Subjective strands in the jurisprudence of the Constitutional Court and related implications for Civil Society

by

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DECLARATION

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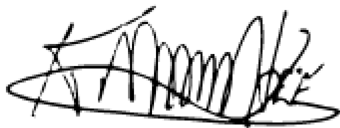

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ABSTRACT

From 1994 up until now, the Constitutional Court has been making decisions which continue to reshape the moral landscape of South Africa. During this period, it has entered many of the spaces, whether private or public, of people living in South Africa as it continues to make decisions on profoundly moral issues. Included in this moral reshaping of South African society are subjective strands in the jurisprudence of justices of the Constitutional Court. Having said this, there is nothing novel regarding subjectivity in court judgments (and regarding the formulation and application of the law in general). How law decides on matters of moral importance differs from society to society and amongst various communities, and even between judges involved in the same case. American Realism and Critical Legal Studies (CLS) are good examples taken from the not-too-distant past, confirming the inextricable relationship between subjectivity and the courts. This study does not purport to be novel in the sense of having discovered the absence of objectivity regarding law and its application, nor does this study delve into debates related to law against the background of universality or natural law thinking. What this study is, in essence, comprised of is an extraction from selected judgments of central subjective views emanating from the Constitutional Court. Bearing this in mind, the reader is reminded (or enlightened) of the fact that the South African Constitution is understood and applied in accordance with the subjective views of the justices who are tasked with the challenging and important task of protecting the plethora of interests in a highly plural society. But what is the added contribution to be made other than bringing to the fore the said subjective strands regarding views on what the Constitution is telling us beyond the written text, especially regarding the values and rights included in the Constitution? Since the advent of the Constitution, there have been several attestations emanating from civil society pointing to an acceptance of the understanding that the Constitutional Court justices are the exclusive mouthpieces of the Constitution. In this thesis, the focus is primarily on expressions stemming from the Church (as an integral part of civil society) that confirm this reliance on the Constitutional Court justices as being the exclusive mouthpieces of the Constitution. Therefore, in effect, the understanding is promoted that the gatekeepers of how the Constitution should be understood are the justices of the Constitutional Court. This, in turn runs the risk of assisting in the limitation of a participatory (and activist) role of the Church and other religious communities, indeed of wider civil society, pertaining to what the moral vision for the country

should be. In many instances, parts of civil society argue that it is for lawyers to extrapolate the value system they opine is reflected in the Constitution, as it is only they who have the necessary training, experience and expertise as lawyers. If civil society simply keeps deferring to the Constitutional Court on this issue, in effect, it is abdicating its participatory (and activist) role on profoundly moral matters such as the meaning of human life, marriage, punishment, the disciplining of children, adultery, abortion and many other matters which demand civil society's input. It is contended that if civil society, and indeed the Constitutional Court itself, grasped the reality of the subjective nature of views emanating from that court, it would assist in clearing the path towards an improved engagement by civil society with the State (including the Constitutional Court), on important (and less important) moral matters. It is also argued that this awareness of the subjective nature of views emanating from the Constitutional Court is inextricably related to the teaching of law to our future jurists, leaders and members of civil society.

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CHAPTER 1

INTRODUCTION

1.1 RESEARCH PROBLEM

The Constitution of South Africa[1] heralded substantive improvements in matters pertaining to democracy, governmental accountability and the protections awarded to fundamental rights. During the past 30 years or so, the Constitutional Court has been making decisions which continue to reshape the moral landscape of South Africa. South Africa's apex court has entered the hospitals, churches, synagogues, temples, classrooms, homes (and even the bedrooms) of people living in South Africa as it continues to make decisions on profoundly moral issues. Critical thought on the jurisdiction of, as well as judgments by, the courts in South Africa abound, involving broad specialised fields such as legal philosophy, legal interpretation, constitutional law and human rights law (and the overlap of these with one another). Constitutional adjudication faces the challenge regarding modes of reasoning that all in a liberal democracy do not share. That the judiciary, in whatever societal paradigm, can never escape from some or other degree of subjectivity, cannot be refuted. It was especially American Realism and the Critical Legal Studies (CLS) movements that, in our modern-day liberal democracies, did much to dispel the idea that the judiciary can be wholly objective. Irrespective, the judiciary, in general, in liberal democracies around the world, whether intentionally or unintentionally, is not always expressive of this idea. In this regard, the South African Constitutional Court is by no means excluded.

