ADOPTING EVIDENCE-BASED JUDICIAL REVIEW TO DETERMINE THE
CONSTITUTIONALITY OF THE LAW THAT REQUIRES HIV-TESTING BEFORE
SURGICAL AND DENTAL PROCEDURES: THE CASE OF BOTSWANA’S PUBLIC
HEALTH ACT OF 2013

by

TUMELO AUDREY KWAPE

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PROFESSOR ANNELIZE NIENABER

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# LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tr>
<td>AIDS</td>
<td>Acquired Immunodeficiency Syndrome</td>
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<tr>
<td>ARASA</td>
<td>AIDS and Rights Alliance of South Africa</td>
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<tr>
<td>CC</td>
<td>Constitutional Court</td>
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<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic and Socio-Cultural Rights</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
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<tr>
<td>PEP</td>
<td>Post-Exposure Prophylaxis</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>SCA</td>
<td>Supreme Court of Appeal</td>
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<td>SALC</td>
<td>Southern African Litigation Centre</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNAIDS</td>
<td>Joint United Nations Program on HIV/AIDS</td>
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<tr>
<td>UNHCHR</td>
<td>United Nations High Commission for Human Rights</td>
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<td>WHO</td>
<td>World Health Organisation</td>
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ABSTRACT

In 2013 the legislature of Botswana passed a new Public Health Act (the Act). Section 109 of the Act requires HIV-testing before non-urgent surgical and dental procedures. The legislators did not explicitly state the purpose of the provision. Utilising the models and canons of interpretation, the study demonstrates that section 109 of the Act was intended to prevent or reduce the risk of HIV transmission from patient to healthcare professional during dental or surgical procedures. It also demonstrates that section 109 limits the enjoyment of several of the patient’s constitutional rights, including the right to life, the right to privacy and the right to equality and non-discrimination.

The study contends that evidence-based judicial review should be adopted when determining the constitutionality of the infringement of rights caused by a provision that prima facie places a limitation on rights. It further demonstrates that the values of accountability, openness, democracy and justification inherent in a constitutionality analysis may be successfully achieved through the model of evidence-based judicial review. In the end, the study applies evidence-based judicial review in its determination of the constitutionality of the infringements caused by section 109 of the Act. It concludes that the lack of complete and reliable information proving that measures prescribed in section 109 of the Act are proportional to the ends they seek to achieve renders the provision unreasonable and therefore unconstitutional.
CHAPTER 1

1. Background

Botswana recorded her first case of human immunodeficiency virus (HIV) infection in 1985.\textsuperscript{1} Today she stands as the third most affected country in the world, with an HIV prevalence rate of 18%.\textsuperscript{2} HIV and opportunistic infections are the main reason for most hospital admissions.\textsuperscript{3} At least 50% of public hospital beds are occupied by HIV patients.\textsuperscript{4} The high number of HIV patients admitted to hospitals and clinics exposes health professionals to a high risk of HIV transmission.\textsuperscript{5}

The World Health Organisation (WHO) estimates that, out of the 35 million health workers in the world, three million sustain occupational injuries each year.\textsuperscript{6} In consequence of the three million occupational injuries, more than 500 healthcare workers are infected with HIV.\textsuperscript{7} In Botswana, a study carried out in 2016 recorded that the prevalence of needle stick and sharp object injuries in six months was 11.8%. However, besides the first case of occupational transmission that was reported in 1987,\textsuperscript{8} no epidemiological study has been undertaken showing the total number of HIV infections resulting from occupational injuries.

In order to provide a safe working environment for health professionals, the government of Botswana promulgated a new Public Health Act\textsuperscript{9} (the Act) containing provisions that are intended to prevent and reduce the risk of HIV transmission from a patient to a health professional during medical healthcare.\textsuperscript{10} These provisions allow the health professional to require the patient to undergo HIV-testing before non-urgent surgical and dental health procedures.\textsuperscript{11} If the patient refuses to be tested, the medical professional can proceed in accordance with one of the stipulated alternatives. First, the medical professional may treat the patient, but with strict adherence to universal precautions;\textsuperscript{12} second, the medical professional...
may transfer the patient to another health professional and third, the medical professional may seek guidance from the Director on how to proceed.

2. Problem statement

It is commonly understood that any measure implemented by the government to control the transmission of HIV should be in accordance with the human rights-based standard. This standard requires a ‘conceptual framework for the process of human development that is normatively based on international human rights standards, and operationally directed to promoting and protecting human rights’. The human rights-based approach strongly emphasises respect for human rights, which include among others, the right to privacy, right to access to health services, right to equal protection and freedom from discrimination. The Constitution guarantees the enjoyment of these rights.

There is consensus among a number of authors and non-governmental organisations that the law that requires HIV-testing before surgical and dental procedures does not meet the human rights standard, in that it substantially limits the enjoyment of human rights guaranteed in the Constitution and international instruments. However, its constitutionality has not yet been challenged before the court. This study points out the challenges that may be encountered by the litigants and the judges in future when the constitutionality of the law is challenged.

The first challenge relates to the content of the law itself. The legislators did not explicitly stipulate the purpose or intended aim of the law that requires HIV-testing before surgical and dental procedures. It is a paramount principle of constitutional litigation that any

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13 As above.
14 As above.
17 Art 17 CCPR, and Art 12 Universal Declaration.
18 Art 25 Universal Declaration; Art 12 CESR; Art 6 African Charter and Art 6 CCPR.
19 Art 3 African Charter; Art 2 & 7 Universal Declaration; Art 26 ICCPR; Art 2 CESR.
20 Constitution of the Republic of Botswana 1966. See sec 9(1) - the right to privacy, sec 4(1) - right to life & sec 3 & 15 - right to equality and freedom from discrimination.
law that limits the enjoyment of constitutional rights should be subjected to a reasonableness test.\textsuperscript{21} Part of applying the reasonableness test requires the court to determine whether the plaintiff has proved, on the balance of probabilities, that the law is envisioned to achieve a legitimate aim, and whether the measures adopted are proportionate to the intended aim.\textsuperscript{22} Because of the lack of clarity on the intended purpose of the law that requires HIV-testing before surgical and dental procedures, the future litigants may be inhibited from challenging its constitutionality. Furthermore, when the issue is brought before the court, the legislators may come up with a biased intention. In order to address this challenge, this study applies the literal and purposive methods of interpretation, together with the canons of interpretation, to ascertain the legislative intention or purpose of the law that requires HIV-testing before surgical and dental procedures.

The second challenge relates to the lack of clarity on whether the law indeed infringes constitutional rights. It is observed that the arguments made so far about the implications of the law on the right to privacy and non-discrimination have not been made with sufficient particularity. Furthermore, the authors have neglected to apply their minds to whether the law infringes the right to life. Therefore, this study canvasses the nature of the right to privacy and non-discrimination and how the law that requires HIV-testing affects them. It also illustrates how the law affects the right to life.

The third challenge involves the appropriate approach that the court should adopt when applying the standard of reasonableness. It is observed that the courts have not been able to formulate a consistent approach to be applied when determining the reasonableness of the law that limits the enjoyment of human rights. While some courts applied an evidence-based judicial review approach during their reasonableness analysis,\textsuperscript{23} others have refrained from applying it.\textsuperscript{24} In terms of an evidence-based judicial review approach, the court charged with determining whether the limitation is reasonable should inquire whether the legislative fact underlying the enactment is informed by reliable and complete evidence.\textsuperscript{25} An evidence-based judicial review subjects any law that limits the enjoyment of human rights to an evidence-based

\textsuperscript{21} \textit{State v Marapo} (2002) AHRLR 58 para 16; \textit{Attorney General v Othomile} 2004 1 BLR (CA).
\textsuperscript{22} As above. See also \textit{S v Makwanyane} 1995 3 SA 391 (CC).
\textsuperscript{23} As above.
\textsuperscript{24} \textit{Makuto v S} 2000 (2) BLR 130 (CA); \textit{Mazibuku v City of Johannesburg} 2010 4 SA 1 (CC); \textit{Residents of Slovo community, Western Cape v Thubelisha homes} 2010 3 SA 454 (CC); \textit{Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism} 2004 4 SA 490 (CC).
\textsuperscript{25} n 21 above.
judicial analysis. The court is not allowed to defer to the evidence presented by legislators and every piece of evidence presented before it is useful.

Courts that chose not to adopt evidence-based judicial review are of the view that courts should refrain from interfering with any law that is informed by complex expert evidence or polycentric information. Oftentimes, the courts argued that the matters that involve complex evidence should be left solely to the decision of legislators, not the judiciary. They believe that by making a judicial pronouncement on issues that involve complex evidence, the judiciary usurps executive and legislative powers.

Since an assessment of the reasonableness of the law that requires HIV-testing before surgical and dental procedures may require an assessment of complex scientific and statistical evidence on the transmission of HIV, the court may be required to make a choice between these polar opposite approaches. The high number of judicial decisions and scholarly articles arguing that the court should refrain from interfering with laws that are informed by expert evidence, and the few supporting the court to inquire into laws that involve expert evidence may influence the court charged with a duty to determine the constitutionality of the law that requires HIV-testing to refrain from adopting an evidence-based judicial review approach.

Therefore, this study defends the adoption of evidence-based judicial review. It is argued that evidence-based judicial review is essential for the effective protection of constitutional rights. The study also shows that the realisation of the values of accountability, openness, and justification underpinning the standard of reasonableness can be perfectly achieved through the evidence-based review approach. It submits that the reasonableness of the law that requires HIV-testing before surgical and dental procedures should be determined by adopting an evidence-based judicial review approach.

26 As above.
27 As above.
28 n 24 above.
29 As above.
30 As above.
31 n 24 above. See also DM Davis ‘To Defer and Then When? Administrative Law and Constitutional Democracy’ 2006 23 Acta Juridica 26. According to Davis, the substance of decisions made by government agencies is not appropriate to judicial decision-making, particularly because of the polycentricity of task and consequence, and that the government official or agency is an expert or at least more of an expert than the court deciding the issue in question. These views were adopted by the Court in the case of Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC) para 48.
32 n 21 above.
Since ‘evidence-based judicial review’ is a newly conceptualised term, part of this study outlines the scholarly debates that led to its conceptualisation. The study also canvasses the scholarly definitions of the evidence-based judicial review and recommends what it posits as ‘the most appropriate meaning of evidence-based judicial review’. It also provides a scholarly contribution to the sources of information that should be used by the court applying an evidence-based judicial review. The concept of evidence-based judicial review as used in the study is in the context of suggested reforms.

3. **Research questions**
   
i) What was the intended aim of the law that requires HIV-testing before surgical and dental procedures?

   ii) Does the law that requires HIV-testing before surgical procedure limit the enjoyment of constitutional rights?

   iii) What is the evidence-based judicial review approach and is it necessary for the protection of constitutional rights?

   iv) Can an evidence-based judicial review be legitimately applied under the reasonableness standard?

   v) If the answers to (ii) and (iv) are in the affirmative, is there complete and reliable scientific or statistical evidence in support of the legislative facts showing that the law that requires HIV-testing is reasonable? (This essentially involves the adoption of evidence-based judicial review to assess the reasonableness of the law that requires HIV-testing before surgical and dental procedures.)

4. **Research assumptions**
   
i) The law that requires HIV-testing before surgical and dental procedures was intended to prevent HIV transmission from patients to healthcare professionals during surgical and dental health procedures.

   ii) The law that requires HIV-testing before surgical and dental healthcare limits the enjoyment of constitutional rights.

   iii) Evidence-based judicial review is a model of judicial review in which the court is obliged to assess whether the legislative facts leading to the enactment in dispute were founded on complete and reliable evidence. It is necessary for the effective protection of human rights.
iv) Evidence-based judicial review may be legitimately applied under the reasonableness standard.

v) There is no sufficient and reliable evidence showing that the law that requires HIV-testing before surgical and dental procedures is consistent with the reasonableness standard.

5. **Review of existing scholarly literature**

The provision that requires HIV-testing before surgical and dental procedures in the Public Health Act 2013 is fairly new, thus research on its constitutionality is limited. There are no textbooks dealing with the subject. Only one journal article dealing with the subject was found. Most writings about the law that requires HIV-testing before surgical and dental procedures were authored by activist groups and non-governmental organisations (NGOs).

According to a journal article by Sarumi, the HIV-testing provision in the Public Health Act 2013 violates individual rights and will place health professionals in a position where they will have to choose between acting lawfully or ethically. He recommends law reform to ensure that HIV-testing achieves the joint goals of public health and human rights. Although Sarumi observes that the law infringes human rights, he does not state the rights infringed, why he is of the view that they are infringed and how they are infringed. Furthermore, Sarumi’s study does not include the question of whether the infringement is reasonable or constitutional.

In February 2013, an NGO, Botswana Network on Ethics Law and HIV and AIDS, in partnership with other NGOs, such as AIDS and Rights Alliance of South Africa (ARASA), and the Southern African Litigation Centre (SALC), wrote a letter to the Botswana National Assembly recommending that the Public Health Act should be reformed to ensure that HIV-testing practices are not detrimental to patients’ rights. The letter also alluded to the fact that the HIV-testing provisions in the Act are ambiguous and can be interpreted to refuse HIV-positive patients’ access to surgical and dental procedures. Like the work of Sarumi, the letter

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34 As above.
35 As above.
36 As above.
38 As above.
did not address the issue of the constitutionality of the limitation resulting from the Act. The letter is very short and does not delve into the discussion on the purpose of the law and how the rights are infringed.

According to a report by SALC, sections 109(3) and 109(7) should be deleted because they violate the right to equal protection and freedom from non-discrimination guaranteed in the Constitution. Moreover, ARASA argues that the law should be revised and replaced by legislation that recognises and protects the rights of people living with HIV. Neither ARASA nor SALC addressed the issue of the constitutionality of the limitation. Although ARASA is of the view that the law should be replaced by another, it does not provide guidance on how it should be improved.

The small volume of writing on the law that requires HIV-testing before surgical and dental procedures, particularly an interpretation on its purpose, the human rights it infringes and how it infringes them, gives this research the latitude to explore the chosen subject without replicating a similar study.

There are also no textbooks, journal articles or doctoral studies providing a consistent and coherent approach that Botswana’s courts should adopt when applying the reasonableness test. Currently, constitutional jurisprudence is characterised by diametrically opposite viewpoints on the issue. While some courts chose to adopt an evidence-based judicial review approach, others did not.

This study defends an evidence-based judicial review approach. It illustrates how it is important for the effective protection of human rights, and how it can be legitimately applied in the reasonableness test. In the end, the study applies an evidence-based approach to determine the reasonableness or constitutionality of the law that requires HIV-testing before surgical and dental procedures.

6. Research methodology
The method of literature study used is a desktop study. The literature consists of:

- Relevant textbooks and journal articles on legal interpretation;

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41 See n 21 & 24 above.
42 As above.
• Relevant journal articles and policy documents on the benefits of HIV-testing before surgical and dental procedures;
• Journal articles on the concept of evidence-based judicial review;
• Botswana and South African judicial decisions in which the courts adopted evidence-based judicial review;
• Botswana and South African judicial decisions in which the courts refrained from adopting an evidence-based judicial review;
• Relevant journal articles, policy documents and guidelines showing whether there is sufficient scientific evidence proving the justifiability of law requiring HIV-testing before surgical and dental procedures.

7. Limitation of the study
• The focus of the study is limited to the implications of the law on three main constitutional rights: right to life, right to privacy and right to equality and non-discrimination. The study does not extend to the implications of the law for other constitutionally protected rights.

• Because of time constraints, the study did not discuss all the cases in which the courts applied evidence-based judicial review and all the cases that missed an opportunity to do so. It is taken that the few cases discussed were sufficient to illustrate the apparent inconsistencies in the application of evidence-based judicial review.

• The study discusses the adoption of evidence-based judicial review in constitutional cases only. It does not establish whether an evidence-based judicial review should be established in judicial decisions that do not involve constitutional matters.

8. Structure of the study
• Chapter 1 is the introduction.

• Chapter 2 outlines the law that requires HIV-testing before surgical and dental procedures. Thereafter, it applies the principles and the canons of legal interpretation to ascertain the purpose that the legislature intended to achieve.

• Chapter 3 discusses the human rights implications of the law that requires HIV-testing before surgical and dental procedures. It thoroughly discusses the nature of the right to life, right to privacy and right to equality and non-discrimination and further illustrates
how the law that requires HIV-testing before surgical and dental procedures infringes them.

- Chapter 4 discusses the concept of evidence-based judicial review, particularly the genealogy of the concept, critical analysis of its existing scholarly definitions and how such definitions may be improved. The chapter illustrates that the concept of evidence-based judicial review has not been consistently applied in Botswana and South African decisions. In so doing the chapter cites the judicial decisions where evidence-based judicial review was applied and the ones in which the court refrained from applying it. In light of these decisions, the chapter illustrates how the adoption of evidence-based judicial review in the reasonableness test is essential for the effective protection of human rights.

- Chapter 5 applies an evidence-based judicial review approach in the assessment of the reasonableness of the law that requires HIV-testing before surgical and dental procedures. It begins by thoroughly discussing the nature of the reasonableness standard. It illustrates that the inherent values of the reasonableness standard, being openness, accountability and justification, permits the adoption of evidence-based judicial review in the reasonableness standard. The chapter concludes by adopting evidence-based judicial review in the assessment of the reasonableness of the law that requires HIV-testing before surgical and dental procedures.
CHAPTER 2
THE LEGISLATIVE PURPOSE OF HIV-TESTING BEFORE NON-URGENT DENTAL AND SURGICAL PROCEDURE

1. Introduction
This chapter determines the legislative purpose or rationale of the law requiring HIV-testing before surgical and dental procedures. The first part of the chapter gives an overview of the HIV-testing framework of Botswana Public Health Act 2013, including provisions requiring HIV-testing for non-urgent dental and surgical procedures. The second part of the chapter is partitioned into two stages: First, a literal-meaning interpretive approach is applied to establish the ordinary meaning of the law requiring HIV-testing for non-urgent surgical and dental procedures and second, a purposive interpretive approach is applied to determine its legislative purpose or rationale.

2. Overview of HIV-testing framework of Botswana Public Health Act 2013
The law governing HIV-testing in Botswana forms part of the Public Health Act (the Act). The provisions requiring HIV-testing are divided into six main categories: a) Voluntary and routine HIV-testing, b) HIV-testing in the interest of public health, c) HIV-testing in the unconscious patient’s medical interest; d) HIV-testing of a person convicted of rape or defilement, e) HIV-testing of a person who donates blood or tissue, and f) HIV-testing before a person undergoes dental or surgical procedures, where the procedure is not urgently required.

a) Voluntary and routine HIV-testing
The Act contains provisions relating to voluntary and routine HIV-testing. Although both tests are conducted with the individual’s consent, the order in which they are conducted differs.

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1 Public Health Act 11 of 2013.
2 Secs 104(1) & 105(1)(a), (b) & (c).
3 Sec 104(3)(b).
4 Sec 105(2).
5 Sec 106.
6 Sec 109.
7 n 2 above.
While voluntary HIV-testing is conducted at the individual’s request, routine HIV-testing is initiated by a healthcare professional and a patient is given the option to decline the test.

b) HIV-testing in the interest of the public or public health

The Act empowers the Director of the Department of Health or any authorised person to request any person or a specified class of individuals to submit to an HIV test. According to section 104(4) of the Act, if the person requested to be tested for HIV under sub-section three refuses to submit to an HIV test, the Director must apply to an appropriate magistrate’s court for an order compelling such a person to submit to the required test. In determining whether or not to order the patient to submit to an HIV test, the magistrate must consider three main grounds, namely whether there has been a risk of exposure to HIV transmission, the right to information of an individual at risk of HIV transmission, and the availability of HIV medication. The magistrate must make the order sought only when he or she is convinced on a balance of probabilities that the order will be in the interest of public health or public interest.

c) HIV-testing in the interest of a patient

A medical practitioner may cause his or her patient to undergo an HIV test without consent if the patient is unable to give informed consent, and the medical practitioner is of the view that an HIV test is medically required or necessary for the patient’s health. The Act indemnifies any medical practitioner who has performed a test for this purpose from any civil or criminal liability.

d) HIV-testing for a person convicted of rape and defilement

Any person convicted of the offence of rape or defilement under the Penal Code is compelled to submit to an HIV test.

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11 O’Grady (n 9 above) 6-7.
12 n 3 above.
13 Sec 104(6)
14 Sec 104(7).
15 Sec 105(2).
16 Sec 105(3).
17 Penal Code 2 of 1964 (as amended up to Act 14 of 2005).
18 n 5 above.
e) HIV-testing of a person who donates blood or tissue

A person who proposes to donate any tissue, or whose tissue is proposed to be donated, must submit to an HIV test immediately before the donation.\(^{19}\) The same applies to a person who donates blood.\(^{20}\) Such blood tests must be undertaken in terms of procedures and guidelines prescribed by the Minister from time to time by way of ministerial regulations.\(^{21}\)

f) HIV-testing for surgical and dental procedures

The Act further provides for HIV-testing for surgical and dental procedures in section 109. In order to avoid distortion of interpretation, the section is quoted in full: \(^{22}\)

1) Before carrying out a surgical or dental procedure in respect of a person, a medical practitioner, nurse or dental practitioner shall assess whether or not the procedure is urgently required.

2) Where in the opinion of the medical practitioner, nurse or dental practitioner, the surgical or dental procedure is required in respect of a person, the medical practitioner, nurse or dental practitioner shall:
   a) carry out the appropriate procedure;
   b) refer the person to another medical practitioner, nurse or dental practitioner, as appropriate, who is available to carry out the urgently required procedure; or
   c) seek advice from the Director in relation to appropriate action in respect of that person.

3) Where, in the opinion of a medical practitioner, nurse or dental practitioner, the surgical or dental procedure is not urgently required in respect of a person, the medical practitioner, nurse or dental practitioner may require the person to undergo an HIV test before carrying out that procedure.

4) Where a person undergoes an HIV test after being required to do so in terms of subsection three and the result is positive, the medical practitioner, nurse or dental practitioner shall:
   a) carry out the appropriate surgical or dental procedure;
   b) refer the person to another medical practitioner, nurse or dental practitioner, as appropriate, who is available to carry out the procedure; or
   c) seek advice from the Director in relation to appropriate action in respect of that person.

5) Where the person refuses to undergo an HIV test after being required in terms of subsection three, the medical practitioner, nurse or dental practitioner concerned shall:
   a) carry out the appropriate procedure;
   b) refer the person to another medical practitioner, nurse or dental practitioner, as appropriate, who is available to carry out the procedure; or
   c) seek advice from the Director in relation to appropriate action in respect of that person.

\(^{19}\) n 6 above.
\(^{20}\) As above.
\(^{21}\) Sec 107.
\(^{22}\) Sec 109.
6) A medical practitioner, nurse or dental practitioner who carries out a medical or dental procedure under this section shall carry it out in accordance with such guidelines as may be issued by the Minister.

7) This section shall not interfere with the right of the medical practitioner, nurse or dental practitioner to make a decision on medical grounds, whether or not to carry out any surgical or dental procedure irrespective of the result of the HIV test.

3. Interpretation of the legislative purpose of section 109 of the Public Health Act

A rationale for the law requiring HIV-testing before surgical and dental procedures is not explicitly provided in the Act. However, it can be construed by ‘dealing with the text’ itself through the application of the canons of statutory interpretation. A double synthesis of the literal and purposive approaches will therefore be applied below to construe and/or ‘retrieve’ its reasonable legislative purpose or rationale. The augmentations catering for inadequacies inherent in these canons and aids of statutory interpretations will also be applied.

3.1. Literal (or text-based) approach

A literal approach originates from English law. Its classic formulation is the one articulated by Innes J, in the case of *Venter v R.* According to Innes J, the literal rule requires the legislative intention to be ascertained by taking cognisance of the language of the instrument as a whole. Where the words are unambiguous and clear, the court should place upon them their ordinary

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24 According to Du Plessis (n 22 above) 595 there is a distinction between canons and aids of construction. Canons include ordinary-meaning rules (text-based approach) that are couched prescriptively right from the outset.

