principle and understanding that would suggest an internally consistent approach within international law to the question of the right of access to health care

³⁴ WTO/WHO Report fn 32 *supra*

³⁵ The WHO defines health as "a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity". "Public health" refers to all organized measures (whether public or private) to prevent disease, promote health, and prolong life of the population as a whole.

³⁶ See Mitra S 'WTO Agreements and Public Health: A nexus rather than an agreement' who criticises the WTO/WHO study as having belied the expectations of those who had hoped for a critical analysis of WTO policies and the likely impact they would have on public health, especially in developing countries. Mitra comments that on the question of coherence between health and trade policies the report states that the WHO's objective is "the attainment of all peoples of the highest possible level of health". And what, asks Mitra, has that to do with trade? In this regard the report says, "an underlying assumption is that a liberal international trade regime, subject to reasonably stable and predictable conditions, improves the climate for investment, production and employment creation, and therefore contributes to economic growth and development. Generally the health status of a country is affected positively by such growth."

services or a right to health generally. It is submitted that international law and South African domestic law relating to health service delivery, whilst they may share the same conceptual structures at some deep level, are far from continuous or even contiguous and that while they have some broad common interests, there are many differences in the detail of their respective approaches to this topic.

10.2.1 Criticisms of International Law

There is no country in the world in which international law applies independently of national or domestic law or where it is the only prevailing system of law. Thus even in those countries whose legal systems espouse automatic incorporation, as opposed to legislative incorporation, or international law into their domestic legal systems, this incorporation is by virtue of domestic, often constitutional legal provisions rather than any stipulation within international law itself. As a result, international law has the potential to be differently understood and applied in practice by various nations states. Its homogeneity, as least as far as its practical application is concerned, is thus notional. It follows that the same can be said of its theoretical and practical content. A right to health, or of access to health care services, is still not recognised in the USA - one of the wealthiest countries of all and with one of the most expensive health systems in the world. By contrast, the right of access to health care services has been recognized in Venezuela, a developing country with a marked lack of resources, despite the fact that the Venezuelan government apparently lacks the means to comply with court orders upholding this right³⁷. There has to be a time and place where ideology and reality meet in order for law to become relevant and meaningful. Unfortunately such a happy tête-à-tête seems largely to have eluded international law at least as far as a right to health, or even health care, is concerned.

International law does not take into account inequalities between societies³⁸. Foreign aid, when it is made available, comes with a subtle price tag that sometimes directly

³⁷ Torres, 'The Human Right To Health, National Courts and Access to HIV/AIDS Treatment: A Case Study from Venezuela' *Chicago Journal of International Law* Spring 2002, 105.

³⁸ Kingsbury B 'Sovereignty and Inequality' *European Journal of International Law* 9 (1998) 599-625 observes that inequality is one of the major subjects of modern social and political inquiry but it has received minimal consideration as a theoretical topic in the recent literature of international law. He argues that the lack of other means to cope with inequality is a serious problem for international law that has been wrongly neglected, but that the lack of such an alternative provides a strong reason to adhere to the existing concept of sovereignty, however much it may be "strained by practice and problematized by theory". He states that: "The theory of sovereignty has relieved international lawyers

undermines the sovereignty of the country for whom the aid is destined. The funding in question is often placed in the hands of non-governmental and other private organisations rather than those of the government – no matter how democratically elected. If it is the primary responsibility of the government in question to ensure the progressive realisation of socio-economic and other rights, foreign funding that is channelled away from that government into the private sector has the effect of disempowering government to fulfil its mandate. Yet international law imposes these human rights obligations not upon the private or non-governmental sectors within developing countries but upon their governments. Operationally and functionally speaking therefore, international law is weak³⁹ and subject to manipulation by the

of the need for a general theory of the legal management of inequality in three ways. First the concept of sovereignty underpins a principle of sovereign equality that has attained an almost ontological position in the structure of the international legal system. This ontological status makes enough difference in the processes of international law and politics to modestly vindicate the significance and effectiveness of the system of sovereign equality: thus very small states are procedurally on an equal footing with the largest or most powerful states in the International Court of Justice, and groups of small states have made some difference in the dynamics of multilateral bargaining on issues such as climate change. In the same spirit, legal doctrines of the special status of great powers have been in the descendant since 1945, and such matters as the structure of the Non-Proliferation Treaty or the UN Security Council are dealt with by most legal writers as anomalies, however necessary or enduring, in the scheme of sovereign equality. This conceptual scheme serves, if very unevenly, as a counter to the vast inequalities that might otherwise be expected to feature in the formal structure of the legal system. Second, the concept of state sovereignty allows questions of social and economic inequality among people to be treated in international law as a responsibility of territorial states. International law and legal institutions are able to promote market activity, for example, through the World Trade Organization or the International Monetary Fund, while in theory leaving largely to states the responsibility of mitigating social and economic inequalities associated with markets. Episodic attempts to address economic and social inequality directly through substantial non-market changes in the international legal order have met with little success outside the established human rights and environmental programmes. Despite economic and political turbulence associated in some respects with inequality, concerns about it have remained displaced by preoccupations with reducing the role of the state in economic activity and in major market-distorting egalitarian redistribution. International institutions continue to play important roles in economic development, and political leaders in prosperous countries confronted with concerns about poverty or maldistribution abroad increasingly hope for solutions from the World Bank and other intergovernmental agencies along with bilateral assistance and the much-vaunted voluntary sector. There is, however, a growing incongruence between the increasing market orientation of international law and the inability of international governance institutions or of many sovereign states to cope with problems of inequality that markets alone do not resolve...Third, the theory of sovereignty provides the means by which people can express, and be deemed to have expressed, consent to the application of international legal norms and to international institutional competences. Consent, whether express or tacit, plays a role in legitimating international legal rules and institutional activities in situations where their legitimacy may be in doubt, as where they infringe deeply held egalitarian principles. This legitimating function is of vast importance for the international legal system. It is not clear that in the present state of heterogeneous international society, any non-consensual legitimating principle is viable; and sovereignty appears to be a relatively low cost means to organize 'consent'."

39

For example, Fidler DP 'Globalization, International Law and Emerging Infectious Diseases' notes that although international control plans would involve private organizations like universities and nongovernmental organizations, the primary actors on the emerging infections stage are sovereign states. He states "The action plans are predominantly blueprints for co-operation among states and represent a call for the internationalization of responses to a problem caused by globalization. Put another way, the proposed solutions to the emerging infections threat rely on the sovereign state, while the threat feeds off the impotence of the state in addressing global disease problems. When it comes to public health activities, globalization erodes sovereignty, but the proposed solution makes sovereignty and its exercise critical to dealing with the threat of emerging infections. The consequences of the unavoidable emphasis on international cooperation in the proposed action plans for emerging infections are troubling. To achieve the desired objectives... states will have to agree on many issues and translate such agreement into guidelines or rules. International law becomes important to the effort for emerging infections control. Political leaders, diplomats and scholars have long recognized the weakness of international law in regulating state behaviour. At first glance the prospect of having to rely on a notoriously weak institution of international relations as part of the global effort to combat emerging infections is unsettling.... The success of WHO in globalizing disease control programs might suggest that the defects of international law have not hobbled its effectiveness in improving health care worldwide. However, despite having the authority to do so, WHO has been reluctant to use international law. The International Health Regulations administered by WHO represent the most important set of international legal rules relating to infectious disease control but the regulations only apply to plague, yellow fever and cholera. The importance of health is mentioned in international declarations (for example, see the Universal Declaration of Human Rights art. 25[1]) and treaties (for example see the International Covenant on Economic, Social and Cultural Rights, art.12), leading some legal scholars to argue that international law

more powerful, developed countries to suit their own purposes and further their own causes⁴⁰. The weakness of international law is nowhere more evident than in the

creates a "right to health"; but this "right" does not directly address the control of infectious diseases. WHO has refrained from adopting rules on trade in human blood and organs which does raise issues of infectious disease control as illustrated by the sale of HIV-contaminated blood in international commerce. Issues of disease control also appear in specialized treaty regimes outside WHO such as treaties controlling marine pollution from ships. Other areas of international public health law, for example, rules about infant formula and guidelines on pharmaceutical safety, do not deal with the control of infectious diseases." [Footnotes omitted] Fidler goes on to point out that the emerging infections problem exacerbates basic weaknesses in the law and that these infections pose specific difficulties in the law which are related to the nature of disease and its prevention. He observes that part of the reason that the existing International Health regulations cover only a few diseases might be the unwillingness of the WHO member states to commit to more serious infectious disease control measures. He notes that the vagueness and lack of specificity in the so-called "right to health" also illustrate this problem. Fidler identifies as a specific difficulty the extent of medical and scientific resources needed to establish an effective global surveillance and control network for emerging infectious diseases. Fundamental aspects of the proposed action plans involve improving surveillance networks, public health infrastructures, scientific research and medical and scientific training. He points out that some states, particularly in the developing world do not have the resources to undertake such measures. Unless more affluent countries provide the resources, developing states may use the inequity of wealth in the international system as an argument to complicate negotiating a global agreement. In Parisi F and Sellers M (eds) *International Legal Theory* (a Publication Of The American Society Of International Law Interest Group On The Theory Of International Law) it is stated that: "International law cannot make policy on its own, but people can. Normative knowledge can only serve as a frame of reference, although sometimes a compelling one, for statesmen, political leaders, organizations, corporations, and individuals, who, in the final analysis, are the ones who make the decisions. For normative knowledge, international law, like all law, is ineffective if it lacks "operators", that is, legal subjects entitled to use the law for particular purposes. ("Norms comprise symbols of normative conceptions about reality. A translation of these conceptions is operationalized by the user." B. Holzner *et al.*, Knowledge Application: The Knowledge System in Society 95 (1979).) States, organizations, relevant groups, and individuals can become both target subjects and operators of international legal and institutional frameworks. (The terms "operator," "actors," "decision makers," and "international participants" are used here to refer to international legal subjects that enjoy sufficient access and standing to create policy or make decisions. Thus, for example, states are the only operators and participants with access and standing at the International Court of Justice, though individuals may also become operators before an international human rights court. Presidents, Ministers, leaders of governmental and non-governmental organizations, organizations themselves, and individuals, if entitled with the authority to participate in a decision-making process, are operators or relevant actors....Once we acknowledge the essential role of human actors in international law, we can only ascertain the effectiveness of international law if, in addition to the more traditional bases of legal inquiry, we consider the interaction of what actors believe—or want to believe—the law is." http://law.ubalt.edu/ciel/ilt/2_1_1996.pdf

40 See for instance the views expressed in the following sources: Chang H, *Kicking Away the Ladder: Development Strategy in Historical Perspective* argues that developed countries did not become rich by adopting the 'good practices' and the 'good institutions' that they now present to poorer countries as the essential basis for development. He maintains that the industrialised nations are in this way 'kicking away the ladder' by which they climbed to the top, preventing the developing world from applying the very policies and institutions upon which they themselves had relied in order to develop.

Dichter T, *Despite Good Intentions: Why Development Assistance to the Third World has failed*. The author, himself a veteran aid-agency worker, surveys the history of development assistance from 1945, which has been premised on the belief that the industrialised countries could in some way engineer the acceleration of history in the less-developed world. He argues that the enterprise is internally flawed: the vast differences in power between the donors and recipients of aid, and the organisational imperatives to show 'results', conspire to keep the development industry in business and the unequal relationships intact. If the goal is for aid recipients to become autonomous, free of external control, then the first step has to be to reduce and not increase development assistance, since this serves principally to consolidate the power of the 'helpers'.

Ferguson, J *The Anti-Politics Machine: 'Development', Depoliticization, and Bureaucratic Power in Lesotho*, 1994 Based on a case study of a development project in Lesotho, the author of this work makes a searing critique of the development industry as a whole. The 'anti-politics machine' refers to the process through which outside 'development' agencies and experts wilfully turn the political realities of poverty and powerlessness into 'technical' problems which require an equally technical solution. Using an anthropological approach, the author analyses the institutional framework within which development projects are crafted, revealing how it is that, despite all the 'expertise' that goes into formulating them, these projects often betray a startling arrogance and deep ignorance of the historical and political realities of the communities whom they are intended to help.

Escobar, A *Encountering Development: The Making and Unmaking of the Third World* 1994. In this now classic presentation of post-development thought, Escobar offers a challenging critique of development discourse and practice, arguing that development policies deployed by the West to 'assist' impoverished countries are in effect self-reinforcing mechanisms of control that are just as pervasive and effective as colonialism was in earlier years. To capture the production of knowledge and power in development initiatives, Escobar uses case studies which illustrate how peasants, women, and nature, for instance, become objects of knowledge and targets of power under the 'gaze of experts'. He concludes with a discussion of alternative visions for a post development era.

Note: The reviews quoted above are in *Resources* <http://www.developmentinpractice.org/readers/Methods/resources.pdf>
See also Nyamugasira W "Aid, Conditionality, Policy Ownership and Poverty Reduction: A Southern Perspective of Critical issues, Constraints and Opportunities", a background paper presented at the meeting of International Advisory Committee The Reality Aid Project, San Jose, Costa Rica, September 17-21, 2000.

<http://209.130.12.187/jpdfs/jiacwn.pdf>. The author, in asking how conditionality crept into the aid business, states that: "Conditionality is most powerful when collectively imposed. In recent years, individual bilateral donors have ceded much of their decision-making power to the IMF, which certifies that the macroeconomic management of a country is

Venezuelan case of *Cruz Bermudez, et al v Ministerri de Sanidad y Asistencia Social*⁴¹ where the judgment of the court made no difference to the harsh reality of a lack of necessary resources. Law in a vacuum is meaningless. International law in particular, lacks contextual value. While it is useful when it comes to broad general principles it is not instructive with regard to practical considerations involving individual cases.

International law does not regulate multinational corporations despite the enormous global power that they wield. International law applies to the governments of nation states and not private entities⁴². The major innovative pharmaceutical companies in the world fall into this category. They guard their intellectual property rights in the medicines they develop with missionary zeal, regardless of the effect on accessibility to these products for developing countries. Their research and development efforts are, furthermore, largely directed at dealing with the health problems of developed countries because that is where the money lies. Diseases of poverty are, by definition, unlikely to yield significant returns unless they start becoming a threat to the developed world⁴³. International law regulates none of this. In fact in many instances

sound and deserving of support. In addition, donors have increased coordination among themselves and increasingly present a united position to the recipient countries. Conditionality has succeeded because: Firstly, the recipients have been denied other alternative sources of development finance. Donors killed off all alternative channels for poor countries to obtain development finance, starting with independent thinking... Secondly comparative advantage has been applied to block potential to generate own resources, condemning Africa to exporting a narrow range of primary commodities whose exchange value never appreciates. Thirdly there is no ideological alternative, the one that gave so much hope to poor people and without which much of Africa would perhaps not have been liberated, having been finally dismantled. Fourthly, vulnerability has increased as developed countries cause exogenous shocks to already weak and vulnerable economies. Fifthly, South-South cooperation joint initiatives have been thwarted, making it hard for disaffected economies to extricate themselves from destructive conditions. The global economy is designed to work against them. Sixthly, have (sic) failed to learn alternative survival skills, poor countries are unable to create internal conditions that strengthen their negotiating position..."

⁴¹ See Torres fn 37 *supra*

⁴² Forsythe DP 'The Political Economy of Human Rights: Transnational Corporations' notes that "Transnational corporations (TNCs) drive globalization, meaning the increasing economic interconnectedness of the world. Their power is widely recognized. Also increasingly recognized is the good or ill they can do for human rights, especially labor rights. The public regulation of TNCs, especially for social reasons like human rights, has long been problematical. Global international law regulates states primarily, not TNCs...It has been long recognized that business enterprises that operate across national boundaries have an enormous impact on the modern world. If we compare the revenues of the twenty-five largest transnational corporations with revenues of states... we see that only six states have revenues larger than the nine largest TNCs.... The world's 200 largest TNCs are incorporated in just ten states above all in the United States and Japan." <http://www.du.edu/humanrights/workingpapers/papers/14-forsythe-03-01.pdf>

⁴³ Good examples of this are the diseases caused by parasites known as trypanosomes. Chagas' Disease (American trypanosomiasis) affects 16 to 18 million people in Latin America. Chagas disease is named after the Brazilian physician Carlos Chagas who first described it in 1909. The disease is endemic in 21 countries in Central and South America and is found only in the American Hemisphere. Still it affects 16-18 million people in Latin America and 100 million people are at risk of becoming infected. Chagas is caused by a protozoan parasite, *Trypanosoma cruzi*, transmitted to humans by blood-sucking insects known in various countries as the "kissing bug", "vinchuca", "barbeiro" or "chipo". The disease is caused by *Trypanosoma cruzi* (*T. cruzi*), a flagellated protozoan parasite. The parasite is transmitted to humans in two ways, either by a blood-sucking insect, which deposits its infective feces on the skin at the time of biting, or directly by transfusion of infected blood. Humans and a large number of species of domestic and wild animals constitute the reservoir, and the vector insects infest poor housing and thatched roofs. Chagas disease exists in both acute and chronic stages. After initial infection and a subsequent incubation period, the acute phase of infection begins and typically persists for two months. With a mortality rate of 2%-8%, acute disease is generally seen in children and is characterized by fever, swelling of lymph glands, enlargement of the liver and spleen, or local inflammation at the site of infection. But, commonly, there are no acute clinical manifestations, and those infected may remain without symptoms. Approximately one-third of acute cases progress to a chronic stage, which develops some 10-20 years later and can

cause irreversible damage to the heart, esophagus and colon, with dilatation and disorders of nerve conduction in these organs. Patients with severe chronic disease become progressively more ill and ultimately die, usually from heart failure. There is, at present, no effective treatment for such cases. The geographical distribution of the human *T. cruzi* infection extends from Mexico to the south of Argentina. The disease affects 16 - 18 million people and some 100 million people (about 25% of the population of Latin America) are at risk of acquiring Chagas disease. The risk of infection with Chagas disease is directly related to poverty: the blood-sucking triatomine bug which transmits the parasite finds a favorable habitat in crevices in the walls and roofs of poor houses in rural areas and in the peripheral urban slums. The rural/urban migration movements that occurred in Latin America in the 1970's and 1980's changed the traditional epidemiological pattern of Chagas disease and transformed it into an urban infection that can be transmitted by blood transfusion. The figures of infection of blood in blood banks in some selected cities of the continent vary between 3.0 and 53.0 % thus showing that the prevalence of *T. cruzi* infected blood is higher than that of HIV infection and Hepatitis B and C. Two treatments presently exist for Chagas disease in the acute stages: Benzidazole, given as twice-daily intravenous infusions for 60 days. • Nifurtimox, given as three times-daily intravenous infusions for 90 days. Both of these treatments are accompanied by frequent, serious and life-threatening side effects, and the months of treatment required for cure have led to resistance and high levels of treatment failures. Sources: Centers for Disease Control (CDC), United States, Division of Parasitic Disease, Chagas Disease Fact Sheet

http://www.cdc.gov/ncidod/dpd/parasites/chagasdisease/factsheet_chagas_disease.htm

and World Health Organization, Special Program for Research and Training in Tropical Diseases,

<http://www.who.int/tdr>; <http://www.oneworldhealth.org/>

In 'Rare Infection Could Affect U.S. Blood Supply' *Health Highlights: Nov. 18, 2003* it is reported: "A parasitic infection that's rare in the United States but common in Latin America could pose a danger to the U.S. blood supply because there's no test to detect it, *The New York Times* reports. While only nine cases of Chagas disease have been transmitted by blood transfusion or tissue transplant in North America in the past 20 years, more than 18 million people in Latin America are said to be infected. Some 50,000 people in Mexico, Central America and South America die from the disease each year, the newspaper says. A test to detect the disease isn't expected until next year at the earliest. The newspaper cites a Chagas expert at the American Red Cross, who says the risk of acquiring the disease through infected blood is only about 1 in 25,000. Since 1989, several expert panels to the U.S. Food and Drug Administration have recommended that all donated blood be screened for the disease. But no test has been approved yet, and the companies working on one concede they are under no pressure to finish their work, the *Times* reports. An FDA spokeswoman wouldn't rank Chagas among all threats to the U.S. blood supply, but added "we would certainly recommend a Chagas test if one is developed." <http://www.healthfinder.gov/news/newsstory.asp?docID=516099>. In October 2003 the WHO reported on Current global status of Chagas disease as follows: "Large-scale regional initiatives to halt vector-borne transmission and improved screening of blood-donors have been successful. At present, estimates indicate an infection prevalence of 13 million, with 3.0-3.3 million symptomatic cases and an annual incidence of 200,000 cases in 15 countries. The disease remains a priority health problem due to: the need for surveillance and control in areas where sylvatic vectors can invade dwellings; the medical and social costs of care for infected people in the absence of efficient and well-tolerated therapy, especially against the chronic form of the disease; the difficulty in obtaining priority for control activities and vector elimination in areas where vectorial transmission has been interrupted; and the need to continue strengthening mandatory blood-donor screening in endemic areas, as well as in non-endemic areas where increased travel and/or immigration of potentially infected donors might compromise donated blood supplies." It stated that "The complexity of the pathology of Chagas disease and the diversity of its clinical manifestations have made the understanding of its pathogenesis difficult. The autoimmune hypothesis, once widely accepted, has increasingly been challenged by the parasite persistence hypothesis. Arguments for the latter hypothesis come from demonstrations of the presence of parasites in tissues of chronic patients, and the fact that treatments that decrease parasite burden are associated with a decrease in clinical symptoms. The two hypotheses might not be mutually exclusive since anti-immunopathogenic responses in chagasic patients might be driven by the parasite burden. Although further studies are needed, including elucidating the role of the recently described parasitokines, these results indicate an urgent need for the development of new antiparasite drugs, and their evaluation in large-scale randomized clinical trials, as well as for progress in the development of vaccines and immune interventions against pathogenesis." The WHO observes with regard to future outlook: "As the *T. cruzi* genome project... nears completion, new approaches will become available for the identification and validation of new drug targets, early diagnostic indicators of infection and vaccine candidates, and for the elucidation of the mechanisms underlying host cell invasion, immune response and pathogenesis. The challenge will be to transform new knowledge into cost-effective, equitably affordable interventions and to guarantee their access to the patients and populations of endemic countries."

Naula C and Burchmore R 'A Plethora of targets, a paucity of drugs: progress towards the development of novel chemotherapies for human African trypanosomiasis' <http://www.future-drugs.com> note with regard to Human African Trypanosomiasis (HAT) that it is a major health problem in large regions of Africa. The World Health Organisation has estimated that 300 000 people are infected with HAT and 60 million individuals are exposed to the risk of infection. They note that unfortunately developments in chemotherapy have not kept up with the rise of HAT and the drugs that are commonly employed today are the same as those that were in use in the 1950s. This situation, they say, represents a dramatic failure that has been brought about by a combination of the political situation in endemic countries and the economic reality of the global pharmaceutical industry. Trypanosomiasis is fatal if not treated. The authors observe that trypanosomes are the most intensively studied protozoa but most investigators are based in academia and have focused on the many aspects of trypanosome biology that are unique or unusual. They state: "The orphan disease status of HAT has stimulated support for basic research from public and charitable sources and the community of academics that study trypanosomes and related protozoa is extensive... This interest is not matched in the commercial sector, which is critical for drug development. There has been very little progress by the pharmaceutical industry in developing promising leads. An important reason for this failing is the lack of a wealthy market for drugs to treat trypanosomiasis. Non-profit organisations such as the WHO and Medecins Sans Frontieres (MSF) aim to encourage drug development by a variety of mechanisms. Of particular note is the Drugs for Neglected Diseases (DND) working group, and MSF sponsored initiative... HAT is a significant economic and social problem in large areas of Africa. Existing chemotherapies leave much to be desired. However, this situation is not new and the recent history of antitrypanosomal drug development is not encouraging. Nevertheless, there have been recent efforts to encourage and facilitate development of antiparasitic drugs by pharmaceutical companies. Increasing awareness of health problems in the under developed world serves to

it upholds the *status quo*. The World Trade Organisation's interest in intellectual property rights, unaccompanied by any significant desire to counterbalance these against the urgent needs of developing countries, is testimony to this.

A further criticism of international law lacks one of the *essentialia* of law itself – certainty. In some areas, such as customary international law and *jus cogens*, there is not even any certainty as to what constitutes international legal principles and what does not and when the transition to international law is made. Certainty is recognised in the South African legal system as a prerequisite for fairness and credibility of law since it impacts on the reliability of the legal remedies offered by law. International law offers no remedies and no certainty. Its enforceability depends upon the interests and motivations of the few countries that can call themselves global powers. International law, at the enforcement level, seems to be a one way street since those doing the enforcing are generally powerful, developed countries or their agencies and those subject to enforcement activity are developing or significantly weaker countries. The likelihood, rate and intensity of the enforcement intervention seems to be directly proportionate to the mainly financial and commercial interests of the enforcer in the country that is being taken to task⁴⁴.

The practical relevance of international law even as an ideal is questionable when considered against the backdrop of South African constitutional law since any comparison of the right to health in international law has to made be at various levels of complex matrices of rights often beset with their own internal conflicts. The point is made in the first chapter that where there is an internal conflict between constitutional rights, a balancing of rights must take place. Thus where there is an internal conflict between human rights at international law and an internal conflict between similar rights in domestic law, the internal conflict between the domestic rights must first be resolved before any consideration of international law can fruitfully take place since consistency is a prerequisite of a rational and certain

pressure pharmaceutical companies to address these issues. The market for HAT therapy may not at present be wealthy but it is large and poor prospects for vaccine development suggest that HAT may remain a problem in the long term. There is also a very important veterinary market for trypanosomiasis in cattle...It is to be hoped that success with DB 289 or its related compounds will stimulate commercial interest in the development of novel drugs to treat a disease that threatens such a large population...There can be little hope that new drugs for HAT will come to market in the next 5 years. ”

⁴⁴ As the most recent, large scale, interventions by the American and British governments in Iraq would seem to indicate when compared to the relative disinterest in the continuing or relatively recent gross human rights violations in Zimbabwe and Rwanda respectively.

domestic legal system. Considerations of international law in relation to a single right in the Bill of Rights in isolation from the matrix of rights, of which it is but one inextricable element, can lead ultimately to a fragmented and chaotic domestic legal order with a concomitant diminution in value of the very body of rights the latter seeks to confer.