Also, many strands of subjectivity in judgments pass by either as unnoticed or as accepted by the members of society in general. This also applies to the teaching of law at our institutions of higher education. When looking at selected decisions by the Constitutional Court, the question needs to be asked whether the Constitution truly reflects a shared normative or moral

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[1] The first Interim Constitution – Act 200 of 1993 – negotiated by the parties was implemented in 1993 – (hereafter referred to as "the Interim Constitution"). The Constitution now in place was enacted in 1996 – *Constitution of The Republic of South Africa*, 1996 (referred to herein as "the Constitution").

basis as intimated in various ways in such selected judgments by the Court. An express example of this is the reference to an "objective normative value system" that certain justices of the Constitutional Court opine can be found in the Constitution. In *Carmichele v Minister of Safety and Security*[2] (hereafter, *Carmichele*), Ackermann J and Goldstone J stated:

> Our constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the Legislature, Executive and Judiciary.' The same is true of our Constitution. … It is within the matrix of this objective normative value system that the common law must be developed.

Whilst there are justices of the Constitutional Court who do not necessarily use this phrase related to the reliance on the so-called "objective normative value system" emanating from the Constitution, they still assert that in interpreting and applying the Constitution, they are merely giving content to what is already in the Bill of Rights. Implied here is that this content should enjoy a shared support base. This point of view signifies in itself a subjective take on things. Cognisance is taken of the fact that one may find various categories of subjectivity regarding positions taken on moral matters. In this regard, there are sweeping or arbitrary claims as well as claims that are based on a more informative, coherent and consistent set of arguments (albeit that such an informative and coherent set of arguments represents, as a whole, a subjective take on a moral matter). For purposes of this thesis, these distinctions are not of primary relevance.

To reiterate, the focus of this thesis is on subjective strands evident in selected judgments by the Constitutional Court and which relate to foundational or weighty moral matters; strands that vary from explicit claims to objectivity (as seen above) or views that the idealism contained in the judgments of the Constitutional Court: "[392] … is to be found not in the minds of the judges, but in both the explicit text of the Constitution itself and the values it enshrines"[3] and

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2 2001 (4) SA 938 CC:961F.

3 Sachs J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (hereafter *Makwanyane*).

that: "[171] … a justice of the Constitutional Court…merely serves as its (the Constitution) mouthpiece".[4] There is a very real danger in professing, or in indirectly implying, that one is either applying "the objective normative value system" contained in the Constitution or that "one is merely being a mouthpiece of what already is in the Constitution". This, while the Constitution provides, in the term used by Charles Taylor, no "objective pole" outside of itself and the institutions created by it to act as a reference point when ascertaining the purported value system in the Constitution.[5]

The possibility of dire implications related to an understanding that the justices of the Constitutional Court give expression, whether directly or indirectly, to an objective normative system also forms part of the focus of this thesis. In this regard, what is addressed are the negative consequences of a belief in an objective normative system emanating from constitutional adjudication for the advancement of a participatory (and activist), inclusive and free society; here, specific attention is placed on especially mainstream traditional religions, which also constitute an important facet of civil society as a whole. In this regard, mainstream traditional religions refer to those religions of old that believed in God as the cause of all Creation and who is to be distinguished from all of Creation. Examples of such religions are Christianity, Judaism and Islam.[6] With the rapid expansion of law to all parts of our existence, together with the attractions of a Constitution heralding in a new and democratic dispensation, the temptations are rife in leading many in society into a belief in the ultimacy and truthfulness of what the justices of an apex court understand such a Constitution to mean. It is, therefore, imperative for the advancement of participation, inclusion and freedom (which form part of the essential traits of democracy) to unveil central substantive subjective strands in selected judgments of the Constitutional Court pertaining to matters of fundamental moral worth and

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4 Jafta J in *City of Tshwane Metropolitan Municipality and Afriforum and Another* [2016] ZACC 19.

5 Taylor 2007:26.

6 These religions being that which Justice Sachs mentions in the following well-known excerpt from the Constitutional Court judgment of *Minister of Home Affairs v Fourie, Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC): "[89] … religious bodies play a large part in public life, through schools, hospitals and poverty relief. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution".

once this has been done, to postulate the relevance of this awareness for civil society with a specific focus on religious communities.