25 As above. Du Plessis is of the view that ‘aids to construction include preambles or long titles and texts or text-components that inform the construction of enacted provisions to which they relate on the strength of the prescriptive force which they derive from canons of construction authorising and regulating interpretive reliance on them’.

26 EA Kellaway *Principles of legal interpretation of statutes, contracts and will* (1995) 189. Kellaway argues that using only one form of interpretation puts the evaluation in a poor light and he suggests that a triple synthesis of literalism, intentionalism and purposiveness should be applied to interpret a statute. A different approach is taken by Du Plessis in his book, LM Du-Plessis *Re-interpretation of statutes* (2002) 65. He argues that the theory of intentionalism is analogous to literalism. I concede to Du Plessis’s proposition and as such I am of the view that it will be duplication of efforts to make an analysis on the basis on both intentionalism and literalism. I will therefore apply the double synthesis approach instead of the triple synthesis approach suggested by Kellaway.


28 (1907) TS 910 913.

29 *Venter v R* (n 28 above) 918-919.
The ordinary and grammatical meaning of the text is regarded as representative of the intention of the legislature.\textsuperscript{31}

In terms of the literal rule, the court can deviate from adopting the ordinary meaning only where the ordinary meaning would lead to absurdity, repugnancy or inconsistency with the rest of the Act.\textsuperscript{32} This deviation is widely understood as the golden rule of interpretation.\textsuperscript{33} It allows the court to look at the secondary aids of construction to ascertain the intention of the legislature.\textsuperscript{34} The secondary aids of construction include the title of the statute, heading, chapters and sections.\textsuperscript{35} In the event that the secondary aids of construction are insufficient to establish the intention of the legislature, the court can make use of common law presumptions.\textsuperscript{36} If the judge is of the opinion that the intention of the legislature can be construed from the ordinary meaning, no further recourse would be had to other aids to interpretation.\textsuperscript{37}

Section 109 of the Act is couched in plain and unambiguous terms. It clearly provides that, before any surgical or dental procedure, a medical practitioner, nurse or dental practitioner is required to determine whether a dental or surgical procedure is urgent. In the event that the surgical or dental procedure is not urgent, a medical professional may require the person to undergo an HIV test before carrying out that procedure. Where the result of the HIV test is positive or the patient refuses to undergo the HIV test as required, a medical professional is given the power to proceed on the basis of one of three independent alternatives: that he or she may perform the procedure, refer the patient to another health professional or seek advice from the Director on the appropriate action to be followed.

A medical professional who decides to carry out a dental or surgical procedure on a patient who has been proven to be HIV-positive or whose status is unknown is mandated to follow the precautionary measures recommended in the Minister’s guidelines. These

\begin{flushleft}
\textsuperscript{30} As above. \\
\textsuperscript{31} As above. \\
\textsuperscript{32} As above. \\
\textsuperscript{33} As above. \\
\textsuperscript{34} As above. See also CJ Botha Statutory interpretation: an introduction for students (2012) 68; Principal Immigration Officer v Hawabu 1936 (AD) 27 31. \\
\textsuperscript{35} As above. \\
\textsuperscript{36} Botha (n 32 above) 69; L Baxter Administrative law (1984) 314. \\
\textsuperscript{37} FK Mdumbe ‘Has the literal/intentional/textual approach to statutory interpretation been dealt the coup de grace at last? Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 7 BCLR 687 (CC)’ South Africa Public Law Journal 472-481.
\end{flushleft}
guidelines require strict adherence to universal precautions and sterile techniques, regardless of one’s HIV status. It is apparent from the above-mentioned provisions that only a patient who refuses to be tested and one who tests positively are subject to the medical professional’s discretion on whether or not the patient should be provided with surgical and dental care. The Act further mandates the medical professional to follow precautionary measures provided in the Minister’s guidelines, in the event he or she decides to carry out the procedure on an HIV-positive patient or one who refuses to be tested.

The ordinary reading of section 109 of the Act reveals that the legislature intended to prevent HIV transmission from patient to healthcare professional during surgical and dental procedures. The Act gives the medical practitioner the discretion either to transfer the HIV-positive patient or one whose status is unknown to another healthcare professional or seek advice from the Director on how to proceed with the dental or surgical procedure. In the event the healthcare professional decides to carry out the procedure on an HIV-positive patient, or one who status is unknown, he or she is mandated to follow precautionary measures. The legislative intention to prevent HIV transmission during occupational healthcare is consistent with the intended theme and purposes of section 109 of the Act. It is explicitly stated in the Act that every provision regarding HIV infection is intended to promote HIV-testing, prevention and control. Since there are other provisions promoting HIV-testing under the Act, section 109 cannot be said to have been intended for the promotion of HIV-testing.

3.2. Purposive approach

Some authors argue that the legislator’s true intention cannot be ascertained by a mere application of a literal interpretative approach. They contend that the literal or the text-based approach should be concomitantly applied with the purposive approach. These arguments are bolstered by the minority decision of Schreiner JA in the case of Jaga v Donges. He remarked
that the interpretation of the words and expressions used in a statute in light of their context\(^{46}\) and in accordance with their ordinary meaning are of equal importance.\(^{47}\) He further cautioned that, for an interpreter to ascertain the legislative purpose, attention should be paid to the wider context of the provision, even where its grammatical meaning seems to be clear and unambiguous.\(^{48}\) The same sentiments are held by Botha.\(^{49}\) He argues that a determination of the textual meaning of the provision can only be regarded as the most preliminary stage of construing the meaning of a provision and that the purpose of the statute is one that qualifies the meaning of the text.\(^{50}\)

Purposive interpretation assists the interpreter with most probable meanings of the law in relation to its purpose.\(^{51}\) In the case of \textit{Heydon},\(^{52}\) Lord Coke provides a four-layered approach to be followed in determining the legislative purpose of an enactment, where the purpose is not explicitly provided. He held, in principle, that the following should be considered:

a) What was the common law before the making of the enactment?

b) What was the mischief or defect for which the common law did not provide?

c) What remedy has Parliament resolved and appointed to cure the mischief and the defect?

d) What was the true reason for the remedy?\(^{53}\)

\(^{46}\) That is looking at the overall purpose of the statute, beyond the textual meaning by way of applying aids of construction, as explained by Du Plessis above.


\(^{48}\) n 28 above.

\(^{49}\) Botha (n 32 above) 68. See also \textit{University of Cape Town v Cape Bar Council} 1986 4 SA 903 (A); \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs} 2004 4 SA 490 (CC) para 90; \textit{Thoroughbred Breeders Association v Price Waterhouse} 2001 4 SA 551 (SCA) para 12; \textit{S v Tieties} 1990 2 SA 461 (A). In these cases, the highest courts have left no doubt that contextual interpretation of clear and unambiguous language is not only permissible but arguably mandatory with overriding consequences.

\(^{50}\) As above.

\(^{51}\) Du Plessis (n 22 above) 599.

\(^{52}\) (1584) 2 ER 18 as cited in Kellaway (n 18 above) 99.

\(^{53}\) As above. Lord Coke argued that the construction of the statute shall be tailored in such a way that it suppresses the mischief.
Kellaway\(^{54}\) suggests similar four-layered approach. He submits that where the purpose of the enactment is unclear, an interpreter in search of the purpose of the legislation may:

a) Look at the preamble to the Act or express indications in the Act as to the object to be achieved;
b) Study the various sections wherein the purpose may be found;
c) Look at what led to the enactment (not to show the meaning, but to show the mischief with which the enactment was intended to deal);
d) Draw logical inferences from the context of the enactment.

When evaluated against Heydon’s four-staged framework, Kellaway’s\(^{55}\) approach fits neatly into the former’s four-legged enquiry. A combined application of the respective approaches proposed by the two authors, therefore, can be re-formulated into the following four-pronged approach:

a) What was the law before the enactment?
b) What was the mischief that the law did not rectify?
c) What remedy did the legislators provide to rectify the mischief?
d) What was the true reason for the remedy? In determining the true reason for the remedy, the interpreter will look at Kellaway’s point in a), b) and d). Reference will also be made to textbooks, scholarly articles and policy documents.

### 3.2.1. A four-pronged approach

#### 3.2.1.1. Law before the enactment

The Public Health Act of 2013\(^{56}\) was passed to repeal and replace\(^{57}\) the Public Health Act of 1981 (‘the old Act’).\(^{58}\) Since the first cases of HIV were only reported in 1981, the old Act

\(^{54}\) Kellaway (n 25 above) 68-69.

\(^{55}\) As above.

\(^{56}\) n 1 above.

\(^{57}\) See Preamble.

\(^{58}\) Public Health Act 63:01 of 1981.
made no provision for HIV-testing, control and prevention. It provided for compulsory testing and control of several diseases that were prevalent at the time. The Act of 1981 regulated the notification and control of the diseases and infections prevalent at the time.\textsuperscript{59}

\subsection*{3.2.1.2. Mischief that the law did not rectify}

Since 1985, the prevalence of HIV infection in Botswana has steadily increased\textsuperscript{60} and it has consequently become a public health threat. The proliferation of HIV cases in an environment with no appropriate legal framework made the prevention and control of the transmission of HIV, as well as the facilitation of treatment, problematic.\textsuperscript{61}

\subsection*{3.2.1.3. Remedies provided by legislators to rectify the mischief}

In order to take charge of the threat posed by the scourge of HIV, Botswana legislators were prompted to introduce policy documents, programmes and campaigns aimed at facilitating treatment, prevention and control of HIV.\textsuperscript{62} Furthermore, in 2013, the Parliament passed the Public Health Act, which repealed, re-enacted, consolidated and amended the law relating to public health.\textsuperscript{63} The Act has an entirely new chapter, entitled ‘HIV-testing, prevention and control’.\textsuperscript{64} It is in this chapter that there are provisions requiring the patient to undergo HIV-testing before surgical and dental procedures.\textsuperscript{65}

\subsection*{3.2.1.4. True reason for the remedy}

The rules of legal interpretation dictate that an enactment cannot be passed without a remedial effect or public benefit.\textsuperscript{66} The true remedial effect of HIV-testing for surgical and dental procedures will therefore be ascertained below by a study of various sections of the Act, scholarly articles and policy documents. The intention of the legislators, as derived from the provision’s ordinary meaning, will also be considered.

\subsection*{a) Sections of the Act in which the purpose may be found}

\textsuperscript{59} Sec 5.
\textsuperscript{60} Ministry of Health (2012) \textit{Botswana National policy on HIV} 7
\textsuperscript{61} Ministry of Health (2012) \textit{Botswana National policy on HIV} 7
\textsuperscript{62} www.bw.undp.org/.../botswana/.../HIV/AIDS/Botswana%20HIV%20and%20AIDS%2
\textsuperscript{63} (accessed 10 May 2017).
\textsuperscript{64} See above.
\textsuperscript{65} As above. See also Ministry of Health (2008) \textit{Botswana national HIV treatment guidelines}
\textsuperscript{66} n 53 above.
\textsuperscript{67} Secs 104 & 122.
\textsuperscript{68} Sec 109.
\textsuperscript{69} Interpretation Act 1:04 of 1984 sec 26.
Part 12 of the Act seeks to promote public health\textsuperscript{67} through provisions relating to the control, prevention and testing of HIV. It is observed that, except for section 109, the Act explicitly gives a legislative purpose for every provision that requires patients to submit to HIV testing. The provisions relating to routine HIV testing are aimed at facilitating access to health-related programmes;\textsuperscript{68} section 104(6) and section 104(7) require HIV-testing if it is in the public interest.\textsuperscript{69} Furthermore, a patient who is unconscious can be tested for HIV without consent if it is clinically necessary in the interest of that person.\textsuperscript{70}

In the case of \textit{Hyams v Stuart King}, the court held that when the legislature enacts a particular phrase in a statute, the presumption is that it is saying something that has not been said before in the text.\textsuperscript{71} It is argued, in the light of this presumption, that by creating an independent section on HIV-testing for surgical and dental procedures, the legislator wanted to achieve another unique purpose, which was not intended in the preceding sections. This common law presumption rules out the possibility of an argument that HIV-testing before dental or surgical procedures is required in the interest of or to the benefit of an unconscious patient or for public health.\textsuperscript{72}

In the same premise, and in view of the concluding remarks in section 109, it is argued that the section requiring HIV-testing before dental and surgical procedures was not intended for medical judgment. The concluding section\textsuperscript{73} provides that the preceding provisions must not in any way affect the right of the medical professional to decide on the basis of medical grounds, whether or not to carry out any surgical or dental procedure irrespective of the result of the HIV test. It is submitted that by explicitly and categorically recognising a medical professional’s right to make a decision on whether or not to carry out the procedure, based on medical grounds and irrespective of the results of the HIV test,\textsuperscript{74} the Act explicitly excludes ‘patient’s medical grounds’ as a purpose of requiring HIV tests before dental and surgical

\begin{itemize}
\item[\textsuperscript{67}] Sec 2 of the Act defines public health as ‘a science and art of preventing disease, prolonging life, promoting physical and mental health and efficiency through organised community efforts for the control of infections, the organisation of medical and nursing services for the prevention and early diagnosis of the disease and the development of social machinery which will ensure, to every individual in the community, a standard of living adequate for health.’
\item[\textsuperscript{68}] Sec 104(2). Health-related programmes and services for the purpose of this section include HIV counselling and free provision of anti-retroviral therapy. See n 35 above.
\item[\textsuperscript{69}] Sec 104(5) & (7).
\item[\textsuperscript{70}] Sec 105(2).
\item[\textsuperscript{71}] (1908) 2 KB 696.
\item[\textsuperscript{72}] n 66 & n 67 above.
\item[\textsuperscript{73}] Sec 109(7).
\item[\textsuperscript{74}] Sec 109(7).
\end{itemize}
procedures. The legislators recognised (correctly so), that the patient’s HIV status alone should have no influence on a decision on whether to carry out a surgical or dental procedure.

It is submitted that the disqualification of the law that requires HIV-testing before dental and surgical procedures from other probable intended purposes, such as medical judgement, public healthcare or the medical interest of the patient who cannot consent to it, leads to a reasonable conclusion that HIV-testing before surgical and dental procedures is intended mainly for the prevention of HIV transmission from patients to healthcare professionals during dental and surgical procedures. This conclusion is further bolstered by the paternalistic options given to a medical practitioner in instances where a patient tests positive or where a patient refuses to undergo the test. The mandatory requirement to follow the Minister’s guidelines in the event that the medical practitioner opts to carry out the surgery also points to the legislature’s intention to prevent HIV transmission from the patient to a healthcare professional during dental and surgical procedures.

b) Policy documents

The most recent guidelines do not have provisions relating to pre-operative testing. They only recommend the use of universal precautions to every healthcare professional exposed to infectious material. The 2008 policy document, preceding the promulgation of the Act of 2013, not only accentuated the importance of universal precautions, but also cautioned against pre-operative HIV-testing. In terms of such guidelines, HIV-testing of an acceptable surgical candidate provides no useful clinical information about the patient’s operative risk. The guidelines recommended that the examination of the surgical risk for HIV-infected patients had to be unbiased, and had to be similar to the procedure followed for the examination of HIV-negative patients. On the basis of the strength of legislators’ argument against pre-operative testing that is intended to determine pre-operative risk, it is argued that the legislature

75 See Du Plessis (n 22 above) 65. He argues that effect must be given where possible to every word, unless necessity or absolute intractability of the language dictates otherwise. On the flipside Du Plessis argues that repetition should not be assumed and in support thereof, he quotes the case of Hyams (n 68 above). See also Du Toit v Minister of Transport 2006 1 SA 297 (CC) where the court pointed out in principle, that if meaning can be ascribed to a legislative provision it should not be easily assumed that such provision is mere surplusage.
76 n 60 above.
77 n 36 above.
78 As above 5.
79 n 1 above.
80 n 57 above 95.
81 As above.
82 n 57 above 94.
could not possibly have held different views in 2013 when the Act was passed. Thus, it cannot be reasonably concluded that HIV-testing before surgical and dental procedures was intended for the assessment of the preoperative risk of the surgical candidate.

Moreover, the discretionary choices given to the medical profession, as discussed in paragraph 3.1, are in no way aimed at ascertaining surgical interest for the patient’s benefit, but are solely aimed at preventing the transmission of HIV from the patient to the medical healthcare professional.

c) Journal articles

Academic writers have not devoted earnest attention to this topic and this has resulted in very limited literature on the subject. In the few articles found, authors seem to agree that HIV-testing before surgical or dental procedures in most, if not all cases, is aimed at benefitting healthcare workers. According to the Nigerian authors Osime and Odigie, the laws that justify a healthcare professional’s refusal to treat a patient on the basis of HIV status or that put greater emphasis on HIV-testing before invasive procedures are conducted, are prompted by nothing more than an exaggerated fear of occupational exposure. Healthcare workers perceive HIV-testing as a self-protection measure emanating from such fear.

In an article published in a South African journal, Smit writes that the risk and fear that the HIV pandemic poses to the surgical profession is undeniable. However, he states that such risk and fear are ‘yesteryear’ and have ‘fortunately come to pass without much impact’. Smit conclusively states that HIV patients should not be regarded as a homogenous group and that ‘all body fluids of all patients should be regarded as hazardous’. There is also agreement among different authors that there is no significant difference in clinical presentation, treatment and treatment outcome in HIV-positive or HIV-negative patients.

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84 Osime & Odigie (n 58 above) 52.
87 Smit (n 85 above) 358.
88 As above.
89 As above.
90 As above.
4. **Conclusion**

The literal and purposive interpretation of the law that requires HIV-testing before surgical and dental procedures reveals that the law that requires HIV-testing before surgical and dental procedures was intended to prevent HIV transmission from patients to healthcare professionals during surgical or dental healthcare. The legislators did not intend to achieve other HIV-testing-related benefits such as public health, patients’ medical interests and medical practitioners’ medical judgement. Such benefits are provided for elsewhere in the Act. Moreover, the style and the general theme of the provisions are paternalistic, and they cannot in any way be qualified to benefit the patient, medically or otherwise.
CHAPTER 3

HUMAN RIGHTS IMPLICATIONS OF THE LAW THAT REQUIRES HIV-TESTING BEFORE DENTAL AND SURGICAL PROCEDURES

1. Introduction

This chapter provides a detailed assessment of the human rights implications of the law that requires HIV-testing before surgical and dental procedures. It begins with a brief discussion of global, regional and constitutional human rights norms relevant to HIV-testing. Thereafter, the chapter determines whether the law requiring HIV-testing before surgical and dental procedures is structured in a manner that is in accordance with the global, regional and constitutional human rights norms discussed. In particular, it determines whether the law impedes the realisation of the right to life, right to privacy, right to equality and non-discrimination.

2. Overview of human rights norms relevant to HIV

There is no a global or regional human rights treaty designed specifically to address HIV. However, there seems to be general consensus that all HIV-related laws and policies must be consistent with a ‘human rights-based approach’. This philosophy forms the epicentre of HIV-related legislation and policy. It is premised on the proposition that, because human rights are universal, indivisible, and interrelated, all human being must be guaranteed fair treatment.

The human rights-based approach requires all states to incorporate human rights in the designing, implementation and evaluation of any law or policy relating to HIV. Governments are required to align their individual obligations and analyse health laws in accordance with

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3. Pieterse (n 2 above) 59; Gumede (n 2 above) 183.
5. Gumede (n 2 above) 185.
the human rights norms outlined in the Universal Declaration of Human rights (1948), and other international and regional treaties. These include the International Covenant on Economic, Social and Cultural Rights, 1966 (CESR); International Covenant on Civil and Political Rights, 1966 (CCPR); and African Charter on Human and Peoples’ Rights (1981).

Despite the lack of regional and international conventions providing HIV-specific norms, there is a variety of non-enforceable guidelines on the various human rights norms that should be considered when designing or implementing any HIV-related policy or law. Most important among these is the Joint United Nations Programme on HIV/AIDS (UNAIDS) and Office of the High Commissioner on Human Rights (OHCHR) guidelines. In addition to these are the resolutions adopted by the United Nations General Assembly Special Session on HIV and the resolutions on HIV by the Commission on Human Rights (Human Rights Commission).

The human rights norms mandated by the above-mentioned international norms and treaties include, among others, the right to privacy, right to access to health services, the right to equal protection and the right to freedom from discrimination. These rights are also among the human rights norms enshrined in the Constitution of Botswana.3

3. Compliance of law requiring HIV-testing before surgical and dental procedures with human rights standard

3.1. Right to life

The Constitution guarantees the protection of the individual’s right to life. In *S v Makwanyane* (*Makwanyane case*), the court remarked that the right to life is considered the most

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6 As above.
7 As above.
11 Art 17 CCPR, and Art 12 Universal Declaration.
12 Art 25 Universal Declaration; Art 12 CESR; Art 6 African Charter and Art 6 CCPR.
13 Art 3 African Charter; Art 2 & 7 Universal Declaration; Art 26 ICCPR; Art 2 CESR.
14 Constitution of the Republic of Botswana 1966. See sec 9(1) - the right to privacy, sec 4(1) - right to life & sec 3 & 15 - right to equality and freedom from discrimination.
15 Sec 4 Constitution.
16 1995 3 SA 391 (CC).
fundamental human right.\textsuperscript{17} In view of the fundamental importance associated with the right to life, the Human Rights Committee recommended that it should be given a broad, generous and purposive construction, instead of a narrow one.\textsuperscript{18} This recommendation coincides with the Botswana court’s ruling in \textit{Attorney General v Moage}\textsuperscript{19} where the presiding judge, Ketridge JA, held that the human rights entrenched in the Constitution of Botswana should be afforded a broad and generous interpretation.\textsuperscript{20}

In the \textit{Makwanyane} case,\textsuperscript{21} the South African Constitutional Court broadly interpreted the right to life to include the right to good quality of life and the right to dignity. In particular, O’Regan J stated:\textsuperscript{22}

\begin{quote}
But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as a mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured … The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.
\end{quote}

In \textit{Van Biljon v Minister of Correctional Services} (the \textit{Van Biljon} case),\textsuperscript{23} the court held that the protection of the right to adequate medical treatment is necessary to enjoy the right to life. The applicants, who were HIV-positive inmates, sought an order compelling the respondents to provide them and other HIV-positive inmates with anti-retroviral treatment.\textsuperscript{24} The relevant authorities neglected or refused to give the applicants and fellow inmates the anti-retroviral medication.\textsuperscript{25} The applicants’ contention was based on section 35(2) of the Constitution, which provides that:\textsuperscript{26}

\begin{quote}
Everyone who is detained, including the sentenced prisoners, had the right to conditions of detention that are consistent with human dignity, including at least, the provision, at State’s expense, of adequate accommodation, nutrition, reading material and medical treatment.
\end{quote}

\textsuperscript{17} 1995 (3) SA 391 (CC) para 83 & 326.
\textsuperscript{18} Human Rights Committee, General Comment 6 1982.
\textsuperscript{19} 1982 2 BLR 124 184.
\textsuperscript{20} As above.
\textsuperscript{21} 1995 (3) SA 391 (CC) para 326.
\textsuperscript{22} As above.
\textsuperscript{23} \textit{Makwanyane} (n 66 above) para 44.
\textsuperscript{24} \textit{Van Biljon} (n 75 above) para 1.
\textsuperscript{25} \textit{Van Biljon} (n 75 above) para 18.
\textsuperscript{26} As above.
After due assessment of the information presented by both parties, the court held that the applicants had proved, on the balance of probabilities, that the anti-retroviral therapy was, at the time, the only prophylactic, and that the benefits of the treatment, in the form of extended life expectancy and enhanced quality of life, required the respondents to provide it to unfortunate sufferers of HIV infection, within available resources. By regarding anti-retroviral treatment as a means to improve the prisoners’ quality of life, the decision coincided with and further expanded the nature of the right to life outlined in the Makwanyane case.

In *Paschim Banga Khet Mazdor Samity v State of West Bengal*, *(Paschim case)*, the Supreme Court of India ruled that the right to life encompasses the right to timely healthcare services. The petitioner fell off a train and suffered serious head injuries and brain haemorrhage. He was then rushed to Mathurapur primary health centre. Upon his arrival there, the medical officer informed him that the health centre did not have sufficient equipment for his treatment. The medical officer in charge ordered that he should be transferred to Diamond Harbour Sub-Divisional Hospital. Once again when he got there, there was no sufficient medical equipment. In the end, the petitioner was admitted and treated in a private hospital.