10.2.2 Imbalance in the Formulation of International Law

Not all countries have an equal say in the formulation of international law because not all countries have equal access – or any access at all for that matter – to powerful international organisations such as the World Trade Organisation (WTO)⁴⁵ and other bodies under whose auspices public international law is created. One of the key functions of the World Trade Organisation is to serve as a forum for international trade negotiations. As such it attracts large and powerful developed countries that have equally large and powerful interests in global trade. The magnitude of their bargaining power in relation to much smaller and weaker developing countries whose stake in international trade is exponentially smaller than that of their developed counterparts creates a considerable imbalance in the formulation of international law. This is disjunctive of the fact that public international law that is created under the auspices of the World Trade Organisation impacts not only upon trade issues but significantly affects human rights and other aspects of international law as well. WTO Agreements such as the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) and GATS were formulated before many of the developing countries became members of the WTO. The chances of their being able to effect amendments to the terms of such agreements are slight. The difficulty with which developing countries succeeded in the meeting of the WTO at Doha is testimony to this. The Africa group of negotiators went to Doha opposed to adding new issues to the trade agenda until a

⁴⁵ By February 2002, 144 countries were members of the WTO. Together they account for more than 90 per cent of world trade. In the WTO, gaining membership is not automatic. Countries negotiate their accession to the WTO with existing members. WTO agreements are, in general, ratified in members' parliaments. Currently, several countries are actively negotiating their entry into the organisation, including the Russian Federation. There is growing consensus that WTO membership constitutes a key step towards integrating developing countries into the global economy and the international trading system. Countries that wish to join the WTO must negotiate with existing WTO members and a working party is set up to handle each application. Accession working parties are open to all WTO members, and countries with an interest in the applicant country's trade join the working party. Acceding country governments must then undergo a fact-finding process regarding their trade policy and undertake a series of commitments to bring trade policy into line with the WTO agreements. The accession process can be quite burdensome, complicated, and lengthy. As of February 2002, 16 of the 44 governments that had applied for WTO membership had completed the process and become WTO members. The entire process, which in some cases began before 1995 under the GATT, took between 3 and 10 years, except in the case of China, which recently became a member after 15 years of accession negotiations.

better deal was reached on those already covered. With the notable exception of South Africa, which announced beforehand that it would support the launch of a broad new round of negotiations, most African countries wanted Doha to concentrate on resolving outstanding “implementation issues” such as the failure of Northern governments to reduce tariff barriers to African exports⁴⁶. One of the major steps forward at Doha in terms of the recognition of the needs of developing countries was a declaration on TRIPS and public health was adopted in terms of which the 142 countries stated *inter alia*:

- “1. We recognize the gravity of the public health problems afflicting many developing and least developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.
2. We stress the need for the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address these problems.
3. We recognize that intellectual property protection is important for the development of new medicines. We also recognize the concerns about its effects on prices.
4. We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all.”

The Doha Declaration went on to recognize the right of each member to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted. It also recognised that each member has the right to determine

⁴⁶ Mutume G ‘What Doha means for Africa’ *Africa Recovery* Vol 14 No 4 December 2001 p 3. He observes that: The WTO General Council had decided in December 2000 that the differences over these previous agreements, known as the Uruguay Round, should be resolved before or at Doha. Despite a commitment under Uruguay to reduce import duties, some developing country products exported to industrial nations such as sugar, metals, cereals and textiles, continue to face tariff barriers, in some cases of more than 100 per cent. These are the countries that evangelize in the name of free trade said President Yoweri Museveni of Uganda in an address to the Un General Assembly in New York in November at the same time as the Doha meeting. “What a paradox,” he said. “These double standards must end”. African ministers, says Mutume, went to Doha hoping to obtain binding commitments from rich countries to reduce the agricultural subsidies that enable the North to export cheap food to developing countries, to the detriment of farmers in the South. As well, they wanted binding commitments on food aid, grants and technical assistance from industrialized countries as compensation for the negative impact of removing agricultural import barriers. Finally they sought an explicit affirmation that safeguards on intellectual property rights could be overridden for public health purposes, without fear of triggering trade sanctions or legal challenges. Mutume states that in the end Doha resulted in a broad compromise between the rich and poor countries. The industrialized countries got a mention of the contentious new issues they wanted, but in the face of developing country resistance, agreed to postpone any decision to actually begin negotiations until the next WTO ministerial meeting in 2003. While the developing countries’ emphasis on “implementation issues” such as access for their agricultural and textile goods to industrialized country markets was not actually resolved in Doha, they did win agreement that a review of past accords be incorporated into the new round. Mutume notes that: “Against a backdrop of war and global recession, trade ministers at the World Trade Organization meeting in Doha, Qatar, concluded what Director-General Mike Moore termed an “extraordinarily successful” conference. They agreed to a new round of negotiations aimed at opening vast new areas of the global economy to international competition. But the 9-14 November meeting also exposed the same kind of bitter divisions among the trading powers and between the industrial North and the developing South – that led to the failure of the last WTO ministerial meeting in Seattle in 1999...For proponents of greater trade liberalization, the stakes in Doha seemed considerable. A second failure like the one in Seattle, combined with deepening global recession, they felt, could have spelled a return to widespread protectionism, thereby worsening the world crisis. ‘The cost of failure’, said Mr Moore, ‘would have been very high’. However, with Africa’s share of world trade dropping and its people sliding deeper into poverty, the continent’s trade ministers might well have left Doha wondering about the costs of success and who would pay for them.”

what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency, or other circumstances of extreme urgency. Of particular importance to developing countries, the Declaration recognized that WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. It instructs the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002⁴⁷.

The point is that when TRIPS was first formulated this was apparently not done with reference to other instruments of international law relating to human rights and also without reference to the needs and concerns of developing countries and their other international law obligations. Its effects had to be modified, and then only with considerable difficulty, in order to gain some acknowledgment from the powerful developed countries who first formulated it, of these important issues. International law is clearly not a unified, coherent and internally consistent body of universal legal principles that takes into account the needs of both the powerful and powerless countries of the world. The more cynically minded might regard it as an instrument for the validation of the application of power by dominant countries to those susceptible to domination. Inevitably this is accompanied by debates concerning the north-south global divide.

10.2.3 Compliance With International Law Affords No Protection

Compliance with international law, contrary to expectation, apparently offers no protection from larger and more powerful national interests⁴⁸. The stance of the

⁴⁷ According to Kraus D 'DOHA Declaration on the TRIPS Agreement and Public Health: Current State of Discussion' (<http://www.ige.ch/E/juinfo/j110100.htm>): A solution was subsequently postulated that another Member having manufacturing capacity could issue a compulsory licence for the exportation of the product to the Member lacking such capacity. However the principle of territoriality of patents allow a Member to issue a compulsory licence only predominantly for the supply of the domestic market. While until 2005 exportation is possible from Members enjoying a transition period a long-term solution has to be found which takes all interests into account, including those of victims of pandemics and the necessity to assure further research and development into the needed pharmaceutical products.

⁴⁸ McCadney J, an international trade associate at the Washington DC based law firm Collier Shannon Scott, PLC in an article entitled 'Lessons from South Africa: Striking a Balance Between the Protection of Intellectual Property Rights and Access to Pharmaceuticals in Developing Countries While Complying With TRIPS' written for Security Policy Group International (http://www.spgi.org/articles/mccadney_aidsdrugs.html) observes that "even though South Africa's legislation incorporated permissible, flexible mechanisms of TRIPS, including compulsory licensing and parallel imports, it was met with a backlash of disapproval from developed countries, as well as the global pharmaceutical

United States of America on the TRIPS agreement and the debates relating to access to pharmaceuticals by developing countries is a case in point. The controversy surrounding the South African government's proposed legislation⁴⁹ which would allow the parallel importation of medicines in certain circumstances was hotly debated in a number of international forums all over the world at the time⁵⁰. It would

industry. The disapproval, in large, was in opposition to the threatening erosion of intellectual property rights and ensuing loss of profits earmarked for research and development should other similarly situated countries choose to implement a comparable, albeit WTO compliant, legislation. Herein lies the South African dilemma – what recourse does a country have when it has complied with the governing international treaty to which it is a member, as well as its own law, yet must defend itself from bilateral attack based on actions taken on behalf of public health and indeed national sovereignty? Limitations on the scope of national acts are part of the price of membership to the most prestigious of global treaties. It is for this reason that countries hesitate to join without first negotiating the terms of their succession with exacting scrutiny. In this respect the AIDS pharmaceutical imbroglio speaks of a large imbalance in that developing countries often do not have a seat at the table during treaty negotiations. Like form contracts, they are often bound to the terms that have already been established. More often than not, these terms have been set by developed countries with, although certainly not in all areas, inapposite agendas and contrasting interests from subsequent joining developing country members." She notes that in May of 1998 the United States Trade Representative announced a special 301 out-of-cycle review of South Africa's legislation and placed South Africa on the Special 301 Watch List. Special 301 listing identifies countries believed by the United States to either threaten or inadequately protect American intellectual property rights. Although the listing is no more than a public admonition, it is designed to deter private foreign investment and development.

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Act 90 of 1997 amending the Medicines and Related Substances Control Act No 101 of 1965

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See Parmar S 'Access To Drugs Update' http://www.lawyerscollective.org/lc-hiv-aids/magazine_articles/june_2001.thm who writes: "In a surprise move the Pharmaceutical Manufacturers Association (PMA) announced on April 19th that it was withdrawing its legal action against the South African government which had been brought before the Pretoria High Court. Moreover the PMA has stated that it will pay the legal costs incurred thus far by the South African government and friend of the court, the Treatment Action Campaign (TAC). In return the South African government has affirmed its commitment to respecting the World Trade Organizations' (WTO's) rules governing intellectual property rights." The PMA had sought to prevent the coming into effect of section 15(c) of the Medicines and Related Substances Act as amended by Act 90 of 1997, on the grounds that it offered the "potential for abrogation of intellectual property rights". The PMA alleged that the legislation violated the South African Constitution and the TRIPS Agreement to which South Africa, as a member of the WTO is subject. According to Parmar, the PMA's decision to unconditionally withdraw its challenge was attributed to intense international lobbying efforts by several Non-Governmental Organisations (NGOs) and the involvement of UN Secretary General Kofi Annan in negotiations between South Africa and the PMA.

A statement by the Pharmaceutical Research and Manufacturers of America (<http://www.cptech.org/ip/health/phrma/301-00/safrica.html>) reads: "PhRMA member companies appreciate the good will and statements of the current Government of South Africa that it intends to fully meet its multilateral obligations as spelled out in the WTO TRIPS Agreement. PhRMA understands that the U.S Trade Representative's removal of South Africa from the 1999 "Special 301" Watch List in December 1999 was made on the basis of South Africa's statements to this effect and belief that South Africa would come into full TRIPS compliance shortly... Until South Africa completes its own judicial and parliamentary internal review and amendment of the Medicines Act, PhRMA requests that South Africa should be included on the 2000 "Special 301" Watch List". In 'Priority Foreign Countries, South Africa, Intellectual Property Protection' *Phrma: Issues & Policy* it is stated with reference to section 15C of the Medicines and Related Substances Act No 101 of 1965 that: "Given the seriousness of the attack on patent rights and the apparent intransigence of the Government, the South African pharmaceutical industry, with the support of their American and European counterparts, has filed a legal challenge to the Act in South Africa's Constitutional Court. Plaintiffs include the local trade association and 40 individual companies. The suit was filed in February 1998 and as a result the Act has not taken effect. (<http://www.cptech.org/ip/health/phrma/201-99/safrica.html>)

Kasper T, Co-ordinator of the Access to Essential Medicines Campaign for Médecins Sans Frontières – South Africa, in 'Developing Countries Must Stand Firm on People Over Patents' *South Bulletin 11* notes that when South Africa emerged from apartheid, the government was confronted with a problematic pharmaceutical pricing structure: drug companies had set their prices to target the country-within-a-country of the rich, white upper class, essentially ignoring the vast number of (black) people who could not afford these prices. Concerned with matters of equity the government passed the Medicines and Related Substances Control Amendment Act in 1997 to introduce measures to bring down the price of medicines in both the public and private sectors. From the hysterical statements emanating from pharmaceutical company representatives, one might have thought that South Africa was trying to introduce radical legislation, abolishing all patent rights. In reality, nothing is further from the truth: the law is consistent with the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and all of the most important provisions are already enshrined elsewhere around the world, typically in developed countries. For example, generic substitution – the practice of requiring a pharmacist to prescribe the cheapest available version of drugs that are not patent-protected, unless the patient specifically requests the originator product rather than a generic alternative – is common in countries such as the U.S., the Netherlands and Japan. The creation of a pricing committee with the power to fix a so-called 'single exit price', where the pharmaceutical company sets a single price at which it must sell to all private sector purchasers, is an extremely mild form of price control that is aimed at promoting transparency in pricing and doing away with perverse prescribing practices, such as when a pharmacist is entitled to dispense a particular product as a result of (typically time-limited) discount offers. The most controversial part of the law – which the pharmaceutical industry argued allows the government to abrogate patent rights with no regard to due process – is

seem from the experience of South Africa with regard to the Medicines Amendment Act⁵¹ and the reaction of the developed world to its attempts to improve access to health care services for its people, that international law is designed to benefit primarily developed countries. This is clear from the fact that although the law in question did not and still does not violate the TRIPS Agreement, in the years 1997 to 2000, the American government pressurised South Africa to drop its plans to seek cheaper alternatives to medicines for HIV and AIDS. The US government backed the pharmaceutical companies that took the South African government to court with regard to the Medicines and Related Substances Amendment Act⁵². According to a 1999 US State Department report: “U.S. Government agencies have been engaged in a full court press with South African officials from the Departments of Trade and Industry, Foreign Affairs and Health, to convince the South African government to withdraw or amend the offending provisions of the law”⁵³. When South Africa continued to defend the law, asserting that it was in full compliance with TRIPS requirements, the U.S. Trade Representative placed South Africa on the Special 310 Watch List which lists countries under scrutiny for possible intellectual property violations. A U.S. trade official is quoted as saying “While we don’t say it explicitly, it’s a warning for investors going to that country that there are potential problems with respect to protection of intellectual property”⁵⁴. The failure of other countries of the developed world who were members of the World Trade Organisation to speak out against the hostility of the US government towards South Africa when it became clear

section 15C. The industry arguments on 15C were never likely to succeed given that they ignored two crucial points. First the South African government has insisted, since the law was in draft form, that 15C is aimed solely at enabling parallel importation of medicines (as allowed, for example, within the European Union). Second, the language of 15C is based on a draft of model language on the exhaustion of rights (through which parallel importation is enabled) prepared by a World Intellectual Property Organization Committee of Experts in 1990. Concretely, the fact that parallel importation will be permitted means that South Africa (both government and private bodies) can shop around for the lowest price offered globally on medicines marketed by the patent-holder (or under license from the patent-holder); it will not facilitate the introduction of generic medicines. If South Africa wishes to take advantage of the lower prices frequently offered by generic producers, it will need to issue compulsory licences, which allow the use of a patented product without the consent of the patent holder. Given the weakness of the pharmaceutical industry arguments, it was not particularly surprising that the companies sought a settlement.”

51 Medicines Amendment Act fn 33 *supra*

52 Medicines Amendment Act fn 33 *supra*

53 Chaudhry L ‘U.S. to South Africa: Just Say No’ (<http://www.wired.com/news/politics/0,1283,35874,00.html>)

54 Chaudhry L fn 50 *supra*. When it became apparent to even the Americans that the legislation was not in violation of the TRIPS Agreement, a U.S. Trade official stated that: “We consider TRIPS to be a minimum standard.” Under congressional mandate, mere TRIPS compliance is not sufficient to keep a country off the 301 List. While the US trade official would not specify exactly what ‘TRIPS plus’ entailed, reports Chaudhry, he said both compulsory licensing and parallel importing were ‘not considered appropriate’. It is therefore strange to note that, without any further amendments to the South African Medicines legislation on the subjects of parallel importation or compulsory licensing in December 1, 1999, the US Trade Representative announced the removal of South Africa from the Special 301 Watch List, based on a bilateral understanding developed with South Africa under which both Governments reaffirmed their shared objective of fully protecting intellectual property rights under the WTO TRIPS Agreement, while addressing the health issues identified by South Africa. South Africa agreed that it would address health needs in a manner that fully protects intellectual property rights. The US Trade Representative apparently took this action as a result of this understanding, as well as other steps South Africa had taken and was taking to improve further the protection of intellectual property.

that South African law was not in violation of the TRIPS Agreement is remarkable. It is another indicator of the weakness of international law and its tendency to resemble a one-way street. Developing countries must comply with TRIPS as a minimum standard but this apparently does not prevent developed countries from taking further action against a nation state as they see fit. The message seems to be: “You had better comply with this standard of international law because if you don’t, we will penalise you, but if you do and we don’t like it, we will penalise you anyway.” This is born out by the observation of the WTO/WHO Report that the WTO facilitates the implementation, administration and operation of the various covered agreements but the power of initiative in the context of the organization rests not with the Secretariat but with member governments whose representatives constitute and preside over the many councils and committees dealing with issues that arise in connection with the agreements⁵⁵. The certainty factor is once again conspicuous in its absence from international law.

10.2.4 ‘Standard Setting’ Approach Not Helpful To The Developing World

One of the problems that South Africa faces, even internally, is that of the setting of standards. In the health sector particularly, the problem is exacerbated by the significant disparities in wealth that exist across the public and private sectors. The question in setting standards is, does one set a standard that is low enough that the often cash strapped public health sector can attain or does one set the standard much higher, in the full knowledge that it will be unattainable within the public health sector but will challenge the private health sector? If one sets two different kinds of standards, what message does this give to a country with a legacy of apartheid? A similar problem exists with regard to international law which is more often than not developed by the wealthy countries of the northern hemisphere. One of the major roles of international law is to set up global standards to which everyone must aspire but if some of the nations of the world have a head start on others, the race can hardly be said to be fair. If the standard is set with regard to well-resourced, well developed countries and what they are capable of, it is hardly surprising that international law in the eyes of developing countries is of little constructive use.

⁵⁵ WHO/WTO Report fn 32 *supra* at p 26

It is not without significance that the WTO is not a funding organization. It has no mandate to finance development projects. The nature of the technical assistance to developing countries that the WTO does provide is also significant. According to the WTO/WHO Report, the aim of the 'assistance' is both to assist members in the implementation of WTO agreements and to train officials so that they understand the system and its agreements, know how to administer them, and negotiate more effectively. Technical assistance is also extended to acceding countries. The Report states that the training is often rather "legal" and is aimed at providing an understanding of rights and obligations members have under the various agreements. The 'assistance' provided by the WTO to developing countries is thus self-serving in that it is designed to promote and enforce the adherence of those countries to the principles of public international law as formulated by the WTO without assisting them in terms of the resources they might need to observe these principles of law.

Under the WTO agreements, as in the dark, all cats are grey. Countries cannot normally discriminate between their trading partners. A special benefit granted to one country must be granted to all other WTO members⁵⁶. While this may seem superficially to be beneficial to all in that no-one is given preferential treatment, the question is who does this rule actually favour in practice? This principle conveniently ignores the fact that some countries are developing countries and others are developed countries. Their problems, needs and concerns are uniquely different. Health care is an extremely good example of this. Many developing countries have serious problems with tropical diseases such as malaria and cholera and diseases of poverty such as tuberculosis, diseases caused by nutritional deficiencies and HIV/AIDS. Disease profiles in developed countries show diseases of ageing and lifestyle as being the predominant public health problems. The disease profiles of populations in developing countries are clearly very different to those in developed countries⁵⁷. Of the top 13 causes of mortality in Africa only 8 can be considered to significantly

⁵⁶ WHO/WTO Report fn 32 *supra* at p 29. The Report states: This principle, known as most-favoured-nation (MFN) treatment, is enshrined in Article I of the GATT, which governs trade in goods. MFN treatment is also one of core obligations of the GATS (Article II) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Article 4). Together, those three Agreements cover the main areas of trade covered by the WTO. In general, MFN means that every time a country lowers (or introduces) a trade barrier or opens up a market, it has to do so for the same goods or services or service suppliers from all its fellow WTO Members - whether rich or poor, weak or strong.

⁵⁷ Gwatkin, D and Guillot M 'The Burden of Disease among the Global Poor: Current Situation, Future Trends and Implications for Strategy' World Bank, Washington 2000 p 9 of the top five causes of death, there is only one that overlaps between developed and developing nations – ischaemic heart disease.

affect the developed world⁵⁸. The products and services required to manage and counteract these different disease profiles are very different to those required in developed countries. Malaria drugs and continued research into malaria treatment and prophylaxis are critical to developing countries whereas in developed countries this need is negligible. If public international law on trade governs the supply of such goods and services to developed countries, it is not difficult to appreciate their impact on the health status of people in countries where malaria is a problem. This principle ties the hands of those developed countries that would wish to give more favourable terms to developing countries with the result that the ability of developing countries to enter international markets and their concurrent capacity to improve the lives of their residents is effectively stymied. The principle does not incentivise developed countries to assist developing countries and has the overall effect of maintaining the balance of power in favour of the developed world. The result is that foreign aid is substituted for trade. Developing countries must constantly look to developed countries for financial and other aid instead of becoming empowered, through global trade and world markets, to meet the needs of their people themselves.

According to the WTO/WHO Report, article XX of GATT guarantees the members' right to take measures to restrict imports and exports of products when those measures are necessary to protect the health of humans, animals and plants (Article XX(b)) or otherwise relate to the conservation of natural resources (Article XX(g)). Article XIV of the GATS authorizes members to take measures to restrict services and service suppliers for the protection of human, animal or plant life or health. If the relevant conditions are met, including the good faith obligations inherent in the chapeaux of these Articles, they provide an override of any other obligations, including tariff concessions on goods or specific commitments on services, that WTO members have undertaken under WTO agreements. These provisions recognize that there are cases where members may wish to pursue other legitimate policy objectives, such as health. It is alleged in the WHO/WTO Report that the health exceptions allowed for in GATT and GATS indicate the importance that WTO members assign to national autonomy in the protection of health. TRIPS does not contain an exception for health purposes *per se*, but it does allow measures necessary to protect public health and nutrition,

⁵⁸ Moran M 'Reneging on Doha' *Médecins Sans Frontières*, 2002

provided they are consistent with other TRIPS provisions (TRIPS, Article 8 - Principles). It is submitted that the reality of these concessions to health concerns are belied by the stance of the US towards the South African government on the subject of parallel importation. The question of equality between nations, in terms of their relative resources, levels of development and international obligations is not a notable feature of international law.

10.2.5 Absolute Rights v Relative Rights

International law is generally not helpful when it comes to situations requiring the balancing of conflicting rights. One of the reasons for this, it is submitted, has been quite well captured by Schlemmer-Schulte⁵⁹ who notes that human rights are for structural reasons not the best tools to put a more human face to development. She states that especially economic and social human rights obligations lack teeth as they are formulated as relative rights instead of absolute rights of individuals with their implementation being dependent on the state's capacities and discretionary power in setting policy priorities and that even where human rights are used as benchmarks (e.g. in the regional human rights system), their use requires a sophisticated institutional system, particularly independent courts to develop and clarify their contents for application purposes. She comments that, generally speaking detailed entitlement legislation is a better guarantee of human rights than a mere human rights catalogue. International law provides no assistance or guidance as to how rights should be prioritized or realized in practice. It does not even suggest appropriate vehicles of domestic law for this purpose. For example, in a country in which the majority of people cannot afford to purchase health care products and services, a very important question arises as to the suitability of the law of contract to ensure that their right to access health care services is fulfilled. The World Trade Organization views medicines and the related intellectual property as a commercial commodity that is the subject of international trade. The implication is that commercial law, such as that of contract, is the legal regime of choice as far as these products are concerned. This is not in keeping with the idea of medicines as a public good, to which the World Health

⁵⁹ Schlemmer-Schulte S, a professor of International Law at the University of Leiden in the Netherlands, 'Human Rights in the Work of the World Bank and Its Inspection Panel – Suggestions for Development with a more Human Face' http://www.dse.de/ef/human_rights/Schulte.htm

Organization apparently subscribes, to which everyone should have access irrespective of their ability to pay for them. It also does not recognize the realities of the developing world in which the majority of people are in no position to bargain with multinational manufacturers of pharmaceuticals in order to gain access. In fact one finds that international organizations whose activities revolve around international finance, such as the World Bank, and trade, such as the World Trade Organization, have a remarkably non-interventionist approach when it comes to ensuring that developing countries meet international human rights standards. To be blunt, the international community is not particularly adept at putting its money where its mouth is. Furthermore, offers of financial assistance, when they do come, usually have strings attached with very vested interests visible at the other end. International law, like international development programmes⁶⁰, tends to be fragmented in the sense that it does not offer internally consistent, holistic solutions to problems at a practical level⁶¹. The right to health was first recognized as a fundamental right when in 1946 the Constitution of the World Health Organisation was adopted at the International Health Conference held in New York from 19 June to 22 July, and signed on 22 July by the representatives of 61 states. It has been observed that on a strict understanding a 'right to health' 'implies somewhat absurdly that everyone has the guarantee of perfect health.' The Pan American Health Organisation suggested in 1989 that it would be more correct to speak of a "right to health protection, including two

⁶⁰ Schlemmer-Schulte (fn 59 *supra*) writes "Weaknesses of the international human rights system (in particular United Nations (UN) human rights machinery) have led to calls on international financial institutions such as the World Bank (the Bank) to use their financial muscle to improve implementation of and compliance with international human rights standards. The Bank has, however, been reluctant to follow these calls as it was neither created for the purpose of protecting human rights nor can it so easily change its legally prescribed mandate, or (nor ?) would it be practical to base its work on human rights in order to promote development with a human face....Human rights are, however, of great inspirational value in the improvement of Bank policies. A survey of Bank policies would be useful to help fill substantive gaps (lack of policy on education) and correct formal defects (vague instead of precise directions in the area of gender and adjustment). Finally a human rights inspired review of Bank policy alone will not solve what many consider currently the major problem of development assistance programs. In conjunction with these programs a broader perspective should be used to screen adjustment policies and individual programs carefully, primarily for lack of attention to social concerns. The "Washington Consensus" recipe which has been used by the Bank since the 1980s and which included trade, capital and financial markets liberalization, privatization and fiscal austerity neither promoted global financial economic stability nor led to steady development in several Third World regions. On the contrary the "Washington Consensus" recipe contributed to the outbreak of crises and even exacerbated them. In order to end the social sufferings that occurred during these crises and in their aftermath, no bits-and-pieces solution such as the simple introduction of a labour standard policy is needed by a comprehensive look at the entire recommended adjustment package and a checking of its contents against vital elements of sound economics..."

⁶¹ The statement of Professor T C Van Boven, at the United Nations workshop on 'The Right to Health' in 1979 that: "Three aspects of the right to health have been enshrined in the international instruments on human rights; the declaration on the right to health as a basic human right; the prescription of standards aimed at meeting the health needs of specific groups of persons; and the prescription of ways and means for implementing the right to health", it is submitted is not correct since whilst international instruments such as the ICESCR does specify certain steps to be taken in to realise the right to health, these steps are by no means exhaustive and do not in themselves guarantee the realisation of the right to health. They are also not contextualised with regard to other areas of international law or even with regard to other internationally recognised human rights that also require a great deal of resources. The ICESCR requires states to reduce the stillbirth rate. It has been observed by Izzard R 'Background to the Medicine and Human Rights Module' <http://www.dundee.ac.uk/med&humanrights/SSM/intro/jn-backgrnd.html> that the term 'the right to health' therefore tends to be used for the sake of convenience and implies a reasonable, as opposed to an absolute, standard.

components, a right to health care and a right to healthy conditions”⁶² This inability to agree even on the language to be used to describe the right intended does not bode well for a universally recognized right of access to health care within international law. Furthermore, instead of working with the realities of the situation and establishing measures to cope with the relative nature of the right, it tends to be stated in public international law instruments in the broadest and vaguest of universal terms in a manner that serves only to hide a multitude of sins.

10.2.6 Conclusions Concerning International Law

At the level of customary international law, the conclusion that one draws as to whether or not a right to health has passed into customary international law depends on the theory of customary international law to which one subscribes. This obviously fails one of the most basic tests of law – that of certainty. If one cannot state with any conviction what the law is, how can it be law? Despite the fondest wishes of legal academics in the health arena, if it can at all be said that there is a right to health, or health care, in customary international law, it is only at the most abstract and idealistic level. This is of no assistance to the people of South Africa in the face of the much more concrete and pragmatic arguments of constitutional law and the need to balance conflicting rights.