1.2 HYPOTHESIS

The overarching hypothesis of this thesis is that there are subjective strands in the jurisprudence of the Constitutional Court that require critical exposure in order to promote a more participatory, inclusive and free society, with specific reference to the role to be played by civil society, with special emphasis on religious communities and legal education.

1.3 PRIMARY RESEARCH QUESTION

What are some of the central subjective strands in the adjudication of selected judgments stemming from the South African Constitutional Court, and what are the implications of these pertaining to the advancement of participation, inclusivity and freedom of religious communities in a liberal democracy?

1.4 SECONDARY RESEARCH QUESTIONS

What are the parameters of diversity, inclusivity and tolerance in a liberal democracy when it comes to the right to freedom of belief, whether religious or non-religious?

What are the limits of constitutional adjudication?

1.5 BACKGROUND AND IMPORTANCE

Ran Hirschl comments, “This global trend toward juristocracy is arguably one of the most significant developments in late-twentieth- and early-twenty-first-century government.”[7] Accompanying this, says Hirschl, is associating the idea of a true democracy with no majority rule but rather the protection of minority interests.[8] Consequently, a bill of rights is necessitated and judges have become responsible for the enforcement of such rights. This, in turn, implies that judges are to be viewed as seemingly removed from the pressures of partisan politics.[9] The substantive shift of authority to the courts[10] bolsters the importance of scrutinising the exercise of this authority that the judiciary has been meted with against the background of the unveiling of central subjective strands in the judgments by the South African Constitutional Court. Hirschl observes that,

> According to Robert Putnam and others, the sociocultural factor (that is, the existence of a vibrant civil society and a democratic civic tradition), rather than the institutional factor, is

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[7] Hirschl 2004:1. Hirschl adds that, “Over the past two decades, the national high courts of Canada, Israel, New Zealand, and South Africa (as well as of many other countries) have become major loci for dealing with the most fundamental political controversies a democratic polity can contemplate. To paraphrase Alexis de Tocqueville’s observation regarding the United States, there is now hardly any moral or political controversy in these countries that does not sooner or later turn into a judicial one”, ibid., 169. Although this observation by Hirschl was made approximately two decades ago, his observation still rings true for today. In similar fashion, Tom Daly comments that: “Strong judicial review became increasingly common in the immediate post-war era, established in the constitutions of new democracies as diverse as Japan (1947), Italy (1948), Germany (1949), and India (1949), and amplified in other states (e.g. Costa Rica in 1949). However, it was most clearly in Europe that this led to the emergence of a new paradigm of ‘constitutional democracy’ and a ‘new constitutionalism’, which places emphasis on the individual, trammels the power of democratic majorities, and places a constitutional court at the centre of governance” (Daly 2017:70).

[8] In this regard, Jonathan Sumption comments that: “The justification commonly put forward for treating such matters as constitutional issues and referring them to judges is that it protects minorities against majoritarian tyranny better than the legislative process. I question whether there is any factual basis for this assumption. The most that can be said is that in some periods of history it has done so, and in others it has not. What constitutes majoritarian tyranny very much depends on how you define your minority and what you regard as tyranny.” (Sumption 2019:56).

[9] Hirschl 2004:1-2.

[10] In this regard, Hirschl states that: “Most scholars of constitutional politics agree that there is a strong correlation between the recent worldwide expansion of democracy and the contemporaneous global expansion of judicial power” (Hirschl 2004:31). Hirschl adds that: “Many countries have seen a growing legislative deference to the judiciary, an increasing (and often welcomed) intrusion of the judiciary into the prerogatives of legislatures and executives, and a corresponding acceleration of the process whereby political agendas have been judicialized. Together, these developments have helped bring about a growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions and have transformed national high courts into major political decision-making bodies” (Hirschl 2004:221).

> the most important variable in understanding why democracy works better in specific places. In a nutshell, the rights-supportive culture thesis emphasizes hospitable civic traditions and sociocultural conditions, rather than formal institutional settings, as the crucial factor in making constitutional democracy work.[11]

Bearing this in mind, the first part of this study, by looking at constitutional adjudication in South Africa (with specific reference to the Constitutional Court), confirms that the judiciary cannot escape making subjective pronouncements on especially fundamental moral issues. Accompanying this is the unveiling of strands of subjectivity emanating from selected judgments by the Constitutional Court regarding specified matters of fundamental moral importance. This study does not purport to be novel in the sense of discovering that there is no such thing as objectivity regarding law and its application, nor does this study delve into debates related to the universality versus the particularity of law. In this regard, the following comment by Jonathan Sumption[12] comes to mind namely,

> We are all prisoners of our own experience. I have passed most of my life in the study and teaching of history and in the work of the English courts. Lawyers live on the margins of politics, whether they like it or not … After all, none of the questions that I have posed is new. The competing claims of law, ideology and politics to legitimacy have been explored by academic lawyers and political scientists for many years. Britain's collective experience of these issues goes back a long way … Yet recent events have tested them. The debates on Britain's relations with the European Union have brought to a head many constitutional issue.