The issue for determination was whether the state’s failure to provide timely medical treatment resulted in the infringement of the petitioner’s fundamental right to life. In answering this issue, the court held that the government hospitals' failure to provide the petitioner with timely medical treatment when he was in need of such care was equivalent to the infringement of Article 21 of the Bill of Rights. The court said that Article 21 of the Bill of Rights obligates the state to protect the right to life of everyone in India. It concluded its decision by stating that the government hospitals and the medical officers employed in them had a duty to render medical assistance for preserving human life.

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27 Van Biljon *(n 75 above)* para 60.
28 As above.
30 *Paschim* *(n 81 above)* para 1.
31 As above.
32 As above.
33 As above.
34 As above.
35 *Paschim* *(n 81 above)* para 4.
36 *Paschim* *(n 81 above)* para 9.
37 As above.
38 As above.
A similar conclusion was arrived at by the Canadian Supreme Court in *Chaoulli v Quebec* (*Chaoulli* case).\(^{39}\) The court had to determine whether the right to life, liberty, and security of a person included the right to healthcare. By means of a motion for declaratory judgment, the appellants contested the validity of the prohibition of private health insurance.\(^{40}\) They contested that in view of the waiting times caused by the Quebec public health system, the legislation that prevented a health system that reduces the waiting period contravened the right to life, liberty and security of a person.\(^{41}\).

Conceding to the appellants’ contentions, the majority of the judges of the Court of Appeal decided that the unreasonable waiting times for health services resulting from Quebec’s prohibition of private health insurance contravened the right to life under the Quebec Charter.\(^{42}\) According to the court, the pain and suffering caused by long waiting periods made it impossible for patients to enjoy the desired quality of life fully.\(^{43}\) Moreover, the delays resulting from the waiting lists increased the risk of patient mortality or irreparable injuries.\(^{44}\)

The Human Rights Committee has also broadly interpreted the right to life to encompass the right to timely medical healthcare. In the case of *Lantsov v Russian Federation* (*Lantsov* case),\(^{45}\) Lantsov, the mother of the deceased, Vladimir Albertovich Lantsov, claimed that her son was a victim of Russia’s violation of article 6(1) of the International Covenant on Civil and Political Rights.\(^{46}\) The deceased died when he was placed in pre-trial detention in Moscow.\(^{47}\) Lantsova submitted that the deceased was healthy when he first entered pre-trial detention, and fell ill owing to the prison’s poor conditions.\(^{48}\) She further contended that the deceased was not given medical treatment despite his repeated requests.\(^{49}\) It appears that fellow inmates requested medical help on his behalf sometime after the first week of his detention, and the medical doctor attended to him only a few times.\(^{50}\) During a rapid and noticeable deterioration of his condition, the deceased did not receive any medical help, despite frequent

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40 *Chaoulli* (n 94 above) 793.
41 As above.
42 As above.
43 As above.
44 As above.
46 *Lantsov* (n 100 above) para 1.
47 As above.
48 *Lantsov* (n 98 above) para 2.
49 As above.
50 *Lantsov* (n 98 above) para 2.5.
requests for assistance by his fellow detainees. The deceased received medical attention only a few minutes before his death.

In considering this communication, the Human Rights Committee took into consideration all the evidence tendered by the litigating parties. In the end, the Committee ruled that the state neglected to take the necessary measures to preserve the deceased’s life at the time of his detention. The court also held that failure to take appropriate steps to preserve the right to life is tantamount to the deprivation of the right to life guaranteed under article 6(1) of the International Covenant on Civil and Political Rights.

The European Court of Human Rights has also broadly interpreted the right to life to encompass the right to timely medical healthcare. In the case of Anguelova v Bulgaria (Anguelova case), Anguel Zabchekov died while in police custody in Bulgaria, following his arrest. Immediately after midnight, the police were informed about attempted theft by Zabchekov. Sergeant Mutafov arrested him and he was taken to the police station just before 1:00. Preceding the arrest, Zabchekov fell on his face several times in his effort to escape. Sometime later, after 3:00, the police officers at the station informed the officers in charge of the arrest (who were on patrol duty at the time), that Zabchekov's health was deteriorating. They immediately drove back to the police station to assess the situation and thereafter sought medical assistance. Zabchekov was admitted to hospital at around 5:00 and the doctor confirmed him dead.

The court observed that the police’s delay in ensuring that Zabchekov got appropriate medical treatment contributed considerably to his death. The prison officers who were on duty at the time when the detainee’s condition was deteriorating delayed taking him to hospital. Instead of taking him to hospital, they called the officers who were responsible for arresting

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51 As above.
52 As above.
53 Lantsov (n 98 above) para 8.1.
54 Lantsov (n 100 above) para 9.2.
55 As above.
57 Anguelova (n 111 above) para 1.
58 As above.
59 As above.
60 As above.
61 As above.
62 As above.
63 As above.
64 Anguelova (n 111 above) para 3.
65 As above.
him. The court held that the police officers’ failure to take the deceased to hospital in time was tantamount to a violation of the right to life guaranteed under article 2(1) of the European Convention on Human Rights, 1953.

In terms of the Public Health Act, a person who tests HIV-positive or refuses to take a test can be treated or transferred to another available medical health professional or his treatment can be held in abeyance, pending advice from the Director. In the light of the lack of a clearly stated waiting period under these provisions, and the unreasonably long waiting period that may be caused by shortage of qualified medical staff, HIV-positive patients and those refusing to be tested may experience delayed access to surgical and dental healthcare. Some patients may even be denied access to healthcare. The pain and suffering caused to patients who may be denied healthcare or alternatively be subjected to unreasonable waiting periods may make it impossible for them to enjoy an acceptable quality of life. They may also be exposed to high risk of death or irreparable injuries.

On the basis of the foregoing, it is submitted that the law that requires HIV-testing before surgical and dental procedures is contrary to the constitutional right to life. The unreasonably long waiting periods leading to inability to access healthcare, or delayed access to healthcare, coupled with the suffering that patients may be forced to endure while waiting to be treated, may make it impossible for them to enjoy the nature of the right to life explicated in the judicial decisions discussed above.

3.2. Right to equality and non-discrimination

The Constitution of Botswana guarantees equal enjoyment of constitutionally protected rights without any form of discrimination. It regards any written law or order of a public authority that results in unfair treatment as unconstitutional. In particular, it provides that ‘… no law shall

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66 As above.
67 As above.
68 Public Health Act 11 of 2003 sec 109 (2) & (4).
69 The Act does not specify a time period within which the medical professional should transfer the patient to another health professional for treatment. Neither does it instruct the medical professional to whom the patient is transferred, to treat the patient immediately or within a reasonable time. Furthermore, the Act does not provide a time period within which the Director should have responded to the medical professional’s request for advice.
70 n 55 above.
71 n 74 & n 83 above.
72 n 83 above.
73 Constitution of Botswana (n 14 above) sec 3
make any provision that is discriminatory.74 The Constitution defines the meaning of the word ‘discriminatory’ in the following manner:75

… the expression ‘discriminatory’ means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

In Harksen v Lane (Harksen case),76 the Constitutional Court held that the list of the grounds of differentiation under section 9(3) of the Constitution of South Africa were not exhaustive.77 Harksen, the wife of the deceased, challenged the constitutional validity of certain provisions of section 21 of the Insolvency Act.78 The Act required the solvent’s spouse’s property to vest in the Master of the High Court, and later in the trustee of the insolvent deceased estate, if the deceased’s spouse should be declared insolvent.79 The property vested in the Master of the High Court or the trustee was to be the released to the solvent spouse only if proof of a valid legal title to the property was provided.80 If the solvent spouse failed to do so, the property would be considered part of the insolvent estate, and therefore eligible to be used for the benefit of the creditors of the insolvent estate.81

Harksen contended that the provisions of section 21 of the Act contravened the equality clause of the interim Constitution82 and unfairly discriminated against solvent spouses.83 According to Harksen, the vesting provisions imposed severe burdens, obligations and disadvantages on solvent spouses, more than those applicable to other persons with whom the insolvent had dealings or close relationships.84

74 Sec 15(1) Constitution.
75 Sec 15(3) Constitution.
76 1998 1 SA 300 9 (CC).
77 The Constitution of the Republic of South Africa, 1996 sec 9(3) provides that: The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. This provision is similar to section 15(3) of the Constitution of Botswana.
78 Act 24 of 1936.
79 Harksen (n 130 above) para 8.
80 Harksen (n 130 above) para 10.
81 As above.
82 Harksen (n 130 above) para 40
83 As above.
84 As above.
The court held that the right to equality mandates the respect of everyone’s dignity, and that every act that has the potential to impair individual’s dignity should be regarded as an unspecified ground.\(^\text{85}\) In these premises, the court concluded that because the provision that Harksen complained about had the potential to demean a person's inherent dignity and humanity, it should be regarded as an unspecified ground of discrimination.\(^\text{86}\) However, it was held that a differentiation on such grounds was fair and justifiable.\(^\text{87}\)

The decision of the court in *Harksen* case\(^\text{88}\) was confirmed in Botswana’s constitutional jurisprudence. In the case of *Diau v Botswana Building Society*\(^\text{89}\) the applicant, who was on probation, was required to submit a certified document on her HIV status in order for her employment to be confirmed.\(^\text{90}\) The applicant refused and consequently, the respondent (her employer) refused to confirm her appointment.\(^\text{91}\) The applicant approached the court for relief, and she contended that the instruction to undergo HIV-testing in order for her appointment to be confirmed was contrary to sections 3 and 15 of the Constitution.\(^\text{92}\)

The court held that the grounds of differentiation listed under section 15(3) are not exhaustive.\(^\text{93}\) It stated that a closer interrogation of the grounds for differentiation under the section revealed one distinctive feature; that is, they outlawed discrimination on grounds offensive to human dignity.\(^\text{94}\) The court concluded that since the termination of a person’s employment contract owing to perceived positive HIV status is repugnant to human dignity, the ground of HIV status or perceived HIV status should be considered as one of the unlisted grounds of section 15(3) of the Constitution of Botswana.\(^\text{95}\)

There is on-going debate among authors about whether the court’s decision in *Harksen v Lane*\(^\text{96}\) offers the correct conceptualisation of the right to equality and non-discrimination. In particular, the issue is whether the court was right in subsuming all the harm connected to equality under the idea of impairment of dignity.

\(^{85}\) As above.

\(^{86}\) *Harksen* (n 130 above) para 61.

\(^{87}\) As above.

\(^{88}\) n 128 above.


\(^{90}\) As above.

\(^{91}\) As above.

\(^{92}\) As above.

\(^{93}\) *Diau* (n 144 above) 429.

\(^{94}\) As above.

\(^{95}\) As above.

\(^{96}\) n 128 above.
According to Albertyn, a commitment to equality requires attention to actual social and economic inequalities in society, remedial and re-distributive measures and the achievement of a society in which every person participates fully, and is able to develop to his or her full potential.\footnote{C Albertyn ‘Equality beyond dignity: Multi-dimensional equality and justice Langa’s judgments’ 2015 2015 \textit{Acta Juridica} 430-455 431.} He therefore argues that the harms addressed by the principle of dignity, being stigma, humiliation, stereotyping and prejudice, are too individualistic and discreet to enforce the true nature of the right to equality.\footnote{As above.} Albertyn suggests a multi-dimensional conception of equality that allows full understanding of the different forms of unequal treatment that the right to equality aims to address.\footnote{As above.} He is of the view that equality should be understood in terms of a four-dimensional framework.\footnote{As above.} It should be understood as a concept designed to address stigma, stereotypes, prejudice and violence;\footnote{As above.} as a means to redress socioeconomic disadvantage;\footnote{As above.} as a tool for the facilitation of participation and inclusion;\footnote{As above.} and as a framework to accommodate differences through structural change.\footnote{As above.}

Moreover, the dignity-based approach has been regarded as an impediment to the establishment of equality jurisprudence. Botha argues that the dignity-based approach fails to challenge the forms of discrimination embedded in social attitudes, practices and institutions.\footnote{H Botha ‘Equality, dignity and the politics of interpretation’ 2004 19 \textit{South African Public Law} 724-751 725.} He suggests a more complex interpretation of equality, which recognises multiple forms of disadvantage, and openly takes into consideration the constitutive power in law and social relations.\footnote{As above.} According to Albertyn and Goldblatt, the conceptualisation of the right to equality under the individualistic nature of dignity fails to take sufficient cognisance of the group-based nature of discrimination and systemic forms of inequality.\footnote{C Albertyn & B Goldblatt ‘Facing the challenge of transformation: The difficulties in the development of indigenous jurisprudence of equality’ 1998 14 \textit{South African Journal of Human Rights} 248-276 248. See also DM Davis ‘Equality: the majesty of Legoland jurisprudence’ 1999 \textit{South African Law Journal} 398-413.} They therefore argue that the right to equality should be construed in the light of the meaning of the value of equality, rather than the value of dignity.\footnote{As above.}
In contrast, the proponents of a dignity-based approach argue that the individualism that can possibly result from dignity-based interpretation of the right to equality is held in check by various other factors, such as contextual considerations, the complainants’ position and the possibility of other patterns of discrimination. According to de Vos, the use of the principle of dignity is rhetorical, and it does not prevent the court from considering context and advantage.

Moreover, Cowen denies that dignity is an inherently individualistic concept. He contends that the concept of human dignity is not founded in the abstract notions of individualism, but in the individual as a social being who belongs to a social and communal context. He also contends that the value of dignity is closely interwoven with material considerations necessary to challenge inequalities and governmental action.

Drawing on the critics and proposals discussed above, it is submitted that classifying an HIV-positive status or perceived HIV status as an unspecified ground of discrimination should not happen on the basis of the value of dignity alone. Equality should not be understood in a broader sense. It should be understood as a means of redressing the socio-economic disadvantage faced by HIV-positive people, promoting their voice and participation, and preventing unfair treatment of them through structural and institutional change.

The multi-dimensional approach ensures holistic protection of the right to equality. It enables the court to enforce the equality right in cases where the impairment of the value of human dignity cannot be sufficiently established. The impairment of other grounds, such as the need to address the socio-economic status of HIV-positive patients, the need to promote their voice and participation and the need for structural and institutional change should also be considered in a determination of whether HIV or anything else should be qualified as an unspecified ground of differentiation. A multi-dimensional approach enables the realisation or protection thereof, of the right to equality even where impairment of the value of dignity is not apparent.

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109 As above.
112 As above.
3.3. Right to privacy

The Constitution of Botswana guarantees every individual the right to privacy. In particular, it provides that: 113

Except with his or her own consent, no one shall be subjected to search of his or her person or his or her property or the entry by others on his or her premises.

According to the court in the case of Keatlhotswe v Debswana Diamond Company (Pty) Ltd, 114 the above-mentioned provision is intended to guarantee the right to privacy. However, the court left unanswered questions on what is meant by the right to privacy and what it amounts to, as contemplated by the Constitution.

3.3.1. Meaning of the right to privacy

Great controversy surrounds the definition of privacy. 115 The concept’s protean nature makes it difficult to establish its common meaning. 116 Definitions of its essential core are often viewed as either too broad or overly narrow when measured against the practical uses to which the concept is put in legal discourse. 117 In Bernstein v Bester NO 118 Ackermann J stressed that ‘the concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate’.

Despite his comments on the difficulties encountered in trying to find common ground regarding the meaning of privacy, Ackerman J 119 proceeded to attempt to explain what privacy means. He held that: 120

The scope of privacy has been closely related to the concept of identity and it has been stated that ‘rights like privacy are not based on the notion of the unencumbered self, but on the notion of what is necessary to have one’s autonomous identity’.

113 n 14 above.
114 Unreported, delivered on 27 September 2011. See also Diau v Botswana Building Society 2003 2 BLR 409 (IC).
116 Currie (n 19 above) 550.
117 As above.
118 1996 2 SA 751 (CC) 787-788.
119 As above.
120 Bernstein (n 20 above) para 65.
The views expressed in the *Bernstein* case were subsequently quoted with approval in *NM v Smith*. The court held that the concept of the right to privacy ‘envisage a concept of the right to be left alone’. The court also, in clear and explicit manner, approved the conceptualisation of the right to privacy by Ackerman J in a subsequent paragraph.

Neethling criticises the definition of privacy offered by Ackerman in *Bernstein v Bester*. He argues that by interpreting privacy as a means of protecting personal identity, Ackerman J took too limited a view of privacy. Neethling argues that the limited view adopted in *Bernstein v Bester* negates other private facts relating to a person worthy of protection.

In his own conception of what the right to privacy entails, Neethling offers the following scholarly definition:

Privacy can be described as a condition of human life characterised by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has himself determined to be excluded from the knowledge of outsiders and in respect of which he has the will that they are kept private.

Neethling’s conception of privacy does not constitute the final word as to what the right to privacy entails. Rautenbach reviews both *Bernstein* and Neethling’s definitions of privacy and concludes that neither suffices as a definition of privacy in the Constitution. He argues that *Bernstein*’s definition of privacy, as the protection of personality right, fails to explain how the right to privacy differs from other constitutional rights protecting personality rights. With regard to Neethling’s conception of privacy as a matter of an individual’s ability to retain control over information, he argues that such conceptualisation does not accommodate the question of what information should be reasonably considered private.

An interpretation of the right to privacy, according to Rautenbach, requires determining a manner in which the protective scope of the right to privacy may be singled out from other

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121 2007 7 BCLR 751 (CC) para 32.
122 As above.
123 *NM v Smith* (n 23 above) para 33.
125 Neethling (n 26 above) 20.
126 As above.
127 Neethling (n 26 above) 19.
129 As above.
130 As above.
131 As above
rights and how it relates to them.\textsuperscript{132} Taken from the viewpoint of the conduct and interests guaranteed by the constitutional right to privacy, Rautenbach proposes the following definition:\textsuperscript{133}

The right to privacy in section 14 protects one’s actions to control:

a) Access to personal matters, which mainly consist of the ways in which most of the other rights in the bill of rights are exercised; and

b) The obtaining, dissemination and use of information in respect of these matters.

Neethling\textsuperscript{134} lambasts Rautenbach’s definition on the basis of its certainty and width. He states:

Rautenbach, by defining the protective ambit of the right to privacy, mainly in terms of the way in which most other fundamental rights are exercised, is extending the concept of privacy far too wide and in a manner that may eventually lead to confusion and legal uncertainty, since the Bill of Rights covers a wide variety of different personal matters (also other personality rights) which do not even remotely relate to a person’s seclusion from the public and publicity.

Neethling and Rautenbach’s debate illustrates the difficulties encountered in an attempt to find the meaning of the concept of privacy. It highlights the uncertainties and vagueness encountered in the conceptualisation of privacy under one common meaning and how such conceptualisation may be less useful for the adjudication of a multitude of privacy problems that are posed by section 109 of the Public Health Act.\textsuperscript{135}

Solove cautions against an attempt to find a common conception of the right to privacy. He observes:\textsuperscript{136}

The top-down approach of beginning with an overarching conception of privacy designed to apply in all contexts often results in a conception that does not fit well when applied to the multitude of situations and problems involving privacy.

On the basis of the above, Solove proposes a ‘new taxonomy’\textsuperscript{137} to define privacy in a ‘comprehensive and concrete manner.’.\textsuperscript{138} He advises a shift from the ambiguous concept of

\textsuperscript{132} As above
\textsuperscript{133} As above.
\textsuperscript{134} Neethling (n 28 above) 21.
\textsuperscript{135} n 1 above.
\textsuperscript{136} Solove 2002 (n 17 above) 1099.
\textsuperscript{137} Solove 2006 (n 17 above) 478.
\textsuperscript{138} As above.
‘privacy’ and recommends specific activities that cause privacy concerns. Solove describes the activities that present privacy concerns as those problems that have been given considerable attention in the societal atmosphere. He also points out that historical, philosophical and legal sources were used to identify such privacy problems.

### 3.3.2. Solove’s taxonomy

Solove identifies four harmful activities that affect the right to privacy. These are:

1. **Information collection;**
2. **Information processing;**
3. **Dissemination of information;** and
4. **Invasion of people’s private affairs.**

The first group of activities relates to information-gathering such as watching, recording, listening to and probing for information. The second group involves activities pertaining to the storage, use and manipulation of information. Solove observes that there are recognised breaches that may arise from the dissemination of information in the latter group and, as such, he suggests a third group of activities involving dissemination of information. The third group of activities is further divided into five subgroups, which include, among others, a breach of confidentiality, disclosure and increased accessibility. The fourth and last group of activities involves intrusion into people’s private lives through decisional interference.

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139  As above.
140  Solove 2006 (n 17 above) 483.
141  Solove 2006 (n 17 above) 558.
142  Solove 2006 (n 17 above) 488.
143  As above. In *Reid-Daly v Hickman* 1981 2 SA 315 (ZA) 323, the court recognised that reading an individual’s private documents is tantamount to a breach of privacy. The same conclusion was reached with regard to listening in to private information – see *S v A* 1971 (2) SA 293 (T) and shadowing of a person – *Epstein v Epstein* 1906 TH 87.
144  As above.
145  As above.
146  As above. Other subgroups are blackmail, appropriation and distortion.
147  Solove 2006 (n 17 above) 491. See *NM and others v Smith others* 2007 5 SA 250 (CC) where the court concluded that where there is no overwhelming public interest, publishers should not circulate information about the identity status of the plaintiffs without their informed consent. A similar conclusion was arrived at in *Jansen van Vuuren v Kruger*. 1993 4 SA 842 (A) The Appellate Court held ‘that a doctor had no duty to transfer information about his patient’s HIV status to another doctor in the course of a golf game and that the recipient had no corresponding right to receive the information’.
148  As above. In order to prevent a medical doctor from interfering with or otherwise affecting the patient's informational decision-making capacity, the National Health Act 61 2003 sec 6 makes obtaining informed consent a prerequisite to every medical procedure. This principle has developed to include pre-test or post-test counselling. In *C v Minister of Correctional Services* 1993 4 SA 842 (A), the court held that deviation from the accepted norm of informed consent, including the fact that there was no
3.3.3. **Appraisal of Solove’s taxonomy**

It is submitted that Solove’s taxonomy, as spelled out in paragraph 3.1.2 above, provides a far more robust and clear account of what the right to privacy entails. Unlike the piecemeal approaches in case law, and the ones proffered by other scholars, the taxonomy moves beyond an attempt to define privacy under a single core and provides a more concrete conceptualisation.

The definition offered by the court in *Bernstein* is too narrow to cover other aspects of life viewed as typically private. As Neethling correctly argues, it negates the protection of the aspects of an individual’s private affairs that are worthy of protection.¹⁴⁹ The court offered an approach that falls short of encompassing what is otherwise recognised in Solove’s five groups of activities. The same deliberations are maintained with regard to the conceptualisation of the concept of privacy presented by Neethling and Rautenbach.

3.3.4. **Applying Solove’s taxonomy of the right to privacy**

The law requiring HIV testing before dental and surgical procedures, as provided for in the Public Health Act¹⁵⁰ (the Act), contravenes the patient’s right to privacy. This law results in the contravention of the right to privacy through two of the activities identified by Solove. It results in interference with the patient’s decisional capacity and unwarranted disclosure of the patient’s personal information.