Whilst there is a considerable body of public international law on the subject of the right to health, much of it is not binding upon South Africa or its subjects. South Africa has not ratified the International Covenant on Economic, Social and Cultural Rights which contains the most comprehensive statement of the right to health in public international law according to its drafters. Furthermore, although South Africa has ratified the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), it has not expressly enacted the provisions of these instruments into domestic law. Undoubtedly the Constitutional proscription of unfair discrimination supports the principles of CEDAW and section 28 of the Constitution largely supports those of the CRC. The Promotion of Equality and Prevention of Unfair Discrimination Act is also in keeping

⁶² Fuenzalida-Puelma HL and Scholle Connor, S (eds) 'The Right to Health in the Americas' Pan American Health Organisation, *Scientific Publication No 509*, 1989 at p 600 <http://www.dundee.ac.uk/med&humanrights/SSM/intor/in-backgrnd.html>

with the former but its concerns are much wider than just discrimination against women and are based on the grounds of unfair discrimination identified in the Constitution. Furthermore the constitutional court has expressly and repeatedly refused to apply the public international law concept of minimum core obligations to socio-economic rights as expressed in the South African Constitution.

There is no golden thread of commonality discernible within the various public international law instruments that contain references to rights relating to health. They are often couched in subjective terms that make objective identification of practical standards of quality and levels of care impossible. The content of the right to health care or the right to health, there is even uncertainty as to how best to express it, is quite simply anyone's guess. At best it is an abstract concept that is dependent upon domestic law and local courts for its content. Since this naturally varies from one country to another one cannot help but draw the conclusion that at international law, the right to health care is a vague and somewhat emotional notion that appeals to the higher nature of humankind but adds very little to its practical reality.

10.3 Constitutional Law

As stated previously constitutional law, and more specifically the Constitution, is the central theme running through this thesis. It defines a number of rights relating to health care most notably the right of access to health care services including reproductive care, the right not to be refused emergency medical treatment, the rights of the child to basic health care services and the rights of prisoners to medical treatment.

These rights were previously non-existent at worst and unacknowledged at best. The Constitution has therefore introduced in the relevant sections in the Bill of Rights, certain legal concepts with which the legal systems of many other countries throughout the world, and international law, have still to come to grips. Socio-economic rights, such as that of access to health care services, are still controversial in many countries despite international legal instruments such as the International

Convention on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Universal Declaration of Human Rights and the constitution of the World Health Organisation.

10.3.1 Individual Rights vs Rights as Elements of a System

In contrast to international law, there is no express mention of a broad right to health in the Constitution. As stated previously, however, the approaches of the Constitution and international law can be distinguished in that whereas the former tends to have a bottom-up approach the latter has a top-down approach. One would therefore not expect to see a right to health *per se* in the Constitution but rather all of the elements of law necessary to ensure health as an outcome of the application of the Bill of Rights. This is in effect what one finds. 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. It is a requirement of any coherent system that its elements operate in harmony to further or achieve a specific goal. In practice, it is submitted, the constitutional approach is preferable to that of international law which still shows a clear tendency to view rights in isolation from each other. Whilst there are groupings such as the socio-economic rights reflected in the ICESCR and the CRC, such groupings tend not to be contextualised within a single, homogenous system of international law generally. Whilst the Constitution facilitates an integrated and holistic approach that requires a balancing of all relevant rights, international law does not. The constitutional rights to life, dignity, freedom and security of the person, bodily and psychological integrity, privacy, emergency medical treatment, access to health care services including reproductive health care, sufficient food and water, an environment that is not harmful to health or wellbeing and social security all contribute to health as an outcome. The operation of each right with equal strength and power in any single given situation is neither necessary nor appropriate in order to achieve the desired outcome. Their importance varies between different factual situations. It is relative. The constitutional court has committed itself to a purposive approach⁶³ to the interpretation of the Bill of Rights. It is submitted that this approach

⁶³ Thus the constitutional court 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 (1) SA 997 (C) pointed out that: "Following the 'purposive' approach to the interpretation of the Constitution which has been adopted by the Constitutional Court, the right to human dignity which is in issue in the present proceedings must not be construed

is laudable and appropriate in the light of South Africa's historical context and the need to avoid distortion of the spirit of the law through the abuse of the letter of the law such as was all too often the case prior to 1994. It indicates a preoccupation with justice and other values that underpin the Constitution rather than a concern with law, for law's sake. It also indicates the need to approach law and its interpretation in a manner that differs significantly from the thinking that held sway when the South African legal system was essentially driven by the common law as opposed to the Constitution⁶⁴. Regrettably within certain quarters of the South African judiciary this departure from an outmoded jurisprudence is still meeting with considerable resistance⁶⁵. It is at worst a temporary problem stemming from the reluctance of a

in isolation '... but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of [the Bill of Rights] of which it is part. It must also be construed in a way which secures for "individuals the full measure" of its protection'+ (per Chaskalson P in the *Makwanyane* case at para [10]; see also *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* (supra at paras [171] - [172] and [255]); *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (1997 (12) BCLR 1696) at para [16]). In this regard, it is important to bear in mind that a 'purposive' approach and a 'generous' approach to constitutional interpretation do not necessarily or always coincide. As was indicated by Chaskalson P in the *Soobramoney* case at para [17]: "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." See also *S v Makwanyane and Another* (supra at para [9], note 8 (per Chaskalson P) and at para [325] (per O'Regan J)). The purposive approach was not unknown in the pre-constitutional legal dispensation. See for example the judgment of Davis J in *Levack and Others v Regional Magistrate, Wynberg, and Another* 1999 (4) SA 747 (C) where he stated with reference to a judgment of Watermeyer JA in *S v M* 1963 (3) SA 183 (T) that: "It represents an early example of the purposive approach to interpretation in which the interpreter attempts to define the design or purpose which lies behind the legislation in order to give content to the words employed in the text. The approach adopted in Matemba's case acknowledges that the words employed in the section cannot be interpreted so literally that the provision becomes frozen in the historical context of its initial creation. The purpose of the section should be employed to guide the Court interpreting the provision, so that developments that could not have been foreseen when the provision was initially drafted can be accommodated to promote the purpose of the provision. In following this approach to interpretation it is as well to emphasise that this is but one of a repertoire of approaches which a court may employ in order to give meaning to the text. As Frank Michelman has written, albeit within a constitutional context, various interpretative approaches 'cannot be alternatives amongst which the Judge chooses; there are multiple poles in a complex field of forces, among which Judges navigate and negotiate. I don't believe that any responsible constitutional adjudicator will end up, over any interesting run of cases ignoring any of the factors; perceived verbal significations, perceived concrete intentions, perceived general purposes, perceived and evaluated social consequences, perceived and intuited normative theories or unifying visions.' (1995 (11) SAJHR 477 at 483.) In certain cases the purposive approach represents the most appropriate within the interpretive repertoire in order to guide the process of interpretation. As Smalberger JA said in *Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at p 943, 'the purpose of a statutory provision can provide a reliable pointer to such interpretation where there is ambiguity'.

⁶⁴ Sachs J noted in *S v Mhlungu and Others* 1995 (3) SA 867 (CC): "In any event, a question mark has to be placed over the usefulness of common law presumptions in interpreting the Constitution. As Wilson J pointed out in a notable dissent, 'such presumptions can be inconsistent with the purposive approach to Charter interpretation which focuses on the broad purposes for which the rights were designed and not on mechanical rules which have traditionally been employed in interpreting detailed provisions of ordinary statutes in order to discern legislative intent'. Sir Rupert Cross suggests that even in relation to ordinary statutes, the increasing use of a purposive approach makes the role of presumptions 'necessarily less important than in the days of more literal interpretation'. The preferred approach, as I have indicated, is not to search for what is general and what is specific, but rather to seek out the essential purposes and interest to be served by the two competing sets of provisions, and then, using a species of proportionality, balance them against each other. The objective is to achieve appropriate weight for each and preserve as much as possible of both. To extend the analogy, there are no trumps, but there are cards of higher and lower value."

⁶⁵ A case in point is *Afrox Healthcare Limited v Strydom* 2002 (6) SA 21 (SCA) in which the court failed to notice and apply the pertinent observations of Sachs J in *S v Mhlungu and Others* (fn 64 supra) to the effect that it is necessary to achieve an appropriate weight for each competing provision especially where, as Carstens P and Kok A point out at p 444 in 'An assessment of the use of disclaimers by South African hospitals in view of constitutional demands, foreign law and medico-legal considerations' *SA Public Law* Vol 18 No 2 2003 p 430, one is an express and specific constitutional right of access to health care services whilst the other, the essentially common law rule of the sanctity of contract (*pacta sunt servanda*) is not. The court also failed lamentably to apply the purposive approach to an interpretation of the right of access to healthcare. This case aptly demonstrates the inability of law alone to promote justice in the absence of a purposive approach to interpretation that turns the focus to the spirit of the law.

previous generation to relinquish the conceptual relics of an unfortunate past and will no doubt disappear with time and the processes of attrition. The purposive approach does not preclude the limitation of rights⁶⁶. Indeed in the context of the right of access to healthcare services which is inherently limited by the available resources referred to in section 27(3) of the Constitution the purposive approach would include conscious cognisance of such limitation⁶⁷. It is submitted that the meaning of the right

⁶⁶ Jones J in *Phato v Attorney-General, Eastern Cape, and Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, and Others* 1995 (1) SA 799 (E) observed the following: "Hogg *Constitutional Law of Canada* 3rd ed 1992 puts it thus at para 33.7(c) (at 814-15): 'The Court has generally assumed that a "purposive" approach and a "generous" approach are one and the same thing - or at least are not inconsistent. Indeed, statements of the purposive approach have nearly always been accompanied - often in the same sentence - by statements of the generous approach. In the case of some rights, that is correct: a purposive interpretation will yield a broad scope for the right. In the case of most rights, however, the widest possible reading of the right, which is the most generous interpretation, will "overshoot" the purpose of the right, by including behaviour that is outside the purpose and unworthy of constitutional protection. The effect of a purposive approach is normally going to be to narrow the scope of the right. Generosity is a helpful idea as long as it is subordinate to purpose. Obviously, the Courts in interpreting the Charter should avoid narrow, legalistic interpretations that might be appropriate to a detailed statute. But if the goal of generosity is set free from the limiting framework of purpose the results of a generous interpretation will normally be inconsistent with the purposive approach.'

One of the reasons for placing proper limits upon the content of a fundamental right in chap 3 is the interplay between the interpretative process of defining the right in the first place and the adjudicative process of determining whether a restriction upon the constitutional right as defined is justified in terms of s 33 of the Constitution. Hogg (op cit) poses the problem and the solution in the following manner in para 33.7(b) (at 812-13): 'In *R v Oakes* ((1986) 26 DLR (4th) 200) . . . the Court decided to prescribe a single standard of justification for all rights, to make that standard a high one, and to cast the burden of satisfying it on the government. This insistence that the test of justification be a stringent one is, in practice, inconsistent with the insistence that the guaranteed rights be given a generous (broad) scope. If the scope of the guaranteed rights is wide, they are bound to reach conduct that is not really worthy of constitutional protection. If Parliament or a Legislature attempts to regulate conduct that is guaranteed only by virtue of an artificially wide definition of the Charter rights, the courts are going to strive to uphold the legislation. Since the courts can uphold the legislation only under s 1 (in our case s 33), they will strive to find that it is satisfied, and the inevitable result will be the erosion of the *Oakes* standard of justification.' The author proceeds to give examples of the connection between defining a right and determining when a restriction upon it is justified. Some of them show the lengths to which it has been necessary to go to place a workable and common-sense restriction on a right which has been given too wide a content. For example, 'Soliciting for the purpose of prostitution is protected by the Constitution (because it is, like advertising, constitutionally protected as part of the widely defined freedom of expression) which would no doubt surprise many Canadians, but few would be surprised to find that the Criminal Code has been upheld under s 1 (the limitation clause) - although the case for justification was weak. Similar comments could be made about hate propaganda, obscenity, defamation and nude dancing, which are some of the other activities caught by the broad scope of s 2(b) of the Charter of Rights' (op cit). He continues: 'Does it make much difference whether the Court gives a wide interpretation to rights and relaxes the standard of justification under s 1, or gives a narrow interpretation to rights and maintains the stringent standard of justification called for by *Oakes*? If we assume that the outcome of cases will be much the same under either approach, the second approach is surely preferable, because it will reduce the volume of litigation and limit the policy-making role of the Courts. If the scope of the guaranteed rights is wide, and the standard of justification is relaxed, then a large number of Charter challenges will come before the Courts, and will fall to be determined under s 1. Since s 1 requires that the policy of the legislation be balanced against the policy of the Charter, and since it is difficult to maintain meaningful standards to constrain the balancing process, judicial review will become even more unpredictable than it is now. While there are signs that some Judges welcome such extensive powers, most Judges will be concerned to stem the wasteful floods of litigation to limit the occasions when they have to review the policy choices of legislative bodies, and to introduce meaningful rules to the process of Charter review. These purposes can be accomplished only by restricting the scope of the Charter rights.' I think that this reasoning is sound. It proposes a disciplined and far-sighted approach to interpretation. I would only add the reminder that any limit upon the definition or content of a chap 3 right must, of course, be in accordance with proper and acceptable rules of constitutional interpretation, which should not be 'narrow, legalistic interpretations that might be appropriate to a detailed statute' (Hogg (op cit))." Hogg is also quoted with approval in *Shabalala v Attorney-General, Transvaal, And Another Gumedde and Others v Attorney-General, Transvaal* 1995 (1) SA 608 (T). In this case Cloete J also noted that: "In *Cachalia et al, Fundamental Rights in the New Constitution* (1994) the following is said at 11-12: 'A generous interpretation of a Charter would require a court to interpret the language in the widest possible manner. By contrast a purposive interpretation is predicated upon the purpose of the right, with the result being that the widest possible interpretation will not inevitably be the one which will be supported. . . . It is submitted that this approach to constitutional interpretation is one which South African Courts would do well to follow if they wished to put chap 3 of the Constitution in the best and most coherent possible light.'"

⁶⁷ Thus in *Soobramoney v Minister of Health, Kwazulu-Natal* (fn 28 *supra*) the constitutional court observed specifically with regard to the right of access to healthcare services that "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. This should be done in accordance with the purposive approach to the interpretation of the Constitution which has been adopted by this Court. Consistently with this approach the rights which are in issue in the present case must not be

of access to health care services in section 27(1) of the Constitution must be interpreted be ascertained by an analysis of the purpose of such a guarantee. It must be understood in the light of the interests it was meant to protect. This analysis is to be undertaken, and the purpose of the right is to be sought, by reference to the character and larger objects of the Constitution itself, to the language chosen to articulate the specific right, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Constitution. The interpretation should be a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Constitution's protection⁶⁸.

In the past, health care services were effectively denied to the majority of people in various ways. Health professionals condoned human rights violations in their failure to speak out when they were called in to treat the results of gross violations of human bodily and psychological integrity. They did their work secure in the knowledge that should their conduct towards their patients in these cases have amounted to something less than professional, the authorities, including the statutory professional body responsible for disciplining medical practitioners for unprofessional conduct, could not have cared less and their patients certainly had no choice in the matter. The quality of the health services people received from health professionals prior to 1994 was thus largely dependent upon the ethical beliefs and principles, or lack thereof, of the individual professional in question⁶⁹. Access to health care services does not, it is

construed in isolation ' . . . but in (their) context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of (the bill of rights) of which (they are) part'. 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." [footnotes omitted]

⁶⁸ *S v Makwanyane and Another* fn 25 *supra* para 9 at p 403.

⁶⁹ See Sidley P 'South Africa's Doctors Apologise for Apartheid Years' *British Medical Journal* 1995 311 p 148 in which it is noted that the apology stated that: "the association remained silent on race and public policies affecting the medical profession and the community. Examples include the restriction of medical school admissions on the basis of race, the segregation of hospitals and other health facilities, the maintenance of separate waiting rooms by doctors and tolerating interference with doctors' treatment of prisoners and detainees. . . . While the apology is long overdue, the association has made no mention of specific incidents that helped to isolate it internationally during the apartheid years – incidents such as the organisation's refusal to deal with the medical and ethical issues raised by the death of Steve Biko, a political activist who died in prison in the late 1970s and the inadequate performance of the district surgeon attending to him. One of these, Dr Benjamin Tucker, was a member of the association. The association refused to take action against him and to dissociate itself from the South African Medical and Dental Council's refusal to discipline the district surgeons." See also Williams J R 'Ethics and Human Rights in South African Medicine' *Canadian Medical Association Journal* 18 April 2000; 162 (8) who observes that the failings of South Africa's medical profession were revealed at the Truth and Reconciliation Commission hearings as being of two kinds: toleration or active promotion of inequities in health care and complicity in gross violations of human rights. The commission's report condemns the Medical Association of South Africa for failing to draw attention to: "(a) the effects of the socioeconomic consequences of apartheid on the health of black South Africans, (b) the fact that segregated health care facilities were detrimental to the provision of health, (c) the negative impact on the health of millions of South Africans of unequal budgetary allocations for the health



submitted mean access to unprofessional, unethical or otherwise unacceptable health care services that do not take into consideration a patient's rights to human dignity, to bodily and psychological integrity, to equality and to life. This cannot be the access that was contemplated in the Constitution because the right of access to health care services has to be read in the light of the character and larger objects of the Constitution itself. The sacrifice of such fundamental rights on the altar of the sanctity of contract is unjustifiable and in itself unconstitutional since the state is obliged, in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. The sanctity of contract is a common law right that does not appear in the Bill of Rights. Furthermore, only a strained interpretation of the right to freedom can include sanctity of contract since, on a purposive interpretation, the right to freedom does not mean the right to conduct oneself in a manner that contradicts the principles and values of the Constitution or that undermines the rights contemplated therein. The interests that the right of access to health care services were meant to protect are not only the procedural aspects of access but also the substantive aspects. It is submitted that access to health care services that are not of a sufficient quality or standard necessary to achieve their intended purpose is not access as contemplated by the Constitution. The condonation of unprofessional or unethical conduct that adversely affects the health or wellbeing of a patient is in fact tantamount to a denial of access. It is submitted that a purposive interpretation of the right of access to health care services is the only one capable of giving meaning to the right, of fulfilling the purpose of its guarantee and securing for individuals the full benefit of the Constitution's protection. A legalistic interpretation will only result in the very inequities that the Constitution as a whole is designed to preclude.

care of difference 'racial groups', (d) the fact that solitary confinement is a form of torture and (e) the severe impact of detention on the health of children." The report, notes Williams, is equally critical of similar failings on the part of the South African Medical and Dental Council, the body responsible for licensing, ethics and standards of practice. He notes that the Truth and Reconciliation Commission hearings witnessed numerous accounts of gross human rights violations in the health care sector. Many examples of misconduct of the district surgeons who were responsible for the health care of prisoners, apart from that of Steve Biko were reported, especially complicity in torture by police interrogators. This involved among other things, advising torturers on how not to leave telltale signs on their victims and falsifying medical reports and death certificates to omit any mention of the effects of torture. Other physicians who worked in emergency wards of hospitals routinely broke patient confidentiality by reporting patients with gunshot wounds to the police. Despite many complaints the South African Medical and Dental Council habitually failed to discipline or even investigate physicians involved in state-sanctioned violations of human rights. Williams notes that the medical profession's complicity in apartheid cannot be explained by ignorance of the human rights abuses that were being perpetrated. He states that although individual physicians may not be to blame for ignorance of basic principles of medical ethics, the same cannot be said for the medical profession as a whole. It is this history, it is submitted, that must be taken into account when interpreting the right of access to health care services in section 27(1) of the Constitution. It is this history that the court in *Afrox Healthcare v Strydom* (fn 65 *supra*) chose to ignore in making its decision on disclaimers used in South African hospitals, suggesting that the threat of disciplinary action by a professional body was a sufficient deterrent and remedy for the patient who is the victim of negligent and unprofessional conduct.

A right to health *per se* is not only vague but unnecessary in South African law. Socio-economic rights at international law have been criticised as being relative rather than absolute⁷⁰ and this has been equated with a lack of teeth. The comment has also been made that detailed entitlement legislation is a better guarantee of human rights⁷¹ than a mere human rights catalogue such as is found, it is submitted, at international law. However, it is further submitted that it is not the relative nature of the rights that are problematic. It is rather a weakness of international law that it can only at best provide a catalogue of rights without any meaningful content. This is precisely because rights cannot exist in a vacuum independently of the structures and values of the society in which they operate. Since international law by definition cannot accommodate the variations in social structures and values of the different nations of the world it cannot satisfactorily address the content of socio-economic and other rights. The strength of the constitutional Bill of Rights lies in the fact that all of the rights it contains are relative. The relative nature of the rights in the Bill of Rights is clearly seen in numerous dicta of the courts⁷². The relativity is also contained in the constitutional notion that the rights must not only be fulfilled, they must also be protected, respected and promoted. In the health care context, health care services do not always promote and fulfill life, particularly if one accepts that life is a state that is not necessarily dependent upon access to health care services. It is submitted in chapter two that emergency medical treatment essentially protects life much more than it promotes or fulfills it. It is life preserving not life fulfilling. Thus in terms of the Constitution, not only different contexts but also different obligations impact upon

⁷⁰ Schlemmer-Schulte fn 59 *supra*

⁷¹ Schlemmer-Schulte fn 59 *supra*

⁷² *Rudolph and Another v Commissioner for Inland Revenue and Others NNO* fn 28 *supra*; *Qozeleni v Minister of Law and Order and Another* 1994 (3) SA 625 (E); *Soobramoney v Minister of Health, KwaZulu-Natal* fn 28 *supra* (Durban High Court); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 389 (W). See also Van der Vyver *D Seven Lectures on Human Rights* (quoted with approval by the court in *Phato v Attorney-General, Eastern Cape, and Another; Commissioner of the South African Police Services v Attorney-General, Eastern Cape, and Others* 1995 (1) SA 799 (E) and also in *Shabalala v Attorney-General, Transvaal, and Another Gumedede and Others v Attorney-General, Transvaal* 1995 (1) SA 608 (T)) who says at p 64-5: 'The lesson to be learned from the West German Constitution is that a bill of rights does not and, if it were to be feasible, cannot imply that the rights and freedoms it contains ought to confer unrestricted claims and competencies. I have gained the impression that the generally entertained distrust in South African of human-rights ideas has to a large extent been cultivated upon this false notion - which may, incidentally, have been inspired by the sweeping phraseology of the American Bill of Rights and certain international human-rights documents - that human rights are supposed to be absolute rights. The truth is that all rights and freedoms claimed by an individual have their appropriate boundaries to be determined, in general, by both the equal rights and freedoms of other persons and by state or community interests - provided that state interests are restricted in view of the true function of a state as an historical community destined to create and preserve law and order. Nor ought the scope and importance of one right or freedom to be preferred over that of another. . . . In short, the only significance of a bill of rights would be that the government is constantly reminded that the rights and freedoms it contains have been regarded as of special importance for the preservation of a free society, that those rights and freedoms can be abridged in the specified circumstances and to the specified extent only, and that restrictions upon those rights and freedoms ought always to remain the exception and not the rule. Inclusion of a particular right or freedom in a bill of rights ought in no way to change its nature or ambit.'

different rights differently. The right to life is not absolute in the sense that one cannot choose to give it up. In South African law everyone has the right to refuse medical treatment even if, without that treatment, the patient would surely die⁷³. It is also relative in the sense that the sacrifice of the life of one may be necessary to save the lives of many and therefore fully justifiable in certain albeit limited circumstances. In the context of health services delivery more than most one encounters such situations in which those rendering such services are forced to make difficult choices. When the courts, on rare occasions, are asked to make, or at least adjudicate, these choices it becomes international news, for instance in the case of *Soobramoney*⁷⁴. However health professionals and public health administrations are obliged to make such choices often as a normal part of the execution of their professional duties. In the case of the former one, sees this frequently in the form of triage procedures within trauma units that experience a sudden influx of critically injured people consequent upon a multiple motor vehicle accident or some other manmade or natural disaster. In the case of the latter it takes the form of resource rationing decisions that have to be made in order to achieve the most effective and optimal distribution and utilisation of limited resources. In such circumstances anyone who tries to argue that the right to life is absolute is nothing short of naïve. There are many who would argue that life without dignity and freedom is no life at all. A pertinent example of the truth of this argument in the health care context is that of the persistent vegetative state in which the unfortunate patient in *Clarke v Hurst*⁷⁵ found himself.

Rights are thus relative as between different individuals who hold the same or different conflicting rights, as between each other when viewed in the context of a single individual who holds a number of conflicting rights and also as between the individual and society as a collective – the latter often represented by the State. The relativity of rights is also evident in the varying obligations to respect, protect, promote and fulfill them. The possibilities for legal permutations between these various planes of relativity are infinite when combined with the various factual permutations that can arise in real life. Thus one can have a decision in *Soobramoney*,

⁷³ In the case of Jehovah's witnesses they choose to value their right to freedom of conscience, religion, belief and opinion above their right to life when it comes to blood transfusions. The right to refuse a blood transfusion has been recognised by a South African court in *Phillips v de Klerk* TPD (unreported) March 1983 (see Strauss SA *Doctor Patient and the Law: A Selection of Practical Issues* p 29 and 94)

⁷⁴ *Soobramoney* fn 28 *supra*

⁷⁵ *Clarke* 1992 (4) SA 630 (D)

which favours the rights of a group over those of a single individual, sitting comfortably side by side with a judgment in the *TAC*⁷⁶ and *Grootboom*⁷⁷ cases which focus very much upon the rights of individuals. The point is that relativity of rights promotes flexibility of law and flexibility of law in its turn permits justice to prevail in different circumstances.

10.3.2 The Right of Access to Health Care Services

The right of access to health care services should not be confused with the notion that there is a right to indefinitely evade death⁷⁸. It is submitted that this view of the court in *Soobramoney* is entirely consistent with the spectrum of health services contemplated by the Constitution since the latter include palliative care in a hospice setting which involves the psychological preparation of the individual for death and the alleviation of physical suffering in the end stages of life. It was the view of the constitutional court in *Soobramoney* that life includes death and that one cannot therefore take the attitude that the right of access to health care services precludes death from the equation. If one did so, then it is submitted that the term “health care services” could not be read to include the kinds of services rendered by hospices. This principle is exceptionally important when one is dealing with limited resources in the delivery of health services. If it were not recognized, people would be able to demand access to the most expensive, latest technological developments in health care in the world solely on the basis that this would prolong their lives.

The point is made in chapter two of this thesis that there can be fundamental differences, and even conflict, between a right to health and a right of access to health care services. The example is used of spraying dwellings with DDT, an environmentally harmful substance, in an effort to protect the inhabitants from malaria carrying mosquitoes. The concept of a right to health in South African law is 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*.

⁷⁶ *Minister of Health and others v Treatment Action Campaign and Others* (No 2) fn 26 *supra*

⁷⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* fn 26 *supra*

⁷⁸ *Soobramoney v Minister of Health, Kwazulu-Natal* fn 26 *supra*

It is clear that the right of access to health care services is justiciable⁷⁹. Although 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’. Pregnant women are not ill but they are entitled to health care services in support of their pregnancy. The term “health care services” means more than just curative or therapeutic services because the term “health care” suggests the promotion, maintenance and preservation of health as much as it does the restoration of health. It also means more than just “medical treatment” as evidenced by the use of this term in section 27(3) of the Constitution to distinguish it from the right referred to in section 27(1). There is thus an important distinction drawn in the Constitution itself between “health care services including reproductive health care” on the one hand and “medical treatment” on the other. The right in section 27(3) refers to “emergency medical treatment”, suggesting that there are other kinds of medical treatment. However the section 27(1) of the Constitution refers to a right of access to health care services as opposed to “medical treatment”. It is submitted that medical treatment is therefore a subset of the health care services contemplated in section 27(1) of the Constitution.