The second part of this study sets out to promote Hirschl's reference to a rights-supportive culture that transcends formal institutional settings (such as the judiciary). By doing so, this study contributes towards thought in support of the advancement of making constitutional democracy work. As we will see hereafter *inter alia* at page 12, where a whole denomination deferred to the courts of the land on a doctrinal question, and also in Chapter 4 of this thesis, particularly in 4.3 thereof, since the advent of the Constitution, parts of civil society, inclusive of certain thinkers and leaders from various religious communities, in South Africa, when giving moral content to the constitutional concepts of dignity, equality and freedom, in effect have embraced the assumption that justices do not infuse their judgments with their subjective

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11 Hirschl 2004:154.
12 Sumption 2020:x.

beliefs. Consequently, parts of civil society who are well qualified to give input concerning the moral content of the said concepts, such as religious thinkers have simply deferred to the Constitutional Court justices in these matters. As things stand, such a role for civil society is limited and circumscribed by what the Constitutional Court's moral vision for the country is. Thus, in effect, the gatekeepers are the justices of the Constitutional Court who intimate that it is predominantly for jurists to extrapolate an assumed objective value system and/or values they opine exist in the Constitution from the Constitution. (In Chapter 4 *inter alia* from footnotes 386 and 387 it will be clear that any assertion concerning the participation or lack of participation by civil society must be duly qualified.) The implications of this for religious communities to determine their own views on matters of moral worth are clear. This also has implications for teaching and the dissemination of knowledge, especially in institutions of higher learning. In this regard, law schools (and other disciplines within higher education) where future leaders, jurists and members of civil society are educated need to be included.

Regarding universities, for example, it would most certainly not be too presumptuous to aver that what is being currently taught in various disciplines, including especially that of law, also attest to instances where the judgments by the justices serving on the Constitutional Court are proclaimed (whether expressly or tacitly) as being the ultimate voice pertaining to insights on what is contained in the Bill of Rights as well as other parts of the Constitution. In this regard, Sanford Levinson comments that:

> Indeed, most constitutional law courses avoid discussing the assumptions not only that there are standard cases that must be read, but also that the act of reading itself is, when all is (un)said and done, unproblematic. Consider also the way we treat the innovative judges of our legal tradition, particularly as they appear in law school courses. Do we really wish to argue that John Marshall or Earl Warren (or the most recent dynamic innovator, William Rehnquist) got the essence right in their interpretations of the Constitution, or do we recognize instead the extent to which we have been subdued by their political visions?[13]

If civil society simply keeps accepting, without critically engaging with, the Constitutional Court's judgments on moral issues, it is, in effect, abdicating its activist role on profoundly

[13] Levinson 1982:388-389.

moral matters such as what is human life, when does our duty commence to protect human life, the meaning of marriage, forms of punishment, the parameters for the disciplining of children, the role of medical ethics, the legal relevance of adultery, the legalisation of abortion and many other matters which demand wider society's input and on which the Constitutional Court already has pronounced. If civil society grasped the validity of the hypothesis of this thesis, it may well assist in motivating and empowering civil society, and for purposes of this thesis, religious communities, to engage the State, inclusive of the Constitutional Court, on all moral issues. Also, religious communities would be motivated and empowered in their activist role to help the Constitutional Court give content to concepts such as dignity, freedom and equality contained in the Constitution. This will also assist in bolstering a more effective democratic society and with the upholding of inclusive participation, tolerance and diversity as part of the core building blocks of the South African constitutional paradigm.