By requiring the patient to undergo an HIV test without being offered the necessary pre-test counselling,¹⁵¹ and further allowing the medical professional to transfer a patient who refuses to be tested to another medical professional (who is not legally obliged to treat the patient),¹⁵² the Act interferes with the patient’s decisional capacity. The shortage of qualified medical staff and inequitable deployment of trained staff¹⁵³ present a challenge to the timely delivery of healthcare.¹⁵⁴ As a result, patients may be compelled or unduly influenced to

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¹⁴⁹. n 36 above.
¹⁵⁰. n 1 above.
¹⁵¹. Sec 109(4). The Act requires HIV testing without mandating pre-test counselling.
¹⁵⁴. As above.
undergo HIV-testing without informed consent, for fear of being subjected to further waiting periods. Failure to require pre-test counselling may also interfere with the patient’s ability to make an informed decision on the HIV test. The need for pre-test counselling was emphasised in *C v Minister of Correctional Services*.\(^{155}\) It was stated that the information provided to the patient during HIV pre-test counselling is necessary to enable the patient to give informed consent for the test.\(^{156}\)

Further to the foregoing, Solove argues that the right to privacy extends to an individual’s interest to avoid disclosure of certain private matters.\(^{157}\) His argument was premised on the Supreme Court case of *Whalen v Roe*,\(^{158}\) where it was explained that the constitutional protection of privacy includes the individual’s interest in preventing disclosure of private matters.\(^{159}\) It is therefore submitted that the transfer of a patient’s HIV results from the medical professional to the Director, and the mere existence of the results in the Director’s custody,\(^{160}\) may lead to unnecessary disclosure and thus infringe his or her privacy. It is also submitted that the lack of necessary procedures for the protection of the patient’s HIV results against unwarranted disclosure\(^{161}\) may increase the chances of unnecessary exposure.

4. **Conclusion**

The law that requires HIV-testing before surgical and dental procedures, as provided for under section 109 of the Public Health Act, limits the enjoyment of human rights guaranteed under the Constitution of Botswana and international and regional instruments. It flagrantly limits the HIV-positive person’s enjoyment of the right to life, right to privacy and right to equality and non-discrimination.

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\(^{155}\) 1993 4 SA 842 (A).

\(^{156}\) As above.

\(^{157}\) Solove (n 17 above) 56.

\(^{158}\) 429 US 589, 599-666 (1977) as cited in Solove (n 24 above) 56.

\(^{159}\) As above.

\(^{160}\) Custody, in this case, may include the storage of information in electronic and physical files.

\(^{161}\) In *Whalen v Roe* (n 60 above) 666, the court dismissed the plaintiff’s contention because the legislature had ensured adequate protection against unwarranted disclosure of the plaintiff’s private information.
CHAPTER 4
PREVENTION OF THE UNNECESSARY LIMITATION OF CONSTITUTIONAL RIGHTS THROUGH EVIDENCE-BASED JUDICIAL REVIEW

1. Introduction

This chapter illustrates the necessity of an evidence-based judicial review approach for the effective protection of constitutional rights. The first part of the chapter is divided into two sections. The first section introduces the concept of evidence-based judicial review, in particular the debate that led to its conceptualisation and the differing views on its substantive meaning. The second section critically analyses these contrasting views and makes recommendations on how they may be improved in order to come up with the most appropriate definition of evidence-based judicial review. It also recommends the appropriate sources of information that should be used in the application of an evidence-based review approach. (The concept of evidence-based judicial review in this chapter is understood in the context of the recommended definition.)

The second part of the chapter points out that the method of evidence-based judicial review has been applied, albeit inconsistently, by the Botswana and South African courts. In so doing, the chapter discusses the judicial decisions wherein the courts applied evidence-based judicial review in their constitutionality analysis and the ones in which in which the courts missed the opportunity to utilise it. In the light of these decisions, the chapter illustrates the necessity of evidence-based judicial review for the protection of constitutional rights.

2. Evidence-based judicial review

The term ‘evidence-based judicial review' is relatively new to judicial review scholarship. Its exact meaning is not yet certain. This part of the chapter introduces the debate that led to the birth of the term ‘evidence-based judicial review,’ that is, the ‘Bar-Siman-Tov\(^{162}\) and Alemanno\(^{163}\) debate’. It illustrates the points on which these authors agree and how their respective substantive perceptions of evidence-based judicial review differ. These authors' contrasting views are then subjected to critical analysis, with the aim of establishing the most appropriate substantive meaning of the term ‘evidence-based judicial review’.

\(^{162}\) Assistant professor at Bar-Ilan University’s Faculty of Law.
\(^{163}\) Professor at New York University School of Law.
2.1. Birth of the term ‘evidence-based judicial review’

The debate that led to the conceptualisation of the term ‘evidence-based judicial review’ was kindled by two articles by Bar-Siman-Tov, the first one entitled ‘The puzzling resistance to judicial review of the legislative process’, 164 and the second one entitled ‘Semi-procedural judicial review’. 165 In the first article, the author argues that during judicial review, the court should always complement the commonly applied ‘substantive judicial review’, 166 with ‘judicial review of the legislative process’. 167 The former method requires the court to assess whether the content of the legislation is in accordance with the Constitution, 168 and the latter determines the validity of the legislature through the examination of the legislative procedure that has led to the enactment. 169

In his second article, published a year later, Bar-Siman-Tov observes the emergence of a relatively ‘new’ 170 but yet ‘undefined’ 171 form of judicial review. He terms it ‘semi-procedural review’ (SPR). 172 Bar-Siman-Tov contends that the new form of review should be termed SPR because it constitutes the infiltration of a ‘higher’ 173 form of procedural review into substantive constitutional adjudication. 174 In essence, the new form of review is characterised by the complementary application of two forms of review discussed in his first article, 175 but instead of a ‘pure procedural review’, a higher standard of procedural review is adopted. 176 Unlike pure procedural review, which is concerned with whether the legislative process complied with formal rules, procedural review under SPR enforces ‘judicially created’ 177 procedural questions such as whether the infringement was enacted through a process informed by appropriate investigation or studies, and sufficient parliamentary deliberations. 178 Bar-Siman-Tov argues that the courts usually resort to judicially created

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166 See Bar-Siman-Tov (n 8 above) 1920 & 1923.
167 See Bar-Siman-Tov (n 8 above) 1921.
168 n 10 above.
169 n 11 above.
170 Bar-Siman-Tov (n 9 above) 271.
171 As above.
172 Bar-Siman-Tov (n 9 above) 271.
173 Bar-Siman-Tov (n 9 above) 283.
174 Bar-Siman-Tov (n 9 above) 271-272.
175 See first para of point 2.1.
176 n 18 above.
177 Bar-Siman-Tov (n 9 above) 283 (the author uses ‘judicially created’ in the literal sense to denote that these substantive rules are usually not provided under the formal rules of legislative procedure).
178 Bar-Siman-Tov (n 9 above) 274 & 283.
procedural questions in what he regards as ‘complex situations’, where there are no formal rules demanding a special legislative process for the limitation of certain rights.\textsuperscript{179}

Bar-Siman-Tov proves his assertion about the emergence of SPR by citing the decisions of the courts in the United States of America\textsuperscript{180} and Europe.\textsuperscript{181} He argues that two main paradigms transcend all these decisions: that the court should first determine if the enactment substantively infringes the Constitution and if the answer is in the affirmative, the court can then enter the second stage of inquiry, where it enquires whether the enactment process was based on the necessary legislative studies, findings and parliamentary deliberations.\textsuperscript{182} In terms of the SPR, the latter point replaces the proportionality test and becomes decisive.\textsuperscript{183}

In 2013, Alemanno published an article, ‘The emergence of evidence-based judicial reflex: a response to Bar-Siman-Tov’s SPR’.\textsuperscript{184} Alemanno argues, contrary to Bar-Siman-Tov’s view, that the new form of review should not be characterised as independent from the existing pure forms of judicial review (substantive and procedural judicial review).\textsuperscript{185} Instead, this new form of judicial review should be conceived as a manner in which the court supplements its substantive constitutional analysis with a more rationally orientated legislative procedural review.\textsuperscript{186}

Further to the above, Alemanno argues that Bar-Siman-Tov’s meaning falls short of demonstrating the broader roots necessitating the occurrence of this new form of judicial

\textsuperscript{179} Bar-Siman-Tov (n 9 above) 274. This explanation is vehemently opposed by Alemanno, as will be observed later in the debate.

\textsuperscript{180} See Bar-Siman-Tov (n 9 above) 277-278. (He refers to the ruling of the Court in Fullilove v Klutznick 448 U.S 448 (1980) where the dissenting judge held that the character of the legislative process should be considered (procedural judicial review) where the product of the legislative procedure caused a deprivation of liberty or property (substantive infringement) without due process of law. Applying this approach to the Act in question, Justice Evans examined the congressional records and found insufficient deliberation and consideration in the enactment process. He held that “this kind of perfunctory consideration of the unprecedented policy of profound constitutional importance was sufficient grounds for concluding that the statute was not narrowly tailored.”) See also Reno v A 521 US 844 & 879 (1997.)

\textsuperscript{181} See Siman-Tov (n 9 above) 275 (He refers to two European cases: Evans v. United Kingdom (2007) ECHR 6339/05 & Hirst (no. 2) v. United Kingdom (2005) ECHR 2005 681. In the former case, the Court explicitly confirmed that, in assessing the proportionality of the Act, “it is relevant that the Act was the culmination of an exceptionally detailed examination and the fruit of much reflection, consultation, and debate. In the latter case, the Court referred to, among others, lack of substantive parliamentary debate or evidence in the legislative records that the legislature sought to weigh the competing interests or to assess the proportionality of the restriction and it consequently held that the infringement of the rights failed the proportionality test.”)

\textsuperscript{182} Bar-Siman-Tov (n 9 above) 279.

\textsuperscript{183} As explained in the preceding paragraph.

\textsuperscript{184} A Alemanno ‘The emergence of evidence-based judicial reflex: A response to Bar-Siman-Tov’s semi-procedural review’ 2013 1 Legisprudence 1-16.

\textsuperscript{185} Alemanno (n 28 above) 5 & 16.

\textsuperscript{186} See n 22 above.
review.\textsuperscript{187} He contends that by neglecting to ascertain the broader roots of SPR, Bar-Siman-Tov’s study leads to an erroneous understanding of the nature, scope and dynamics of this new form of judicial review.\textsuperscript{188} He argues that Bar-Siman-Tov’s approach makes it difficult to apprehend the normative desirability that is fundamental to this new phenomenon.\textsuperscript{189}

Alemanno contends that the evolution of a movement towards a ‘more rationally-orientated substantive judicial review’\textsuperscript{190} is directly connected and representative of two main paradigms: the diffusion of evidence-based decision-making requirements imposed on policymakers across the globe,\textsuperscript{191} and an increased demand for accountability for rule-making in the light of the protection of human rights in a constitutional dispensation.\textsuperscript{192} In order to ensure accountability and compliance with evidence-based standards, policymakers consult experts, conduct studies, collect evidence and engage in a deliberation process.\textsuperscript{193}

Alemanno argues that the adoption of evidence-based decision-making by policymakers and the increased demand for accountability prompt the court and other interested parties to assess the quality of the process leading to the adoption of a given enactment intuitively.\textsuperscript{194} Similar to Bar-Siman-Tov’s observation,\textsuperscript{195} Alemanno observes that when called upon to establish the legality of an act, the courts supplement their substantive scrutiny with references to some of the procedural requirements that have progressively been incorporated into the policy process.\textsuperscript{196} Legislative studies, expert reports, consultative procedures and parliamentary debates all provide a useful critical mass of materials considered by the court when making a determination about the quality of the legislative process leading to the enactment.\textsuperscript{197}

Further to the above, Alemanno argues that given the revolutionary move towards evidence-based decision-making, and its gradual infiltration into the existing pure model of substantive review, it appears to be more appropriate to capture the newly emerging form of

\begin{footnotesize}
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\item\textsuperscript{187} Alemanno (n 28 above) 3. Bar-Siman-Tov gave a rather shallow explanation that judicially created procedures are usually applied where there are no formal rules demanding special legislature. See n 23 above.
\item\textsuperscript{188} Alemanno (n 28 above) 4.
\item\textsuperscript{189} As above.
\item\textsuperscript{190} Alemanno (n 28 above) 7.
\item\textsuperscript{191} As above.
\item\textsuperscript{192} Alemanno (n 28 above) 15.
\item\textsuperscript{193} As above.
\item\textsuperscript{194} Alemanno (n 28 above) 8.
\item\textsuperscript{195} See n 24 & 25.
\item\textsuperscript{196} Alemanno (n 28 above) 8.
\item\textsuperscript{197} As above.
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review as the ‘evidence-based judicial reflex’.\(^{198}\) Furthermore, he argues that since the emerging trend is characterised by the instrumental use of the evidence gathered during the legislative process,\(^{199}\) it can be appropriately characterised as substantive rather than semi- or fully procedural review.\(^{200}\)

Alemanno classifies this form of judicial review as reflex in nature because it is ‘an involuntary and instantaneous movement in response to a stimulus’.\(^{201}\) He argues that the stimulus in this regard is the increasing evidence-based nature of the judicial processes and a demand for accountability for rule-making, in the light of human rights.\(^{202}\) He observes that because of the reflex nature of this new form of review, the courts turn to the procedural records culminating in the adoption of the contested enactment, not only when they are available but also when they are missing.\(^{203}\)

Three years after Alemanno’s response, Bar-Siman-Tov published another article, ‘The dual meaning of evidence-based judicial review of legislation’.\(^{204}\) Bar-Siman-Tov seems to have changed his mind about the independent nature and the conceptualisation of the emerging form of judicial review. He concedes to Alemanno’s arguments that the new form of judicial review should be captured as evidence-based judicial review. He also seems to welcome Alemanno’s contention that the new form of judicial review cannot be understood before establishing its broader roots. He too believes that evidence-based judicial review should be viewed as an inevitable result of a revolutionary movement towards evidence-based decision-making.

Bar-Siman-Tov, however, holds a different view on the meaning of evidence-based judicial review. He argues that it should be understood under two related, but different meanings, hence a ‘dual meaning to evidence-based judicial review’.

In terms of the first meaning he states, ‘the judicial decision determining the constitutionality of the legislation should be a product of independent judicial evidence-based

\[^{198}\] As above.

\[^{199}\] As above.

\[^{200}\] As above.

\[^{201}\] Alemanno (n 28 above) 9.

\[^{202}\] As above.

\[^{203}\] As above. The author referred to the decision of *Volker and Markus Schecke* (2010) EHRR 11063, where the Court held that the lack of legislative records showing full substantiation of reasons underpinning the chosen policy is proof that the content of the enactment was not proportionate and therefore interfered with the right to privacy.

The court makes its decision on the basis of evidence tendered by the parties. Where the evidence before the court is insufficient for the purposes of reaching an evidence-based decision, the court should require the parties to supply additional evidence or engage in its own fact-finding. The evidence tendered by the parties or alternatively requested by the court may be extracted from a variety of sources including the legislative records. Bar-Siman-Tov illustrates the application of evidence-based review in its first meaning through the Israeli case of Commitment to peace and social justice society. In this case, the court held that the petitioners failed to provide a complete factual basis that would enable it to make a determination on whether there had been a violation of the right to a subsistence minimum.

In terms of the second meaning he describes, ‘the judicial decision determining the constitutionality of legislation should require evidence that the legislation was a product of legislative evidence-based decision-making’. The court considers, among others, investigations and studies conducted by the legislature, impact assessment reports and records on consultation processes and parliamentary debates. Bar-Siman-Tov argues that the Hartz IV decision is representative of the second meaning. In this case, the German Supreme Court held that the Hartz IV provisions on the subsistence minimum were not a product of evidence-based decision-making. The decision of the court is captured more clearly by Egidy, who summarises the court’s conclusion as follows:

In calculating the Hartz IV standard benefits, the legislature deducted certain expenses from various subcategories deemed inessential to subsistence. In the subcategory of furniture, division five, for instance, expenses for camping furniture and art were subtracted from the amount that the lower quintile of households on

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205 Bar Siman-Tov (n 48 above) 6.
206 As above.
207 As above.
208 Bar Siman-Tov (n 48 above) 14. (He argues that this evidence will not be decisive as understood in Alemanno’s meaning. Rather, such evidence will be employed as one more piece of evidence, among others, which can help courts in their independent substantive evidence-based determination of constitutionality.)
209 2005 2 Isr LR 335 as cited in Bar Siman-Tov (n 48 above) 8.
210 As above. (The complete factual basis that the court required the appropriate documentation on the sources of income; the current and fixed expenditure of that person; information relating to all the national and other support systems that assist that person and the steps he takes in approaching them in order to exhaust his rights. It will also be necessary to clarify whether the person works, and what the employment alternatives available to him are.)
211 Bar-Siman-Tov (n 48 above) 7.
212 As above.
213 125 BVerfGE 175 1 BvL 1/09 as cited in Bar-Siman-Tov (n 48 above) 10.
214 As above.
average spent on furniture. Likewise, the legislature did not include expenses for education, division ten, in the standard benefits. These decisions lacked an empirical basis since no research had been performed to determine whether households actually spent money on those items or, if so, how much they spent. The free estimates conducted at random could not be justified and violated the fundamental right to the guarantee of a subsistence minimum.

Bar-Siman-Tov argues that Alemanno’s conceptualisation of evidence-based judicial reflex as an evidence-based turn within the substantive judicial review is not cognisant of the dual meaning of evidence-based review. He quotes the following passage from Alemanno’s article to support his argument:216

Called upon to exercise substantive review of a contested act, courts supplement their (substantive) analysis with references to the process that led to the adoption of that act. In particular, courts refer to the evidence, investigations, parliamentary debate, and consultation input - often called ‘semi-substantive rules’ - that have led to the adoption of the contested act. As a result, under this emerging ‘judicial trend’, these procedural requirements typically act, regardless of their legal status, as proxies for the determination of constitutionality infringements.

Bar-Siman-Tov further argues that, in his understanding, supplementing the substantive analysis with the quality of the legislative process is representative of a combination of evidence-based judicial review in its first and second meaning.217 He states: ‘…courts scrutinise the legislative process not strictly as a source of evidence for the determination of constitutionality, but rather in order to establish the adequacy and quality of that process’.218

It is, with due respect, argued that Bar-Siman-Tov misunderstood Alemano’s statement. Alemanno’s argument, as depicted in the phrase, was never to assess the legislative process in order to ‘establish the adequacy and the quality of the legislative process’ in a procedural sense. The above phrase is best understood when read in the context of the whole article. Alemanno explicitly argues that evidence-based judicial review is a direct consequence of the infiltration of evidence-based decision-making requirements into the judicial review sphere.219 To that end, courts are now intuitively under an obligation to make evidence-based decisions and they follow judicially created procedural requirements such as examining the legislative records

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216 Alemanno (n 28 above) 8.
217 Bar-Siman-Tov (n 48 above) 7.
218 As above.
219 As above.
leading to the enactment. This, as Alemanno argues, depicts substantive judicial review instead of procedural judicial review.

2.2  Critical analysis of Bar-Siman-Tov’s dual meaning and Alemanno’s evidence-based judicial reflex

A critical analysis of Bar-Siman-Tov and Alemanno’s methods of evidence-based judicial review is made here under three sub-headings: first, the relationship between evidence-based judicial review and the existing forms of review, particularly whether, in light of all the cases cited in Bar-Siman-Tov and Alemanno’s conceptualisations, evidence-based judicial review should be regarded as a substantive or procedural form of review or both. Secondly, the discussion focuses on the weaknesses and the strengths associated with Bar-Siman-Tov’s first meaning. In the third part, the strength and weaknesses of Alemanno and Bar-Siman-Tov’s second meaning are discussed. The analysis ends with a recommendation on how the conceptualisation offered by the authors may be improved.

2.2.1. Relationship between evidence-based judicial review and existing forms of judicial review

It is argued that evidence-based judicial review should be categorised as a substantive form of judicial review. Close analysis of the judicial decisions cited by Alemanno and Bar-Siman-Tov in support of their respective approaches reveals that the courts’ underlying focus when applying evidence-based judicial review is not the legislative procedure. In all cases cited to illustrate Bar-Siman-Tov’s dual meaning and Alemanno’s approach, the court sought to make evidence-based decisions on the basis of any available form of substantive evidence. Such evidence may be in different forms, depending on the circumstances of each case.

In the Volker and Markus Schecke case, cited by Alemanno as representative of evidence-based judicial reflex, the court opted to use substantive evidence derived from legislative records to assess the justifiability of the law that infringed the right to privacy. In doing so, the court first established the substantive infringement based on the facts presented before it by the parties and then thereafter, it concluded that the law in dispute was unjustified and therefore unconstitutional. The court held that there was no evidence in the legislative records showing that the legislators explored the adoption of less restrictive means.

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220 n 42 above.
The approach of the court in the decisions cited by Bar-Siman-Tov to illustrate two meanings of evidence-based judicial review also reveal the courts’ paramount interest in substantive evidence. Although Bar-Siman-Tov attempts to make a distinction between the two cases in terms of their classification as either substantive or procedural, close examination of both cases reveals that both courts were interested in substantive evidence.

The Hartz decision cited by Bar-Siman-Tov to establish the procedural nature of evidence-based judicial review fits better under substantive judicial review than procedural judicial review. Contrary to Bar-Siman-Tov’s contention that the court reached its decision solely on the basis of a defective legislative procedure, a close reading of the case shows that the court’s reasoning was more substantive than procedural. The court assessed the content of the legislative records presented to it and concluded that the legislators had neglected to take into consideration some significant factors that were necessary for the determination of subsistence benefits and consequently, such provisions were unconstitutional. The same can be said about the Commitment to Peace and Social Justice Society case, which was cited as illustrative of the first meaning. In this case, the court likewise used solely substantive evidence to arrive at its evidence-based decision.

2.2.2. Bar-Siman-Tov’s evidence-based judicial review under the first meaning

In terms of the first meaning, the court’s decision on the constitutionality of an enactment is a product of independent evidence-based decision-making. To that end, the court may make use of any form of evidence tendered by the parties during the litigation process. The court may also require the parties to supply more evidence or engage in its own fact-finding. Bar-Siman-Tov notes that the evidence tendered by the parties or alternatively requested by the court may be extracted from the legislative records. He argues, however, that the evidence derived from the legislative records must not be decisive, but should be employed as one more piece of evidence, among others, which can help courts in their independent substantive evidence-based determination of constitutionality.221

2.2.2.1. Weaknesses

The requirements of evidence-based judicial review in its first meaning allows court fact-finding. Court fact-finding is a process in which a judicial officer can support its decision with an authority that is independent of any of the evidence tendered by the parties during the

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221 As above.
litigation process.\textsuperscript{222} An example is the case of \textit{Re: J}\textsuperscript{223} where the court’s decision relied extensively on a document that was never tendered by the parties during the litigation process.\textsuperscript{224} The parties were not given the opportunity for cross-examination, rebuttal or introduction of further testimony.\textsuperscript{225}

The judicial process that allows the court to engage in its own fact-finding may prompt the court to rely extensively on readily available internet sources to support its arguments.\textsuperscript{226} Most of these internet sources are without control measures and regulations to ensure that the information placed in them is true and reliable.\textsuperscript{227} Consequently, court findings that are based on internet studies and statistics may be tainted with bias and factual mistakes.\textsuperscript{228}

Furthermore, even where the court may find means to guard against mistakes and bias posed by the digital age, there remains a question of fairness.\textsuperscript{229} This concern has two components. On the one hand there is the ‘short-term fairness question with regard to the parties’\textsuperscript{230} and on the other ‘long-term fairness about the legitimacy of the Supreme Court generally’.\textsuperscript{231} The litigating parties often feel unfairly treated when the judge makes a decision on the basis of factual authorities independently found by himself and denies the litigants the opportunity for further cross-examination, rebuttal or the introduction of further testimony relative to the disputable fact at issue.\textsuperscript{232} The disadvantaged position of the litigants created by court’s independent fact-finding is completely inconsistent with the goals of fairness and accuracy inherent in the adversarial process.\textsuperscript{233}

A litigation process that promotes the court’s independent fact-finding also limits the requirement of democratic legitimacy inherent in judicial decision-making.\textsuperscript{234} The process of constitutional adjudication requires the participation of both the litigants and the court.\textsuperscript{235} The court’s decision should be a response to the factual findings and the arguments presented by

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\textsuperscript{222} AO Larsen ‘Confronting Supreme Court fact-finding’ 2012 98 \textit{Virginia Law Review} 1256-1312 1257.
\textsuperscript{224} As above.
\textsuperscript{225} As above.
\textsuperscript{226} Larsen (n 58 above) 1281-1291.
\textsuperscript{227} As above.
\textsuperscript{228} As above.
\textsuperscript{229} Larsen (n 58 above) 1301.
\textsuperscript{230} As above.
\textsuperscript{231} As above.
\textsuperscript{232} As above.
\textsuperscript{233} As above. Larsen argues that the adversarial process allows the litigants to participate fully in the litigation process.
\textsuperscript{234} As above.
\textsuperscript{235} CJ Peters ‘Assessing the new judicial minimalism’ 2000 100 \textit{Columbian Law Review} 1454-1581 1481.
\end{flushright}
the parties.\textsuperscript{236} It is therefore narrow-minded to think of adjudication as decision-making by the judges.\textsuperscript{237} Adjudication involves decision-making by both the judge and the litigants, in that, while the latter present the facts and create arguments, the former considers all the information tendered to reach an evidence-based decision.\textsuperscript{238}

Further to the above, the conceptualisation of evidence-based judicial review under the first meaning is unconscious of the distinctive features of the forms of evidence inherent in every constitutional case: the legislative and adjudicative facts.\textsuperscript{239} It is not clear whether the evidence derived from the listed sources will be used in support of the legislative or adjudicative facts.