The right expressed in section 27(1) of the Constitution is not a right to health care services but a right of *access* to health care services. It is argued that this acknowledges and supports the other rights in the Bill of Rights such as the rights to dignity and bodily and psychological integrity. In keeping with these other rights, health services may only be lawfully rendered on the informed consent of the patient because it is a right of access and not a right to health services. The language of the Constitution in expressing the right to health care services also indicates a certain responsibility upon the individual to avail him or herself of the services in question. Access is a channel or path by means of which an object is attained – it is not the object itself. The individual must therefore walk that path if he or she wishes to obtain the health services to which it leads. A person cannot complain that health services have not been delivered to him when they are accessible to him.

⁷⁹ *Grootboom* fn 26 *supra*

A further implication of a right of access to, as opposed to a right to, health services is that the state is not obliged, in terms of the manner in which the right is expressed in section 27(1) of the Constitution to provide health services. It can ensure access without necessarily providing the health services itself. Thus if a person is a contributor to a medical scheme which assures her access to private health care facilities she is not necessarily entitled to free health care services from the state at public health facilities merely by virtue of section 27(1). Indeed she may not be entitled to *any* health care services at a public health establishment, whether she pays for them or not, if she has sufficient access to equivalent health services in the private sector. Similarly if the state adopts a means test in order to decide who should contribute to the costs of their health care services a public health establishment and who should obtain those services free of charge, such an attitude on the part of the state would not necessarily be unconstitutional provided that the fees payable are reasonable in relation to the means of the patient and consistently applied to everyone in the same means category.

The question of a medical scheme member's rights as against the state when he or she exhausts the benefits available under the scheme depends upon whether or not the required treatment is available to patients commonly serviced within the public health sector. A good example of this is the treatment of AIDS through the use of antiretroviral drugs. If these drugs are available to public sector patients but there is no mandatory requirement for medical schemes to provide benefits to secure the same treatment then a medical scheme member would be entitled to access the drugs at a public health establishment. This does not, however, mean that such access will be free of charge if there is a system of fees generally applicable within the public sector based upon the patient's ability to pay. In South Africa, at present, membership of a medical scheme is voluntary. Therefore people can choose to belong to a medical scheme, which in most cases still assures them of a certain degree of access to private health facilities, or they can choose not to in which case they will have to pay out of their own pockets for access to those same private health facilities or avail themselves of health services in the public sector where they may still be obliged to contribute towards the costs of those services on the basis of a means test. Where the treatment in question is highly specialized and is not available in the public sector, it is submitted that a medical scheme member who exhausts his medical scheme benefits

in obtaining such highly specialized treatment will have no right to claim those same services from the state on the basis of section 27(1) of the Constitution. Sections 213 to 215 of the Constitution make provision for the allocation of revenue and the mechanisms that must be employed in this regard. It is submitted that the state also has a right to allocate resources on the basis of sections 85 (in the case of the President in Cabinet) and 125 (in the case of provincial governments) which provide the authority for the developing and implementing of national and provincial policy, coordinating the functions of state departments and provincial administrations and performing any other executive functions assigned to them by the Constitution or legislation. It is submitted that provided that decisions by the state concerning the allocation of resources are lawful, fair, rational and reasonable and meet the criteria laid down in *inter alia Soobramoney*, the courts will be extremely reluctant to interfere with such decisions since, constitutionally speaking, they are the province of executive government and not the judiciary.

The point is made in chapter 2 that “access” implies much wider obligations upon the state than mere availability of health care services and that the obligations of the state in respect of section 27(1) do not stop at the boundaries of the jurisdiction of the national and provincial departments of health. Access implies adequate roads to and from health facilities, reliable transport services from people’s homes to health establishments, sufficient numbers of suitably qualified and skilled health professionals to be able to provide the required services, adequate supplies of water and sanitation, the maintenance of government buildings and facilities from which or within which health services are delivered and the allocation of sufficient funding to the various state departments concerned to ensure that they can fulfil these mandates. The right of access to health care services therefore impacts upon the roles and functions of the departments of provincial and local government, public works, transport, water affairs and the national and provincial treasuries.

10.3.3 Realisation Of The Right Of Access To Health Care Services

The Constitution requires the progressive realisation of the right of access to health care services and obliges the state to take reasonable legislative and other measures to

achieve this. In cases such as *Grootboom*⁸⁰, *Soobramoney*⁸¹, and *TAC*⁸² the constitutional court has provided some guidelines as to the approach that should be adopted in this regard. In *Grootboom* the court stated the following broad principles:

- (1) Questions involving socio-economic rights must be considered on a case-by – case basis, considering the terms and context of the relevant constitutional provision and its application to the circumstances;
- (2) The rights must be understood in two contexts – firstly their textual context and secondly their social and historical context;
- (3) Socio-economic rights cannot be considered in isolation but must be considered in the setting of the Constitution as a whole;
- (4) The obligations imposed upon the state are not absolute or unqualified. The state’s obligation with regard to socio-economic rights is defined by three key elements –
 - (a) the obligation to take reasonable legislative and other measures;
 - (b) to achieve the progressive realisation of the right; and
 - (c) within available resources;
- (5) Policies and programs must 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;
- (6) The formation of policies and programs are just one of the aspects of the task that must be reasonable. Implementation of such programs and policies must also be reasonable;

⁸⁰ *Grootboom* fn 26 *supra*

⁸¹ *Soobramoney* fn 28 *supra*

⁸² *TAC* fn 26 *supra*

- (7) In order to be reasonable, a program must be balanced and flexible and make appropriate provision of attention to crises and to short, medium and long term needs;
- (8) A program excluding a significant segment of society is not reasonable;
- (9) 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;
- (10) Accessibility has to be progressively facilitated, requiring the examination of legal, administrative, operational and financial hurdles which have to be lowered over time;
- (11) 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;
- (12) 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;
- (13) The national government bears the overall responsibility for ensuring that the state complies with its obligations with regard to socio-economic rights;
- (14) Provision must be made for relief for those in desperate need. Programs and policies that do not cater for them are unconstitutional.

In the *TAC* case many of these principles were simply endorsed by the court with reference to *Grootboom*. The court in *Grootboom* approved of the principles laid down in the judgment in *Soobramoney*.

The court in *TAC* added the following principles or refinements to those referred to in *Grootboom*:

- (1) A policy that excludes those that can reasonably be included is unconstitutional;
- (2) Not everyone can immediately claim access to benefits;
- (3) State policy must take into account disparities in access between the private and public sectors;
- (4) An approach that nothing but the best should be provided is unconstitutional if it has the effect of denying access to a benefit that is substantive even though less than optimal;
- (5) Transparency of government policies and programmes and widespread communication of such policies and programmes in an essential element of the State's obligations with regard to the progressive realisation of socio-economic rights

From *Soobramoney* the following principles emerge:

- (1) 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 and good faith.
- (2) In support of the purposive approach to the interpretation of the right of access to health care services the court observed that the constitutional commitment to address the deplorable conditions of great poverty, high levels of unemployment, inadequate social security and widespread lack of access to clean water and adequate health services, is expressed in the preamble which, after giving recognition to the injustices of the past, states:
'We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

...

Improve the quality of life of all citizens and free the potential of each person.’ Therefore one the central purposes of the right of access to health care services is to improve the quality of life of all citizens and free the potential of each person. This carries the implication that health services that fail unreasonably to achieve these objectives cannot be regarded as the kind of health services to which access is contemplated by the Constitution.

- (3) The right not to be refused emergency medical treatment must not be confused with the right of access to health care services.
- (4) The purpose of the right not to be refused emergency medical treatment seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate medical attention 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 section 27(3) requires is that remedial treatment that is necessary and available be given immediately to avert that harm.
- (5) The government, which is responsible for health services, has to make decisions about the funding that should be made available for health care and how such funds 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.
- (6) The state’s failure to provide a particular kind of health care service for everyone is not necessarily unconstitutional but must be considered in the light

of prevailing circumstances, including the availability of resources and how rationally they have been deployed.

10.3.4 Horizontal Application

It is submitted that the foregoing principles are not necessarily confined to the delivery of health care services by the state. If the fact is accepted that the wording of the right of access to health care services in section 27(1) of the Constitution is sufficiently wide that the state is not necessarily obliged to itself deliver health care services to every individual and that it can take other measures to ensure access, such as the regulation of medical schemes and health establishments and professionals in the private sector and the provision of health financing in terms of a social health insurance scheme, then the right of access to health care services cannot be regarded as imposing a corresponding obligation upon the state alone. The fact that state resources may be overburdened and incapable of accommodating everyone who needs health care services cannot be used as justification to argue that the State's obligations in terms of section 27(1) begin and end with the public health sector. A purposive interpretation of sections 27(1) and 27(2) of the Constitution, it is submitted, obliges the state to take reasonable legislative and other measures to ensure that the right of access to health care services is also capable of realisation within the private sector and this obligation will remain for as long as the state itself does not have the capacity to render health care services to everyone. For this reason, it is submitted that the constitutional principles outlined above apply, *mutatis mutandis* to the private health sector as much as they do in the public health sector. Moreover they must infuse and inform other areas of law that are applicable in the context of health service delivery, such as the law of contract to the extent that contracts are used as the legal vehicle for the provision of health care services, the law of delict to the extent that it redresses the wrongs done to patients in the provision of health care services and administrative law to the extent that it applies to the decisions and conduct of statutory professional bodies, private entities performing a public function (for example members of the private health sector who have been awarded state tenders for the delivery of health services or the supply of health products) and governmental institutions and public entities (including the Medicines Research Council and the National Health Laboratory Services).

The question of payment for health care services within the private sector is not necessarily a bar to the application of section 27(1) to providers of health care services in the private sector. Patients are required to make payments in respect of health care services in the public sector where a means test demonstrates that they have the necessary resources. This is not unconstitutional. In the private health sector such a means test is simply less overt since one cannot access health services in the private sector in the absence of the means to pay for them. Since in many instances patients serviced by both the public and the private health sectors have the means to pay (whether by virtue of their membership of a medical scheme, because of some kind of social insurance scheme such as is currently provided for occupational illnesses and injuries in terms of the Compensation for Occupational Injuries and Diseases Act or by virtue of their own personal resources) it would be a mistake to use this single issue in isolation as a justification for the horizontal inapplicability of the right in section 27(1) within the private sector.

It is further submitted that the right contemplated in section 27(1), as seen against the wider context of the Bill of Rights, applies equally to all persons whether they access health care services in the public or the private sector. Thus a refusal by a private sector provider to treat a patient in a manner or on a ground that is unfairly discriminatory or that unreasonably impacts on the patient's rights to psychological or bodily integrity would be just as unconstitutional as a similar refusal within the public sector. An unreasonable refusal by a private provider of health care services to treat a patient or to comply with certain statutorily imposed standards of quality in regard to a particular patient could most certainly be argued as impacting upon his or her constitutional right of access to health care services. Contractual terms that vitiate or nullify the constitutional right of access to health care services cannot and should not be upheld by courts of law since the courts form a part of the state and the state is required to take reasonable legislative and other measures to respect, protect, promote and fulfil the rights in the Bill of Rights⁸³. This obligation, it must be noted, does not specifically extend to rights other than those expressed in the Bill of Rights. The

⁸³ In *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* 2003 (1) SA 472 (CC) the court observed that the three branches of government are indeed partners in upholding the supremacy of the Constitution and the rule of law. In *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) the court said that there are only three branches of government, viz legislative, executive and judicial.

sanctity of contract is one that falls within the common law rather than constitutional law. Since the common law must be informed by and developed so as to be consistent with the Constitution, there is in any event a constitutional mandate for judiciary to prefer constitutional rights to rights at common law where there is a conflict.

10.3.5 Conclusions Concerning Constitutional Law

Due to the fact that the rights in the Bill of Rights cannot be construed in isolation, questions involving the right to health care services are unlikely to be resolved only with regard to the right expressed in 27(1) and indeed they should not be. The rights in the Bill of Rights are interdependent and interconnected and a right of access to health care services is no exception. Other rights that are most likely to be involved are the right to human dignity, the right to life, the right to freedom and security of the person, the right to bodily and psychological integrity, the right to an environment that is not harmful to health or wellbeing. The approach of the courts to the right of access to health care should be considerably broader than it is at present in order to fully embrace this idea of rights as a composite concept. From the judgments discussed in the second chapter of this these, including the adoption of the constitutional court of the purposive approach to the Bill of Rights, it is clearly wrong to adopt a narrow and purely analytical approach to constitutional rights. Since constitutional rights themselves are not applied in a vacuum but may well be contextualized even further within the common or statutory law, one can no longer justifiably adopt a purely reductionist approach to these areas of law either. Legal synthesis and the construction of the right within its factual and legal contexts against a background of constitutional values and broad constitutional principles is essential if one is to give effect to the spirit of the law as embodied in the Constitution throughout the South African legal system. A meagre, starkly analytical approach that fails to take account of these issues is unlikely to infuse the common law with constitutional values and is even more likely to fall short of that most elusive of social goals – justice. Sarat and Kearns⁸⁴ point out that contrary to popular belief, law is often

⁸⁴ Sarat A and Kearns T R (eds) *Justice and Injustice in Law and Legal Theory*. In chapter one, Sarat observes the following: "Justice, Drucilla Cornell argues, "is precisely what eludes our full knowledge." We cannot "grasp the Good but only follow it. The Good . . . is a star which beckons us to follow." While justice, or what Cornell calls the Good, is, on her account, always present *to* law, it is never completely realized *in* law. Or, as Judith Butler puts it, ["T]he law posits an ideality . . . that it can never realize, and . . . this failure is constitutive of existing law." Law exists both in the "as yet" failure to realize the Good and in the commitment to its realization. In this failure and this commitment, law is

associated rather more with injustice than with justice despite the fact that in earlier times law and justice were perceived as synonymous. South Africans in particular have good reason to know the truth of this and just how naïve is the idea that law and justice are one and the same⁸⁵. In the book by Sarat and Kearns⁸⁶, the point is made that Commentators from Plato to Derrida have called law to account in the name of justice, asked that law provide a language of justice, and demanded that it promote the attainment of justice. The fact that justice itself is a balancing exercise, often between the interests of the individual and the collective, is no small coincidence⁸⁷. Human

two things at once: the social organization of violence through which state power is exercised in a partisan, biased, and sometimes cruel way, and the arena to which citizens address themselves in the hope that law can, and will, redress the wrongs that are committed in its name. These thoughts remind us that running throughout the history of jurisprudence and legal theory is a concern about the connections between law and justice and about the ways law is implicated in injustice. Commentators from Plato to Derrida have called law to account in the name of justice, have asked that law provide a language of justice, and have demanded that it promote, insofar as possible, the attainment of a just society. Yet the justice described is elusive, if not illusory, and in some scholarship disconnected from the embodied practices of law, including law's violence. In an earlier day, speaking about law and justice was not so vexing or difficult. Justice (*ius* meaning "law") was a legal term, pure and simple. At the outset, then, "justice was defined and constituted by laws which were 'given' and held to be unchanging and unchangeable. This ineluctable link between justice and law, as put forth by Hobbes, had the virtue of making the boundaries of justice more or less clear; but it had the considerable vice of labelling even heinous, iniquitous laws just. Justice could do no critical/reconstructive work because it was impossible to think of justice as external to law. Apart from Hobbes, most natural-law thinkers have resisted this result by insisting that unjust laws are not law, though doing so meant the end of any easy identification of positive or human law with "real" or binding law. The alternative, embraced by perhaps a majority of those who continue to be at ease in this idiom, is to cut justice and law free from one another, to insist that justice is more than mere conformity to law, and to acknowledge that even unjust laws might nonetheless be law. Most recently, the distance between law and justice has been recognized in postmodern theorizing about ethics. Thus, as Douzinas and Warrington argue, "[J]ustice has the characteristic of a promissory statement. A promise states now something to be performed in the future. Being just always lies in the future, it is a promise made to the future, a pledge to look into the event and the uniqueness of each situation. This promise, like all promises, does not have a present time, a time when you can say: "there it is, justice is this or that." Suspended between the law and the good...justice is always still to come or always already performed." Severance of the definitional tie between justice and law has left both notions free (if also bound) to acquire new identities. In both cases, former boundaries have been enlarged. Thus, matters other than those directly regulated by law (for example, the distribution of wealth) are viewed as falling under the purview of justice, and patently unjust legal arrangements (for example, apartheid in South Africa) are accepted as lawful despite their moral repugnance. But as Clarence Morris notes, "Though there can be law without justice, justice is realized only through good law. In fact, law and legal theory continue to be shaped by concerns about justice and injustice, just as understandings of these latter notions are shaped by an awareness of law and the concerns of legal theory." [Footnotes omitted].

Pecarelli A M in "Reflections on Law and Justice" <http://www.dcba.org/brief/octissue/1997/art11097.htm> recalls the following anecdote concerning two of America's more famous judges: "A conversation reported to have occurred between U.S. Supreme Court Justice Oliver Wendell Holmes and U.S. Circuit Court of Appeals Justice B. Learned Hand, at the time sitting on the Second Circuit Court of Appeals in New York, emphasizes a dilemma which has concerned me for sometime.

Justice Holmes and Justice Hand, had lunch together. Afterward as Hand exited Holmes' carriage and Holmes began to drive off, Hand, in a sudden onset of enthusiasm, ran after him, crying: "Do justice sir, do justice"; to which Holmes stopped the carriage and reproved Hand: "That is not my job. My job is to apply the law."

Pecarelli comments that: "It is my opinion, based on my years of private practice and public service, that: Justice cannot be declared by judicial fiat within a legal system. Justice is transitory when the adjudication of a dispute is consistent with one person's preconceived concept of a desired result, but is inconsistent with another person's concept of a desired result. Justice requires a fundamental understanding and uniform result desired by all. Justice is considered a special virtue of what is the just thing to do in the circumstances of actual life or as a directive for acting toward each other to do or not to do something that concerns the other, the performance of which elicits approval. The source of the approval may be from another person or society in general. Justice, sometimes, is described or defined as the imposition of obligations or duties which supplies its own sanction and needs no norm or standard by which it is to be measured. In each such instance a range of meaning is expressed in which precision is transitory. The dilemma becomes acute in attempting to reconcile the objectivity of Positive Law, or the objectivity/subjectivity of Sociological Law, and the subjectivity of Natural Law. The expectation that the purpose of law is to increase justice creates an ambiguity. Law and justice are not mutually inclusive as the adjudication of a dispute may be perceived by some people in a given society as justice, while others could perceive the adjudication of the same dispute as injustice.

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See Dyzenhaus *D Judging The Judges, Judging Ourselves* for further views on this subject.

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Sarat fn 84 *supra*

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See Kastner F 'How To Deal With Paradoxes of Justice: The Ultimate Difference Between a Philosophical and a Sociological Observation of the Legal System' Paper for the Conference "The Opening of Systems Theory at Copenhagen Business School, May 23-23 2003 <http://asp.cbs.dk/ccc/> who notes that: "There had been a certain

rights considerations in particular often seem to raise this type of dichotomy and in the field of public health it is also common. What benefits the individual does not always benefit society as a whole and the cost of treating and individual may at times even be detrimental to the collective as *Soobramoney's* case so clearly shows. The constitutional court has made considerable headway in setting out some guiding principles for executive government as to how to approach socio-economic rights. Many of these principles are very prominent aspects of administrative law and the concept of administrative justice or more detailed glosses on these principles. Transparency, the consideration of the interests of everyone concerned as opposed to only a single sector, the need to make provision for exceptions to the general rule, the importance of taking all of the relevant factors into account when designing a programme affecting socio-economic rights, reasonableness of not only programme design but also implementation – many of these principles as outlined above can be seen as being based in or stemming from administrative law considerations such as that of *audi alteram partem*, that those tasked with decision-making must apply their minds, that the facts and merits of each case must be taken into account, that there must be no bias (*nemo iudex in sua causa*), or unfair prejudice, in deciding for or against a particular individual or grouping, that decisions must be taken *bona fides*, and that everyone should be given an opportunity to make representations stating her particular case. These are all well recognised and established principles of administrative law and arise from its preoccupations with fairness and the principles of natural justice. It is fitting that this should be the approach of the constitutional court since this is in keeping with the doctrine of separation of powers in terms of which it is the function of the executive to make the policy decisions, to determine the allocation of resources and to manage them in a manner that fulfils its own peculiar obligations in terms of the Constitution. The court cannot substitute its own judgment or opinion for that of the executive branch of government merely because believes that this is preferable⁸⁸. As the court in *Soobramoney* stated clearly:

discomfort accompanied by every attempt to codify justice in law at all times...Between the simple law and its permanently changing subjected matter... diverge an insurmountable abyss: for what is just for everybody is not doing justice to everyone".

⁸⁸ Thus in *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 41 the constitutional court states: "In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness. . . . Citizens are entitled to expect that government policy will ordinarily

“ 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 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.”⁸⁹

In view of these observations the importance of administrative law in the delivery of healthy care services cannot be overstated.

10.4 Administrative Law

Administrative law can be a highly confusing and technical area of law with which many people, including government officials, are largely unfamiliar. It is traditionally not an area of law that has preoccupied the private sector to any significant extent. Section 33 of the Constitution states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It further states that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons and that national legislation must be enacted to give effect to these rights.

In *Pharmaceutical Manufacturers Association of SA and Others: In re Ex parte President of the RSA and Others*⁹⁰ it was held that administrative law, which occupies a special place in South African jurisprudence, is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government.

Principles of administrative law under the common law should not be seen as separate from those under the Constitution⁹¹.

not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker.”

⁸⁹ *Soobramoney* fn 28 *supra* at p776

⁹⁰ *Pharmaceutical Manufacturers* 2000 (2) SA 674 (CC)

⁹¹ Chaskalson P stated in *Pharmaceutical Manufacturers* fn 84 *supra* that: “The control of public power by the Court through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the Courts through the application of common-law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common-law principles that previously provided the grounds for judicial

10.4.1 The Promotion of Administrative Justice Act No 3 of 2000

The Promotion of Administrative Justice Act⁹² (PAJA) defines administrative action as -

“any decision taken, or any failure to take a decision, by-

- (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-
 - (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;
 - (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;
 - (cc) the executive powers or functions of a municipal council;
 - (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.” He also held that he could not “accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. 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 its force from the Constitution and is subject to constitutional control. Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public powers by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was ‘the main crucible’ for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law.”

⁹² Promotion of Administrative Justice Act fn 22 *supra*

- (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
- (ff) a decision to institute or continue a prosecution;
- (gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
- (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
- (ii) any decision taken, or failure to take a decision, in terms of section 4 (1);”

In terms of the Act, ‘administrator’ means an organ of state or any natural or juristic person taking administrative action.

In terms of PAJA ‘decision’ means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly”

These are important definitions. Their extent of their applicability to the exercise of various powers exercised by government officials is not always clear⁹³. In the context

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See for instance *Minister of Home Affairs v Eisenberg & Associates: In Re Eisenberg & Associates v Minister of Home Affairs and Others* 2003 (5) SA 281 (CC) in which Chaskalson CJ observed that: “The definition of ‘decision’ does not refer to the making of regulations and it is not clear whether this constitutes administrative action for the purposes of PAJA. Moreover, the definition of ‘administrative action’ specifically excludes ‘any decision taken, or a failure to take a decision, in terms of s 4(1)’. It may be open to doubt, therefore, whether reliance could be placed on PAJA in the

of the delivery of health care services it would seem that a refusal to deliver up a health record, the imposition of a condition or restriction upon access to a health service, the refusal of a certificate of need to a health facility could all fall under the definition of the term 'decision' a PAJA. The performing of the public function or exercise of the public power in question must have a direct, external legal effect in order for it to be classified as administrative action under PAJA. The exercise of a public power or the performance of a public function by a natural or juristic person that does not have such an effect is clearly not administrative action for the purposes of PAJA.

The constitutional right to administrative action contemplated in section 33 of the Constitution must be pursued and enforced in terms of the PAJA. In *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another*⁹⁴ the court made the point that where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used. It found that the Promotion of Administrative Justice Act did not provide for the kind of relief afforded to the appellant in paragraphs 2(c) and 3 of the order.

10.4.2 The Nature of the Function Not the Functionary

In *Pennington v Friedgood and Others*⁹⁵, the court stated that it was in agreement with the following words of Devenish, Govender and Hulme⁹⁶:

circumstances of this case. The scope of PAJA and its relationship to administrative law principles based in common law is also not entirely clear." In *South African Shore Angling Association and Another v Minister of Environmental Affairs* 2002 (5) SA 511 (SE) Erasmus J observed that: "Counsel for applicant submits that in s 6, PAJA simply re-enacts the common law. He suggests that for an administrative action to be regarded as lawful, reasonable and procedurally fair, it must now comply with the provisions of s 6(2) of PAJA *supra*. He submits that, in particular, paras (h) and (i) are of the utmost importance insofar as it is there provided that the action must be reasonable and must not be unconstitutional or unlawful. Counsel for respondent have a somewhat different view of the legislation. They submit that s 6 of PAJA was intended as an exhaustive codification of the law relating to the judicial review of the exercise of public power. They submit that this understanding of the intended scope of the Act is fortified by the decision of the Constitutional Court in *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) at para [51], where Chaskalson P says that judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Whatever the precise status of common-law principles in proceedings for judicial review of administrative action may be, clearly those proceedings are now conducted under s 6 of PAJA. The basic approach, however, is the same as before: the Court considers the administrative action in the light of the evidence."

⁹⁴ *Jayiya* 2004 (2) SA 611 (SCA)

⁹⁵ *Pennington* 2002 (1) SA 251 (C)

⁹⁶ Devenish GE, Govender K and Hulme D *Administrative Law and Justice in South Africa* at p 25

“Administrative action’ is the conduct of public authorities and indeed private entities when they exercise public powers, perform public functions or are obliged to exercise authority in the public interest. This means that common-law review now only applies in a very narrow field in relation to private entities that are required in their domestic arrangements to observe the common-law principles of administrative law. This applies in relation to voluntary associations, such as sporting clubs and religious organisations.”

It is clear from this that the question of whether or not an activity such as the delivery of health care services falls within the purview of administrative law depends not on whether the functionary or entity delivering those services is a public or private body but whether the delivery of health care services is a public function or is the consequence of an exercise of a public power or authority in the public interest⁹⁷. It is submitted that in a situation in which a private entity has been contracted by the state to deliver health care services pursuant to the constitutional obligations of the state contemplated in section 27(1) of the Constitution decisions of that private entity could constitute administrative law decisions depending on the terms of the contract and the nature of the decisions taken. The provision of health care services to patients in the absence of a contractual relationship between the provider and the patient, it is submitted, could promote an inference that the relationship is governed by administrative law to the extent that the provision of those health care services is regarded as a public function.

To take a practical example –

The provincial governments are required by section 16 of the Health Act No 63 of 1977 to provide hospital facilities and services. There appears to be nothing in the Act to prevent a provincial government from contracting with a private sector hospital group to provide these services and to ensure the carrying out of those daily activities sufficiently to fulfil the provincial government’s obligations as contemplated. If the provincial government itself had performed these activities this would no doubt have constituted a public function. Why should the situation change simply because a private provider has now been contracted to do the job? To the extent that the private provider fails to comply with administrative law in the decisions it takes concerning

⁹⁷ The court in *Pennington* (fn 95 *supra*) stated: “Since the advent of the Constitution and, pursuant thereto, the PAJA, a requisite jurisdictional fact for success on judicial review is that the impeached conduct must constitute administrative action. From the above-quoted dicta from *Pharmaceutical Manufacturers* and from the PAJA, it is clear that whether such conduct constitutes administrative action falls to be decided by reference to whether such action amounts to the exercise of public power or the performance of a public function.”

the provision of those health care services, it should be subject to administrative law review in the same manner in which the provincial government would have been. This is not to suggest that the contractual relationship between the provincial government and the private provider could ever have the effect of absolving the former from its constitutional obligations in terms of section 27(1). However the arrangement does have the effect of bringing the private provider within the purview of administrative law.