As alluded to earlier, it is expected that by showing that when making moral pronouncements, the Constitutional Court is not merely in an objective manner setting out what already is in the Constitution but expressing subjective moral viewpoints; civil society, inclusive of organised traditional religions, will be empowered to engage all arms of the State, including the judiciary, on what makes for a more inclusive, humane, diverse and just society. This will also assist in downgrading possible deification of the Constitution and the Constitutional Court itself. This relates to Brian Jones's statement: "When discussing the legal, political, societal or personal effects of constitutions, we should be careful not to concoct false narratives of what they can accomplish or exaggerate how indispensable they are for societies, as doing so turns them into the false gods of our legal, political and societal communities."[14]

As also alluded to earlier, it is anticipated that the result of this research may be that members of civil society in general, inclusive of the members of the various religious communities in South Africa, be encouraged and empowered to join the debate on substantive moral matters and not be disempowered by the argument that this task is reserved for lawyers under the guise of judges merely as legal technicians explicating and applying, and/or being mouthpieces of,

[14] Jones 2020:11.

the values and human rights already contained in the Constitution. In my capacity both as an advocate of the High Court of South Africa and as a member of civil society (more particularly as part of one of the religious communities and structures in South Africa), I have been intimately engaged, since 1994, in attempting to persuade the courts that they legitimately can come to decisions concerning concepts such as dignity, life and equality other than prevailing Western European jurisprudence on the issues, hereby also implying a more open and clear admission that the judiciary is not immune to subjectivity. At the same time, I also have endeavoured to persuade religious communities and wider civil society that given the subjective nature of the reasoning process of Constitutional Court justices, they are able to engage the justices when it comes to profoundly moral issues and the reshaping of the moral fabric of South Africa.

I am mindful of the need to remain alert to the different contexts and rules of engagement of the two worlds involved, namely, law and civil society. As I have engaged in these two worlds, I have become aware of an intersection of these worlds which would, as alluded to earlier, free and empower civil society, inclusive of the religious communities, in a more meaningful way, to enter the fray about moral issues which come before the Constitutional Court. This thesis will focus on this intersection. Amongst other things, it is envisaged that this thesis will instil an awareness amidst jurists and judges to be cautious and sensitive to inclusivity when providing reasons for the decisions that they make. Also, this study is aimed at assisting in empowering judges, lawyers, legal scholars, political scientists, politicians, theologians, church leaders, law students (and students in many other relevant sciences), as well as other members of civil society, to engage with one another when confronted by profound moral issues and the reshaping of the moral foundation of South Africa as a society; and in the process arrive at a jurisprudence not unwittingly and unduly influenced by, amongst others, a Western European hermeneutic, when it comes to giving content to concepts such as dignity, freedom and equality.

I am also well aware that what results in apathy on the part of the members of society regarding active participation is not merely the result of a single cause and that a myriad of factors plays a role in this regard, not least socio-economic conditions that are not only formed by local

events but also by global developments. Nevertheless, this should not negate focussing on constitutional adjudication as an important facet to be investigated pertaining to the advancement of participation, inclusivity and freedom. If the research shows that objectivity is not present when the Constitutional Court makes its rulings, it will be argued that this is the intersection where civil society will be free to decide whether or not it should merely be passengers on a train or whether it wants to fulfil an activist role whereby it engages on the design/development of the train itself, namely, the values and rights purportedly already contained in the Constitution. In addition to this, it is hoped that this thesis will alert civil society (and institutions of higher learning where many of our future representatives of civil society are nurtured) to the question of whether or not the said subjective strands contain the ever-present danger of being a competing value system with that of the various faith-communities in South Africa, be they religious or non-religious. To a large extent, this thesis should be viewed as a concerted effort to assist in the advancement of South Africa's democracy, bearing in mind Jonathan Sumption's concern that:

> We will not recognise the end of democracy if it comes. Advanced democracies are not overthrown. There are no tanks on the streets, no sudden catastrophes, no brash dictators or braying mobs. Instead, their institutions are imperceptibly drained of everything that once made them democratic. The labels will still be there, but will no longer describe the contents. The façade will still stand, but there will be nothing behind it. The rhetoric of democracy will be unchanged, but it will be meaningless. And the fault will be ours.[15]

1.6 LITERATURE REVIEW

"For the past two centuries," writes critic Daniel Lazare, "the Constitution has been as central to American political culture as the New Testament was to medieval Europe. Just as Milton believed that 'all wisdom is enfolded' within the pages of the Bible, all good Americans, from the National Rifle Association to the ACLU, have believed no less of this singular document."[16] It would be difficult to refute this observation as applicable to the South African context regarding the status of the South African Constitution. Included in the aforementioned, is the

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15 Sumption 2019:112.
16 Cited in Hirschl 2004:5.