\textbf{2.2.2.2. \textit{Strengths}}

Evidence-based judicial review under the first meaning gives the court an opportunity to make a decision that is informed by a variety of information, such as parties’ evidence, \textit{amici curiae} and legislative records. Since these sources are replete with both contemporaneous and historical information, the court may be able to make a decision that is representative of both the plaintiff(s) and the government's current economic or social circumstances. Where the issues on legislative facts revolve around scientific information, the availability of contemporaneous information will enable the court to make a decision that is abreast of current technological advances.

Furthermore, the judicial process that welcomes evidence from other legal bodies, which are independent of the litigating parties, increases the possibility of a balanced litigation process. The other parties to litigation may not be sufficiently resourced in a manner that will

\textsuperscript{236} As above.
\textsuperscript{237} As above.
\textsuperscript{238} As above.
\textsuperscript{239} The distinction between legislative and adjudicative facts was first pointed out by Professor Davis. See KC Davis ‘An approach to problems of evidence in the administrative process’ 1942 55 \textit{Harvard Law Review} 364,402. He argued that every litigation process is characterised by two forms of evidence, legislative facts and adjudicative facts. Legislative facts are on the one hand facts underlying a law or policy, for example, the empirical, social or scientific evidence on which the law or policy is based. Adjudicative facts, on the other hand, relate to facts specific to the litigating parties, such as what the parties did, what the circumstances were and what background conditions were. Other authors followed this distinction. See note 63 above; JO McGinnis & CW Mulaney ‘Judging facts like law’ 2008 25 \textit{Constitutional Commentary} 69-129; DL Faigman ‘Defining empirical frames of reference in constitutional cases: unravelling the as applied versus facial distinction in constitutional law’ 2009 36 \textit{Hastings Constitutional Law Quarterly} 631-665 (Faigman denotes adjudicative facts as ‘constitutional case specific facts’ and he divides legislative facts into two classes: ‘constitutional doctoral facts’ and ‘constitutional reviewable facts’. This classification still coincides with Davis’s distinction); CE Borgmann ‘Rethinking judicial deference to legislative fact-finding’ 2009 84 \textit{Indiana Law Journal} 1-56; DM Hashimoto ‘Science as a mythology in Constitutional law’ 1997 76 \textit{Oregon Law Review} 111-153.
enable them to present every form of evidence that may be required to establish or disprove legislative facts.\textsuperscript{240} By requiring a variety of evidence, which may include, among others, solicitation of \textit{amici curiae} and independent expert and specialised panels, the court may prevent the probabilities of a one-sided presentation, which often results in an imbalanced litigation process.\textsuperscript{241}

The approach of evidence-based judicial review in its first meaning may also eliminate the possibility of erroneous decisions, provided the court pays thorough attention to all types of evidence tendered before it.\textsuperscript{242} The same results may not be achieved where the court gives preference to the evidence derived from its own fact-finding or any other source of information. In order to reach decisions that are free of error, the court has to examine all the evidence tendered before it carefully and impartially.\textsuperscript{243}

\textbf{2.2.3. Alemanno’s evidence-based judicial reflex and Bar-Siman-Tov’s evidence-based judicial review in terms of the second meaning}

In terms of both Alemanno’s evidence-based judicial reflex and Bar-Siman-Tov’s second meaning, evidence derived from legislative records is decisive. This definition implies that where the information provided in the legislative records fails to support the enactment’s constitutionality, the court will declare such enactment unconstitutional even where there is sufficient evidence before the court proving that the enactment is constitutional. Conversely, where the court concludes that the information provided in the legislative records proves the enactment’s constitutionality, the court will uphold it in spite of sufficient evidence provided by the parties proving its unconstitutionality.

\textbf{2.2.3.1. \textit{Strengths}}

The judiciary is faced with a real institutional disadvantage at gathering information about the legislative facts.\textsuperscript{244} Unlike the legislature, the court is sometimes required to deal with legislative facts without specialised staff, without lobbyists to provide statistics and data to support their causes and without the ability to subpoena those who may have the information in support of the legislative facts.\textsuperscript{245} The evidence derived from legislative records will

\begin{footnotes}
\item[241] As above.
\item[242] Davis (n 75 above) 1594.
\item[243] As above.
\item[244] Larsen (n 58 above) 1259.
\item[245] As above.
\end{footnotes}
therefore provide the court with robust and coherent evidence that would otherwise have been inaccessible.

Further to the above, the method of judicial review that requires the court to make constitutional decisions that are informed by legislative evidence increases the integrity of the court’s decision.\textsuperscript{246} Instead of making decisions that are based on the judges’ common-sense assumptions, intuitions, and anecdotal evidence, the court will make decisions that are well informed by robust and coherent legislative evidence.\textsuperscript{247}

Reliance on the information derived from the legislative process may result in a less expensive litigation process. Where legislative evidence is decisive, the parties to the decision may only be required to prove the adjudicative facts and the information in support of the legislative facts may be derived from the readily available legislative records. The parties to litigation may, therefore, save money that could otherwise have been spent on expert witnesses.

\textit{2.2.3.2. Weaknesses}

Legislative records may not always be accurate.\textsuperscript{248} As soon as the judges undertake to make decisions that are exclusively based on legislative records, legislators, staffers and lobbyists who could not win majority support may introduce comments into the legislative records in order to influence future interpretations.\textsuperscript{249} Since legislators do not usually pay thorough attention to the minutia of legislative records, these undemocratic insertions may go unnoticed and may subsequently find their way into the court’s deliberations.\textsuperscript{250}

Further to the above, the legislative records may not be representative of contemporaneous circumstances. In cases where a long period has elapsed between the date of enactment and the date on which the constitutionality of the enactment is challenged, the evidence derived from the legislative records may have been overtaken by events. Thus, a decision that is based on such legislative evidence alone may not be representative of the technological, political, social and economic transition that might have occurred post-enactment.

\textsuperscript{246} Alemanno (n 28 above) 15.
\textsuperscript{247} As above.
\textsuperscript{248} Note ‘Deference to legislative fact determinations in the first Amendment cases after Turner broadcasting’ 1998 111 \textit{Harvard Law Review} 2312-2329 2322.
\textsuperscript{250} As above.
3. Recommendations

In the light of the above analysis, it is observed that Bar-Siman-Tov’s first meaning offers the most representative conceptualisation of evidence-based judicial review, subject to the following improvements:

- That instead of defining evidence-based judicial review as a form of judicial review that requires the court to make ‘an independent evidence-based decision based on the evidence tendered before it by the parties (including evidence derived from legislative records) or information based on its own fact-finding’, evidence-based judicial review should be understood as follows: ‘a form of substantive judicial review in which the court is required to ensure that the legislative facts underlying the law or policy in dispute are supported by complete and reliable evidence’. The change in language highlights the unique importance of legislative facts in evidence-based judicial review, which is otherwise not clear under Bar-Siman-Tov’s first meaning. When making a decision about the constitutionality of the enactments, in particular, the analysis of whether the limitation or infringement caused by the enactment is reasonable and therefore justified, the court’s paramount focus is on legislative facts, rather than adjudicative facts. Evidence-based judicial review requires the courts to ensure that the evidence tendered in support of legislative facts is complete and reliable. It is against judicial deference to legislative evidence and it requires the courts to pay attention to all forms of evidence tendered by the parties during the litigation process. It also condemns legislative facts that are founded on assumptions, anecdotes or conjecture.

- That, when making an evidence-based decision, the court should not rely on any information that is not extensively deliberated upon by the parties. Where, during court fact-finding, the judge discovers disputable evidence in support of legislative fact, he or she should invite the parties to the litigation or amici curiae to participate in the consideration of those facts. This procedure reduces the possibility of egregious

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251 It allows the court to take cognisance of the evidence that is required under both Alemanno’s evidence-based judicial reflex and Bar-Siman-Tov’s second meaning and further requires the court to consider other relevant information. Under this definition, the information derived from the legislative records is not decisive.

252 As is shown in the cases discussed by Alemanno and Bar-Simon-Tov, the concept of evidence-based judicial review applies only when the court has already established substantive infringement by reference to the adjudicative facts. These cases illustrate that the evidence required in the application of the concept of evidence-based judicial review is only necessary to support legislative facts.

253 Davis (n 75 above) 1599. See also Larsen (n 58 above) 1308.
errors associated with court fact-finding. It is also in accordance with the principle of fairness and democracy inherent in the litigation process.

- That, even where the court is presented with what might appear to be sufficient legislative evidence in support of the legislative facts, the court should independently assess it against other evidence before the court. The evidence derived from legislative records should be viewed as a presumption that can be rebutted by the facts raised by the litigating parties or the amici curiae.

4. Effective protection of constitutional rights through evidence-based judicial review

The courts, particularly in Botswana and South Africa, have not consistently welcomed evidence-based judicial review in their constitutional analysis. While in a few cases the courts have adopted evidence-based judicial review, some judicial decisions have vigorously rejected it. Through the judicial decisions in which the courts adopted evidence-based judicial review and the ones in which did not, this part of the chapter illustrates the necessity of adopting evidence-based judicial review for effective protection of constitutional rights.

4.1. Judicial decisions where evidence-based judicial review approach was adopted

In two important cases, one from the South African constitutional jurisprudence, and one from the Botswana constitutional jurisprudence, the court adopted evidence-based judicial review. In both cases, the court pronounced the constitutionality of an enactment after due consideration of all the evidence in support of or against the legislative facts. The courts did not defer to the legislative evidence in support of the legislative facts or make decisions on the basis of assumptions, anecdotes or conjecture.

In S v Makwanyane the accused was convicted of the offence of murder, which carried the death penalty in terms of section 277(1)(a) of the Criminal Procedure Act. The issue for determination was whether the provision that allows the death penalty was reasonable, and therefore a justifiable limitation of the constitutional right to life and the right to protection.

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254 As above.
255 As above.
256 Note (n 87 above) 2327.
257 As above.
258 Note that the same observation may be true of other African countries. This dissertation is however limited to Botswana and South African jurisprudence.
259 1995 3 SA 391 (CC).
against cruel, inhuman and degrading treatment.\textsuperscript{261} The state argued that the provision that legalised the death penalty was constitutional. It advanced three main legislative facts or reasons that lead to the enactment: that the death penalty deters crime better than any other sentences such as life imprisonment, that it ensures that the worst murderers will not endanger the lives of other prisoners and that it meets the need for retribution demanded by society in response to a high level of crime.\textsuperscript{262}

The court applied the limitation standard provided in section 33 of the Constitution of the Republic of South Africa,\textsuperscript{263} and it further determined whether there was complete and reliable evidence in support of the alleged legislative facts.\textsuperscript{264} It assessed the evidence tendered by the parties and the \textit{amici curiae} and held that the Attorney General had failed to provide sufficient evidence in support of the alleged legislative facts.\textsuperscript{265} The court noted that the only evidence advanced in support of the deterrent effect associated with the death penalty was statistics that showed a substantial increase in violent crime over the previous five years\textsuperscript{266} and the Attorney General’s assertion that it is common sense that the death penalty is the most feared.\textsuperscript{267} The court weighed these statistics against the evidence presented by other parties and it held that the high incidence of violent crime could not simply be attributed to failure to carry out the death penalty.\textsuperscript{268} The court asserted that the increase in violent crime was the consequence of great social change associated with extreme turmoil and conflict, particularly during the period from 1990 to 1994.\textsuperscript{269} It further noted that many other factors could have contributed to the upsurge in violent crime.\textsuperscript{270} These included the frustrations consequent upon homelessness, unemployment and poverty.\textsuperscript{271} With regard to the assertion that in terms of common sense, the death penalty is the most feared, the court held that ‘punishment as extreme and irrevocable as [the] death penalty cannot be predicated upon speculation.’\textsuperscript{272} The court also held that there was no complete and reliable evidence in support of the other two legislative facts advanced by the state.\textsuperscript{273} In light of this analysis, the court held that the lack of evidence

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  \item \textsuperscript{261} S v Makwanyane (n 93 above) para 80-90.
  \item \textsuperscript{262} S v Makwanyane (n 93 above) para 340.
  \item \textsuperscript{263} Constitution of the Republic of South Africa, 1996.
  \item \textsuperscript{264} S v Makwanyane (n 93 above) para 116-127.
  \item \textsuperscript{265} As above.
  \item \textsuperscript{266} S v Makwanyane (n 93 above) para 118.
  \item \textsuperscript{267} S v Makwanyane (n 93 above) para 127.
  \item \textsuperscript{268} S v Makwanyane (n 93 above) para 119.
  \item \textsuperscript{269} As above.
  \item \textsuperscript{270} As above.
  \item \textsuperscript{271} As above.
  \item \textsuperscript{272} S v Makwanyane (n 93 above) para 127.
  \item \textsuperscript{273} S v Makwanyane (93 above) para 128-131.
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in support of the legislative facts advanced in support of the death penalty rendered the provision that allowed the death penalty unreasonable and therefore unjustifiable under the general limitation clause.\textsuperscript{274}

In \textit{State v Marapo}\textsuperscript{275} the respondent was arrested and charged with rape. In terms of section 142(1)(i) of the Penal Code,\textsuperscript{276} he was not entitled to bail pending his trial. He brought an application in terms of section 18 of the Constitution of Botswana\textsuperscript{277} for an order declaring section 142(1)(i) contrary to section 5(3)(b)\textsuperscript{278} and section 10(2)(a)\textsuperscript{279} of the Constitution.\textsuperscript{280} On the contrary, the state argued that the provision was justified by public interest and public health.\textsuperscript{281} It was contended that the law would prevent the incidence of rape cases and control the HIV/AIDS epidemic that afflicted the nation.\textsuperscript{282} The state did not provide any evidence substantiating these alleged legislative facts.

The court held that there was no convincing evidence proving that denying bail to people charged with rape would prevent the incidence of rape cases.\textsuperscript{283} In the premises, it was held that section 142(1)(i) was unconstitutional. In particular, Tebbutt AJP held:\textsuperscript{284}

\begin{quote}
It is beyond my comprehension how depriving a person of his liberty merely because he is alleged to have committed rape - not, it must be stressed, because he is found guilty of it - can in any way reduce the crime rate, including rape or serve to contain or restrict the incidence of HIV/AIDS. After all, not all persons who commit rape are infected with HIV/AIDS. It may be thought that knowing that no bail will be granted if a person is charged with rape, will have a deterrent effect, persuading those who may be so minded to desist from pursuing their intentions. That, however, it would seem, was the ostensible purpose in the enactment of the sections 142(1)(ii)
\end{quote}

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\textsuperscript{274} \textit{S v Makwanyane} (n 93 above) para 145 & 146.
\textsuperscript{275} 2002 AHRLR 58 (BwCA 2002).
\textsuperscript{276} Cap 08:01.
\textsuperscript{278} Section 5(3)(b) of the Constitution reads as follows: 'Any person who is arrested or detained ... (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana, and who is not released, shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.
\textsuperscript{279} Section 10(2)(a) of the Constitution reads: 'Every person who is charged with a criminal offense (a) shall be presumed to be innocent until he is proved or has pleaded guilty.'
\textsuperscript{280} n 109 above.
\textsuperscript{281} \textit{S v Marapo} (n 109 above) para 17.
\textsuperscript{282} As above.
\textsuperscript{283} As above.
\textsuperscript{284} \textit{S v Marapo} (n 109 above) para 19.
\end{flushright}
(2)(3)(4)(5) by section 3 of Act 5 of 1998 containing, as they do, harsh and severe mandatory punishments for rape, particularly for those persons who are HIV positive and especially if they are aware of it. I cannot conceive that making the fact that a person who may be alleged to have committed rape not entitled to bail can operate in any manner as a deterrent.

4.2. Judicial decisions where the opportunity to apply evidence-based judicial review was missed

In *Makuto v S*\(^{285}\) the appellant was convicted of rape. Section 142(2) of the Penal Code as amended by section three of the Penal Code (Amendment) Act, 1998 made HIV-testing for rape convicts compulsory.\(^{286}\) The Act also outlined new penalties for rape convicts. If an individual convicted of rape was found to be HIV-negative, he or she was liable to a minimum of 10 years imprisonment.\(^{287}\) If the convicted person tested positive, and such results were unbeknown to him or her, he or she was liable to be sentenced to a minimum term of 15 years imprisonment.\(^{288}\) However, if the rape convict was aware of his or her HIV positive status, he or she was liable to be sentenced to a minimum term of 20 years' imprisonment.\(^{289}\)

Pursuant to the provisions of section 142(2) of the Penal Code, the appellant was caused to undergo the HIV test and he was proven to be HIV-positive, and thereafter sentenced to 16 years of imprisonment.\(^{290}\) The appellant contended that that section 142(4)(a) of the Penal Code was unconstitutional because it contravened section 15 (right to freedom from unfair discrimination) of the Constitution.\(^{291}\) The appellant further contended that section 142(4)(a) was unjust and unfair in so far as it presumed that the convicted person who, after trial and conviction, tested HIV-positive, must have infected the victim and therefore be liable for harsh punishment.\(^{292}\)

In defence of section 142(2), the state narrated to the court the history of the development of HIV in the country and the background that led to the enactment.\(^{293}\) It was argued that the heightened charges required under the Act were intended to contain or at least
ameliorate the spread of HIV.294 The state did not advance any evidence to prove that the enhanced punishments were reasonably required to combat or ameliorate the spread of HIV. In spite of this unsubstantiated legislative fact, Amissah P held that:295

Read in the sense that the convicted person must have the HIV syndrome at the time of the act of rape, whether he was aware of it or not, I think the legislation is reasonably necessary in a democratic society, as Botswana is, to abridge the freedom from discrimination provision of the Constitution, in order to combat the spread of the HIV/AIDS pandemic which has afflicted the nation; and to deter the increasing incidence of rape.

In Mazibuku v City of Johannesburg (Mazibuku case)296 the court was required to provide an appropriate meaning of section 27(1)(b) of the Constitution.297 The applicants, Mazibuko and four others, who represented Phiri community, challenged the legality of the water policy adopted by the City of Johannesburg.298 Their main contention was that the water policy infringed Phiri residents’ constitutional right to sufficient water.299 They argued that the amount of free basic water prescribed by the water policy was insufficient to preserve the quality of life envisioned in the Constitution.300 They submitted that six kilolitres monthly basic water allowance does not amount to ‘sufficient water’, and that the introduction of pre-paid meters was unlawful, unreasonable, unfair and discriminatory.301 According to the evidence advanced in support of the applicants’ contention, sufficient water should be fifty litres per person per day.302

The respondent, the city of Johannesburg, did not dispute the applicants’ contention that the amount of water provided under the water policy was insufficient.303 It however submitted, in defence of the water policy, that a decision to ensure that each household had sufficient water was a difficult financial and administrative decision.304 It also pointed out that the city had

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284 As above.
294 As above.
295 Makuto v S (n 119 above) 140.
296 2010 4 SA 1 (CC).
297 Section 27(1) provides, among others, that ‘Everyone has the right to have access to sufficient food and water.’ Section 27(2) requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
298 Mazibuku (n 130 above) para 44. The water policy provides for the installation of pre-paid meters, and further that the free water that will be given to each household will be limited to six kilolitres per month.
299 As above.
300 As above.
301 As above.
302 Mazibuku (n 130 above) para 86.
303 Mazibuku (n 130 above) para 95.
304 Mazibuku (n 130 above) para 94.
continued to improve its free basic water policy ever since it was first implemented and continued to engage in considerable research to improve its policies. The respondent did not provide concise evidential proof of why it could not provide the applicants with fifty litres per person.

In spite of the lack of evidence provided by the respondent to prove why the applicants’ requests should not be granted, the court held that the water policy was reasonable and therefore constitutional. The court held that it was not appropriate for it to give a quantified amount of what constitutes sufficient water because such a task should be left to the government.

Commenting on the judgment in the Mazibuku case, Ngang argues that the city of Johannesburg was not called upon to give reasons for its decision to deny the community of Phiri sufficient water. Quinnot holds the same sentiments. He observes that the manner in which the court arrived at its conclusion that the water policy was reasonable remains questionable.

Another case in which the court missed the opportunity of adopting evidence-based judicial review in its constitutionality analysis was Residents of Slovo community, Western Cape v Thubelisha homes. This case involved an appeal against an order allowing the respondents to evict and relocate the applicants from a large informal settlement known as Joe Solove settlement to temporary residential houses in Delft. The respondents sought the relocation of the applicants in order to provide reasonable housing for those living in the informal settlement. The applicants resisted the eviction order, arguing that, when seeking the eviction, the respondents had not acted reasonably within the meaning of section 26 of the Constitution. The applicants’ arguments were premised upon three main grounds: Firstly, that the respondents had not carried out sufficient consultation with the affected communities.

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305 Mazibuku (n 130 above) para 94.
306 As above.
307 As above.
309 G Quinot ‘Substantive reasoning in administrative law adjudication’ 2010 3 Constitutional law review 111-139 128.
310 2010 3 SA 454 (CC).
311 As above.
312 As above.
313 Sec 26: (1) ‘Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of the Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions’.
before the relocation;314 secondly, that the temporary residential units in Delft did not constitute adequate alternative accommodation315 and thirdly that the respondents had no plan in place for those who would not financially qualify for the new houses.316

The court ruled that the eviction order was reasonable within the meaning of section 26 of the Constitution. In light of the above contentions, the court held that, in view of the benefits of the project to the Joe Slovo community, the lack of adequate engagement would not prevent its implementation.317 The court further held that to mitigate the negative effects that might be triggered by the lack of a sufficient consultation process, the respondents had to ensure that 70% of the houses to be built were allocated to current Joe Slovo residents.318 With regard to the third contention, the court held that those who could not be accommodated in Joe Slovo after it had been developed would be given permanent housing in Delft.319

When assessing the reasonability of the eviction and transfer of the residents of Joe Slovo settlement, the court displayed some preferential attitude to the evidence provided by the respondents in support of the legislative facts. It made a decision without first requesting the respondents to give evidence that they had sufficient financial and human resources to carry out the project in the manner required by the order. Furthermore, the court did not require the respondents to provide sufficient evidence that refuted or otherwise mitigated the applicants’ concerns.