The question as to whether or not a juristic person or entity other than an organ of state is performing a public function was considered in the case of *Transnet Ltd v Goodman Brothers (Pty) Ltd*⁹⁸. In that case, which was decided before PAJA came into effect, the court carefully considered the nature of the duties of Transnet. It noted in this regard that from the history of the creation of Transnet, one could only deduce that all the powers and functions of the former S A Transport Services were transferred to Transnet, which was now obliged to exercise the said powers and perform the said functions. In doing so, Transnet merely stepped into the shoes of the SA Transport Services. Like the latter, it is performing a public service and function and exercising all the powers of a government department. Furthermore, said the court, the state is the only member and shareholder of Transnet; the entire commercial enterprise of the state (previously existing as the South African Transport Services), including all assets, liabilities, rights and obligations, was transferred to Transnet; the state is the only member and shareholder of Transnet and controls Transnet; an employee of Transnet is deemed to be an employee of the state; Transnet is obliged to provide a service that is in the public interest; the Minister of Transport is entitled to make regulations on a large range of matters relating to the control and functioning of Transnet. These observations were supported by the legislative provisions that established Transnet.

⁹⁸ *Transnet* 2001 (1) SA 853 (SCA)The court observed in this case: “The right to equal treatment pervades the whole field of administrative law, where the opportunity for nepotism and unfair discrimination lurks in every dark corner. How can such right be protected other than by insisting that reasons be given for an adverse decision? It is cynical to say to an individual: you have a constitutional right to equal treatment, but you are not allowed to know whether you have been treated equally. The right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action.”

The court in *Transnet* observed that according to the *SARFU*⁹⁹ case what has to be taken in consideration is, *inter alia*, the source of the power exercised, as well as ‘. . . the nature of the power, its subject-matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other to the implementation of legislation, which is’ and that the implementation of legislation is an administrative responsibility, and will ordinarily constitute ‘administrative action’ within the meaning of s 33 .

10.4.3 The Distinction Between Public and Private Powers

In *Pennington v Friedgood*¹⁰⁰ the court held that the distinction between public and private (or non-public) powers is reflected in a comparison of four decisions: on the one hand, *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange and Others*¹⁰¹ and *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another*¹⁰² and on the other hand, *Herbert Porter & Co Ltd and Another v Johannesburg Stock Exchange*¹⁰³ and *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*¹⁰⁴. After examining the relevant dicta in these cases the court observed that a medical scheme is a body corporate. It noted that in terms of the Act it acquires such status upon registration and that it is governed by the Act, the regulations and the scheme rules. Such rules, said the court, constitute the contract between the scheme and its members.¹⁰⁵ A meeting of the members of a scheme is thus similar to a meeting of the members of a company. Both acquire status in terms of an Act of Parliament. Hodes AJ found that the relationship between the trustees (the first to fourth respondents) and the members of the scheme is governed by the Medical Schemes Act, the regulations and the rules. In the case of a company the relationship between members and the company is governed by the Companies Act and the articles of association of that company. He held that just as a meeting of shareholders of a company is not subject to the review of the High Court, so too the proceedings of an annual general meeting of a medical scheme are also not subject to

⁹⁹ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC)

¹⁰⁰ *Pennington* fn 95 *supra*

¹⁰¹ *Dawnlaan Beleggings* 1983 (3) SA 344 (W)

¹⁰² *Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A)

¹⁰³ *Herbert Porter* 1974 (4) SA 781 (T)

¹⁰⁴ *Cape Metropolitan Council* 2001 (3) SA 1013 (SCA)

¹⁰⁵ *Meaker NO v Roup, Wacks, Kaminer & Kriger and Another* 1987 (2) SA 54 (C) at 61G - 62C.

the review of the High Court, for they do not constitute administrative action. Judicial review is a remedy to curb improper or inappropriate exercise of public power. Nothing contained in the Act, the regulations or the scheme rules, said Hodes AJ, imports a requirement by the trustees to observe the common-law principles of administrative law.

In *Cronje v United Cricket Board Of South Africa*¹⁰⁶ the court pointed out that in exceptional cases private bodies are vested with public powers by statute. It said that they are then subject to the rules of public law in the exercise of those powers. Those rules may expressly or by necessary implication prescribe the manner in which their powers must be exercised. If the repository of the power does not exercise them in the prescribed way, its conduct is subject to judicial review under public law. But these consequences flow, not from the nature of the body or the impact of its conduct, but from the underlying statute. Kirk-Cohen J noted that the rules of natural justice are thus in the first place rules of public law, but they do sometimes apply in the sphere of private law, but then only when they are incorporated by contract. Contracts between private individuals and bodies, he said, are ordinarily not governed by the rules of natural justice but they may be incorporated expressly or by necessary implication, depending upon the terms of the contract. Such a right may even be granted to an outsider if a private body by contract extends such a right to an outsider¹⁰⁷. The court stated that it is only where the constitution of a voluntary association incorporates the rules of natural justice that they then apply between the association and its members or those with whom it has privity of contract. The rules do not apply to a non-member who is not a party to the contract.

Despite this, it is submitted that where the Board of Trustees of a medical scheme acts in a manner that adversely and unlawfully impacts upon a member's constitutional rights of access to health care services, human dignity, privacy or bodily or psychological integrity or in a manner that is unfairly discriminatory, it can be taken to task on the basis of constitutional law. Since constitutional law itself incorporates

¹⁰⁶ *Cronje* 2001 (4) SA 1361 (T)

¹⁰⁷ Examples of this are *Marlin v Durban Turf Club and Others* 1942 AD 112 at 126 - 7, *Anschutz v Jockey Club of South Africa* 1955 (1) SA 77 (W) at 80, *Jockey Club of SA v Transvaal Racing Club* 1959 (1) SA 441 (A) at 450, *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645 - 6, *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 21D, *Carr v Jockey Club of South Africa* 1976 (2) SA 717 (W) at 721 - 2, *Government of the Self-Governing Territory of KwaZulu v Mahlangu and Another* 1994 (1) SA 626 (T) at 634 - 5 and *Lamprecht and Another v McNeillie* 1994 (3) SA 665 (A) at 668.

many of the principles of administrative law, the decision of the Board of Trustees could in certain cases be set aside on grounds closely resembling those of administrative law.

Despite the views of Hodes AJ in *Pennington*¹⁰⁸, it is submitted that there are many similarities between the Boards of Trustees of medical schemes and bodies that exercise a public function. They may not act outside of the boundaries of the Medical Schemes Act¹⁰⁹ and Regulations for instance. They are obliged to ensure that the scheme provides for a minimum package of benefits as contemplated in the Act and spelled out in the Regulations. They may not step outside of the boundaries of the scheme rules which must be lodged with and approved by the Registrar of Medical Schemes in terms of the Medical Schemes Act. Medical schemes are free to determine their own rules only up to a point. Section 29 of the Act contains detailed provisions concerning matters for which the scheme rules must provide. It is respectfully submitted that the statement of Hodes AJ to the effect that nothing contained in the Act, the regulations or the scheme rules imports a requirement by the trustees to observe the common-law principles of administrative law was not strictly correct. Section 57(6) of the Medical Schemes Act states –

“The board of trustees shall-

- (a) take all reasonable steps to ensure that the interests of beneficiaries in terms of the rules of the medical scheme and the provisions of this Act are protected at all times;
- (b) act with due care, diligence, skill and good faith;
- (c) take all reasonable steps to avoid conflicts of interest; and
- (d) act with impartiality in respect of all beneficiaries.”

10.4.4 Lawfulness

It has been held that it is fundamental to the principle of the rule of law that entities act within the powers lawfully conferred upon them. It will be recalled that lawfulness

¹⁰⁸ *Pennington* fn 105 *supra*

¹⁰⁹ Medical Schemes Act No fn 5 *supra*

is one of the aspects of the right to administrative justice contemplated in section 33 of the Constitution. In *Kolbatschenko v King No and Another*¹¹⁰ the court held that it was only in highly exceptional cases that a court would adopt a hands off approach where a discretion has been exercised or an executive or administrative decision made which directly affects the rights or interests of an individual applicant. At common law, lawfulness is determined on the basis of public policy. It is a concept that is fundamental not only to administrative law but also to the law of contract and delict. The link between public policy and the values expressed in the Constitution was elucidated in *Ryland v Edros*¹¹¹ in which the court held that the values of equality, tolerance of diversity and recognition of the plurality of South African society were among the values that underlie the Constitution and that those values “irradiate” the concepts of public policy and *boni mores* that the courts have to apply. Public policy and constitutional values are inextricably intertwined. Administrative action that is contrary to public policy as informed by constitutional values is unlawful and subject to administrative review.

10.4.5 Reasonableness

Reasonableness is another aspect of the right to administrative action in terms of section 33 of the Constitution. Significantly it is also the standard by which contractual clauses are adjudicated in relation to public policy and against which the actions or omissions of a tortfeasor are measured in terms of the law of delict. As such it is a concept that is central to South African law generally as opposed to one limited area. Reasonableness and rationality are two sides of the same coin. In order to be reasonable an administrative decision must be rational i.e. it must be justifiable¹¹². Administrative decisions moreover must be rationally related to the purpose for which the administrative power was given. Thus in administrative law, administrative action must be consistent with the objects of the empowering statute. In *S v Manamela and Another (Director-General of Justice Intervening)*¹¹³ the court pointed out that reasonableness is a legal commonplace in the courts which are required to apply it daily in determining the standard of care expected of persons in ordinary life.

¹¹⁰ *Kolbatschenko* 2001 (4) SA 336 (C)

¹¹¹ *Ryland* 1997(2) SA 690 (C)

¹¹² *Manfongosi and Others v United Democratic Movement and Others* 2002 (5) SA 567 (TK.H)

¹¹³ *S v Manamela* 2000 (3) SA 1 (CC)

Reasonableness is clearly another of those golden threads that runs through the larger body of South African law. The constitutional court criticised the decision of the government not to provide Nevirapine in public sector health facilities in the grounds of reasonableness. Although this was a policy decision rather than an administrative one and so was not subject to administrative review *per se* this did not preclude the court from setting it aside *inter alia* on the grounds that it was unreasonable. The chances are that if the concept of reasonableness, as applicable to administrative action, had been applied by the state in the determination of its policy in the provision of Nevirapine then the *TAC* case¹¹⁴ would not have materialised. Reasonableness is a cross-boundary issue. It is not confined to administrative action or a particular field of law. This is its value as a unifying factor within the South African legal system. The court in *Grootboom*¹¹⁵ stated that a policy that excludes a significant sector of society is not reasonable. Similarly, it is submitted, administrative action that excludes or prejudices a significant sector of society is unreasonable.

10.4.6 Procedural Fairness

Procedural fairness is the last of the three aspects of administrative justice explicit in section 33(1) of the Constitution. Like lawfulness and reasonableness, it is a pervading principle of administrative justice rather than an isolated aspect thereof. Procedural fairness invokes the principles of natural justice as expressed in the maxims *audi alteram partem* and *nemo iudex in sua causa*. Notice and comment procedures are important in the process of administrative decision-making. Section 4 of PAJA makes provision for notice and comment procedures to be followed or public inquiries to be held where administrative action 'materially and adversely affects the rights of the public' In *Mafongosi and Others v United Democratic Movement and Others*¹¹⁶ the court stated that there were no separate principles applicable to the exercise of power by functionaries other than organs of state where the rights entrenched in section 33 of the Constitution were involved. Procedural fairness it is submitted is particularly important in decisions involving the allocation or distribution of resources. The emphasis of the constitutional court on not only the rationality of

¹¹⁴ *TAC* (No 2) fn 26 *supra*

¹¹⁵ *Grootboom* fn 26 *supra*

¹¹⁶ *Mafongosi* fn 112 *supra*

programmes affecting socio-economic rights but also the *implementation* of those programmes supports this conclusion. Procedural fairness is directly concerned with the practical aspects of health service delivery. In the context of public health services for instance, would it be procedurally fair to ‘fast-track’ medical scheme patients by putting them in a different queue to those queuing for the same service who are not medical scheme beneficiaries? Similarly would it be procedurally fair to stop a particular health service to which people had previously enjoyed access without notifying them of the intention to do so? It is submitted that procedural fairness is of considerable significance in ensuring absence of bias in administrative action and that decisions involving the allocation of health resources are according to objective, rational criteria.

4.5 Administrative Bodies Other Than Organs of State Involved in Health Services Delivery

It is likely that the Health Professions Council of South Africa, the South African Nursing Council, the Pharmacy Council, the Allied Health Professions Council, the Dental Technicians Council and possibly even the Council for Medical Schemes, the Medical Research Council, the National Health Laboratory Services will be regarded as exercising a public function on the strength of the judgment of the court in *Association of Chartered Certified Accountants v Chairman, Public Accountants' and Auditors' Board*¹¹⁷. In that case the court observed that the Board clearly exercises a public power, that it is a creation of statute and that the source of its power is to be found in the Public Accountants' and Auditors' Act¹¹⁸. It noted that the Board also appears to fulfil a public function in terms of the said legislation since it is a regulatory body entrusted with the task of ensuring that proper standards are maintained in the accounting and auditing profession. It functions in close co-operation with structures of state authority, its members are appointed by the Minister and include persons selected among the persons holding office as state functionaries, it is also dependent upon the state for infrastructural support.

¹¹⁷ *Association Of Chartered Certified Accountants* 2001 (2) SA 980 (W)

¹¹⁸ Public Accountants' and Auditors' Act No 80 of 1991



Section 13(1)(g) of the Act vested the Board with the discretionary power to prescribe the degrees, diplomas and other qualifications which entitled any person to exemption from the requirements to be complied with by persons desiring to be registered as accountants and auditors. The applicant had made a formal application to the Board in terms of the Act for the recognition of its examinations for the purposes of exemption of its members from having to sit at the Board's examination. The Board, received, understood and considered the application in performance of its statutory powers. On 11 and 12 June 1996 the executive committee of the Board resolved that it would accept the education and training programmes of the applicant but that the applicant's candidates would still have to write the Board's qualifying examination for 'an interim period'. The court found that the rejection by the Board of the recognition sought by the applicant constituted an administrative act or decision taken by the Board in the exercise of its discretionary powers as a public body. It observed that at common law a right to administrative action arises where such act or decision affects the rights, privileges or liberty of another¹¹⁹ and that this well-established ground for judicial review of public power has been subsumed under the Constitution. The court found that the Board's decision has plainly affected the rights and interests of the applicant. In that it had determined its rights. The applicant asserted that it was indirectly affected by the Board's decision because the value of its examinations would be greatly enhanced if the exemption sought were granted. Boruchowitz J held that the applicant's reputation had also been adversely affected as the Board expressly impugned the standards applied by the applicant in its programmes, courses and examinations and that its decision constituted 'administrative action' that was reviewable in terms of section 33 of the Constitution. It is submitted that the councils referred to above who operate in the health sector, whilst they may not be organs of state as defined in the Constitution¹²⁰, are very much capable of administrative action on the same basis as the Public Accountants and Auditors Board.

¹¹⁹ *Minister van Onderwys en Kultuur en Andere v Louw* 1995 (4) SA 383 (A) at 388H; *Toerien en 'n Ander v De Villiers NO en 'n Ander* 1995 (2) SA 879 (C) at 885E - F.

¹²⁰ In *Korf v Health Professions Council of South Africa* 2000 (1) SA 1171 (T) the court stated that: "The issue whether or not the respondent is an organ of State arose squarely in *Mistry v Interim National Medical and Dental Council of South Africa and Others (supra)*. In that case both Booysen J, who dismissed the applicant's claim for interim relief, and McLaren J, who dismissed the applicant's claim for final relief, applied the control test and concluded that the respondent's predecessor was not an organ of State. It will serve no purpose to repeat the facts set out at 947 - 8 of the judgment which led the Court to come to this conclusion. There has been no material change. The State is not in control of the respondent. The respondent is not an organ of State." It is submitted that to the extent that Korf seems to give the impression that only organs of state can exercise a public power or perform a public function it is clearly wrong. If the refusal of the Health Professions Council to grant access to the records sought had been approached on the grounds of administrative law to the extent that the decision of the Council not to grant access constituted administrative action it would have been subject to review by the courts. In any event both PAJA and the Promotion of Access to Information

10.4.7 Administrative Agreements

Burns¹²¹ observes that it has been said that although South African courts have recognised the administrative disposition and private law contract concluded by the state, they have not as yet, recognised the administrative law agreement. She notes that it has also been said that these administrative agreements in which the state acts in its capacity as an organ of state and exercises a measure of state authority fall somewhere in between the boundary of public law and private law. Public authorities are not empowered to conclude contracts which are incompatible with the proper exercise of their powers and duties: such contracts or actions are void because the authority has exceeded its power and has acted *ultra vires*. Burns says the question is whether the state is liable for damages arising from administrative agreements, such as a contract between the municipality and private agency regarding the removal of rubbish in its municipal area. Where a private contractor performs its contractual obligations negligently, an individual such as a ratepayer who suffers damage as a result of this negligence may sue the private contractor for damages in delict. To succeed in delict, all the elements of the delict must be proved, namely that the action was wrongful, the contractor was at fault, that the damage was caused by the contract, and so on. What is the position asks Burns, where a private contractor is unable to meet the financial commitments arising from claim negligence? Since the individual ratepayer is not party to the original contract, he or she is unable to sue the state for damages based on this contract. The situation then leads to the inevitable question of how and from whom the ratepayer may recover damages. Burns notes that although there are a number of administrative agreements entered into between the state and independent contractors in South African law, the law has not as yet laid down any general rules relating to the liability of these independent contractors for the negligent exercise of the contractual duties or a failure to exercise these duties. The question is whether one simply accepts that the state is not liable for damages under these circumstances once it has concluded a contract with a third party. She says the most important issue to be addressed by lawyers and the courts alike is whether the ultimate

Act No 2 of 2000 have subsequently overtaken this decision and it is unlikely to be followed to the extent that it is now inconsistent with these two statutes.”

¹²¹ Burns Y, *Administrative Law Under The 1996 Constitution* p 316

responsibility lies for damages, which ensue under these circumstances and that a further question to be addressed is whether there are certain public functions, which are categorised as essential services and which remain the responsibility of the state at all times? In other words, can it be said that the state cannot divest itself of its responsibility for these essential services, even when services are provided by an independent contractor? The liability of the state for administrative agreements is anything but clear, says Burns. At this stage, a delictual claim against the state for the negligent action of independent contractors will in all probability unsuccessful. Burns notes that a further point which militates against the success of a delictual claim is that the state will generally not be in a position to supervise or exercise control over the actions of the private agency, while it is fulfilling its contractual obligations. She asks whether it could not be argued that the state should compensate individuals for damages, where, for example, it has acted negligently in contracting with the private agency in question? If it becomes apparent that from the outset, the appointed private agency was unable to perform the function required, one could argue that the state was negligent and therefore liable in delict. Burns observes that currently administrative agreements are governed in the main by the rules of private law and courts are influenced by the private law of contract when determining the rules which applied to administrative agreements. She suggests that once the courts recognise the true nature and extent of the administrative agreements, they will be in a position to develop legal rules to address the issues which she raises.

It would seem that the primary question to be answered with regard to so-called administrative contracts is whether elements of public law, more specifically administrative law, should be applied to what is fundamentally a contractual relationship. It is submitted that the short answer is a qualified 'yes'. However, it is submitted that the motivation for doing so should stem from the Constitution itself rather than common law considerations such as whether or not claims should be entertained against the state under the law of delict. The discussion of this issue by Burns approaches the question of administrative agreements from only one limited angle – that of when the state should be held legally liable for the work of a contractor who has been hired to fulfil a statutory obligation of the state. It is submitted that where there is a constitutional right to the public service in question and particularly where there is an obligation upon the state to take reasonable legislative and other



steps to achieve the realisation of the right¹²², administrative law principles should apply to the measures taken by the state to fulfil the rights in the Bill of Rights. The other measures that the state can take in fulfilling its constitutional obligations in section 27(2) could well include contractual measures with providers of health services in the private sector. It is submitted that principles of administrative law should not only be applicable to these contracts but also to the contracts concluded between the private sector provider and those to whom it is rendering health services. This is in keeping with the provisions of the PAJA. A contract that arises between a private health service contractor to the state and a beneficiary of those services should not be differently construed merely because the state is at a relationship once removed from the beneficiary. Furthermore, it is submitted that the question of whether or not the state can be held delictually liable for the actions of its contractors should be determined in accordance with the normal principles of the law of delict. The failure of the state to fulfil its constitutional obligations may or may not give rise to a delictual claim depending upon the individual circumstances of each case. It is also not necessarily the case that if a delictual claim can only be brought against the contractor that an applicant would not be able to claim some form of relief against the state in respect of its failure to meet its constitutional obligations. To assume, as Burns seems to, that the state in interposing a third party contractor between itself and the beneficiary can escape liability or even avoid its constitutional obligations is not correct¹²³. Burns¹²⁴ is apparently of the view that if the contractor cannot meet the claim in delict then the state should be obliged to do so because the contractor is executing the state's mandate. It is submitted that this view seems to be based on the feeling that the state, as a larger target with far more resources should be made liable for the contractor's unlawful and negligent conduct. This argument it is submitted, uses the same justifications as those used for vicarious liability of employers for the actions of employees¹²⁵ and is tantamount to saying that that a contractor should be

¹²² Such as that contained in section 27(2) of the Constitution which obliges the state to take reasonable legislative and other measures to achieve the progressive realisation of the rights to health care services, sufficient food and water and social security (the rights contemplated in section 27(1))

¹²³ The state's obligations with regard to socio-economic rights are contained inter alia in section 27(2) of the Constitution. It is submitted that any attempt to interpret a contract contrary to the provisions of this section or any attempt to alter the state's obligations as set out in here by way of a contractual arrangement would in itself be unconstitutional and should not be upheld by a court of law.

¹²⁴ Burns fn 121 *supra*

¹²⁵ Burchell J *Principles of Delict* states at p 215 that: "In terms of the principles of vicarious liability, an employer is made liable for the wrongs (delicts) committed by his or her servants in the course and scope of the servant's employment. The employer need not be personally at fault in any way but the wrong of the servant is imputed or transferred to the employer who often has the 'deeper pocket' or 'broader financial shoulders' to compensate the person injured by the

regarded in the same light as an employee in this respect. It is submitted, however that the considerations even if one regards the state in the same light as an employer and the contractor in the same light as an employee, there are some materially different and important considerations in which the position of the state differs from that of an ordinary employer. Firstly the state, unlike employers in the private sector, is not acting for its own personal gain in conducting its business. Secondly the state is obliged to find ways of realising the achievement of socio-economic rights. The state's obligations may be even more specific in terms of some empowering statute. There is generally no general legal obligation upon an employer to conduct a particular business or even in many instances a more specific legal obligation to conduct it in a particular manner¹²⁶. Fourthly, if the only sustainable manner in which the state can achieve the progressive realisation of the right of access to certain healthcare services is to transfer some of the risk to the private sector, why should this be problematic? Social health insurance envisages a situation in which everyone who earns a certain income is obliged to make some kind of contribution to the costs of his or her health care – this is in effect a transfer of some level of risk from the state to the individual citizen. If a state run social health insurance fund enters into a capitation agreement with a provider of private health care services because the state is unable to provide those services itself in a particular area or if it contracts a private provider to provide certain 'high tech' health services because they carry a high degree of risk that it cannot itself sustain for various reasons, why should the state be held liable for the contractor's wrongdoing? The 'broad financial shoulders' of the state may not be as broad as Burns¹²⁷ would like to believe. Fifthly, the state, unlike the private sector employer, cannot freely choose with whom it contracts. It is bound to follow tender procedures and the principles of administrative justice in selecting those with whom it contracts. It cannot simply identify and approach a party of its choice to perform the required services. In the tender process, the state cannot consider parties who have not submitted their tender documentation in time or whose documentation is incomplete or who have not tendered at all - even if the officials dealing with the tender are aware that such parties may be the best ones for the job and those that have submitted

servant's negligence...A number of other justifications for vicarious liability have been advanced: the employer's fault in the selection of the servant (*culpa in elegendo*); the servant's acts are those of the master; and the theory which seems to be gaining prominence – the employer by engaging a servant to carry out his or her interests, creates a risk or danger for the community and the employer should, therefore bear the financial loss if this risk materialises.

¹²⁶ Over and above the usual legal substratum that exists in all societies and that is generally preoccupied with the concept of not harming one's fellow citizens by or in pursuing one's business activities.

¹²⁷ Burns fn 121 *supra*

tenders correctly are actually second choice. Time constraints within and around tender processes sometimes preclude the possibility of a second bite at the cherry. There are also administrative law constraints - especially if other parties who have tendered for the work seem on the documentation submitted to be capable of performing it adequately. The state generally does not have any way of checking, apart from asking for references, as to the suitability of a contractor to do the job because unlike the employer in the private sector, the state is not 'in the business' and does not have personal knowledge and experience of who is in fact good and who is not.

Quite aside from these considerations, however, it is a general rule of South African law that an employer is not responsible for the negligence or wrongdoing of an independent contractor employed by him. The exception is where the employer itself has been at fault or negligent with regard to the conduct of the third party contractor¹²⁸. It is submitted that Burns' attempts to support the concept of administrative contracts using arguments based on an extension of the concept of vicarious liability in terms of the law of delict are ill conceived. The application of the principles of administrative justice, it is submitted, would go a long way towards achieving equality in access to health care services and other constitutional rights across the public and private sectors because of the preoccupation of administrative law with reasonableness and fairness. The allocation of resources to and within health care services is central to the delivery of health care services whether by the private or public sector. The right of access to health care services is not such, it is submitted that it can be confined only to the public sector, although different considerations may be applicable with regard to the legal nature of the relationship between the parties. For instance, why should a private sector provider's abandonment of a patient be any less unconstitutional than a public sector provider's abandonment of a patient?

¹²⁸ See for instance Burchell J fn 125 *supra* at p 227 and the discussion of *Langley Fox Building Partnership (Pty) Ltd v de Valence* 1991 (1) SA (A). Burchell makes the important point in discussing this case that the relationship of the principal and the contractor in this case more closely resembled that of employer and employee in view of the level of control assumed by the principal over the contractor. He points out that the line between a master-servant and employer-independent contractor is a fine one and that particularly since South African courts have indicated some support for the risk theory of vicarious liability, it is not too far fetched to see the relationship between principal and contractor in this case as based also on the right of control that the principal had over the contractor. The Appellate Division, despite its decision in this case, was at pains to stress the general rule that a principal is not liable for the wrongdoing of the contractor.

It may be helpful in answering the primary question as to when administrative law principles should be applied in a contractual context to consider whether the act of contracting in each instance constitutes administrative action as defined in the PAJA with reference to both organs of state and other entities. The definition of administrative action in the PAJA has already been canvassed elsewhere. The point to note is that all organs of state derive their power from statutes. Even the power to enter into binding contracts is derived from the State Liability Act. This does not necessarily mean that every act of contracting by an organ of state constitutes administrative action. Otherwise Burns and the courts would not even be considering whether the private law of contract governs contracts to which an organ of state is a party let alone applying it. Furthermore, administrative action is not confined in the PAJA to organs of state¹²⁹. It is submitted that the PAJA in principle supports the concept of administrative contracts but not necessarily the associated discussion by Burns of claims against the state in delict flowing from such contracts.