It is noted that, on 24 August 2009, the Constitutional Court silently issued an order setting aside the order for the evictions until further notice.320 The court set aside the order for eviction after receiving a report from Western Cape provincial Minister of Housing.321 The report stated that there are ‘grave concerns that the massive relocation might end up costing more than it would cost to upgrade Joe Slovo’.322 Moreover, the report indicated that the respondents had not made any arrangements for the Joe Slovo population that would be not accommodated by the housing project,323 and that erecting a new temporary relocation area for

314 Residents of Slovo (n 142 above) paras 117, 301, 167 & 284.
315 As above.
316 As above.
317 Residents of Slovo (n 142 above) para 280.
318 Residents of Slovo (n 142 above) para 173.
319 Residents of Slovo (n 142 above) para 188.
320 L Chenwi & K Tissington ‘Sacrificial lambs in the quest to eradicate informal settlements’ 2009 10 Economic and Social Rights Review 18-23 23.
321 As above.
322 As above.
323 As above.
Joe Slovo residents could be legally challenged by residents who were about to be allocated houses.\textsuperscript{324}

The issues that led to the suspension of the order were the same issues that the court chose to disregard when they were raised by the applicants. The court deferred to the respondents’ submissions and neglected to take into consideration evidence advanced by the applicants. It suspended its order only after receiving the confirmatory report on the same concerns.\textsuperscript{325}

In \textit{Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism},\textsuperscript{326} the applicant initiated review proceedings in the High Court to set aside the fishing allocation decision made by the respondent in the 2001 allocation process.\textsuperscript{327} The High Court upheld the applicant’s contention and concluded that the ‘Respondents did not provide any evidence to show how the allocation was reached’.\textsuperscript{328} The respondents noted an appeal to the Supreme Court of Appeal (SCA), which rejected the High Court’s decision.\textsuperscript{329} The applicant launched an appeal against the decision of the SCA. The gravamen of the applicant’s appeal was among others that the respondent’s exercise of power was not reasonable as contemplated by the empowering provisions.\textsuperscript{330}

The court evaluated this issue in terms of section 33 of the Constitution, providing for the ‘right to administrative action that is lawful, reasonable and procedurally fair’ and the Promotion of Administrative Justice Act 3 of 2000 enacted in accordance with section 33 of the Constitution.\textsuperscript{331} It held that, on the basis of the reasons given by the respondent, the decision taken could not be said to be unreasonable. In support of its decision, the court held that:\textsuperscript{332}

\begin{quote}
In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise
\end{quote}

\textsuperscript{324} As above.
\textsuperscript{326} 2004 4 SA 490 (CC).
\textsuperscript{327} \textit{Bato Star Fishing} (n 155 above) para 1 & 16.
\textsuperscript{328} \textit{Bato Star Fishing} (n 155 above) para 16.
\textsuperscript{329} As above.
\textsuperscript{330} \textit{Bato Star Fishing} (n 155 above) para 30.
\textsuperscript{331} \textit{Bato Star Fishing} (n 155 above) para 21-24.
\textsuperscript{332} \textit{Bato Star Fishing} (n 155 above) para 48-54.
and experience in the field … The task of allocation of fishing quotas was intimately connected with complex policy considerations and it required the ongoing supervision and management by the departmental decision-makers who are experts in the field … The chief Director’s decision may or may not be the best decision in the circumstances, but it is not for this court to consider.

Similar to other decisions discussed above, the court once again displayed a preferential attitude to the decision-maker. It neglected to ensure that the legislative facts leading to the respondent’s decision were informed by complete and reliable evidence. It did not weigh the respondent’s evidence against that provided by the appellants. This preferential attitude was taken under the façade that the court was incompetent to make a judgment on complex matters.

4.3 Necessity of evidence-based judicial review approach for the protection of constitutional rights

The courts often apply the standard of reasonableness when requested to review the constitutionality of decisions, policies or Acts of Parliament. Where the decision, policy, or Act of Parliament limits the enjoyment of constitutionally protected rights, the limitation is held to be constitutional to the extent that it is within the tenets of the standard of reasonableness. The court is required to establish, on evidence tendered before it, whether there is a relationship between the limitation and the purpose the limitation seeks to achieve, and whether there is evidence in support of less restrictive means. The issues of evidence always come to the fore when applying the standard of reasonableness, especially when the dispute involves the protection of constitutional rights.

It is apparent in the cases discussed above that when determining the reasonableness of governmental action, the courts do not apply the same level of scrutiny to the evidence in

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333 The term ‘legislative fact’ is used loosely to refer to the underlying facts that lead to the respondents’ decision in accordance with their executive function.
334 The standard of reasonableness will be discussed in detail in chapter 5.
335 See S v Makhanya, Makuto v S; Mazibuku v City of Johannesburg; Residents of Slovo v Thubelisha Homes and Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism, discussed under point 4. The standard of reasonableness is discussed in detail in chapter 5.
336 As above.
337 See A Klaasen ‘Public litigation and the concept of deference in judicial review’ 2015 18 Potchefstroom Electronic Law Journal 1901-1929 1915 where Klaasen observes that ‘at the heart of the Constitution is a commitment to substantive reasoning, to examining the underlying principles that inform laws themselves and judicial reaction to those laws.’
support of the legislative facts. The level of scrutiny applied to the evidence in support of legislative facts differs from case to case. Indeed, as Du Plessis and Scott observe:338

The level of scrutiny when applying the standard of reasonableness varies, ranging from the very strict to the deferential, and oftentimes with a lack of guidance by the courts as to the standard’s parameters and applicability.

The level of scrutiny that the court adheres to when applying the standard of reasonableness has a significant impact on the protection of constitutional rights. In light of judicial decisions discussed in paragraph 3.1. and 3.2 above, it is submitted that the level of scrutiny required in evidence-based judicial review is necessary for the effective protection of human rights. A court that neglects or intentionally opts not to adhere to the strict scrutiny required under evidence-based judicial review may open a way for the unnecessary limitation of constitutionally protected rights. However, a court that adheres to the strict scrutiny under evidence-based judicial review may considerably avoid unnecessary limitation of constitutional rights. It may also be able to give way to measures that do not substantially limit constitutional rights.

The adoption of evidence-based judicial review when applying the reasonableness standard in S v Makwanyane339 and S v Marapo340 significantly enabled the court to protect the constitutional rights that were at stake. In the former case, the court held that there was no complete and reliable evidence proving that the deterrent effect attributed to the death penalty was better than one of life imprisonment. The full consideration and analysis of the evidence presented before it enabled the court to opt for the sentence of life imprisonment, which is less restrictive to the convicted person's right to life. The same can be said with regard to the latter case. The court similarly held that there was no complete and reliable evidence in support of the alleged deterrent effect associated with denying bail to an individual accused of committing rape. The application of evidence-based judicial review in the reasonableness test enabled the court to prevent unnecessary limitation of constitutionally protected rights.

According to Pine, the court should not be ignorant of the benefits that substantive evidence has in the constitutional adjudication. She states:

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339 n 93 above.
340 n 109 above.
When justice is blind from the fruits of scientific and social science research and to the demonstrable effect of statutes in operation, rules of law are divorced from the empirical world. Courts are thus rendered impotent in the exercise of their duty to safeguard fundamental constitutional guarantees.

Close analysis of the judicial decisions where the courts did not apply evidence-based judicial reviews underscores the veracity of Pine's statement. Indeed, courts that do not adopt evidence-based judicial review in their reasonableness tests are rendered incapable of exercising their duty to safeguard constitutional rights.

In the *Makuto* case\(^\text{341}\) the court upheld the respondent’s contention that the law that required heightened sentencing for HIV-positive rape convicts was necessary to combat the spread of HIV. The court arrived at this conclusion in spite of the lack of complete and relevant evidence proving that the respondent’s contention was indeed true. By neglecting to ensure that the respondent’s legislative facts were founded on complete and relevant evidence, the court missed an opportunity to prevent the unnecessary limitation of the convict through prolonged imprisonment. Likewise, it missed an opportunity to give at least some assurance, based on complete and reliable evidence, that the prolonged imprisonment was necessary.

In the *Mazibuku* case\(^\text{342}\) the court neglected to make use of evidence-based judicial review in its assessment of what amounts to sufficient water, as contemplated by section 26 of the Constitution. In spite of the fact that even the respondent themselves conceded to the appellants’ contention that six kilolitres of water were insufficient, the court nonetheless neglected to assess the applicants’ evidence in support of the proposed sufficient amount. Instead, it held that the water policy was reasonable and further that it was not appropriate for the court to determine a quantified amount of what constitutes sufficient water. According to the court, such a task should be left to the government. The court missed an opportunity to make use of complete and reliable evidence to enforce the applicants’ right to sufficient water guaranteed under section 26 of the Constitution.

In the *Residents of Slovo* case\(^\text{343}\) the court held that the relocation of the appellants was reasonable in spite of evidence to the contrary. The court did not utilise the complete and reliable evidence presented before it to strike a balance between the appellants’ constitutionally protected rights and the respondents’ constitutional duties. In view of how the events unfolded

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341 n 119 above.
342 n 130 above.
343 n 142 above.
after the court's order, a conclusion to the effect that the respondent’s actions were reasonable was tantamount to an unnecessary limitation of the appellants’ rights. The same evidence that was presented before the court by the appellants, disproving the reasonableness of the eviction and relocation, was re-used by the respondents to convince the court to set aside its order.

In the *Bato Star Fishing* case[^155] the court upheld the reasonableness of the respondents’ fishing quota allocation without inquiring whether the evidence led by the respondents in support of their decision was complete and reliable. The court was of the view that the allocation of fishing quotas involved complex issues, which were better understood by the executive than the judiciary. By refraining from adopting evidence-based analysis in the manner required in evidence-based judicial review, the court failed to fully realise its duty to ensure that constitutionally protected rights were not unreasonably and unnecessarily limited.

5. Conclusion

The chapter thoroughly examined the concept of evidence-based judicial review and it illustrated the necessity of this for the protection of constitutional rights. The chapter commenced with outlining the debate that led to the conceptualisation of the term evidence-based judicial review and thereafter it critically examined its meaning. In the light of the case law that was used in the conceptualisation of evidence-based judicial review, the chapter argued that the meaning attributed to evidence-based judicial review should be re-formulated. The chapter recommended what it posited as ‘the most representative meaning of the concept of evidence-based judicial review’. Furthermore, the chapter discussed judicial decisions in which evidence-based judicial review was applied and ones in which the court refrained from applying it. The chapter concluded by using these judicial decisions to illustrate the necessity of evidence-based review for the effective protection of constitutional rights.

It is established that the concept of evidence-based judicial review is relatively new and that its exact meaning is not yet certain. The conceptualisation of the concept resulted from the debate between two law professors, Alemanno and Bar-Siman-Tov. At the time of the debate, Alemanno was a law professor at the New York School of Law and Bar-Siman-Tov was an assistant professor at Bar Ilan University. The debate between these two authors was kindled by an article published by Professor Bar-Siman-Tov in 2011. The article was entitled ‘semi-procedural review’. In this article, the author observes the emergence of what he regards as a ‘new but yet undefined form of judicial review’, which he terms SPR. Drawing authority from

[^155]: n 155 above.

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American and European constitutional jurisprudence, Bar-Siman-Tov submits that SPR is characterised by the complementary application of two forms of judicial review, namely procedural and substantive judicial review. He further submits that procedural review in the sense of SPR is of a higher standard. Instead of inquiring whether the legislature followed appropriate rules of legislative process, SPR’s procedural review inquires whether the law in dispute was enacted through the process informed by sufficient investigation or studies and parliamentary deliberations. Moreover, Bar-Siman-Tov argues that the application of SPR in judicial review involves giving an answer to two main questions. The first is whether the enactment substantively infringes the constitution (substantive review). The second is whether the enactment was informed by sufficient legislative findings, studies and parliamentary deliberation (procedural review in its highest sense). The second question is only asked when the answer to the first question is in the affirmative. Bar-Siman-Tov submits that an inquiry based on the second question replaces the proportionality test and is thus decisive.

In 2013, Alemanno published an article entitled ‘The emergence of evidence-based judicial reflex - a response to Bar-Siman-Tov’s SPR’. Alemanno agrees with Bar-Siman-Tov’s observation on the emergence of a new form of judicial review. However, he differs from Bar-Siman-Tov on the conceptualisation, meaning and nature of the new form of judicial review. Alemanno submits that instead of being conceptualised as SPR, the emerging form of judicial review should be captured as ‘evidence-based judicial reflex’. Alemanno’s conceptualisation is informed by the roots necessitating the emergence of evidence-based judicial reflex. He argues that its emergence resulted from the imposition of evidence-based decision-making on policy-makers, its gradual infiltration into substantive judicial review and a demand for accountability for rule-making in the light of human rights. He contends that instead of being understood as a complementary application of procedural and substantive judicial review, the new form of judicial review should be classified as substantive judicial review. Alemanno argues that evidence-based judicial reflex supplements substantive judicial review with a more rationally orientated procedural review. He regards the new form of judicial review as reflexive in nature because he believes that it is ‘an involuntary and instantaneous movement in response to a stimulus’. He submits that the stimulus in this sense is the increasing evidence-based nature of the judicial processes and a demand for accountability in rule-making, in the light of human rights.

Three years after Alemanno’s response, Bar-Siman-Tov published another article entitled ‘The dual meaning of evidence-based judicial review’. Bar-Siman-Tov seems to have
adopted a different perspective towards the conceptualisation, nature and meaning of the new form of judicial review. Bar-Siman-Tov concedes, although not by explicit reference to Alemanno’s views, that he too believes that the emerging form of judicial review is an inevitable result of a revolutionary movement towards evidence-based decision-making. Similar to Alemanno’s view, Bar-Siman-Tov submits that the new form of judicial review supplements substantive review with more rational procedural review. However, he contends that in light of the intensity of the rational procedural review required to supplement substantive judicial review, rational procedural review cannot be viewed as a mere ‘reflex’. He submits that the new form of judicial review should be appropriately captured as ‘evidence-based judicial review’ instead of ‘evidence-based judicial reflex’. This chapter argued in support of the former conceptualisation.

Further to the above, Bar-Siman-Tov argues that, instead of being conceptualised in terms of a single meaning, evidence-based judicial review should be understood in terms of two different meanings. According to the first meaning, the judicial review of the constitutionality of an enactment should be a product of evidence-based decision-making. The evidenced used to reach an evidence-based decision may come from different sources. This includes among others evidence tendered by the parties to the litigation, evidence from the court’s own fact-finding, evidence provided by the amicus curiae and evidence derived from legislative records. In terms of the second meaning, judicial review of the constitutionality of an enactment requires investigation into whether the enactment was a product of evidence-based decision-making. In contrast with the first meaning, the court should be informed by the evidence derived from legislative records. The court is not allowed to consult others sources of information used in the first meaning. Bar-Siman-Tov submits that the first and second meaning should be classified as substantive and procedural review accordingly.

The chapter critically analysed the different meanings of evidence-based judicial review proffered by Bar-Siman-Tov and Alemanno. The chapter examined whether these authors’ respective meanings are representative of the nature of evidence-based judicial review. It also critically analysed the sources of information suggested in Bar-Siman-Tov and Alemanno’s respective meanings. The chapter ended a discussion on the conceptualisation and the nature of evidence-based judicial review with a recommendation for the ‘most representative meaning of evidence-based judicial review’.

The chapter contended that the meanings of evidence-based judicial review provided by Alemanno and Bar-Siman-Tov’s second meaning are not representative of the true nature
of evidence-based judicial review. This argument was based on the case law referred to by both authors in support of their respective conceptualisations. Alemanno defines evidence-based judicial review as a form of judicial review that supplements substantive review with a more rationally orientated procedural review. He argues that the application of a more rationally orientated procedural review replaces a proportionality test. Bar-Siman-Tov holds similar sentiments with regard to evidence-based judicial review in its second meaning. He too argues that evidence-based judicial review requires an inquiry into the quality of the legislative process, particularly whether the enactment was a result of an informed legislative process. In terms of Alemanno and Bar-Siman-Tov’s meanings, the evidence derived from legislative records are decisive. The courts should not consult any other source of information besides legislative records.

The chapter argued that the adoption of evidence-based judicial review should not be understood in terms of the meanings provided by Alemanno and Bar-Siman-Tov’s second meaning. It is contended that these meanings constrain the very nature of evidence-based judicial review, which is to ensure that the decisions of the court are a result of an evidence-based analysis. The chapter contended that evidence-based decision-making may require more than one source of information, thus evidence derived from legislative records may not on its own be sufficient for an evidence-based decision. The chapter further contends that although evidence derived from legislative records may at times be deemed comprehensible and reliable, that may not always be the case. The chapter highlighted the dangers that may result from regarding legislative evidence as decisive. It is argued that the legislative records may not always be accurate. The legislators, staffers and lobbyists who could not win majority support may introduce comments into the legislative records in order to influence future interpretations. Since legislators do not usually pay thorough attention to the minutia of legislative records, these undemocratic insertions may go unnoticed and may subsequently find their way into the court’s deliberations. Furthermore, the legislative records may not be representative of contemporaneous circumstances. In cases where a long period has elapsed between the date of enactment and the date on which the constitutionality of the enactment is challenged, the evidence derived from the legislative records may have been overtaken by events. Thus, a decision that is based on such legislative evidence alone may be oblivious of the technological, political, social and economic transition that might have occurred post-enactment.

The chapter contended that, subject to suggested recommendations, the meaning of evidence-based judicial review provided in Bar-Siman-Tov’s second meaning offers the most
representative conceptualisation of evidence-based judicial review. According to this meaning, evidence-based judicial review as a form of judicial review requires the court to make an independent evidence-based decision based on different sources of evidence. Bar-Siman-Tov submits that the sources of evidence may include evidence tendered before it by the parties (this may include evidence derived from legislative records) or information based on its own fact-finding. The chapter contended that the definition perfectly captures the essence of evidence-based judicial review. It is argued that the utilisation of a variety of the sources of information enables the court to make a well-informed evidence-based judicial decision. Furthermore, making reference to other sources may neutralise the dangers associated with a decision informed by a single source of information. The American, European and German case law in which the conceptualisation of evidence-based judicial review was based on did not explicitly constrain the court to a single source of evidence. The courts were more interested in the quality of the law itself, not the quality of the legislative process, and the underlying motive was to determine whether the enactment was informed by complete and reliable information.

The chapter recommended that the definition of evidence-based judicial review offered by Bar-Siman-Tov’s first meaning should be improved to read as follows: ‘a form of substantive judicial review in which the court is required to ensure that the legislative facts underlying the law or policy in dispute are supported by complete and reliable evidence’. The chapter contended that the change in language highlights the unique importance of legislative facts in evidence-based judicial review, which is otherwise not clear under Bar-Siman-Tov’s first meaning. It is also argued that when making a decision about the constitutionality of the enactments, in particular, the analysis of whether the limitation or infringement caused by the enactment is reasonable and therefore justified, the court’s paramount focus is on legislative facts, rather than adjudicative facts. According to the chapter, evidence-based judicial review calls on the courts to ensure that the evidence tendered in support of legislative facts is complete and reliable. It is against judicial deference to legislative evidence and it requires the courts to consider the evidence from all parties to the proceedings. It also condemns legislative facts that are founded on assumptions, anecdotes or conjecture.

345 As is shown in the cases discussed by Alemanno and Bar-Siman-Tov, the concept of evidence-based judicial review apply only when the court has already established substantive infringement by reference to the adjudicative facts. These cases illustrate that the evidence required in the application of the concept of evidence-based judicial review is only necessary to support legislative facts.
The chapter concluded by canvassing the necessity of evidence-based judicial review for the protection of human rights. In so doing, it investigated whether the concept of evidence-based judicial review, in the sense of the meaning recommended by the chapter, has been adopted by the Botswana and South African courts when applying the reasonableness test. Since the term evidence-based judicial review is newly conceptualised, and therefore unlikely to be used by the courts, the chapter identified these judicial cases by inquiring whether the approach of the court was similar to the substantive meaning or nature of evidence-based judicial review. It inquired whether the court, in its analysis, ensured that the legislative facts leading to a decision were informed by complete and reliable information. For example, it was concluded that the court applied evidence-based judicial review in the Makwanyane and Marapo cases because in both cases, the court required the state to prove that the legislative facts leading to an enactment in dispute were informed by complete and reliable evidence. The chapter used the same criteria to identify judicial decisions in which the court missed an opportunity to utilise evidence-based judicial review approach.

Through a comparative analysis of the cases in which the court applied evidence-based judicial review and the ones in which the court missed an opportunity to adopt evidence-based judicial review, the chapter argued that evidence-based judicial review is necessary for the effective protection of human rights. The chapter submitted that, in judicial decisions where evidence-based judicial review was adopted, the court was able to reduce the likelihood of an unnecessary limitation of constitutional rights considerably. The chapter also submitted that, in judicial decisions where evidence-based judicial review was not applied, the court opened a door for unnecessary limitation of constitutional rights. In light of these observations, it was concluded that the evidence-based judicial review approach provides the most coherent form of judicial review for the effective protection of human rights. The chapter also contended that the evidence-based judicial review approach bars the court from adopting a deferential or preferential attitude to evidence presented by the legislative or executive bodies.346 It is submitted that although the evidence led by such authorities may be of substantive importance during judicial review, evidence-based judicial review requires the court always to determine if such evidence is complete and reliable.

346 Note that the issue on whether or not the strict scrutiny required under evidence-based judicial review is within judicial review powers is discussed in chapter 5.
CHAPTER 5
ADOPTING EVIDENCE-BASED JUDICIAL REVIEW TO ASSESS THE CONSTITUTIONALITY OF THE LAW THAT REQUIRES HIV-TESTING BEFORE SURGICAL AND DENTAL PROCEDURES

1. Introduction

The Public Health Act (the Act)\(^1\) requires patients to undergo HIV-testing before surgical and dental procedures. As was established in chapter two of this dissertation, this law is intended to prevent or reduce the risk of HIV transmission from the patient to a healthcare professional during healthcare procedures.\(^2\) It was further established in chapter three that the law limits the patient’s constitutionally protected rights to life, privacy and equality and non-discrimination.\(^3\)

This chapter examines whether the limitation of constitutional rights through the law that requires HIV-testing before surgical and dental procedures is constitutional. It begins by outlining the limitation standard in respect of the right to life, the right to privacy and the right to equality and non-discrimination. It proceeds to provide a discussion on the nature of the outlined limitation clause and its relationship with the concept of evidence-based judicial review, particularly whether the nature of the limitation standard in the Constitution of Botswana (the Constitution)\(^4\) permits the adoption of evidence-based judicial review. The chapter also illustrates that the strict analysis required under evidence-based review is well within the bounds of judicial review and, thus, consistent with the principle of separation of powers. Finally, the chapter adopts evidence-based judicial review in its assessment of whether the law that requires HIV-testing before surgical and dental procedures is within the precepts of the limitation standard. In doing so, the chapter refers to primary sources of information, such as journal articles, case law and policy documents.

2. Limitation test in the Constitution of Botswana

Unlike other constitutions, such as the Constitution of South Africa,\(^5\) the Constitution of Botswana does not have a general limitation clause. Each constitutionally protected right is subject to its own limitation clause. These limitation clauses provided under each right are

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2. See chapter 2 para 4.
3. As above.
characterised by three main elements. First, the limitation should be permitted by law. Second, it must be designed to pursue any of the stipulated legitimate goals. Third, the measures chosen must be reasonably justifiable in a democratic society.

2.1. Limitation must be prescribed by law

In terms of the constitutional provisions protecting the enjoyment of the right to life, the right to privacy and the right to equality and non-discrimination, the limitation of these rights is only allowed to the extent that it is in accordance with a prescribed law. The law that requires HIV-testing before surgical and dental procedures is provided in section 109 of the Public Health Act. It therefore follows that any infringement of the right to life, the right to privacy and the right to equality and non-discrimination through an HIV test required in section 109 of the Act is in accordance with the first element of a constitutionality test.

2.2. Limitation must be designed to achieve stipulated legitimate goals

In terms of the Constitution, the enjoyment of the right to life, the right to privacy and the right to equality and non-discrimination may be limited in order to achieve the purposes of public safety, public order, public morality, public health or protection of the rights or freedoms of other people. The rationale of the law requiring HIV-testing before surgical and dental procedures, as construed in chapter two, may be appropriately categorised as a measure that is aimed at ensuring the realisation of public safety and public order. It may also be desirable for the protection of the rights and freedoms of other people.

2.3. Measures chosen must be ‘reasonably required’ or ‘reasonably justifiable’ in a democratic society

Any measure, law or policy that results in the infringement of the right to life, right to privacy, right to equality and non-discrimination is constitutional only to the extent that it is ‘reasonably justifiable’ or ‘reasonably necessary’ in a democratic society. The enjoyment of the

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7 Secs 4(2), 9(2), 15(4) & (5).
8 Secs 4(1) & (2), 9(1), 3, 15(1) & (3).
9 Sec 4(2).
10 Sec 9(2).
11 Sec 15(6).
12 Act 11 of 2013.
13 The right to life is understood in the context defined in chapter 3.
14 n 5 above.
15 The protection of other person’s rights in the present purposes refers to the medical doctors’ right to be protected from contracting HIV during dental and surgical procedures.
individual’s right to life, right to privacy and the right to equality and freedom from discrimination may be limited only if it is reasonably justifiable in a democratic society.

3. **Interpretation of the phrase ‘reasonably justifiable in a democratic society’**

It is a fundamentally established principle in the Botswana constitutional jurisprudence that provisions limiting the enjoyment of human rights should be given a strict and narrow, instead of a broad construction. A narrow or strict construction ensures that the provisions of the Constitution are construed in a manner that enables the attainment of the instrument’s fundamental purpose. It also allows the interpretation of limitation provisions in a way that will not defeat the ends that the Constitution was designed to serve.

In the case of *State v Marapo*, the court stated that since the deprivation of the right to liberty should be allowed only in narrow confines, a determination on the constitutionality of the law that limits the right to liberty should be guided by the narrow standard of proportionality. Similarly, in *Attorney General v Othomile* the court held that the assessment of the reasonableness of any limitation should be undertaken within the confines of the principle of proportionality. The court supported this view by referring to a remark made by Chakalson P in *S v Makwanyane*:

> The limitation of the constitutional rights for the purposes that is reasonable and justifiable in a democratic society involves weighing up of competing values and ultimately the principle of proportionality.

Although the above-mentioned cases clearly establish that the reasonableness test requires the application of the principles of proportionality, the courts did not provide guidance on the substantive nature of the principle of proportionality.

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16 Sec 4(1).
17 Sec 9(1).
18 Sec 3.
19 Sec 15(1).
20 Sec 15(3)(e).
23 *Rafiu Rabiu v The State* 1981 (NCLR) 293 326.
24 (2002) AHRLR 58 para 16. The issue before the court was to determine whether the deprivation of the right to liberty is justified on the basis of ‘a reasonable suspicion that a person has committed or being about to commit, a criminal offence …’
25 As above.
26 2004 1 BLR (CA).
27 1995 3 SA 391 (CC) para 103.
3.1. Nature of the principle of proportionality and its relationship with evidence-based judicial review

The concept of proportionality was first adopted in Germany in the 19th century. Since then, it has been adopted by other states and a wide range of international regimes, one of them being the European Convention on Human Rights. In English law, its adoption was inspired by European sources, mainly the judicial decisions passed by the European Court of Human Rights (ECHR). In countries that belong to the common law legal tradition, the principle was imported from European sources. In Botswana, for instance, the principle was adopted from the South African case, which was inspired by a Canadian decision. The Canadians lifted the principle from the ECHR.

According to the *Oxford dictionary*, the term ‘proportion’ connotes ‘the relationship of one thing to another in terms of quantity, size or number’. The *Oxford dictionary* further defines proportionality as ‘the quality of corresponding in amount to something else’. In the context of a limitation analysis, it is widely understood that the ‘relationship of one thing to the other’ denotes striking a balance between the limitation of the right and ends to be achieved. It can also be understood to mean finding a balance between the harms that the law imposes and the benefit to be achieved. Moreover, it may imply that there must be a connection between a limitation and the ends to be achieved. As a result, a limitation that does not serve any purpose cannot be permitted.

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28 Article 10(2) of the Prussian General Law (Allgemeines Landrecht) of 1794 permitted the police to take any measure deemed fit to ensure public peace. Such measures were, however, limited to ones necessary to achieve the chosen goal. See M Cohen-Eliya & I Porat ‘American balancing and German proportionality: The historical origins’ 2010 8 International Journal of Constitutional Law 263, 271-273.
29 A Sweet & M Jud ‘Proportionality balancing and global constitutionalism’ 2008 47 Columbia Journal of Transnational Law 73, 112.
30 See 1 (AC) 69; *R v Daly* Secretary of State for the Home Department 2001 2 (AC).
31 n 28 above.
33 As above. See also D Grimm ‘Proportionality in Canadian and German constitutional jurisprudence’ 2007 57 University of Toronto Law Journal 383.
38 Rautenbach (n 37 above) 2231-2232.
39 As above.
Furthermore, the standard of proportionality provides a ‘structured heuristic device for political-moral reasoning’, in that it outlines the inherent elements of justification required for decision-making. It also defines the decision-making process, leaving the judge to analyse the claims critically, and requiring him or her to give reasons for the conclusion reached. According to some scholars, the underlying value of the principle of proportionality is to foster a culture of ‘constitutional deliberation’ in the atmosphere of politics.

The principle of proportionality also institutionalises a culture of justification. The phrase ‘culture of justification’ finds its origins in the writings of the late South African scholar Étienne Mureinik. It was then used by Eliya, and David Dyzenhaus. The culture of justification has become the ‘leitmotiv of constitutional review’. In terms of a culture of justification, a government is required to provide reasons to justify its decisions. According to Mureinik and Dyzenhaus a culture of justification requires any governmental action, in the form of a law, policy or regulation, to be defensible in a court of law by way of demonstrating that it is based on genuine circumstances and demonstrably linked to the intended purpose.

The standard of proportionality is also intended to foster accountability, transparency, openness and trust. Requiring reasons through the culture of justification fosters a processes of ‘deliberation, discourse, and active participation’. The standard of proportionality highlights the important considerations to which the court must pay attention by outlining the

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41 As above.

42 As above.


44 As above.

45 Rautenbach (n 37 above) 2232-2233; M Kumm ‘The idea of Socratic contestation and the right to justification: The point of rights-based proportionality review’ 2010 4 Law and Ethics of Human Rights 143.


47 n 35 above.


50 As above.

51 n 50 above.

52 n 52 above.

53 As above.


55 As above.

56 As above.
issues to which judges must apply their minds during constitutional analysis. Adenas and Zlepting argue that through proportionality, accountability and justification for government action may be considerably improved. They are also of the view that requiring judges to give reasons for their decisions may cause the judiciary to be more accountable for its decisions.

The standard of proportionality has also been viewed as a means of achieving democracy. Lenta states that democracy is not only about the notion of popular sovereignty, but also encompasses the governmental duty to realise effective protection of human rights and promotion of constitutional values of ‘responsiveness’, ‘accountability’ and ‘openness’. He therefore submits that the idea that a judge has no power to overturn the decision of a democratically elected parliament rests on a misguided notion of democracy: something akin to what Mureinik termed ‘snapshot democracy’.

In light of the above it is submitted that the values of accountability, democracy, transparency and justification inherent in the principle of proportionality may be perfectly realised through the adoption of evidence-based review. By requiring the court to make decisions that are supported by complete and reliable evidence, evidence-based judicial review fosters the practical application of the inherent values of the principle of proportionality. Courts that neglect to adopt evidence-based judicial review, as is shown in chapter four, constrain themselves from fully utilising the principle of proportionality. A decision that is a result of one-sided litigation, or which is based on assumptions or anecdotes, falls short of fulfilling the values of accountability, democracy, transparency and justification inherent in the principle of proportionality. The adoption of evidence-based judicial review in the proportionality analysis coincides with the statement of the Canadian Supreme Court in Mackay v Manitoba. The court remarked:

57  As above.
59  As above.
60  As above.
61  Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 2 SA 359 (CC) paras 74-76.
62  Matatiele Municipality v President of the Republic of South Africa 2006 5 SA47 (CC) para 110.
63  As above.
64  Mureinik (n 50 above) 35.
65  See A Klaasen ‘Public litigation and the concept of “deference” in judicial review’ 2015 18 Potchefstroom Electronic Law Journal 1901-1929 1919. Klassen argues that the formalistic approach ignores the culture of justification contrary to the values of openness, justification, participation and accountability in the South African Constitution. (Note that the sec 36 of South African Constitution requires the application of the principles of proportionality in the limitation analysis.)
... the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinions as to the future impact of the impugned legislation and the result of the possible decision pertaining to it may be of great assistance to the courts.

3.2. Proportionality principle, evidence-based judicial review, and the separation of powers

Oftentimes it is argued that courts that interfere with executive decisions that are informed by complex evidence are acting contrary to the principle of separation of powers. Since evidence-based judicial review requires the courts to make an evidence-based decision, there is a likelihood that the same argument may be levelled against its adoption. The argument premised on the principle of separation of powers is characterised by two paradigms: First, that by concerning itself with evidential matters, the judiciary acts beyond its judicial powers and thus usurps the role of the legislature and the executive.68 Second, that evidence-based judicial review requires the judiciary to make judgements on certain complex or polycentric issues that should be appropriated decided by the executive and the legislature.69 For the reasons articulated below, it is submitted that these arguments may not be used to disapprove the adoption of evidence-based judicial review.

The courts are vested with the constitutional power to review the constitutionality of the laws, policies or regulations passed by the executive and the legislature, and thereafter may make appropriate orders, as they may deem fit, for the enforcement of constitutional rights.70 In particular, section 18 of the Botswana Constitution provides that:71

(1) …if any person alleges that any of the provisions of section 3 to 16 (inclusive) of this Constitution has been, is being or likely to be contravened in relation to him

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68 DM Davis ‘To defer and then when? Administrative law and constitutional democracy’ 2006 23 Acta Juridica 26.
69 As above. According to Davis, ‘the substance of decisions made by government agencies is not appropriate to judicial decision-making, particularly because of the poly-centricity of task and consequence, and the government official/agency is an expert or at least more of an expert than the court deciding the issue in question’. These views were adopted by the Court in the case of Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC) para 48; Residents of Slovo Community, Western Cape v Thubelisha Homes 2010 3 SA 454 (CC); Mazibuku v City of Johannesburg 2010 4 SA 1 (CC) These cases are discussed in detail in chapter four.
70 Sec 18(1).
71 As above.
or her, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have the original jurisdiction (a) to hear and determine any application made by any person made in pursuance of subsection … and make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provisions of sections 3 to 16 (inclusive) of this Constitution.

A court discharging its duties pursuant to the above provision is often required to apply the reasonableness test, especially when determining whether the infringement complained of is justifiable. In light of the nature of the standard of reasonableness outlined in paragraph 3.1, the adoption of an evidence-based judicial review in a constitutionality analysis is necessary. The court that adopts evidence-based judicial review may be enabled to fully achieve the values of justification, participation, accountability and openness inherent in the principle of reasonableness. Consequently, such a court will be placed in a better position to fulfil its duty to guard against unjustified limitation contemplated in section 18 of the Constitution.72

In light of the powers of judicial review given to the court under section 18 of the Constitution, it is unnecessarily restrictive to refrain from adopting evidence-based judicial review even where the matter involves complex issues. McGinnis and Mulaney argue that there is 'no ontological or analytical dichotomy between interpretation of law and finding of fact that makes the judiciary incompetent to adjudicate on complex social facts'.73 They argue that the law is part of a wider category of factual issues.74 McGinnis and Mulaney illustrate their argument in the following manner:75

Consider, for instance, the process by which a judge would discover the meaning of ‘recess’ in the Recess Appointments Clause. An originalism judge would weigh various bits of factual evidence from the time of the framing. He might consult an eighteenth-century dictionary to pin down the conventional usage of the time. He might look at the ratification debates to gain a better understanding of the clause’s meaning in the particular context. Thus, he would be investigating social facts about

72 See Minister of Health v Treatment Action Campaign 1 2002 10 BLCR 1033 (CC) para 38.
75 As above. Note that McGinnis and Mulaney’s argument was in support of the Court’s fact-finding. They are of the view that the courts are competent to engage in legislative fact-finding, just like the legislators. Although I do not subscribe to the notion of court fact-finding, as argued in chapter 3, it is submitted that their argument is relevant for the purposes of establishing that judges are competent to analyse and make decisions on complex evidence tendered by the parties.
the world. A judge who embraced a consequentialist approach would employ a different legal method, but nevertheless also sift through facts about the world. For instance, she might focus on how the various branches would interact, depending on the meaning assigned ‘recess.’ She might consult political science texts that describe the relation between the President and Congress, and review the aftermath of past recess appointments.

Thus, a court that is able to interpret the law is equally competent to analyse the evidence provided by both parties in order to establish whether the alleged infringement is justified under the reasonableness standard. What then becomes important is the manner in which the court assesses such evidence. In this regard, guidance can be sought from the celebrated South African case of *Michael v Linksfield Park Clinic*.76 This case outlines the guidelines that the court should follow when assessing expert medical evidence. Although the court outlined the guidelines for civil litigation purposes, these may be equally useful in constitutional adjudication that requires the assessment of complex expert evidence. The court outlined the following guidelines:77

a) The courts should not abdicate its decision making duty to experts. The question of reasonableness and negligence is one of the courts itself to determine;

b) In evaluating evidence, the court is required to determine, whether and to what extent their opinions advanced are founded on logical reasoning;78

c) A defendant can properly be held liable despite the support of the body of professional opinion sanctioning the conduct in issue, if that body of opinion is not capable of withstanding a logical analysis and therefore not reasonable.

The logical analysis contemplated by the court in point (b) and (c) above requires the court to ensure that the expert’s opinion is ‘defensible,’ in that it was arrived at after due consideration of all the comparative risks and benefits of the defended medical treatment.79 It should be applied by the court charged with the duty to determine whether the enactment is proportionate to the aim that it seeks to achieve. Point (a) guards against judicial deference and biased limitation analysis. A court applying evidence-based judicial review should not abdicate its

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76 2001 3 SA 1188 (SCA).
77 *Michael v Linksfield Park Clinic* (n 79 above) para 1200A & 1201F.
78 This point is the crux of the decision in the case of *Bolitho v City and Hackney Health Authority* 1998 AC 232 (H.L).
79 As above.
decision-making duty to the legislative bodies under the guise of being incompetent. It should subject every piece of information tendered by the parties to logical analysis.

3.4. Elements of the principle of proportionality

There is fair consensus among scholars on the components of proportionality. These components are referred to as either the ‘stages’ or ‘sub-principles’ of the proportionality standard. Klatt and Meister outline and explain these components in the following manner:

The first stage examines whether the act pursues a legitimate aim; suitability, whether the act is capable of achieving this aim; necessity, whether the act impairs the right as little as possible; and the balancing stage, whether the act represents a net gain, when the reduction on enjoyment of rights is weighed against the level of realization of the aim.

The elements of proportionality on which authors seem to agree, as stated above, are similar to the ones formulated in R v Oakes. Dickson CJ outlined the integral components of proportionality in the following manner:

There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question: R v Big M Drug Mart Ltd (1985) 1 SCR 295 at page 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance.’

In S v Makwanyane Chakalson J concurred with the integral components of proportionality outlined in Dickson CJ’s judgement and the above-mentioned scholarly views. In this case, Chakalson P held that the following considerations are inherent in an analysis based on proportionality:

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80 n 30 above.
82 Klatt & Meister (n 88 above) 9. See also Cohen-Eliya & Porat (n 58 above) 284.
84 As above.
85 As above.
• the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality,

• the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary and

• whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

In terms of point (b) the court should make an assessment based on the ‘purpose of the limitation’ and ‘rationality’. These requirements mandate the government to provide a legitimate purpose that the limitation intends to achieve. The measures adopted in terms of the limitation should be capable of achieving the intended aim. A limitation that is incapable of furthering the purpose should be regarded as unconstitutional. The manner in which the limitation contributes to the promotion of the intended purpose must be documented. If the intended purpose is served only minimally, it should be concluded that not imposing the limitation would obstruct the attainment of the intended purpose slightly. If the limitation serves the purpose substantially, failure to impose the limitation would negatively affect the intended purpose in an extensive manner.

The element of ‘proportionality and sufficient importance’ as envisaged in *R v Oakes* or ‘strict proportionality’ as perceived by the above-mentioned scholars is more simply conceptualised in point (c). In terms of point (c), the court must assess ‘whether the desired ends could be reasonably achieved through other means less damaging to the right in question’. This inquiry captures the strict proportionality envisaged in the proportionality test more accurately and usefully for the purposes of a limitation analysis. If there are two or more ways of achieving the intended aim, the one that does not substantially limit the enjoyment of human rights must be chosen.

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86 As above.
87 As above.
88 Rautenbach (n 37 above) 2256.
89 As above.
90 See *S v Williams* 1995 3 SA 632 (CC) para 86. The court held that the deterrence value of corporal punishment is too marginal to justify its legality.
91 n 68 above.
92 In *Alberta v. Hutterian Brethren of Wilson Colony* (2009) 2 S.C.R. 567, the court stated that minimal impairment and strict proportionality requires the court to make a determination of whether alternative measures can be employed to satisfy the intended purpose. See also S Weinrib ‘The emergence of the third step of the Oakes test in *Alberta v. Hutterian Brethren of Wilson Colony*’ 2010 68 University of Toronto Law Review 77.
The considerations envisaged by Chakalson J in point (a) do not fit into the reasonableness test required in the Constitution of Botswana. The limitation analysis under the Botswana Constitution does not concern itself with the importance of the right in a democratic society. Instead, the Court is required to assess whether the limitation resulting from the law in dispute is reasonably justified in a democratic society. In this regard, the court must be informed by the essential values and principles of a democratic society, such as respect for the right to life, right to equality and non-discrimination. The presumption is that only limitations that pass the proportionality standard are permitted in a democratic society.

4. Compliance of the law requiring HIV-testing before dental and surgical procedures with the elements of the principle of proportionality

4.1. Purpose and rationality

The law that requires HIV-testing before surgical and dental procedures is intended to prevent or minimise the risk of HIV transmission from an HIV-infected patient to a healthcare professional during dental and surgical procedures. The measures prescribed by the law oblige the health professional to require the patient to undergo an HIV-test before surgical or dental procedures. If the patient tests positive, the medical professional can proceed in terms of one of three options: treating the patient while adhering strictly to precautionary measures; transferring the patient to another health professional who is in turn not obliged to treat the patient; or seeking advice from the Director on how to proceed.

An evidence-based judicial review approach is adopted to assess whether the above-mentioned measures are linked or rational in respect of the intended purpose. Reference will be made to relevant scientific and statistical evidence about the means of transmission of HIV during surgical and dental procedures.

4.2. Means of HIV transmission from infected patient to health professional during surgical and dental procedures

The transmission of HIV occurs when the tissue under the skin, mucous membranes, or non-intact skin comes into contact with HIV-infected or potentially infected bodily fluid(s). These

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93 As above.
94 As above.
95 See the interpretation of section 109 of the Public Health Act in chapter 2.
96 Note that because of time constraints, the writer derived evidence from available secondary sources of information.
bodily fluids include blood (including serum, plasma and all biological fluids visibly contaminated by blood), breast milk, pleural, amniotic, pericardial, synovial and cerebrospinal fluid, uterine or vaginal secretions and semen. Any other bodily fluids that do not contain blood traces are usually not considered potentially infected.

During healthcare, the transmission of HIV from a patient to a healthcare professional often results from a percutaneous injury (where the tissue under the skins comes into contact with the infected bodily fluids due to a needle stick injury or a cut with a sharp instrument), contact with the mucous membranes of the eye or mouth, or contact with non-intact skin (particularly when the exposed skin is chapped, abraded, or afflicted with dermatitis).

The factors that influence the risk of infection resulting from contact with a potentially infected bodily fluid include the type of exposure, the amount of bodily fluid involved in the exposure and the amount of the virus in the source patient’s body at the time of the exposure. The amount of HIV virus in the human body is higher in the initial stage of HIV infection and in the final stage of acquired immune-deficiency syndrome (AIDS). However, it can be reduced to the point of being undetectable through antiretroviral treatment.

In terms of available epidemiological or biological evidence, the transmission of HIV cannot occur through the exposure of intact skin to HIV-infected bodily fluids. The risk of contracting HIV through percutaneous injuries is 0.3%. This risk is greater if the injury was caused by hollow bore needle, if the needle penetrated the infected patient’s artery or vein, and if, at the time of the injury, the source patient had a high viral load. The risk of mucocutaneous transmission (contact with infected mucous membranes) has been estimated at 0.09%. There is consensus among specialists that the risk is lower.

Despite evidence proving the low risk of HIV transmission during healthcare procedures, medical professionals are mandated to practise universal precautions. Taking

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98 As above.
99 As above.
100 As above.
101 As above.
102 Elliot (n 105 above) 10; Hu (n 105 above) 626.
103 DJ Hu (n 74 above) 625; see also HIV treatment guideline (n 74 above) 208.
104 HIV treatment guidelines, (n 74 above) 208; Elliot (n 74 above) 8.
105 As above.
universal precautions reduces the risk of exposure and infection. In terms of the standards of universal precautions, all patients are viewed as potentially HIV-positive. Medical professionals are mandated to employ one or more of the following measures:

Avoidance of ‘sharps’ injuries

Health care practitioners should avoid injuries with ‘sharps’ by: recognising risky objects, not only needles and knives, but less obvious ones such as towel-clips, suction drain introducers, bone spicules, and by never allowing a sharp object, especially a contaminated one, to come near one's fingers (e.g. they should not re-sheath needles and should use instruments to load and unload scalpel blades, etc.). They should be personally responsible for the immediate safe disposal of all ‘sharps’ that they use into an approved container; never handling a ‘sharp’ without looking at it; never putting down a ‘sharp’ except in an agreed neutral area; using the safest ‘sharp’ that will do the job (e.g. knives and sharp needles only for skin; scissors and blunt (round-nosed) needles for tissues); never feeling for a needle point (or other sharp object) with their fingers; never putting their fingers in an area or wound where someone else is using a ‘sharp’, avoiding the use of wire sutures; using heavy-duty gloves (ring-link or similar) in dangerous situations (e.g. where there are broken bones, sharp foreign bodies).

Avoidance of skin and mucous membrane contamination:

Health care practitioners should never have contact with patients’ soiled linen, etc. if the skin of their hands is not intact (e.g. from cuts, eczema, etc.) unless the lesions can be completely isolated by impermeable adhesive tape.

Health care practitioners should make careful use of gloves. Latex gloves should be used by every health care provider handling blood or body fluid. Torn gloves should be removed immediately and contamination washed away. Double gloving reduces skin contamination during operations by 80%, and may reduce the risk associated with ‘sharps’ injuries.

106 n 105 above.
107 These guidelines were extracted from the Health Professions Council of South Africa, *Ethical guidelines for good practice with regard to HIV*, booklet 11 2008 annex 5. The universal precautions were recommended, although not in detail, in the WHO guidelines (n 78 above) 12; HIV treatment guidelines, (n 74 above) 208; Ministry of Health Handbook of the Botswana integrated HIV clinical health care guidelines 2016 5.
In respect of spillage health care practitioners should: Use plastic aprons and impermeable boots where the risk of spillage exists; ensure that all spillage is immediately cleaned. Double seal all containers of blood and body fluid.

In respect of spray-aerosol health care practitioners should: Use face or eye protection (e.g. face shields, eye-goggles) where the risk of spray-aerosol contamination exists. Should continuously aspirate laser and fulguration smoke by suction.

A cross-sectional study carried out in 2016 recorded an 11.8% incidence rate of percutaneous injuries.\textsuperscript{108} A total of 75.7% of these injuries occurred during and immediately after performing a medical procedure.\textsuperscript{109} Other research undertaken in 2016 recorded a 37% incidence rate of percutaneous injuries.\textsuperscript{110}

On the basis of the foregoing studies, it can be concluded that percutaneous injuries actually occur in Botswana and, consequently, that medical professionals are indeed at risk of contracting HIV during dental and surgical procedures. However, besides the first case of occupational transmission that was recorded in 1984, no case of occupational transmission of HIV has since been recorded.\textsuperscript{111} This may be due to the adoption of universal practices as required in the policy documents and the minimal risk of HIV transmission associated with percutaneous injuries.

4.3. **Whether the measures adopted to prevent the transmission of HIV from the patient to a healthcare professional during medical procedures are linked to the intended purpose**

The means adopted in section 106 of the Public Health Act are linked to the prevention or reduction of the chances of the transmission of HIV infection from the patient to a healthcare professional during dental and surgical procedures. The Act requires medical professionals to request patients to undergo HIV-testing. If the patient is proven to be infected with HIV or refuses to be tested, the Act allows the medical professional the discretion to proceed in one of


\textsuperscript{109} Jabu (n 83 above) 6.