In *Independent Municipal And Allied Trade Union and Others v MEC: Environmental Affairs, Developmental Social Welfare and Health, Northern Cape Province, and Others*¹³⁰, Steenkamp AJP noted that in *Goodman Bros (Pty) Ltd v Transnet Ltd*¹³¹ the court ruled that the respondent and decision-maker in regard to the decision to terminate the agreement was a public authority and since its authority to appoint the first applicant derived from a public power, it must follow that its authority to terminate the agreement with the first applicant similarly derived from a public power. This, together with the peculiar content of the agreement, rendered the agreement an administrative agreement. The Supreme Court of Appeal in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*¹³² referring to Burns¹³³ held that it served little purpose to classify the agreement between the first respondent and the appellant as an administrative agreement and that

¹²⁹ It is significant to note in this regard that in terms of the PAJA, 'empowering provision' means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken (writer's italics). The definition of administrative action, includes any decision taken, or any failure to take a decision, by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external legal effect.

¹³⁰ *Independent Municipal* 1999 (4) SA 267 (NC)

¹³¹ *Goodman Brothers* 1998 (4) SA 989 (W). The court in this case referred to the decision in *Administrator, Transvaal, and Others v Zenzile and Others* 1991 (1) SA 21 (A).

¹³² *Cape Metropolitan* fn 104 *supra*

¹³³ Burns fn 121 *supra*

the question remained whether the cancellation of the agreement constituted 'administrative action'. The court in this case found that *Zenzile*¹³⁴ was no authority for the proposition that, if a public authority derived its authority to enter into a particular contract from a public power, its authority to terminate the contract similarly derived from a public power, entitling the other contracting party to the benefit of the application of the principles of natural justice before cancellation of the contract. The court held further that section 33 of the Constitution was not concerned with every act of administration performed by an organ of state, but was designed to control the conduct of the public administration when it exercised a public power, and that whether or not conduct amounted to 'administrative action' depended on the nature of the power being exercised. Other relevant considerations, said the court, were the source of the power, the subject-matter, whether it involved the exercise of a public duty, and how closely it was related to the implementation of legislation.

One of the distinguishing features of an administrative agreement according to these cases is that it involved an agreement to render public services. The situations covered so far have been those in which the organ of state contracts with a third party to perform a service which the organ of state is empowered and obliged to perform. Thus in the health care context an administrative agreement might come into being if a provincial government enters into a public private partnership with a private hospital group to fulfil the former's obligations to provide hospital services in a particular area. Whether or not this amounted to an administrative agreement would depend, according to the courts, on whether the contract involves the exercise of a public duty, how closely it is related to the implementation of legislation and whether the agreement was for the rendering of public services. However in the context of health service delivery, the contractual relationship in question could be with the patient directly. Legislation such as the Health Act mandates the delivery of health care services by organs of state but does not preclude a contract as the legal vehicle for that delivery. It is submitted that such a contract should be an administrative contract in the sense that although it is governed by the private law of contract administrative law principles should also be applicable to the relationship. In other words the relationship is a legal hybrid that is governed by the principles of more than just one field of law.

¹³⁴ *Zenzile* fn 131 *supra*

The interesting question is whether health care services are ‘public services’. In other instances whether services are public or not is fairly straightforward since most people would readily concede that waste disposal, sanitation services and the provision of water supplies are public services. Whilst there may well be private contractors who are frequently contracted to perform such services, they are essentially the responsibility of the municipality concerned in terms of Schedule 5 of the Constitution. Private contractors wishing to undertake these services would contract with the municipality in question as opposed to individual ratepayers. In the health care context the situation is a little different in the sense that where a private provider renders health care service to a patient, the contractual relationship is still usually with that patient directly as opposed to some organ of state that could be said to be responsible for the provision of health care services. Must one assume that when a health care service is rendered by a private provider it is not a public service but that when it is rendered by an organ of state it is? The further question would then be why services that are essentially identical in nature change their identity on the basis of who renders them? Is there any sound reason in law why this should be so? Alternately are all health care services public services in which case what are the implications for private providers of health care services? The final alternative is that health care services are not public services irrespective of whether or not they are rendered within the public or private health sectors.

*In Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*¹³⁵ the court noted that in terms of IC 126 (the Interim Constitution) a provincial legislature is given jurisdiction to make laws with regard to all matters which fall within the functional areas which are specified in IC Schedule 6 but the national Parliament itself also has legislative competence in those areas. A conflict between a law passed by a provincial legislature and an Act of Parliament in these areas is regulated by the relevant parts of IC 126, which read as follows:

‘(3) A law passed by a provincial legislature in terms of this Constitution shall prevail over an Act of Parliament which deals with a matter referred to in ss (1) or (2) except

¹³⁵ *Certification Judgment 1997 (2) SA 97 (CC)*

insofar as the Act of Parliament is *inter alia* necessary to set minimum standards across the nation for the rendering of public services',¹³⁶ This principle has been carried through into the Constitution in section 146 (2) but without explicit reference to 'public services'. Significantly this term seems to have been replaced by the phrase 'government services'. Thus national legislation prevails over provincial legislation where the former is necessary for "the promotion of equal opportunity or equal access to government services".

In *Directory Advertising Cost Cutters v Minister For Posts, Telecommunications and Broadcasting and Others*¹³⁷ the court stated that it is interesting to note that in Canada the courts have rejected a functional link with government as the test for the applicability of their Charter of Rights and Freedoms. Van Dijkhorst J observed that the control test is applied, which looks to an institutional or structural link with government to determine whether a public body is covered by the Charter and that it is irrelevant that a university and hospital are performing a 'public service' as long as they do so independently of government. These remarks, said Van Dijkhorst J, should be read against the background of s 32 of the Charter in terms of which it is applicable to 'government'. He stated that the Courts had to define the scope of that concept. Unlike the Constitution, the Charter does not apply to the private sector or to non-governmental actors in the public sector¹³⁸. The question of whether or not a service is a public service is clearly not so easily decided simply with reference to whether it involves a right in the constitutional Bill of Rights. Section 8(2) of the Constitution sets out the parameters as to when the Bill of Rights binds a natural or juristic person. It states that a provision of the Bill of Rights binds a natural or 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 that right. One also cannot assume that simply because a private provider is rendering health care services that this is not a public service or function since the PAJA expressly acknowledges the possibility that a private body can perform a public function.

¹³⁶ See also *Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd* 2001 (1) SA 500 (CC).

¹³⁷ *Directory Advertising Cost Cutters* 1996 (3) SA 800 (T)

¹³⁸ Van Dijkhorst J referred to Hogg *Constitutional Law of Canada* 3rd ed 34-13; Jones & De Villars *Principles of Administrative Law* 2nd ed 42-7; *McKinney v University of Guelph* [1990] 3 SCR 229; *Harrison v University of British Columbia* [1990] 3 SCR 451; *Stoffman v Vancouver General Hospital* [1990] 3 SCR 483; *Douglas College v Douglas/Kwantlen Faculty Association and Others* [1990] 3 SCR 570

In *Independent Municipal and Allied Trade Union and Others v MEC: Environmental Affairs, Developmental Social Welfare and Health, Northern Cape Province, and Others*¹³⁹ the predecessor-in-title to the second respondent (the HDC) had entered into an agency agreement with predecessor-in-title of the first respondent's department (the department) to render certain primary health services on the latter's behalf in terms of s 20(1)(d) of the Health Act¹⁴⁰, which agreement could be terminated on one year's notice. In this case the court held that the performance of health services by first respondent was a statutory power and if the agency agreement was concluded in terms of statutory power then it was an administrative action. Similarly the termination of the agency agreement was also an administrative action. It also held that the HDC had no statutory or constitutional right to perform health services because health services formed no part of the second applicant's functions unless expressly identified in terms of the Regional Services Councils Act¹⁴¹ and that the HDC had not proved that these functions had been identified. The court found that that the first respondent was not obliged in law to consider the provisions of the Local Government: Municipal Structures Act¹⁴² which were not in existence when he took his decision in 1997 or in September 1998 and, accordingly, the HDC had no statutory function to render health services. The functions rendered by the HDC stemmed from the agency agreement. By cancelling the agency agreement, said the court, the first respondent had not infringed any statutory or constitutional rights of the HDC. It held, further, that the *audi* rule was not applicable to first respondent as an employer in terms of the agency agreement, but it may have been applicable in terms of the doctrine of legitimate expectation. The court found that taking into consideration all the circumstances and evidence, the doctrine of legitimate expectation applied and the third and other applicants were entitled to a fair hearing by the first respondent before their employment was terminated by the HDC as a result of the termination of the agency agreement. It stated that that the duty of the first respondent to afford the third and other applicants a fair hearing and to grant them an opportunity to make representations in compliance with the audi principle would only have come into existence when the first respondent decided that he was intending to compel the HDC to terminate the employment of the third and other applicants. In such a case he was

139 *Independent Municipal* fn 130 *supra*

140 Health Act fn 3 *supra*

141 Regional Services Councils Act No 109 of 1985

142 Local Government: Municipal Structures Act No 117 of 1998

obliged by the administrative law to afford the third and other applicants a fair hearing before he decided whether to compel the second applicant to terminate the employment of the third and further applicants. The parties to the contract in this case were both apparently organs of state, the one being the North West Regional Services Council and the other Administration of the Province of the Cape of Good Hope which is why the court said that the applicants did not have a right to render primary health services.

It is submitted that administrative agreements could prove to be a useful concept in the context of contracts for health services both as between an organ of state as principal and a private provider as contractor and between a private or public provider of health care services on the one hand and the patient on the other. In order to ascertain, however, whether the agreement is one to which the principles of administrative law are applicable, regard should be had to the circumstances of each individual case, in the light of the factors mentioned by the courts in the cases referred to above, such as the content of the contract, and whether the act of contracting constitutes administrative action. A further question that cannot be explored in any depths in this thesis is whether an administrative agreement is essentially an administrative relationship that contains certain principles of the law of contract or whether it is essentially a contractual relationship that contains certain principles of the administrative law. The response is likely to be that this depends on the context and that generally speaking one might say that in the case of a public sector provider the former would be prevalent and in the case of a private sector provider the latter is more likely. Some may consider that attempts at such levels of refinement, though exploratory, are too presumptuous in light of the relative paucity of recognition given by the courts thus far of the broad concept of administrative agreements.

10.4.8 Conclusions Concerning Administrative Law

Administrative law, especially in the public health sector, offers an alternative basis in law to pure contract for the provider-patient relationship. In many ways it is preferable to a purely contractual relationship because of the many inbuilt protections and legal requirements for administrative action. Contracts can be unfair but courts can and still do refuse to strike them down purely on this basis. Administrative action

on the other hand is much more likely to be struck down on grounds of unfairness. The fees payable by patients in the public sector are often published in the form of regulations that can be attacked on constitutional grounds. Regulations are usually subject to notice and comment procedures before they are promulgated giving interested parties an opportunity to make representations. In the private sector, the patient usually has little or no choice in the fees that he or she must pay and no say in the setting of them either.

Although policy decisions are not within the scope of administrative law, decisions involving the implementation of legislation are. Thus to the extent that a health official in the public sector does not observe the principles of administrative justice in implementing a regulation concerning fees payable for health care services or the nature of the services that must be provided in terms of a legislative provision his or her actions can be challenged on administrative law grounds. Subject to what has been said earlier on the subject of administrative agreements, there is no equivalent protection in the purely private health care environment in which patients are generally restricted to remedies based on the law of delict or of contract. The considerations of these areas of law elsewhere in this thesis demonstrate that they do not yield results that are entirely satisfactory from the point of view of the patient.

In the public sector, treatment protocols and guidelines developed pursuant to an empowering provision of a statute such as section 16 of the Health Act¹⁴³ would have to be with due regard to the principles of administrative law. Treatment programmes cannot be unfairly discriminatory either in terms of the nature of the treatment administered to different patients or in terms of the procedure in terms of which the treatment is administered. Treatment guidelines must be fair and rational and implemented fairly and reasonably. Health care services must, in terms of administrative law, be efficient and avoid undue or unnecessary delays. It is submitted that the principles of administrative law are an extremely useful and effective mechanism for ensuring distributive justice in the health sector and it is a great pity that they apply rather more to organs of state and other public bodies than they do to private entities. Concepts of fairness, reasonableness and lawfulness, however are not

¹⁴³ Health Act fn 3 *supra*

confined to the private sector, and thanks to the Constitution, they are likely to become increasingly applicable in more varied ways in fields of law that have in the past been regarded as purely private.

10.5 The Law of Contract

There are many things the courts could do to ensure that the law of contract reflects and upholds the principles and values of the Constitution. The bases upon which to achieve this are easily identifiable since they are the same themes that permeate the other fields of law that are discussed in this thesis – the themes of public interest, *bona fides* or good faith, public policy, reasonableness and fairness. What is more, they have a clearly recognised mandate in terms of the Constitution to develop the common law¹⁴⁴. It would seem that in the law of contract more so than any other area of law, the courts are particularly incapable of making the transition to a constitutional way of thinking. Perhaps it is because of an ingrained view that the law of contract, more than any other area of law, is within the domain of private law and that the Constitution, which many perceive to be primarily public law, should not be permitted to intrude in private affairs. It is submitted that this view of the Constitution is neither appropriate nor correct given the provisions of section 8 and the fact that it states categorically that the Bill of Rights applies to all law. The provisions of section 2 of the Constitution also leave no room for doubt in stating that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid. Moreover an unwarranted preoccupation with classification of law into various categories does not take into account either the constitutional dispensation that superseded a legal system based essentially upon the common law, the fact that justice cannot be confined with artificial conceptual boundaries or that law that is based on a Constitution must be seen as an internally consistent and coherent system.

¹⁴⁴ In *Carmichele v Minister of Safety and Security and Another (Centre For Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) Ackermann and Goldstone JJ stated: "It needs to be stressed that the obligation of Courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the Courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties."

10.5.1 Tacit or Implied Terms in Healthcare Contracts

In the fourth chapter of this these it is suggested that certain tacit terms are implicit within contracts for healthcare services whether they are rendered within the public or the private sector. These are –

- 1 The provider must take all reasonable steps to ensure that the health professional, egg the nurse, doctor or physiotherapist, in the employ of the provider is qualified to perform the services the patient is receiving and such professional meets with the licensing requirements of any law with respect to his or her profession¹⁴⁵.
- 2 The patient will be treated with a reasonable degree of professional skill and care and to a standard required by the professional and ethical rules of the profession to which the relevant health practitioner belongs¹⁴⁶.
- 3 Decisions concerning the patient's treatment will be taken by the provider in a manner that is lawful, reasonable and procedurally fair¹⁴⁷. In practice this means that the patient will be consulted before such decisions are taken and that he or she will be informed of the decision before it is taken.

¹⁴⁵ See *Mterwa v Minister of Health* 1989 (3) SA 600 (D) in which the court said "The two Transvaal cases, as well as *Buls and Another v Tsatsarolakis* 1976 (2) SA 891 (T), neither mention nor support the distinction, which is pivotal to the decision in the Lower Umfolosi case, between professional work over which the hospital is said to have no control and for which it is accordingly not liable, and managerial or administrative duties performed by an employee, for which it is responsible. In the Transvaal cases the issue was simply whether the particular member of staff was negligent in the exercise of his duties, regardless of whether he was part of a professional team or not." See also *Buls and Another v Tsatsarolakis* 1976 (2) SA 891 (T) *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A); *Minister of Police v Rabie* 1986 (1) SA 117 (A).

¹⁴⁶ In *Van Wyk v Lewis* 1924 AD 438 at p 444 and p 448, it was held that "in deciding what is reasonable the Court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs". See also *Blyth v Van Den Heever* 1980 (1) SA 191 (A) and *Durr v Absa Bank Ltd And Another* 1997 (3) SA 448 (SCA) in which the court observed: "Not only did the Judge below adopt the 'typical broker' test, but he held that Mrs Durr tendered no evidence as to the duties and functions of bankers under circumstances such as exist in this case. That is not entirely correct. Mr Goldhawk had said: 'If a person holds himself out as an expert and there is support, such as a financial institution confirming that he's an expert, then any person dealing with him should be entitled to expert advice. There's the analogy of if you get into a taxi and the taxi driver is a bad driver, does that remove any negligence claim you may have against him?' Mr Goldhawk is a chartered accountant and a specialist investigating accountant. He was appointed as such by the liquidators of 'Supreme' and gained a deep insight into the group and its penumbra. In *Jansen Van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A) the court said "The duty of a physician to respect the confidentiality of his patient is not merely ethical but is also a legal duty recognised by the common law." See also *Dube v Administrator, Transvaal* 1963 (4) SA 260 (W).

¹⁴⁷ *Janse Van Rensburg NO and Another v Minister of Trade and Industry and Another NNO* 2001 (1) SA 29 (CC); *Winckler and Others v Minister of Correctional Services and Others* 2001 (2) SA 747 (C) Section 33(1) guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair. See also *South African Veterinary Council and Another v Veterinary Defence Association* 2003 (4) SA 546 (SCA). It is submitted that the same considerations should be applicable to such decisions in the private sector. Equality is not just a constitutional right. It is also a constitutional value. Why should patients in the private sector be treated differently to those in the public sector in terms of considerations of administrative justice? In what basis could one justify an absence of procedural fairness to private sector patients?



- 4 The patient's informed consent will be obtained with regard to treatment that is administered to him or her prior to the administration of such treatment¹⁴⁸.
- 5 The provider undertakes to render the health services in accordance with the patient's consent and on the basis of the information supplied to the patient in order to obtain that consent¹⁴⁹.
- 6 The patient will be informed of the fact that treatment is of an experimental nature or is being conducted in the course of research and will be given the opportunity to refuse such treatment before it is administered¹⁵⁰.
- 7 The patient's health information will be kept confidential and will not be used in a way that will cause harm to the patient. It will not be disclosed to anyone without the patient's prior consent¹⁵¹.
- 8 The patient is entitled to rely on and act in accordance with the advice of the health professionals treating him or her in their capacity as experts¹⁵².
- 9 Unless specifically stated otherwise in express and unambiguous terms the provider does not undertake to cure the patient¹⁵³.

¹⁴⁸ *Lybery v Jefferies*, 1925 AD 236; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T); *Richter and Another v Estate Hammann* 1976 (3) SA 226 (C); *Castell v De Greef* 1994 (4) SA 408 (C); *Broude v Mcintosh and Others* 1998 (3) SA 60 (SCA)

¹⁴⁹ *Esterhuizen v Administrator, Transvaal* fn 149 *supra*
¹⁵⁰ Section 12(2)(c) of the Constitution

¹⁵¹ *Jansen Van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A)

¹⁵² In *Pinshaw v Nexus Securities (Pty) Ltd and Another* 2002 (2) SA 510 (C) the court said that "Clients are wont to place their trust not just in the company, but also in the individuals within the company with whom they deal. Clients tend to expect, and in my view are entitled to expect, the exercise of skill and care from the individual advisers and managers. A failure to exercise appropriate skill and care can have devastating consequences, as Durr's case *supra* illustrated. Furthermore, financial advisers and managers can vis-à-vis their immediate clients contract out of or limit liability, and as I see the position, they can for delictual purposes do the same for their employees. To fix Van Zyl with a duty to Mrs Pinshaw, in the circumstances pleaded, strikes me as being fair and in accord with the legal convictions of the community. It seems to me, therefore, that policy considerations favour upholding the duty rather than negating it."

¹⁵³ In *Buls and Another v Tsatsarolakis* fn 145 *supra* the court commented: "Every man has a legal right not to be harmed; but is there, apart from a contract, a legal right to be healed? It is no doubt the professional duty of a medical practitioner to treat his patient with due care and skill, but does he, merely by undertaking a case, become subject to a legal duty, a breach of which founds an action for damages, to take due and proper steps to heal the patient? It is an interesting question but, because it was not argued and because it is not necessary for the purposes of the present decision to answer it, I shall not discuss it further." See Strauss *Doctor, Patient and the Law* at p 40-41 at which he submits that where a patient consults a doctor who undertakes to treat him, the doctor assumes no greater duty than to treat the patient with due care and skill, unless the doctor has expressly guaranteed that the patient will be healed by his treatment – something which the prudent doctor will not generally do.

- 10 The provider will always act in the best interests of the patient and will only administer treatment that is medically necessary¹⁵⁴.
- 11 The patient will not be abandoned by the provider. Alternative health services will be provided where the provider can no longer provide the health care services previously supplied to the patient. The provider will ensure that where a course of treatment has commenced it will be completed¹⁵⁵.
- 12 The provider is entitled to payment for health care services where this is provided for by law or by mutual agreement and the patient or other person responsible for the patient is liable to pay a reasonable price for such services¹⁵⁶.
- 13 In the absence of provisions in law to the contrary, the patient will not be detained against his or her will by the provider¹⁵⁷.
- 14 The provider will take reasonable measures to ensure the health and safety of the patient while he or she is receiving health services at the provider's premises¹⁵⁸.
- 15 The goods supplied to the patient in the course of medical treatment are fit for the purpose for which they were supplied and are free of latent defects¹⁵⁹.

¹⁵⁴ See *The State v Sikunyana and Others* 1961 (3) SA 549 (E) in which the court stated: "The medical practitioner who performs a dangerous operation with his patient's consent incurs no criminal responsibility if just cause for the operation exists, for the law does not regard his conduct as improper: but if 'there is no just cause or excuse for an operation, it is unlawful even though the man consents to it'- vide *Bravery v Bravery*, 1954 (3) A.E.R. 59 at p. 67, per Denning, L.J. Any intentional act which involves the likelihood of bodily harm to another and which is not recognised by modern usage as a normal and accepted practice of society is forbidden by law and is in no way dependent upon the absence of consent on the part of the victim." It is submitted that due to the nature of the services provided the relationship between provider and patient is fiduciary and that where there is a conflict of interests between the provider and patient it is the duty of the latter to declare it to the patient and to ensure that the patient's interests are not compromised.

¹⁵⁵ *Applicant v Administrator, Transvaal, And Others* 1993 (4) SA 733 (W)

¹⁵⁶ See the discussions in the chapter on the law of contract of the legislation in the different provinces and their fee regulations. It is submitted that where the price in the private sector is unreasonably high, this will impact on the constitutional right of access to health care services and may justify state intervention such as is presently happening in terms of section 22G of the Medicines and Related Substances Act No 101 of 1965 with regard to the pricing of medicines.

¹⁵⁷ Section 12(1) of the Constitution

¹⁵⁸ *Beaven v Lansdown Hotel (Pty), Ltd* 1961 (4) SA 8 (N) *Regal v African Superstate (Pty.) Ltd* 1963 (1) SA 102 (AD); *Quathlamba (Pty) Ltd v Minister Of Forestry* 1972 (2) SA 783 (N); *Bronte Hotel (Pvt) Ltd v Low* 1974 (2) SA 353 (R); *Kritzinger v Steyn En Andere* 1997 (3) SA 686 (C). See also section 9(1) of the Occupational Health and Safety Act No 85 of 1993 which states that "Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety." The definition of 'employer' in the Act is wide enough to include the state.

¹⁵⁹ In *Curtaincrafts (Pty) Ltd v Wilson* 1969 (4) SA 221 (E), the court said that a purchaser of an article is entitled to expect is that the article shall be free from such latent defects as are not to be expected in an article of that quality, price and type, unless he obtains a warranty in expressly wider terms. *Kroonstad Westelike Boere-Ko-Operatiewe Vereniging Bpk v Botha and Another* 1964 (3) SA 561 (A) Liability for consequential damage caused by latent defect attaches to a

16 The patient's constitutional rights to life, bodily and psychological integrity, human dignity, privacy, freedom and security of the person, freedom of religion, belief and opinion, and access to health care services will be respected, protected, promoted and upheld by the provider¹⁶⁰.

These provisions are clearly supported by both the common law and the Constitution in most instances. It is submitted, furthermore, that in terms of the officious bystander test, if one had to ask any patient and provider in the process of concluding a contract whether or not such terms should be included, one or both of them is guaranteed to reply with an impatient affirmative. It is submitted that an acknowledgement by the courts of these terms and a legal base from which to adjudicate matters involving contracts for health care services would go a long way towards addressing the current defects in the law of contract as it pertains specifically to such services. The point is made repeatedly in this thesis that law must be considered and applied within its factual context in order to have any meaningful result. Where that context is specialised or structured in a particular manner and generalizations that are valid within other contexts are clearly inapplicable or inappropriate such generalizations cannot rationally or reasonably be applied.

merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold.

See also *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N) A seller is obliged to disclose all material latent defects which unfit or partially unfit the *res vendita* for the purpose for which it was intended to be used. By operation of the Aedilitian Edicts, as expounded and adopted in our law, into every contract of sale there is imported a warranty by the seller against such latent defects. Although a seller may contract out of his obligations to disclose and out of the statutorily imported warranty against latent defects, the existence of which he does not know at the time of the sale, if he purports to contract out of his obligation to disclose and of the implied warranty against material latent defects unfitting, or partially unfitting, the *res vendita* for the purpose for which it is sold, and those defects are present to his mind at the time of the sale, but he remains silent about them although he must know that to disclose their existence would cause a prospective buyer either not to purchase at all or to insist on a lower price than he otherwise would pay, he will be given the 'replication of fraud' (*de dolo replicationem*).

See also *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) where it was held that a merchant who sells goods of his own manufacture or goods in relation to which he publicly professes to have attributes of skill and expert knowledge is liable to the purchaser for consequential damages caused to the latter by reason of any latent defect in the goods. Ignorance of the defect does not excuse the seller. Once it is established that he falls into one of the above-mentioned categories, the law irrebuttably attaches this liability to him, unless he has expressly or impliedly contracted out of it. The liability is additional to, and different from, the liability to *redhibitorian* relief which is incurred by any seller of goods found to contain a latent defect. Broadly speaking, a defect may be described as an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita* for the purpose for which it has been sold or for which it is commonly used. Such a defect is latent when it is one which is not visible or discoverable upon an inspection of the *res vendita*.

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This is an obligation imposed upon the state by section 7(2) of the Constitution. However it is submitted that in the healthcare context where a patient is often weak and debilitated, physically or mentally incapacitated and has no control over his or her immediate personal environment it would not be difficult to argue that the same considerations apply *mutatis mutandis* to private sector providers of health care services. To suggest any different would be unconstitutional in terms of section 2 of the Constitution. To the extent that a patient is temporarily or even permanently unable to enforce or protect his or her own constitutional rights to dignity, life, privacy, bodily and psychological integrity etc, it is submitted that it is the responsibility of the person in whose care he or she resides to reasonably do so.

10.5.2 Contracts Within The Public and Private Health Sectors

Recognition must be given to the fact that the Constitution has irrevocably altered the commercial status of health care services. The rights that are granted in section 27(1) and 27(3) mean that health care services can no longer be regarded as simply another commodity in trade. The law of contract, it is submitted, must be influenced and informed by this fact whether the services are delivered in the private or the public health sector. To suggest otherwise is to ignore the Constitution. There is therefore now an added dimension to the business of those in the private health sector who trade in health care products and services. There is a constitutional obligation upon the state to take legislative and other measures to achieve the realisation of the right of access to health care services that is not restricted to the public sector. The Minister of Health has recently publicly acknowledged the important role of the private health sector in the delivery of health care services and categorically denied claims that the state is trying to destroy it. However, the private health sector will have to undergo certain fundamental paradigm shifts in order to avoid the perpetuation of its previous flaws and weaknesses and to align its operations with constitutional principles. Its reluctance to transform is evident from the litigation by the National Convention on Dispensing and others challenging the provisions of the Medicines and Related Substances Act concerning the requirement that health professionals other than pharmacists who wish to dispense medicines must obtain a licence from the Director-General to do so¹⁶¹. This is also evidenced by the litigation in the Cape High Court against the regulations on the pricing of medicines by *inter alia* New Clicks Ltd, the Pharmaceutical Society of South Africa and the Netcare group of private hospitals¹⁶². The court battles are an apparently unavoidable step in the process of transformation of the health sector that was contemplated in policy documentation going back to 1996¹⁶³. The regulations concerning the pricing of medicines alone indicate that contracts for involving health care services will have to be considered in a somewhat different light to what they were previously.

¹⁶¹ Judgment is due to be handed down in the Pretoria High Court on 02 July 2004, subsequent to the time of writing.

¹⁶² At the time of writing judgment has been reserved by the court.

¹⁶³ The National Drug Policy which clearly spells out the principles that have subsequently been legislated is dated October 1996. A copy is available at <http://www.doh.gov.za>

It is submitted that while contracts between patient and provider in the public health sector are by no means essential to the delivery of health care services, they can nevertheless play a valuable role in a number of respects. Firstly they serve to emphasise the importance of a patient as an individual to be respected and treated with dignity. Secondly they highlight the fact that the patient has certain entitlements and expectations regarding the health services he or she has contracted for and that there is a legal relationship between the provider and the patient that the courts are able and willing to uphold. Patients in the public sector are too often treated in a dehumanising and demeaning way that does not acknowledge their intrinsic and inestimable worth as human beings. Thirdly, a consciously contractual relationship that is negotiated with a patient, even a non-paying patient, obliges public health officials to talk to and interact with patients as equals, to enquire as to their needs and requirements and to understand that they may incur legal liability should they fail to uphold agreed terms. Contracts can have the effect of humanising the private health sector if they are used in such a way as to promote this. There is thus much to be said for contractual relationships even within the public health sector, between patient and provider. Having said this it is deeply ironic that the law of contract as applied to contracts for health services in the private sector has had the exact opposite effect.

Within the private sector, although there is a general assumption that contracts are the legal vehicles of choice for the delivery of health care services, the law of delict has assumed a significant weight in the adjudication by the courts of cases where contracts existed between the parties. It has been noted elsewhere in this thesis that the courts seem to prefer to adjudicate matters on the basis of the law of delict than on the law of contract given the choice. The difference between the law of contract and the law of delict in terms of the damages that can be awarded may have something to do with this since, in terms of the law of contract, damages may not be awarded for pain and suffering and similar almost inevitable consequences of contractual breach where the contract in question is for health care services. This is a failing of the law of contract specifically in the health services context which arises directly as a consequence of a compartmentalised approach to law that seeks to keep the legal principles underpinning the law of delict firmly in the box labelled 'delict'. It is a failure to recognise that they could and should be of more universal application within

specific contexts where the principles of fairness, reasonableness and public policy so demand.

The value of a contract to a patient in the private health sector is presently significantly limited and may even be negative rather than positive, given the decision of the Supreme Court of Appeal in *Afrox*. The law of contract offers little or no guarantees that one will be treated in good faith in a fair, reasonable, professional or even ethical manner neither does it afford one any remedies in the event of the failure of the provider to do so. It prefers the inferred 'constitutional' principle of sanctity of contract to the express constitutional right of access to health care services because a visually impaired court could not see how a contractual term could limit the latter. The result is that on the whole, the private health care contract presently serves as nothing more than a convenient means for the provider to enforce payment for the services in question. The requirements of informed consent transcend the law of contract and are not dependent upon the law of contract for their enforceability. It is, significantly, the law of delict that comes to the rescue in this regard. It is quite probably not in the private patients best interests to enter into any kind of a contractual relationship with a private hospital given that such a contract is now, thanks to the Supreme Court of Appeal, guaranteed to deprive him or her of his rights and remedies in terms of the law of delict. The irony is that a private hospital patient may not even have any real choice as to whether or not to contract with the provider given the imbalance of power in favour of the provider which the Supreme Court of Appeal has recently heavily reinforced in *Afrox*. It may be that the price increase implemented by the Supreme Court of Appeal in respect of private health care services in at least the hospital sector, with its reputedly higher standards of professional care, is currently way too high for patients such as the applicant in the *Afrox* case. At least within the public sector a patient is virtually guaranteed of a sympathetic judicial ear where the respondent is the government and one can be certain that any attempts by the state to apply the judgment in *Afrox* to its own contractual relationships with patients will not be upheld by any court.

10.5.3 Potential Solutions For Health Care Contracts

Since the judiciary has unquestionably failed consumers in the context of contracts for private health services delivery it may be appropriate for the legislature to intervene if not generally within the law of contract then specifically in the law of contract relating to health care services. This would not be without precedent. There is an Act called the Housing Consumers Protection Measures Act¹⁶⁴ which provides the following with regard to the conclusion of agreements and implied terms in regard to housing in section 13 –

- (1) A home builder shall ensure that the agreement concluded between the home builder and a housing consumer for the construction or sale of a home by that home builder-
 - (a) shall be in writing and signed by the parties;
 - (b) shall set out all material terms, including the financial obligations of the housing consumer; and
 - (c) shall have attached to the written agreement as annexures, the specifications pertaining to materials to be used in construction of the home and the plans reflecting the dimensions and measurements of the home, as approved by the local government body: Provided that provision may be made for amendments to the plans as required by the local government body.

- (2) The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that-
 - (a) the home, depending on whether it has been constructed or is to be constructed-
 - (i) is or shall be constructed in a workmanlike manner;
 - (ii) is or shall be fit for habitation; and
 - (iii) is or shall be constructed in accordance with-
 - (aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and
 - (bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1);
 - (b) the home builder shall-
 - (i) subject to the limitations and exclusions that may be prescribed by the Minister, at the cost of the home builder and upon demand by the housing consumer, rectify major structural defects in the home caused by the non-compliance with the NHBRC Technical Requirements and occurring within a period which shall be set out in the agreement and which shall not be less than five years as from the occupation date, and notified to the home builder by the housing consumer within that period;
 - (ii) rectify non-compliance with or deviation from the terms, plans and specifications of the agreement or any deficiency related to design, workmanship or material notified to the home builder by the housing

¹⁶⁴ Housing Consumers Protection Act No 95 of 1998

- consumer within a period which shall be set out in the agreement and which shall not be less than three months as from the occupation date; and
- (iii) repair roof leaks attributable to workmanship, design or materials occurring and notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than 12 months as from the occupation date.

Housing, like health care services, is the subject a constitutional right¹⁶⁵. It is submitted that there is arguably sufficient motivation for similar legislative provisions with regard to health care services not only on the basis of the law of contract but also to address the failure of the courts to apply the maxim *res ipsa loquitur* to delictual claims in this context and to protect consumers of health care services against unscrupulous, unfair or unconstitutional practices by providers of such services. The legislative provisions in question could assist consumers of health care services in stipulating what they need to do in order to shift the evidentiary burden to the shoulders of the expert respondent.

Closer to home in terms of section 47 of the National Health Act –

- (1) All health establishments must comply with the quality requirements and standards prescribed by the Minister after consultation with the National Health Council.
- (2) The quality requirements and standards contemplated in subsection (1) may relate to human resources, health technology, equipment, hygiene, premises, the delivery of health services, business practices, safety and the manner in which users are accommodated and treated.
- (3) The Office of Standards Compliance and the Inspectorate for Health Establishments must monitor and enforce compliance with the quality requirements and standards contemplated in subsection (1).

It may be that this section will give sufficient powers to the Minister of Health to ensure that exculpatory clauses in private hospital contracts are largely harmless to patients if they are permitted at all.

The Consumer Affairs (Unfair Business Practices) Act¹⁶⁶ could also afford a measure of assistance. In terms of this Act, “business practice” includes-

- (a) any agreement, accord, arrangement, understanding or undertaking, whether legally enforceable or not, between two or more persons;

¹⁶⁵ Section 26 of the Constitution stipulates that everyone must have access to adequate housing and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

¹⁶⁶ Consumer Affairs Act No 71 of 1988



- (b) any scheme, practice or method of trading, including any method of marketing or distribution;
- (c) any advertising, type of advertising or any other manner of soliciting business;
- (d) any act or omission on the part of any person, whether acting independently or in concert with any other person;
- (e) any situation arising out of the activities of any person or class or group of persons,

but does not include a practice regulated by competition law

and

'unfair business practice' means any business practice which, directly or indirectly, has or is likely to have the effect of-

- (a) harming the relations between businesses and consumers;
- (b) unreasonably prejudicing any consumer;
- (c) deceiving any consumer; or
- (d) unfairly affecting any consumer.

The Act establishes mechanisms for the investigation of unfair business practices and their prohibition. There are also consumer affairs courts in various provinces that exist in terms of provincial legislation and that have powers to adjudicate matters affecting consumers in terms of that legislation. At least in such forums it is likely that there will be a focus on the more modern approach of consumerism and considerations such as unreasonableness, good faith and fairness will occupy centre stage.

10.5.4 Conclusions Concerning The Law of Contract

The law of contract as a legal vehicle for health services delivery is presently not ideal. This is not so much due to the fact that the concept of a contract as a binding agreement between two parties is in itself problematic as it is to the antiquated approach of South African courts to this area of the law. To be blunt, the law of contract has not kept pace with sociological and commercial developments whether these are expressed in terms of changing structures and groupings within society or in terms of shifts in balance of power brought about by concepts such as mass production and the increasing idea that certain items are public rather than private goods to which everyone should have access whether or not he or she is able to pay for them. Worst of all there is still an almost complete failure to incorporate constitutional principles and values into the law of contract. Whereas developments in other countries in the law of contract have seen conscious acknowledgement of the need to afford greater protection to consumers, to ensure that contracts are

fundamentally fair and reasonable as between parties in a world where the balance of power is usually heavily in favour of the powerful and wealthy corporate entities that comprise the supply side of the market and to create conditions in which the interests of the individual consumer in the bargaining situation are taken into account by the law that supports the concept of contract as an instrument of trade and commerce, courts in South Africa remain either impervious or oblivious to the need and importance of ensuring similar developments in South African law. In areas such as health care services where the circumstances and the nature of the item of trade in and of themselves should make it quite obvious that there is an unacceptable imbalance of power that should be rectified in order to avoid injustice no less a body than the Supreme Court of Appeal has said that it cannot see the difference between providers of health care services and any other service provider¹⁶⁷. The result is that South African law of contract appears to remain largely trapped within a judicial mindset that would be at home in the Victorian era¹⁶⁸.

The problems within the South African law of contract have not gone unremarked. The South African Law Commission in 1996 in a paper¹⁶⁹ entitled 'Unreasonable Stipulations In Contracts and The Rectification of Contracts' stated that with the rise of the movement for consumer protection in the early seventies, it became the generally accepted view in most first world countries that legislative action was required to deal with contractual unconscionability and noted that the South African proponents of granting such a power of review to the courts support legislation that will introduce the doctrine of unconscionability and the concomitant review power of the courts. Furthermore, said the Commission, the question is being asked whether the "unconscionability" or the "good faith" approach should be followed. In the end, the two approaches may be thought to lead to the same result. When considering the historical background of the South African law, and taking into account the general use of the unconscionability approach by the legal systems close to our own, the

¹⁶⁷ *Afrox Healthcare v Strydom* fn 65 *supra*

¹⁶⁸ Matlala D 'The Law of Contract: When the Supreme Court of Appeal Fails to Act', Senior Lecturer, University of Venda <http://wwwserver.law.wits.ac.za/workshop/workshop03/WWLSMatlala.doc> points out that, in the case of the law of contract, the courts are still happy to follow a statement made by Chief Justice Innes a century ago in *Burger v Central South African Railways* 1903 TS 571 to the effect that it is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature' even though it has the effect that a partially literate and partially sighted signatory is held bound by certain Latin expressions which he does not understand (*Mathole v Mothe* 1951 (1) SA 256 (T) or that a signatory who cannot read or write any language is held bound by a document written in English which she did not understand and which was apparently misrepresented to her (*Khan v Naidoo* 1989 (3) SA 724 (N))

¹⁶⁹ Discussion Paper 65 (Project No 47) (1998)

unconscionability criterion is considered advisable. The Commission expressed the widespread disappointment that was felt when the Appellate Division saw fit to do away with the *exceptio doli* in *Bank of Lisbon and South Africa (Ltd) v de Ornelas*¹⁷⁰.

The team that did the preliminary research work for the Discussion Paper identified a number of common provisions which could and should receive the critical attention of the legislature:

- (i) Clauses reversing the ordinary burden of proof and requiring a debtor to prove facts which according to the ordinary rules of evidence the creditor would have had to prove, e.g. usually the creditor (seller) has to prove delivery of the goods sold; a clause reversing this burden of proof makes it virtually impossible for the debtor (buyer) to prove the negative of non-delivery.
- (ii) Under the existing parol evidence rule, facts extrinsic to the written documents may not be adduced in evidence to modify or contradict the writing. A verbal assurance by a creditor may thus not be proved and relied on by the debtor if it contradicts the written contract.
- (iii) Clauses excluding, waiving or limiting the protection afforded by consumer protection legislation or legislation aimed at the modification of unfair contract terms.
- (iv) The research team proposed a review of, but not a witch-hunt against exemption clauses. These clauses do have a legitimate place but they should

¹⁷⁰ *Bank of Lisbon* 1988 (3) SA 580 (A). The SALC put it as follows: "The Appellate Division held that on a correct interpretation of the contract the bank was indeed entitled to retain the securities. But the respondents relied on a counter-argument, that the conduct of the bank was contrary to the view our society takes of what is right or wrong in the requirements of good faith. They relied on the common-law remedy of the *exceptio doli generalis*. In theory, this was a defence available to a defendant, who, though liable according to the letter of a contract and in strict law, could show that implementation of the contract would be unconscionable or inequitable. But even before this case was heard, this remedy was not rigorously applied by our courts. Yet one could have hoped that a doctrine of relief against unconscionable claims could be founded on this *exceptio*. It was not to be. In this case the majority of the Appellate Division Bench, per Joubert J A, decided "... once and for all, to bury the *exceptio doli generalis* as a superfluous, defunct anachronism. *Requiescat in pace*" (let it rest in peace). The learned judge also held that equity could not override a clear rule of law; neither could the application of good faith do so. The "clear rule of law", presumably, was the rule that contracts must be performed according to their terms. For those hoping that our courts would develop a doctrine of relief in cases of unconscionability, the judgment was a great disappointment."

not be tolerated where, in the circumstances of a particular case, their implementation would lead to harsh and unjust results.

- (v) Choice-of-law clauses, whereby parties agree that legislation, other than that of South Africa, should apply to a contract concluded and implemented here and adjudicated upon by a South African court, should be limited to contracts concluded between foreign contracting parties or between South Africans and foreigners contracting in the ordinary course of their profession or business.
- (vi) Clauses by which rights and defences are lost in the case of cession or discounting of contracts. It appears that there is a standard practice by which a seller sells goods to a purchaser on condition that if the seller cedes or discounts the contract to a third party (e.g. a bank or financial institution) the purchaser will not be able to raise any defence (e.g. that the goods suffered from latent defects, that warranties were not honoured) against the third party.
- (vii) Clauses under which the weaker party submits to the jurisdiction of a magistrates' court, but the stronger party (the seller, usually) does not agree that it may be sued in such court.
- (viii) Clauses by which jurisdiction is conferred upon a court which would not otherwise have had jurisdiction in the matter, to the detriment of, usually, the debtor, by the stratagem of a clause under which it is "acknowledged" that the contract had been concluded or executed or breached in the area of jurisdiction of the said court, etc.
- (ix) Clauses by which jurisdiction is limited to the High Court, thereby making it more difficult for the weaker party to gain access to the courts, in the light of the higher costs of litigation in the High Court.
- (x) Clauses by virtue of which the usual defences available to a debtor under a contract of suretyship (the benefit of prior exclusion, the benefit of division,

the benefit of simultaneous citation and division of debt, the benefit of cession of actions) and to a debtor under a contract of loan (the exception of non-payment of the capital of the loan) are excluded.

(xi) Clauses by which certain rules of court are waived, e.g. that in provisional sentence cases the creditor must prove the legality of the document sued upon or the amount of the debt.

(xii) Clauses waiving -

“all exceptions, defences, benefits and rights, of whatever nature, the content and meaning thereof being known by me”.

(xiii) Clauses by which certain statutory defences, e.g. by the Prescription Act¹⁷¹, the Agricultural Credit Act¹⁷² or the Moratorium Act¹⁷³, are waived.

(xiv) Clauses by which a claim for damages for breach of contract is excluded, e.g. where an agricultural co-operative or a seed company sells infertile seed to a farmer.

The research team found that courts in Germany, England, the USA, Sweden, Israel, the Netherlands and Denmark may take judicial action against unfair terms, in addition to which preventative control may also be used against unfair terms¹⁷⁴. It proposed that legislation should make it possible to test terms in standard contracts against the criterion of good faith. A number of people made important comments¹⁷⁵.

¹⁷¹ Prescription Act No 68 of 1969

¹⁷² Agricultural Credit Act No 28 of 1966

¹⁷³ Moratorium Act 25 of 1963

¹⁷⁴ See also the more recent observations of Carstens P and Kok A in ‘An assessment of the use of disclaimers by South African hospitals in view of constitutional demands, foreign law and medico-legal considerations’ *SA Public Law* vol 18 No2 2003 who point out that in the USA courts have rejected exculpatory agreements signed by patients on the basis that these agreements affect the public interest and cannot be upheld and that the German law of contract recognises in principle that exculpatory clauses/disclaimers in hospital contracts whereby medical negligence is excluded are against public policy

¹⁷⁵ The Commission noted that in a valuable contribution to the research project, the renowned jurist, Prof Hein Kötz of the Max Planck Institute at Hamburg, advised as follows regarding the question of private litigation as a remedy as opposed to administrative control. Enacting new substantive rules on the control of unfair contracts terms is an important step. What is equally important, however, is to consider whether there exist adequate mechanisms through which these

The Commission eventually published the 1998 document¹⁷⁶ to which Davis J referred in *Mort NO v Henry Shields-Chiat*¹⁷⁷. It recommended the introduction of the principles of fairness and good faith in the law of contract and that legislation is necessary to effect the necessary changes. The Commission prepared draft legislation (under the cumbersome but self explanatory title of ‘Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts Bill’) which accompanied its report. The draft Bill met with a significant amount of criticism by those who apparently do not perceive the pressing need to remedy the situation and who still naïvely believe that the courts are capable of the job¹⁷⁸.

Regrettably the South African judiciary does not demonstrate the neutrality and objectivity that one would hope from so eminent an institution as the bench¹⁷⁹. Matlala goes so far as to say that the inability of the judges to rigorously pursue and implement the spirit, purport and objects of the Constitution as regards contractual fairness, equity, dignity and equality may be one reason for the President to be careful

rules are to be made effective. The mechanism normally available is private litigation in which an individual bases his claim or his defence on the invalidity of the contract term on which his opponent relies. For various reasons this mechanism, if taken alone, cannot be regarded as a satisfactory solution of the problem. If an unfair contract term is used throughout an industry it may affect the interests of many people at the same time, but the individual injury will often be so small that there is no point in seeking redress by way of bringing or defending the court action. Sometimes the unfair contract term will typically harm people who are too poor to pay for the expenses of litigation but are too ‘rich’ to qualify for legal aid, if legal aid is available at all. Even where legal aid is available the persons affected may belong to population groups who lack the skills and sophistication required to make use of existing procedures. On the other hand, the interest at stake for the party who proposed the unfair term is typically much larger than the interest of the other side. As a result, there is a strong incentive for the proponent of an unfair term to buy the other side off and thus keep the clause out of the courtroom. Even where a particular clause has been held invalid by a court there is nothing to stop the proponent of the clause to continue its use with impunity in the hope that other less aggressive or less sophisticated parties will fail to pursue their rights in the mistaken belief that the clause is effective. In sum, it is all very well to enact rules defining unfair contract terms and to give the courts a power to set them aside. This will not get you very far in an area where there are few plaintiffs around who are in a position to make an effective use of the available controls by way of private litigation. This is why most European legal systems have not confined themselves to the enactment of substantive provisions on unfair contract terms. They have developed new control systems which do not, like traditional litigation, depend on the existence of an aggrieved individual willing and able to bring or defend a court action. Instead, public officials or consumers organisations have been given standing to institute control procedures before the ordinary courts or special tribunals which may lead to injunctions or cease-and-desist orders if contract terms used or recommended by the defendant are found invalid under the applicable substantive law.

176 *Report on Unreasonable Stipulations in Contracts* fn 169 *supra*

177 *Mort* 2001 (1) SA 464 (C)

178 Cornelius SJ *Principles of the Interpretation of Contracts in South Africa* (2002) at p 94; Hefer JJK ‘Billikheid in Die Kontraktereg Volgens Die Suid-Afrikaanse Regskommissie’ 2000 *Tydskrif vir Hedendaagse Romeins-Hollandsereg*

179 The present writer can state from personal experience that many judges, even a few of those at the level of the constitutional court, do not even attempt to conceal their hostility when the executive branch of government is a party to litigation before them. Whilst it may be an inevitable, though unfortunate, consequence of a liberal constitutional dispensation that it has become fashionable to sue the state, and more particularly the executive branch of government, it is submitted that it is completely alien to the spirit and intent of the Constitution to have a judiciary that is clearly predisposed against the state. One can only hope that the judiciary fails in its apparent attempts, whether conscious or subconscious, to provoke a constitutional crisis. The Constitution is the embodiment of the values and principles of a democratic state that is peculiarly South Africa. It is the culmination of the blood, sweat and tears of many thousands of people who, over the years, considered it worth fighting for. It is not fitting for the judiciary, of all institutions, to ignore or demean it, although, given the role of the judiciary in South African history prior to 1994, it is hardly surprising that it does so.

when it comes to making judicial appointments¹⁸⁰. He points out that in view of the Constitution and its Bill of Rights there is no more reason for South African courts to hesitate in reading constitutional imperatives and values into all contracts. He states that the refusal of the Supreme Court of Appeal to do this in respect of contracts is disappointing to say the least. It is not the intention here to repeat or revisit the work of the South African Law Commission but rather to highlight the fact that the problems with the South African law of contract have been documented at least as far back as 1995.

Whilst there have been a few glimmers of hope that South African contract law is beginning to evolve in the right direction 'being that happy state in which principles of good faith, fairness, equity and reasonableness underpin the law of contract'¹⁸¹, such as may be gleaned from the decisions in *Eerste Nasionale Bank van Suidelike Afrika v Saayman NO*¹⁸², *Mort NO v Henry Shields-Chiat*¹⁸³, *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others*¹⁸⁴, it is submitted that still has a long way to go as is clear from the decisions of the Supreme Court of Appeal in *Afrox Healthcare Bpk v Strydom*¹⁸⁵ and *Brisley v Drotzky*¹⁸⁶.

10.6 The Law of Delict

There is a general need to recognise the imbalance of power between the patient and the provider in individual cases and to factor this into decisions concerning wrongfulness and legal causation. Without detracting from the immense importance of the principle of *stare decisis*, one must not forget that the courts do have the power to depart from established principle where it is clearly wrong. They also have the power to develop the common law in order to align it with the Constitution. Health care services and products are not just another commodity. For one thing they are the

¹⁸⁰ Matlala fn 168 *supra* states that: "One can easily foresee a situation unfolding in which when future appointments are made, preference is given to nominees who are considered as likely to give effect to the 'spirit, purport and objects' of the Constitution. Were this to be the case the judiciary would have nobody but itself to blame for its inability to take the lead in developing the common law, and in so doing take into account the interest of justice as required by s 173 of the Constitution or promoting the spirit, purport and objects of the Bill of Rights when developing the common law as required by s 39(2)"

¹⁸¹ Matlala fn 168 *supra*

¹⁸² *Saayman* 1997(4) SA 302 (SCA)

¹⁸³ *Mort* fn 177 *supra*

¹⁸⁴ *Shoprite Checkers* 2002 (6) SA 2002 (C)

¹⁸⁵ *Afrox* fn 65 *supra*

¹⁸⁶ *Brisley* 2002 (4) SA (1) (SCA)

subject of constitutional rights. They are also, paradoxically, dangerous to health and even life if misused or misapplied and so delictual considerations involving being in control of a dangerous thing come into play for health professionals. The standard of care under the law of delict is thus modified to the standard of the reasonable health professional who is practising in the same field and at the same level of expertise as the respondent¹⁸⁷. Thus one would not judge a general practitioner by the standards of a gynaecologist neither would one judge a nurse against the standards of a physiotherapist or a medical officer in a district hospital by the standards of an orthopaedic surgeon. Lack of skill or experience is no defence if a health professional undertakes treatment in respect of which he or she has not been trained or of which he or she has insufficient personal experience¹⁸⁸. It is permissible for health professionals to observe and respect each other's scopes of practice when working as a team and one cannot be held liable for the delict or wrongdoing of another¹⁸⁹.

There is some degree of convergence between the law of contract and of delict. This is encouraging in the sense that the same constitutional values and principles should underpin them both and that decisions should be consistent across different fields of law as well as within them if the constitutional order is to prevail. The law of delict is not as problematic as the law of contract when it comes to the provision of health care services but there are borderline cases such as that of *Collins v Administrator Cape*¹⁹⁰ when the principles of the law of delict seem somehow to fall slightly short of justice. The principle that the law of delict seeks to restore the victim of a civil wrong to the position in which he occupied before that wrong is not honoured in this particular case because, according to the reasoning of the court, the harm done was so great that no amount of compensation could achieve this objective. The logic that no amount of money can make up for the loss of use of an arm or an eye or a good name but that courts still award amounts in damages for these kinds of injuries anyway did not convince the court in *Collins* that damages should be awarded in respect of a child who was left in a persistent vegetative state due to the negligence of the respondent. Whilst the point is made that the object of the law of delict is compensation, and not

¹⁸⁷ See for instance *Van Wyk v Lewis* fn 146 *supra*; *Dube v Administrator, Transvaal* fn 146 *supra*; *Michael and Another v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA)

¹⁸⁸ *Rex v Van Schoor* 1948 (4) SA 349 (C); *R v Van der Merwe* 1953 (2) PH H 124 (W)

¹⁸⁹ *Van Wyk v Lewis* fn 146 *supra*; *S v Kramer* 1987 (1) SA (N)

¹⁹⁰ *Collins* 1995 (4) SA 73 (C)

punishment which is the domain of the criminal law, the fact is that not all delicts are crimes, that not all crimes are prosecuted successfully and that criminal sanctions such as imprisonment and fines payable to the state are not always appropriate when the respondent involved is a corporate entity such as a private company or a provincial government. It is submitted that there is scope for the argument that in some cases compensation is not merely the making good of a loss, it can also mean satisfaction in the sense that society's need for justice to be done and to be seen to be done is satisfied. The point is also made that it is not only the individual who has an interest in the successful prosecution of a delictual claim – broader society also has an interest. This is clearly evidenced in the considerations that the courts apply in the test for unlawfulness when adjudicating delictual claims. The legal convictions of the community play a key role. Why should the legal convictions of the community not also influence the consideration of awards in damages in certain cases? Scott J's approach to distributive justice in the case of *Collins* is distinctly utilitarian in the sense that the resources must remain where they are most useful. There is no point in transferring resources to a person who has no need of or use for, them. In the context of *Collins*, it is a highly persuasive argument in a country where health care services in the public sector are significantly under-resourced. In terms of traditional legal reasoning, it is not the calculation of damages that is influenced by public policy – only the element of wrongfulness¹⁹¹. Even in cases where wrongfulness is proven, this

¹⁹¹ In fact the argument that there are no public policy considerations applicable in assessing the quantum of damages is not correct. The element of legal causation for the purpose of limiting the extent of the damages for which a defendant is liable is also very much dependent on public policy considerations. With regard to the purely compensatory nature of damages in delict, see the dicta of Scott J in *Zysset and Others v Santam* 1996 (1) SA where he states: "The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. See *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 917B. Similarly, and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the object in awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action. Notwithstanding the foregoing, it is well established in our law that certain benefits which a plaintiff may receive are to be left out of account as being completely collateral. The classic examples are (a) benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and (b) moneys and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy. It is said that the law balks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff. Nor, it would seem, are these the only benefits which are to be treated as *res inter alios actae*. In *Mutual and Federal Insurance Co Ltd v Swanepoel* 1988 (2) SA 1 (A) it was held, for example, that a military pension which was in the nature of a solatium for the plaintiff's non-patrimonial loss was not to be deducted. Nonetheless, as pointed out by Lord Bridge in *Hodgson v Trapp and Another* [1988] 3 All ER 870 (HL) at 874a, the benefits which have to be left out of account, 'though not always precisely defined and delineated', are exceptions to the fundamental rule and 'are only to be admitted on grounds which clearly justify their treatment as such'. It is submitted this baulking of the law to which Scott J refers is based on none other than consideration of public policy. In fact Scott confirms this subsequently in the judgment when he goes on to observe: "It is doubtful whether the distinction between a benefit which is deductible and one which is not can be justified on the basis of a single jurisprudential principle. In the

on its own is insufficient to succeed in a claim in delict. The object of pursuing such a claim is compensation for the loss suffered. Therefore the nature and extent of that loss, i.e. damages must be proven. Where the loss is so great that no amount in damages will constitute satisfactory compensation, the utilitarian approach is that no award of compensation can be made. It is submitted, however, that the common law is no longer only about cold logic expressed in utilitarian terms. It is also about values, more specifically constitutional values and even more specifically the rights to life and to bodily and psychological integrity and the weight that South African society has attached to these concepts. If cold logic is the only legal standard then why should people not be able to sell their body parts for what they can get for them? Why should one treat people who are suffering from terminal illnesses such as certain kinds of cancer and AIDS? Why waste valuable resources on those with a death sentence over their heads when such resources could be better spent in giving those who can recover from other less serious ailments a better chance to do so? Why treat the aged with increasingly expensive medicines and surgical interventions for that matter? Of what utilitarian value are their lives once they reach retirement age? This is why the decision in *Collins* sits so uncomfortably. Those who defend it point out that one must

past the distinction has been determined by adopting essentially a casuistic approach and it is this that has resulted in a number of apparently conflicting decisions. Professor Boberg in his *Law of Delict* vol 1 at p 479 explains the difficulty thus: '(W)here the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit.'