\textsuperscript{110} S Ndlovu ‘Occupational exposure to blood in selected oral health facilities in Botswana: Experiences and practices of oral health, unpublished master’s thesis University of the Witwatersrand 2012 44.

\textsuperscript{111} Jabu (n 116 above) 4.
three given alternative ways. The Act does not require medical professionals to obtain informed consent before carrying out an HIV test or to provide pre-test or post-test counselling.

The first alternative allows the medical professional to carry out the dental or surgical procedure, adhering strictly to universal precautions. In terms of the evidence discussed in paragraph 3.1.1 above, the adoption of universal precautionary principles reduces the risk of HIV transmission during healthcare procedures.

The second option allows the medical professional to avoid treating HIV-positive or potentially HIV-positive patients by transferring them to another available healthcare professional. The medical professional to whom the transfer is made is not obliged to treat the patient(s). It is clear from this option that the legislators wanted to alleviate the risk of transmission completely by preventing surgical and dental healthcare professionals from coming into contact with HIV-positive patients.

The third option requires the medical professional to seek advice from the Director on how to proceed. The Act does not state the kind of advice that should be sought and the period within which such advice should be sought or given, nor does it indicate whether the medical professional is mandated to act in accordance with such advice. However, it may reasonably be concluded that the advice required is about ways to prevent or minimise the risk of HIV transmission from a patient to a health professional.

5. Ways to attain the intended purpose without substantially limiting human rights
Besides the measures prescribed in the Act as discussed above, there are other, less restrictive ways that may be employed to prevent HIV transmission from the patient to a medical professional during dental and surgical procedures. These include HIV-testing with informed consent in the event of significant exposure, utilisation of post-exposure prophylaxis (PEP) in the event the patient refuses to be tested or if the patient is not available for the test and treatment of a patient within a reasonable time, with strict adherence to universal precautions, regardless of the result of the HIV test.

5.1. HIV-testing in the event of significant exposure
In terms of the scientific evidence provided in paragraph 3.1. above, a medical professional can contract HIV infection through mucocutaneous or percutaneous injuries. Statistical evidence shows that the incidence of percutaneous or mucocutaneous injuries in Botswana is about 37% (at most). This means that there is about a 63% probability that percutaneous injuries or mucocutaneous injuries may not occur, and hence a 63% chance of non-exposure to infection.
The use of universal precautionary practices outlined in paragraph 3.2 may also reduce the occurrence of percutaneous injuries.\textsuperscript{112}

Thus, HIV-testing is only necessary when the medical professional has been significantly exposed to potentially infected materials. Significant exposure includes percutaneous or mucocutaneous injury.\textsuperscript{113} In terms of the Health Professions Council of South Africa’s guidelines for good practice with regard to HIV, no person should be forced to undergo HIV-testing before surgical and dental procedures.\textsuperscript{114} However, if a health practitioner is exposed to the risk of contracting HIV infection through a needle stick injury (percutaneous injury), information about the patient’s HIV status may be required to assess whether the health profession should be treated with PEP.\textsuperscript{115} The HIV status of the source patient may be obtained in the following manner:

- HIV-testing of the source patient’s existing blood specimen.\textsuperscript{116} The test should be done only if the source patient has consented to it.\textsuperscript{117} However, if he or she refuses to consent, the specimen may still be tested, but only after notifying him or her that the test will be done.\textsuperscript{118} The source patient should be assured that his or her privacy rights will not be further interfered with.\textsuperscript{119}

- In the event that there is no existing blood specimen and the source patient refuses to consent to an HIV test, the patient should be regarded as infected with HIV and the exposed health professional should be accordingly considered for PEP.\textsuperscript{120}

- If the source patient is unable to consent to undergo an HIV test and may be unable to do so for a substantial length of time, every reasonable attempt should be taken to obtain proxy consent.\textsuperscript{121}

- A medical professional exposed to the risk of infection should be given thorough professional counselling.\textsuperscript{122}

\textsuperscript{112} n 89 above.
\textsuperscript{113} n 82 above.
\textsuperscript{114} Health Professions Council guidelines (n 82 above) para 7.3 & 8.3.
\textsuperscript{115} Health Professions Council guidelines (n 82 above) para 8.2.1; Elliot (n 74 above) 19.
\textsuperscript{116} As above.
\textsuperscript{117} As above.
\textsuperscript{118} As above.
\textsuperscript{119} As above.
\textsuperscript{120} As above.
\textsuperscript{121} As above.
\textsuperscript{122} As above.
5.2. **Post-exposure prophylaxis**

In the event of exposure, if the patient is proven to be infected with HIV or where the patient refuses to be tested, PEP should be prescribed. PEP should preferably be initiated within one to four hours or at least within 72 hours of the exposure to an infected bodily fluid. PEP minimises the chances of HIV infection after potential exposure to HIV-infected bodily fluids. According to the HIV clinical care guidelines, the initiation of PEP should adhere to the following procedure:

- Testing of the potentially infected body fluid to which the healthcare professional was exposed and the extent of exposure;
- Healthcare professional counselling;
- Testing the healthcare professional. No testing should be done without informed consent for the HIV test. In the event the healthcare professional is HIV-positive, PEP should not be indicated;
- Taking a decision on whether or not to initiate PEP. This decision should be left to the medical healthcare professional. The information on the benefits and shortfalls of PEP that is given during counselling should be sufficient for the medical professional to reach an informed choice;
- The administration of PEP. A medical professional on PEP should be monitored; and
- The health professional should be tested after completing PEP treatment.

5.3. **Treatment of the patient within reasonable time**

The patient’s HIV-positive status or potential HIV-positive status should not affect the medical professional’s decision on whether or not to treat the patient. The medical professional should be obliged to treat an HIV-positive patient within a reasonable time. A transfer to another healthcare professional should not be made on the basis of the patient’s HIV status or

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123 R Baggaley et al ‘The strategic use of antiretroviral to prevent HIV infection: A converging agenda’ 2015 60 *Clinical Infectious Diseases* 159. The use of post-exposure prophylaxis is recommended in the Botswana policy documents. See HIV treatment guidelines (n 82 above) 208 and clinical care guidelines (n 82 above) annex 1.

124 HIV clinical care guidelines (n 82 above) annex 1.

125 See Health Professions Council guidelines (n 82 above) para 7.4. According to these guidelines, a person who refuses to be tested should not be refused treatment. He should be managed as if he or she was HIV-positive. The health professional should apply universal precautions at all times.
potential HIV status. In order to prevent the transmission of HIV from the patient to a healthcare professional during dental and surgical procedures, the medical professional should adopt the universal precautions outlined in 3.2.1 above.

6. Proportionality of measures aimed at preventing the transmission of HIV from a patient to a health professional

Besides the measures adopted by the legislature to prevent or minimise HIV transmission from a patient to a healthcare professional, there are indeed other measures that may be employed to achieve the same purpose without substantially infringing the patients’ rights. These include the adoption of universal precautions at all times and HIV-testing with informed consent in the event of significant exposure to an infected bodily fluid. If, in the event of significant exposure, the patient refuses to undergo an HIV test, his or her existing blood specimen may be tested. A health professional who has been significantly exposed to an HIV-infected bodily fluid should be treated with PEP. If the patient refuses to consent to testing, and there is no existing bodily fluid to be tested, the medical professional should be treated with PEP. The patient should be treated within a reasonable time and the person’s HIV status should not be the reason for delayed treatment.

Obtaining informed consent in the event of significant exposure and the duty to treat the patient within a reasonable time, irrespective of HIV positive status, foster the enjoyment of the patient’s right to privacy, right to life and right to equality and non-discrimination. These rights may only be limited through the testing of existing bodily fluid without the patient’s informed consent. This may only be done if, in the case of significant exposure, the patient refuses to give informed consent for the testing of the existing bodily fluid. Where there is no existing bodily fluid, the medical professional should be treated with PEP.

The availability of less restrictive means to prevent or minimise the transmission of HIV from a patient to a health professional during dental and surgical healthcare renders the measures adopted by the legislature incapable of satisfying the proportionality principle. Consequently, such measures cannot be viewed as reasonably justified in a democratic society, and are thus unconstitutional.

126 As above. According to the HIV treatment guidelines (n 84 above) 93, surgery for HIV-infected patients must not be delayed or ruled out simply on the basis of HIV infection alone. Evaluation of emergency surgical risk for HIV-infected patients must be impartial and must follow the same criteria applied when evaluating non-HIV-infected patients.
7 Conclusion

The chapter applied the method of evidence-based judicial review to assess the constitutionality of the law that requires HIV-testing before surgical and dental procedures. It examined whether the law is within the bounds of a limitation test, particularly whether it is prescribed by law; whether it serves a legitimate goal; and whether it is reasonably justified in a democratic society. It was found that the law that requires HIV-testing before surgical and dental procedures is provided for in the Public Health Act and this measure is thus prescribed by law. It was also found that the law is aimed at achieving one of the constitutionally prescribed legitimate goals, being public safety, public order, public health and protection of the rights of others.

The chapter canvassed the meaning and the nature of the phrase ‘reasonably justified in a democratic society’ and how it relates to evidence-based judicial review. Drawing on case law and scholarly articles, the chapter illustrates that the term ‘reasonably justified in a democratic society’ requires an assessment based on the principle of proportionality. It is shown that the values of justification, accountability, openness and transparency form the epicentre of the principle of proportionality. It is argued that by adopting evidence-based judicial review when applying the principle of proportionality, the court may be placed in a better position to fully utilise the inherent purpose of the principle of proportionality. Evidence-based judicial review is necessary to foster justification, accountability, openness and transparency.

The chapter further illustrated that the adoption of evidence-based judicial review is well within the judicial powers and the principle of the separation of powers. In support thereof, the chapter makes reference to section 18 of the Constitution of Botswana. According to this section, a person who is of the view that his or her constitutional rights are infringed or are likely to be infringed may apply to the High Court for redress. A High Court dealing with such a matter is given the powers to make any decision it may deem fit for the enforcement of constitutionally protected rights. The chapter illustrates that the inherent nature of the powers of review vested in the court under section 18 may require the court to apply the constitutionally prescribed reasonableness test. This test, as alluded to in the preceding paragraph, requires an assessment based on proportionality. Evidence-based judicial review as a means to fully utilise the inherent values of the principle of proportionality, therefore, may be legitimately applied by any court acting pursuant to the judicial powers granted in section 18 of the Constitution. However, failure to apply evidence-based judicial review in the reasonableness test may
undermine the very essence of judicial review. The court may fail to fulfil the obligation to enforce constitutionally protected rights mandated under section 18 of the Constitution.

Further to the above, the chapter canvassed three main components of the principle of proportionality. These are the purpose of the law, the rational link between the purpose and the measure adopted and the availability of measures that may be employed to achieve the same purpose without substantially infringing an individual’s rights. Evidence-based judicial reviewed was used in a determination of whether the law that requires HIV-testing before surgical and dental procedures complies with each element. The chapter used available scientific and statistical evidence in its analysis.

It was illustrated that in light of available scientific and statistical evidence, the measures prescribed by the law that requires HIV-testing before surgical and dental procedures are rationally linked to the intended purpose. However, the chapter contended that although such measures are rationally linked to the intended purpose, they affect patients’ rights in a substantially restrictive manner.

The chapter argued that there are available scientifically proven ways of achieving the same purpose without substantially infringing the patient’s constitutional rights. These include the adoption of universal precautions and HIV-testing with informed consent in the event of significant exposure to infected bodily fluid. Where the patient refuses to give consent in the event of an incident of significant exposure, the patient’s existing blood specimen may be tested. The healthcare professional who has been significantly exposed to an HIV-infected bodily fluid should be treated with PEP. Where the patient refuses to consent to testing and there is no existing bodily fluid to be tested, the medical professional should be treated with PEP. It is argued that patients should be treated within a reasonable time and that their HIV status should not be the reason of a delay in treatment.

Compared to the measures prescribed by the legislators to prevent the transmission of or reduce HIV from the patient to a health professional, the above-mentioned measures prevent the transmission of HIV from a patient to a health professional without substantially restricting the patient’s constitutional rights. Obtaining informed consent in the event of significant exposure and the duty to treat the patient within a reasonable time, irrespective of HIV-positive status, do not limit the patient’s rights to privacy, life and equality and non-discrimination. The patient’s rights may only be limited through testing the existing bodily fluid without the
patient’s informed consent. This may only be done if, in the event of a significant exposure, the patient refuses to give informed consent for the testing of existing bodily fluid.

The chapter concludes by submitting that, in light of the availability of less restrictive ways of preventing HIV transmission from a patient to a health professional, the measures adopted by the legislature should not be regarded as reasonably justified in a democratic society, and are thus unconstitutional.
CHAPTER 6
CONCLUSION AND RECOMMENDATIONS

1. CONCLUSION

1.1. Section 109 of the Public Health Act

1.2. Overview
The study applied evidence-based judicial review to assess the constitutionality of section 109 of the Public Health Act (the Act). According to this section, a medical professional may require a patient to undergo an HIV test before any non-urgent dental or surgical procedure. If the patient refuses to be tested or tests positive, the medical professional may proceed in terms of one of three given alternatives. First, the medical professional may treat the patient, but with strict adherence to universal precautions. Second, the medical professional may transfer the patient to another health professional, who is not in turn compelled to treat the patient. Third, the medical professional may seek advice from the Director on how to proceed.

1.3. Legislative purpose
The Act does not explicitly state the purpose or the legislative intention of section 109. Applying well-tested canons of interpretation to the section, the study concluded that section 109 is intended to prevent or reduce the risk of HIV-transmission from a patient to a healthcare professional during surgical or dental procedures. In ascertaining the legislative purpose of section 109 of the Act, the study utilised the literal and purposive methods of interpretation, together with different alternative canons of statutory interpretation.

1.4. Human rights implications
The study argued that section 109 of the Act infringes constitutionally protected rights. In particular, the study illustrated how section 109 infringes the patient's rights to life, privacy and equality and non-discrimination. Chapter three argued that section 109 discriminates against patients on the basis of their HIV status. Moreover, the chapter illustrated that transferring a patient to another medical professional, who is not in turn compelled to treat the patient, may delay healthcare or deny the patient access to healthcare, and is thus contrary to the right to life. Provisions that allow a medical professional to transfer the patient to another health professional or suspend treatment pending advice from the Director may infringe the patient's rights. A patient who would not have consented to the test may undergo the test out of fear of
treatment being delayed or denied. The study also pointed out that the lack of any requirement for pre- and post-test counselling may lead to an infringement of the patient’s privacy.

1.5. Evidence-based judicial review

The study found that a relatively new form of judicial review requires courts to ensure that a decision about the constitutionality of legislation is a result of evidence-based decision-making. According to the study, a court applying evidence-based judicial review is required to examine every piece of information presented before it thoroughly. It should not simply defer to legislative findings or make its decision on the basis of assumptions, unreliable information or conjecture. The evidence presented during evidence-based analysis is necessary to prove legislative facts underlying an enactment. Furthermore, a court should avoid relying solely on legislative evidence or information derived from its own fact-finding.

The investigation carried out in the study shows that the concept of evidence-based judicial review has already been applied previously, albeit inconsistently, by the South African and Botswana courts. The study also showed that while some courts adopted evidence-based judicial review, others refrained from doing so. The courts that refrained from applying evidence-based judicial review did so on the basis of two main paradigms: First, that the adoption of evidence-based judicial review is inconsistent with the concept of separation of powers and, second, that judges are not competent to execute the standard of review required in evidence-based judicial review.

The study contended that evidence-based judicial review should be applied consistently by the courts charged with the duty to determine the constitutionality of a law that infringes human rights. Drawing conclusions from cases in which courts adopted evidence-based judicial review in their constitutionality analysis and ones where this did not happen, the study concluded that evidence-based judicial review is necessary for the protection of constitutional rights. Contrary to the arguments that have been levelled against evidence-based judicial review, as indicated above, chapter five concluded that the adoption of evidence-based judicial review is well within the judicial powers of courts and thus consistent with the principle of separation of powers. The study pointed out that the values of justifiability, accountability and openness inherent in constitutionality analysis can be perfectly achieved through evidence-based judicial review. It was also submitted that there is no ontological difference between the facts and the law, and as such, a court that is competent to make a determination on legal matters is equally competent to adjudicate on complex factual matters.
1.6. Adoption of evidence-based judicial review in the assessment of the constitutionality of section 109

The study concluded by adopting evidence-based judicial review in the determination of the constitutionality of section 109 of the Act. It was found that in Botswana, the determination of the constitutionality of any law that limits the enjoyment of constitutional rights requires a three-step inquiry, that is, whether the limitation is prescribed by the law, whether it is aimed at achieving a legitimate purpose and whether it is reasonably justified in a democratic society. The study found that section 109 of the Act is prescribed by the law. It was also found that section 109 of the Act is aimed at achieving a legitimate purpose. With regard to the question of reasonableness, the chapter stated that a reasonableness inquiry involves analysis based on the principle of proportionality. To establish whether the law is consistent with the principle of proportionality, the following questions should be asked: whether measures employed are linked to the intended purpose and, secondly, whether the desired ends could reasonably be achieved through other means less damaging to the rights in question. Where it is proved that there are measures that may be employed to achieve the same purpose without substantially infringing human rights, the law would be regarded as unconstitutional, even when the answer to the former is in the affirmative.

The study adopted evidence-based judicial review under each inquiry in the proportionality test. It established that there is complete and reliable scientific evidence showing that the measures prescribed in section 109 are rationally connected to prevent or reduce the transmission of HIV from a patient to a health professional during surgical and dental procedures. Nevertheless, the study concluded that, in light of the availability of alternative scientifically proven ways that may be employed to achieve the same purpose without substantially infringing constitutional rights, the measures adopted in section 109 are inconsistent with the proportionality principle and thus unconstitutional.

The study submitted that less restrictive measures that may be employed include the adoption of universal precautionary practices and HIV-testing with informed consent in the event of significant exposure to an infected bodily fluid. If in the event of significant exposure, the patient refuses to consent to an HIV test, his or her existing blood specimen may be tested. A health professional who has been significantly exposed to HIV-infected bodily fluid should be treated with PEP. If the patient refuses to consent to testing, and there is no existing bodily fluid to be tested, the medical professional should be treated with PEP. It is argued that patients
should be treated within a reasonable time and their HIV status should not be the reason for delayed treatment.

Compared to the measures prescribed by the legislators to prevent HIV transmission from the patient to a health professional, the above-mentioned measures prevent HIV transmission from a patient to a health professional without substantially restricting the patient's constitutional rights. Obtaining informed consent in the event of significant exposure and the duty to treat the patient within a reasonable time, despite his or her HIV-positive status, do not limit the enjoyment of the patient's right to privacy, right to life and right to equality and non-discrimination. The patient's rights may only be limited by testing existing bodily fluid samples without his or her informed consent. This may only be done if, in the event of significant exposure, the patient refuses to give informed consent for the testing of the existing bodily fluid samples.

2. **RECOMMENDATIONS**

- When reviewing the constitutionality of the law that limits the enjoyment of constitutional rights, the courts should always adopt evidence-based judicial review. The adoption of evidence-based judicial review in the constitutionality test is necessary for the effective protection of human rights. It also ensures that the values of accountability, openness and justification inherent in constitutionality analysis are perfectly realised.

- Section 109 of the Public Health Act should be amended. The measures employed to prevent or reduce the risk of HIV transmission from a patient to a healthcare professional should be replaced with measures that infringe the human rights of the patient to a less significant extent than is currently the case.
BIBLIOGRAPHY

BOOKS

- Botha, CJ *Statutory interpretation: an introduction for students* (Juta 2012).
- Kellaway, EA *Principles of legal interpretation of statutes, contracts and will* (Butterworths 1995).
- Stasky, WP & O’Connel, JF *Legal analysis and drafting* (West Group 1984).

JOURNAL ARTICLES

- Baggaley, R *et al* ‘The strategic use of antiretroviral to prevent HIV infection: a converging agenda Clinical Infectious Diseases supplement on HIV post exposure prophylaxis’ 2015 60 *Clinical Infectious Diseases* 159.

• Chenwi, L & Tissington, K ‘Sacrificial lambs in the quest to eradicate informal settlements’ 2009 10 Economic and Social Rights Review 18-23 23.


Mdumbe, FK ‘Has the literal/intentional/textual approach to statutory interpretation been dealt the coup de grace at last? Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs (2004) 7 BCLR 687 (CC)’ South Africa Public Law Journal 472.

• Note ‘Deference to legislative fact determinations in the first Amendment cases after Turner broadcasting’ 1998 111 Harvard Law Review 2312.
• Quinot, G 'Substantive reasoning in administrative law adjudication’ (2010) 3 Constitutional law review 111.
• Woodlander, A ‘Rethinking the judicial reception of legislative facts’ (1988) 41 Vanderbilt Law Review 111.

CASE LAW

• Anguelova v Bulgaria App No 38361/97.
• Attorney-General v. Dow 1992 BLR 119 (CA).
• Attorney General v Othomile 2004 1 BLR (CA).
• Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 4 SA 490 (CC).
• Bolitho v City and Hackney Health Authority 1998 AC 232 (H.L).
• C v Minister of Correctional Services 1993 4 SA 842 (A).
• Chaoulli v Quebec (2005) 1 SCR 791.
• Commitment to peace and social justice society 2005 2 Isr LR 335
• Diau v Botswana Building Society 2003 2 BLR 409 (IC).
• De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands & Housing 1999 1 AC 69 (PC).
• Du Toit v Minister of Transport 2006 1 SA 297 (CC).
• Doctors for Life International v Speaker of the National Assembly 2006 6 SA 416 (CC).
• Fullilove v Klutznick 448 U.S 448 (1980)
• Harksen v Lane 1998 1 SA 3000 9 (CC).
• Hirst (no. 2) v. the UK, no 74025/01 (ECHR) 2005.
• Jansen van Vuuren v Kruger. 1993 4 SA 842 (A).
• Matatiele Municipality v President of the Republic of South Africa 2006 5 SA 47 (CC).
• Mazibuku v City of Johannesburg 2010 4 SA 1 (CC).
• Makuto v S 2000 (2) BLR 130 (CA).
• Michael v Linksfield Park Clinic 2001 3 SA 1188 (SCA).
- Minister of Health v Treatment Action Campaign 1 2002 10 BLCR 1033 (CC).
- Mogotlho and another v security systems 2003 1 BLR 202 (IC).
- NM and others v Smith others 2007 5 SA 250 (CC)
- Principal Immigration Officer v Hawabu 1936 (AD) 27 31.
- Rafiu Rabiu v The State 1981 (NCLR) 293 326.
- Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 2 SA 359.
- R (Daly) v Secretary of State for the Home Department 2001 2 AC 532.
- Residents of Slovo community, Western Cape v Thubelisha homes 2010 3 SA 454 (CC).
- S v Tieties 1990 2 SA 461 (A).
- S v Williams 1995 3 SA 632 (CC).
- S v Marapo 2002 AHRLR 58 (BwCA 2002).
- South Dakota v North Carolina 1904 48 L ED 448 446
- State v Marapo 2002 2 BLR 26 (CA).
- Thoroughbred Breeders Association v Price Waterhouse 2001 4 SA 551 (SCA)
- University of Cape Town v Cape Bar Council 1986 4 SA 903 (A).
- Volker and Markus Schecke ECR 11063

INTERNET SOURCES
• Elliot, R ‘The proposed mandatory testing and disclosure Act: An unjustified and unnecessary violation of rights’ www.aidslaw.ca (accessed 24 April 2018);

INTERNATIONAL INSTRUMENTS

- International Covenant on Economic and Socio-Cultural Rights, General Assembly Resolution 2200 (XXI), UN document entered into force in January 1976.

LEGISLATION AND CONSTITUTIONS

Botswana

- Penal Code 2 of 1964 (as amended up to Act 14 of 2005).
- Public Health Act 11 of 2013.

South Africa


THESES


GUIDELINES

- Health Professions Council of South Africa, Ethical guidelines for good practice with regard to HIV, booklet 11 (2008)