But, whatever the true rationale may be, if indeed there is one, it would seem clear that the inquiry must inevitably involve to some extent, at least, considerations of public policy, reasonableness and justice (see *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150E-F and 153B-C; see also Neethling, Potgieter and Visser *The Law of Delict* 2nd ed at 221-2). This in turn must necessarily involve, I think, a weighing up of mainly two conflicting considerations in the light of what is considered to be fair and just in all the circumstances of the case. The one is that a plaintiff should not receive double compensation. The other is that the wrongdoer or his insurer ought not to be relieved of liability on account of some fortuitous event such as the generosity of a third party.

Another case which clearly demonstrates the relevance of public policy considerations to the quantum of damages is *Jones v Krok* 1996 (1) SA 504 (T). In that case Kirk-Cohen J stated obiter that: It is the policy of South African law and practice that for breach of contract the injured party is entitled to no more than compensation for the damages actually suffered by him. The quantum is not in any way dependent upon, or influenced by, the reprehensible behaviour of the defendant or the flagrancy of the breach (*Administrator, Natal v Edouard* 1990 (3) SA 581 (A)). The same applies to the assessment of the quantum of damages under the *lex Aquilia*: see *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) 152H. It is thus trite that the award of punitive damages in such instances, in which category falls the award in this case, is alien to our legal system. The mere fact that awards are made on a basis not recognised in this country does not entail that they are necessarily contrary to public policy. Whether a judgment is contrary to public policy depends largely upon the facts of each case.... In principle it would be wrong to refuse to enforce a foreign order of punitive damages merely because it is unknown in this country. In my view it cannot be said that the principle involved is necessarily unconscionable or excessive or exorbitant." Provisional sentence was refused on the grounds that (a) while the appeal was still pending in the US Court of Appeal, the judgment of the US Court was not a final one; (b) the award of punitive damages was contrary to public policy and a foreign order for such damages would not be enforced by South African Courts; and (c) the award of compensatory damages rested 'upon the same foundation' as the award of punitive damages and would thus not be enforced. In *Jones v Krok* 1995 (1) SA 677 (A) the Appellate Division reversed the decision of Kirk-Cohen J holding *inter alia* with regard to the Court a quo's refusal of provisional sentence on the grounds that the award of 'compensatory' damages by the foreign Court had been 'arbitrary' and that it would be contrary to public policy to enforce it, the Court held that there had been no valid basis for such findings and, in any event, that such findings seemed to have involved entering into the merits of the case adjudicated upon by the US Court, which was not permissible. It concluded that public policy afforded no ground for denying the appellant relief in respect of the amount of US\$13 670 987. Although Kirk-Cohen J concluded that the punitive award of damages would not be enforced the *obiter dicta* in this judgment indicate that there may be circumstances in which damages that are not purely compensatory could be recognised. This view seems to have been supported by the Appellate Division in reversing the decision of Kirk-Cohen J.

be fair to the respondent too. Unfortunately in view of the weight that is attached to life and the ability to enjoy it is such that one cannot help but feel that the scales are balanced rather more in favour of the victim on these thankfully rare occasions.

10.6.1 Constitutional Delicts

The question of constitutional delicts, which can best be described as unconstitutional conduct that is unlawful, blameworthy and which causes personal or patrimonial loss to a person is discussed in chapter five of this thesis. It is submitted that if such a delict is recognised, the most likely situation is that described by the court in *Soobramoney v Minister of Health, Kwazulu-Natal*¹⁹² in reviewing the facts of the Indian case of *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another*¹⁹³. It was a case in which constitutional damages were claimed. The claimant had suffered serious head injuries and brain haemorrhage as a result of having fallen off a train. He was taken to various hospitals and turned away, either because the hospital did not have the necessary facilities for treatment, or on the grounds that it did not have room to accommodate him. As a result he had been obliged to secure the necessary treatment at a private hospital. It appeared from the judgment that the claimant could in fact have been accommodated in more than one of the hospitals which turned him away and that the persons responsible for that decision had been guilty of misconduct. There is no magic in the term ‘constitutional delict’, however. The act or omission would still have to satisfy the requirements of the law of delict before it could fall within the ambit of the law of delict. The added element would simply be that the delict constituted a violation of the Constitution. The unconstitutionality of the act or omission would go a long way to proving its unlawfulness. The question of whether it is constitutional to contract out of delictual liability was settled for the present in the case of *Afrax Healthcare v Strydom*¹⁹⁴ which has already been discussed but judging from the amount of criticism that this decision has attracted it is unlikely to be the last word on the subject for very long.

¹⁹² *Soobramoney* fn 28 *supra*

¹⁹³ *Paschim* 1996 (AIR) SC 2426.

¹⁹⁴ *Afrax* fn 65 *supra*

10.6.2 Unlawfulness

The element of wrongfulness or unlawfulness in the context of the law of delict is particularly well placed to accommodate the golden themes of reasonableness, public policy (*boni mores*), fairness and good faith. The courts have openly acknowledged that a determination of wrongfulness requires a value judgment¹⁹⁵. The values of South African society are to be found primarily in the Constitution whilst some writers¹⁹⁶ have argued that the legal convictions of the community at common law are wider than just those principles and values contained in the Constitution it is submitted that only to the extent that common law policy considerations can be regarded as logically and legally consistent extensions of the constitutional values and principles, can they legitimately be applied in deciding claims in the law of delict. Those that contradict constitutional values and principles clearly cannot stand. In the context of health care services, Burchell points out that a person who occupies a special or protective relationship towards another may be under a legal duty to protect that person from harm. For instance a gaoler is under a legal duty to protect a prisoner from being assaulted or to obtain prompt medical treatment for a sick detainee¹⁹⁷. The courts have recognized this principle *inter alia* in the cases of *Magware v Minister of Health NO*¹⁹⁸ and *Dube v Administrator Transvaal*¹⁹⁹.

10.6.3 Medicines and Medical Devices

The subject of medicines and medical devices raises the question of strict liability on the part of manufacturers in the health sector. It has been observed that in the United States strict liability for physical injury to person and property caused by defective products has been the result of long and complicated development and that the most common justification for strict liability is that the manufacturer has created the risk of personal injury or other tangible damage and should, therefore bear the consequences of the creation of the risk²⁰⁰. In South African law the principle enunciated in

¹⁹⁵ See for instance *Aucamp and Others v University of Stellenbosch* 2002 (4) SA 544 (C)

¹⁹⁶ Leinius B and Midgely JR "The Impact of the Constitution on the Law of Delict" (2002) 119 *South African Law Journal (SALJ)* p17

¹⁹⁷ Burchell fn 125 *supra* at p 43

¹⁹⁸ *Magware* 1981 (4) SA 472 (Z)

¹⁹⁹ *Dube* fn 146 *supra*

²⁰⁰ Burchell fn 125 *supra* at p246. He notes that Prosser and Keeton in *Prosser and Keeton on Torts*, p 678 identify four possible theories of recovery under the complexities of products liability law: '(1) strict liability in contract for breach of a warranty, express or implied; (2) negligence liability in contract for breach of an express or implied warranty that the

*Donoghue v Stevenson*²⁰¹ a manufacturer who intends his product to reach the consumer in the form in which it left him, with no reasonable possibility of intervening inspection, owes a duty to take care that the consumer does not suffer injury or loss as a result of using the product still generally prevails and delictual liability is for the most part fault based. In the case of medicines and medical devices their use contrary to the instructions of the manufacturer can have the effect of nullifying a claim in delict on the ground that the fault does not lie with the manufacturer but with the user. Moreover in situations in which medicines and medical devices are administered or applied by someone other than the patient, for example a health professional, the chain of causation and fault that might have led back to the manufacturer can begin and end with the health professional in question. The fact is that health products are not ordinary consumer goods and that their specialized nature complicates matters when it comes to questions of who in the supply chain is liable. Furthermore, medicines do not come with a guarantee of efficacy. Some medicines are more or less effective than others from one individual to another depending upon the infinite number of variations in biochemistry and illness within the human body. One person's medicine may quite literally be another's poison and this through no fault of the manufacturer. Strict liability would be particularly difficult to impose in the context of medicines in the absence of highly specific circumstances where the liability of everyone except the manufacturer can convincingly be ruled out.

In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*²⁰² the court considered just these circumstances with regard to a local anaesthetic called Regibloc. It was manufactured by the respondent, it was defective when it left the respondent's control, it was administered in accordance with the respondent's accompanying instructions, it was its defective condition which caused the alleged harm and such harm was reasonably foreseeable. The court observed that if there were strict liability, it would not be open to a manufacturer to rely on proof that it had taken all reasonable care, but then one must ask what real difference that is likely to make. It stated that once there is prima facie proof, direct or circumstantial, that the product was defective at the

product was designed and constructed in a workmanlike manner; (3) negligence liability in tort largely for physical harm to persons and tangible things, and (4) strict liability in tort largely for physical harm to persons and tangible things."

201 *Donoghue* [1932] AC 562 (HL)

202 *Wagener* 2003 (4) SA 285 (SCA)

various times material to the action, it is virtually inevitable that *res ipsa loquitur* will apply and require an answer from the manufacturer. It said that whilst the maxim comes into play only if the plaintiff's evidence is such that it can be said that the event (in this case, for example, the necrosis) would not ordinarily occur without there having been negligent manufacture (involving, perhaps, some scientific explanation in addition to the mere fact of the injury) it is perfectly conceivable that the courts may develop reasons for being readier in some cases of alleged defective manufacture to draw the necessary *prima facie* inference of negligence where expert evidence is extremely difficult for the plaintiff to acquire, and perhaps even more so where administration of a substance made to be applied to the human body has apparently had an effect quite contrary to the manufacturer's stated aim. The choice of a health professional of a particular medical device or medicine for use on or by a patient cannot be attacked on the basis of fault unless it was unreasonable when compared to the choices of other health professionals practicing the same discipline.

It is submitted with regard to medicines that product liability need not necessarily arise only from the *design* of the drug. This would involve largely patented drugs since generic drugs are not 'designed' to the same degree as much of the development work has already been done by the erstwhile patent holder. There may not be negligent deviation from the formula of the drug so much as negligence in the manufacturing process itself so that certain active ingredients are for instance inadvertently rendered inactive, or that specific storage conditions for the drug, such as refrigeration at a specific temperature, are not followed. No matter how well designed the drug is, manufacturing processes can and do go wrong. Accidents happen on the production line. Contamination of raw materials can occur. The raw materials can be obtained from an inferior source. Insufficient quality guarantees may be obtained by the manufacturer from the supplier of the active pharmaceutical ingredients. It is in recognition of these dangers that the medicines control legislation in South Africa requires manufacturers to comply with what is commonly referred to as GMP or "Good Manufacturing Practice". There is also the question of the indication for which the drug is registered in South Africa. It often happens that drugs are registered for more than one indication in other parts of the world or that new indications for existing drugs are subsequently discovered. The registration process requires approval of registration for specific indications of the drug and not just

blanket registration for every possible indication. The use of the medicine for an indication in respect of which it has not been registered can hardly be blamed upon the manufacturer in the absence of conduct on his part which promotes or advocates such use.

In *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* the court seemed to prefer the application and even extension of the *res ipsa loquitur* principle to the imposition of strict liability on the manufacturer of a product as being the lesser of two evils²⁰³ However, the predilection of the court in *Pringle v Administrator, Transvaal*²⁰⁴ to apply the doctrine only where the alleged negligence depends on absolutes does not take into account that where the alleged negligence is so dependent upon absolutes it is probably a lot easier for the defendant to produce evidence of negligence in the normal way and the application of the doctrine in such circumstances is likely to be unnecessary in many instances. Part of the reason for the transfer of the evidentiary burden to the defendant by *res ipsa loquitur* is precisely that the plaintiff does not necessarily know what exactly happened and is not necessarily even in a position to identify such 'absolutes'. It is submitted that such an extremely narrow approach defeats the object of the maxim to a large degree since one is effectively saying that the circumstances of the case must be such that there is no significant doubt that there was negligence due to the presence of the 'absolutes' in question.

10.6.4 Delict in the public v the private sector

There is no difference in principle between delicts committed by the state and those committed by private entities or persons. The private sector and the public sector tend to have certain operational differences with regard to the manner in which they render health care services and so in practice different emphases are likely to be placed on different aspects of the law of delict within the two sectors.

²⁰³ *Wagener* 2003 (4) SA 285 (SCA). Howie P stated at p 294: "As regards the problem of proving fault, counsel for the respondent pointed out that even if strict liability were imposed a plaintiff would still have to prove that the product concerned was defective when it left the manufacturer. If that were indeed established, then application of *res ipsa loquitur* would suffice to place the manufacturer on its defence and, in effect, compel an exculpatory explanation, if one existed. In the circumstances it was submitted that proving fault was really no more difficult than proving defectiveness."

²⁰⁴ *Pringle* 1990 (2) SA 379 (W)

Vicarious liability is, for example, of much greater interest to the public sector than the private sector in terms of the risks it poses simply because the public sector employs more kinds of health professionals than does the private sector. Furthermore the state, unlike the private sector does not purchase public liability insurance but self-insures instead which means that there is no sharing of risk by the public sector with other providers of health care services.

The public sector is concerned with the public demand for health care services in a quite different way to the private sector and legal issues involving the rationing of health care services, for instance, are much more likely to be an issue in the public sector than in the private sector.

In the public sector, by contrast, competitive issues are not nearly as significant as they are in the private sector although the sharp divide that once existed between these two sectors in terms of their respective 'turf' is becoming less distinct in that changes to medical schemes legislation allow for the designation by medical schemes of public health facilities as preferred providers and some public hospitals are actively targeting as patients medical scheme members.

In the private sector commercial considerations such as reductions in public liability insurance premiums, are more likely to lead to contractual avoidance of delictual liability whereas in the public sector the courts are likely to invoke the constitutional obligations of the state to strike down attempts at contractual avoidance of such liability.

10.6.5 Conclusions Concerning the Law of Delict

The law of delict in relation to health services delivery has its blind spots. The persistent refusal by the courts to apply the doctrine of *res ipsa loquitur* to claims involving health care services has recently been the subject of a doctoral thesis of its own²⁰⁵. Whilst the Supreme Court of Appeal has demonstrated the same unfortunate

²⁰⁵ See Van den Heever P, unpublished doctoral thesis entitled 'The application of the doctrine of *res ipsa loquitur* to medical negligence actions: A comparative survey' 2002 *University of Pretoria*. He revisits *Van Wyk v Lewis* fn 146



tendencies in the law of delict as it has in the law of contract to ignore the Constitution, the constitutional court has given some promising and enlightened judgments involving the law of delict such as *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*²⁰⁶. As regards the common law there are a great many more cases involving health care services that have been decided on the basis of the law of delict than on that of the law of contract with the courts displaying an apparent preference for the former where they have a choice. While the same set of facts can give rise to a claim both in terms of the law of delict and for breach of contract under the law of contract, it is preferable given the current weaknesses in the law of contract to have one's claim adjudicated in terms of the law of delict.

Although the law of delict essentially seeks to place the claimant in the position in which he or she found himself prior to the unlawful act or omission whereas the law of contract seeks to place the claimant in the position he or she would have occupied had the contract been fulfilled, in the context of health services delivery this is more often than not, a notional distinction at best since it is a general feature of the law of contract relating to health services delivery that the contract seldom guarantees a specific outcome. There is no implied or express undertaking to cure the patient except in specialised cases such as cosmetic surgery and sterilisation procedures in which the term 'cure' is itself usually inappropriate. Since pain and suffering and non-patrimonial loss are almost an inevitability in cases of breach of contracts for health services, and since the law of contract only recognises and permits damages for patrimonial loss, this is another reason to prefer the law of delict when dealing with claims involving health service delivery. Of course, such a choice is not always possible given that the elements of a delict, namely conduct that is unlawful, blameworthy and causes of damage or injury to property or person. The boundaries between the law of contract and the law of delict are by no means set in stone.

Burchell²⁰⁷ points out that a breach of contract is also a civil wrong but that the traditional approach has been to draw a distinction between a delict and a breach of

supra in extensive detail and comes to the conclusion that there was no reason in that case why the maxim should not have been applied and that the court in fact erred in stating that it was not applicable in the medical context.

²⁰⁶ *Carmichele* fn 144 *supra*

²⁰⁷ Burchell J fn 125 *supra* at p 3

contract in terms of a separate but equal approach. He notes that it was said that a delict consists of a breach of a duty imposed by law independently of the will of the party bound whereas a breach of contract consists of a breach of a duty voluntarily assumed. This distinction, says Burchell, is not entirely satisfactory for a number of reasons not least of which is that it describes a delict solely in terms of a breach of a duty, rather than an infringement of a right or interest. It is submitted that this distinction is clearly not in keeping with the central importance accorded to the concept of rights by the Constitution. Burchell states that the traditional distinction between delict and breach of contract also requires modification in the light of the Appellate Division decision in *Lillicrap, Wassenaar and Partners v Pilkington Bros*²⁰⁸. In his commentary on this case he observes that commentators have been equally consistent in their criticism of the judgment of Grosskopf AJA as they have been in praise of the approach taken by Smuts AJA. The thrust of the criticism of Grosskopf's judgment is that it draws too rigid a line between physical loss and pure economic loss and unduly prevents a desirable confluence of contract and delict. Burchell notes that there are differences between the remedy for breach of contract and for delict but states that where fault is present and no damages for pain and suffering are claimed, there is a major area of potential overlap between the two forms of civil remedy. It is submitted that even the justifications for differences between the two areas of the law in terms of the kinds of damages payable are flimsy enough in certain contexts, such as that of health care services, that one can argue that damages for pain and suffering should be payable in terms of the law of contract where such damages are an inevitable or probable consequence of breach. Burchell suggests that there is a possible and less stringent approach to Grosskopf AJA's reasoning. He asks whether Grosskopf AJA was not merely stating that an infringement of a pure economic loss interest (which may also amount to a breach of contract) *may* be unlawful in delict but is not *per se* unlawful since policy factors may militate against unlawfulness. It is submitted that Lillicrap's case is in a sense at the opposite end of the spectrum to delictual claims involving health services delivery in terms of a contract since in the former the applicant's sought to recover damages for purely patrimonial loss in terms of the law of delict because the claim in contract had prescribed. In the case of the latter the debate concerning the conflation of delictual and contractual remedies is

²⁰⁸ *Lillicrap* 1985 (1) SA 475 (A)

whether damages for non-patrimonial loss should be permitted in terms of the law of contract. It nevertheless illustrates the reluctance of the courts to permit cross-pollination between areas of law. Burchell states that a more helpful definition of a 'delict' is one which states the essence of the type of wrong concerned and which draws a fundamental distinction between criminal and delictual liability, while leaving open the possibility of a confluence of delictual and contractual liability²⁰⁹.

The law of delict is far from static and whilst the concerns around fuzziness of elements of the law of delict and the importance of legal certainty should not be downplayed, it is worth noting that the flexibility or fuzziness around the element of unlawfulness, based as it is on the *boni mores*, has been lauded by more than one academic writer and seems generally to have served the legal system well.

The question of causation is divided into factual and legal causation the latter being concerned with the limitation of liability on public policy principles. The *sine qua non* test generally works quite well in most cases but in situations where there are multiple probable causes that are so entangled that it is impossible to clearly identify a single cause the law of delict becomes more problematic. One solution put forward seems to be based upon the concept joint and several liability but this has been criticised and that there should in such cases be an open departure from the *conditio sine qua non* approach to factual causation. In such cases perhaps only the element of legal causation, as established on the basis of public policy principles, should be the deciding factor. In the health care context where there are a number of different health professionals taking care of a patient situations may arise where it is not always possible to establish whether the actions of a particular individual caused the harm. It is conceivable that the error of one can be compounded or exacerbated by others who should have picked up on it and failed to do so. In such situations the application of the *conditio sine qua non* test may well yield unsatisfactory results and the question of causation may have to be decided on the basis of legal causation alone.

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Burchell fn 125 *supra* suggests at p 10 the following definition: "A delict is an unlawful, blameworthy (i.e. intentional or negligent) act or omission which causes another person damage to person or property or injury to personality and for which a civil remedy for recovery of damages is available." He points out, however, that one disadvantage of this definition is that it does not accommodate an important, fast developing fact of the law of delict – liability based not on fault but strict or no-fault liability.

Whilst the courts in the past²¹⁰ have tended to refer to the right to security of the person as an absolute right this clearly is no longer correct under the present constitutional dispensation. The right to security of the person is now expressed in section 12 of the Constitution and all constitutional rights are relative as was pointed out earlier in this chapter. They are all interdependent and interrelated. Informed consent is essential in order to justify conduct which would ordinarily constitute a violation of the right to freedom and security of the person and bodily and psychological integrity. It is therefore a concept which is totally consistent with these rights and also the right to human dignity in the Constitution. The National Health Act enacts certain provisions which will have the effect of creating statutory requirements for informed consent whereas previously it was a purely common law construct. The provisions in the Act are, however, fairly comprehensive and if anything broaden the common law concept of informed consent in providing that where a person other than the patient has the power to give consent on the patient's behalf, the patient must nevertheless wherever possible be consulted and informed at a level best suited to his or her capacity and understanding of the treatment to be administered and his or her wishes must be taken into account. This is important for the protection, and promotion of the patient's right to human dignity even where the patient is a child or a very old person whose mental faculties may not be what they were in her youth .

10.7 In Conclusion

The law as it relates to health service delivery is clearly a complex and voluminous topic to which a single thesis, no matter how ambitious, can only partially do justice. Nonetheless it has become clear in the course of the journey reflected within this thesis that health care law in its broadest sense, including medical law, is a worthy subject of study, debate and discussion in its own right. The factual context in which law is applied is becoming increasingly important since legal principles considered in the abstract can at best only deliver abstract answers that have no practical relevance for the real world. It is when one contextualises the law, for instance in the area of health care, that one realises its significance and its strengths and weaknesses in that context. Health care law is an internationally recognised subject that is not necessarily

²¹⁰ For instance in *Stoffberg v Elliott* 1923 CPD 148

widely taught or even accepted as a legitimate area of study by some South African universities. This is unfortunate. The law of contract as it relates to information and telecommunication systems, it is submitted, is very different in practical terms to the law of contract as it relates to the media or to health care for the simple reason that the context in which the law is applied cannot be separated from the law itself. Considerations of public policy, of which the law expressly takes cognisance, as is clear from the examination in this thesis of international, constitutional, administrative, contractual and delictual law, can be very different, depending on the context. Furthermore, what is fair and reasonable in a purely commercial context may not be fair and reasonable in a public health context. The view of health care as a public good is at odds with the need of the private health sector to make a profit. Health law straddles commercial law as well as human rights law. Just as there is tension is within international law with regard to the exploitation of intellectual property and trade rights as opposed to international human rights so in health law there is a tension between humanitarian beneficence and the need to make money. Even in the public sector, which is not profit driven, the management of income and expenditure presents a constant headache to health officials who must find ways to optimise the utilisation of resources. There is a significant ethics base with regard to health care that quite possibly has no parallel in any other area of human activity. Since the time of Hippocrates people have discussed and debated the many and varied aspects of health ethics. The ethical aspects of health care must have an influence on the health law to which they are so closely related by way of public policy. After all principles of ethics are in many ways distillations of the *boni mores* or public policy in a particular area.

Health care is an area of many legal interfaces such as the interface between the law of contract and the law of delict or that between constitutional law and the law of contract or that between administrative law and constitutional law or that between the law of delict and constitutional law. The Constitution itself underpins them all. The five areas of law that have been chosen for study are considered not only in terms of their own content but also in terms of their interaction with one another. It is only upon the examination of boundary conditions that many areas of knowledge become meaningful. Health law abounds with boundary conditions. One can study the content of the individual traditional branches of law up to a point but the concept of a legal

system only becomes meaningful when one also examines the friction between its elements and the manner of their interaction. The five areas of law examined in this thesis are the major building blocks for health law in South Africa but one cannot derive a significant understanding of health law by studying them separately. It is only in combining them in the context of health care that one comes up with a legal discipline in its own right. This study of the law of health care thus demonstrates that the whole is more than the sum of its parts.

It has been shown in this thesis that the five areas of law considered are but facets of a larger whole, that they are not discrete and cannot be isolated from the broader underlying constructs that link them all. The crystal lattice that binds and structures them into the greater whole of a legal system consists of the principles and values expressed in the Constitution. The Constitution thus manifests not only as a single facet of the law. It also represents its underlying molecular structure. There is consequently no better way of perceiving its internal harmony and construction than to examine a number of areas of law and the manner in which they interface. A further benefit is that this promotes greater internal consistency within the legal system and strengthens and enriches each of the different facets of law through a process of logical and moral reinforcement by the others. Like most crystals, the law is not perfect. It has its flaws and these have been highlighted as they have emerged from the study embarked upon in this thesis. Like crystals in their natural environment, the law is capable of refinement, growth and development. It is subject to all kinds of environmental pressures and forces. It is a dynamic system. Herein lies hope for positive change and growth and the possibility of remedying the flaws that impair its purity and beauty. For the law is beautiful. It has a certain elegance of logic, a certain rightness of reason, which when correctly understood and applied, is no less entrancing than the constructs of higher mathematics.