high esteem held by many within religious circles regarding the authority of the Constitution as to be understood through the voice of the Constitutional Court justices. It would be difficult to refute that our lecture halls especially higher education, are also inundated with similar sentiments. This also relates to well-founded concerns regarding the expansion of the law to every nook and cranny of society and that the judiciary is, in many instances, at the forefront of this expansion. Jonathan Sumption refers to one of the factors contributing substantively to the expansion of law's empire as being "a growing moral and social absolutism which looks to law to produce social and moral conformity."[17] According to Sumption, the attractions of constitutional adjudication are clear. In this regard, Sumption states that:

> Judges are generally intelligent, reflective and articulate people. They are intellectually honest. They are used to thinking seriously about problems that have no easy answer. Contrary to the familiar cliché, they know a good deal about the world. The whole judicial process is animated by a combination of abstract reasoning, social observation and ethical value-judgement that seems to many people to introduce a higher morality into public decision-making. Why not embrace it?"[18]

Sumption, in response to this, states that: "As politics have lost their prestige, judges have been only too ready to fill the gap. The catchphrase that justifies this is the 'rule of law'. But in the last half-century, the courts have developed a broader concept of the rule of law, which penetrates well beyond their traditional role of deciding legal disputes and into the realms of legislative and ministerial policy."[19] Alexander Solzhenitsyn comments, "A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities … Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses."[20] In this

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17 Sumption 2019:8.

18 Sumption 2019:33.

19 Sumption 2019:34. Sumption also comments that: "The problem about the legal model (as opposed to the political one) is that it marginalises the political process. When a judge identifies something as a constitutional or human or fundamental right, he is saying that it derives from a higher law than the ordinary decision-making processes of the state. He is declaring that its existence and extent are not to be determined by political choice. Yet many judicial decisions about fundamental rights are themselves political choices, only made by a smaller and unrepresentative body of people," Sumption 2019, 83. Sumption adds that: "A nation cannot hope to accommodate divisions among its people unless its citizens participate in the process of finding political solutions to common problems. Law has its own competing claim to legitimacy, but it is no substitute for politics" (Sumption 2019:90).

20 Solzhenitsyn 1978:17-19.

regard, it is rather ironic that certain sectors of traditional religions, in this case, the Church,[21] promote such legalistic currents in South African society by paying homage to the authority of the Constitution and constitutional adjudication. A prominent example of this (and not too far back) is the South African High Court judgment of *Gaum and Others v. Van Rensburg NO and Others*[22] (hereafter referenced as *Gaum*).

In *Gaum*, the Court was of the view that a decision taken by the Synod of the Dutch Reformed Church, which included a condition of a life of celibacy for gays and lesbians in order to be ordained as ministers in the church, along with a prohibition against the solemnizing of same-sex civil unions by ministers in the church, resulted in a violation of the right to equality and that unfair discrimination based on sexual orientation had taken place. Consequently, the Court came up with a finding based on a specific moral view on the permissible boundaries regarding conduct related to sexual orientation that should apply to a religious association. The Court was of the view that the matter before it should be limited to the procedural issues related to the case, an approach that is aligned with popular legal precedent in many liberal democracies that respects the associational autonomy of religious associations such as churches. However, the Court also made a decision on the substantive issues, the reason being, and as stated by the Court itself, that the Court was requested to do so by all the parties before it. In this regard, all the parties before it were members of the Dutch Reformed Church. Therefore, what we find here is, as alluded to earlier, a tendency to allow for law to infiltrate 'a religious world of meaning'. Added to this, *Gaum* is reflective of unencumbered faith in what the court understands the Constitution to mean, and in the process, allowing for the subjectivity of the court to infiltrate the domain of religion and its accompanying views on what should be deemed moral or immoral, right or wrong. The Court should have rather refrained from delving into matters related to doctrine even if the parties before it requested this to be done. This view is widely supported in liberal democracies around the world, namely, the understanding that the courts do not want to get involved in doctrinal matters when dealing with matters related to religious associations.

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[21] By "Church" is meant the Christian religion.

[22] (40819/17) [2019] ZAGPPHC 52.

According to Brian Jones, the view that law is superior to politics is quite new, and this is especially manifested, and forcefully so, through the 'adjudicated constitution'. This, says Jones, is different from long periods in history in which law and politics endeavoured to differentiate themselves.[23] Brian Jones adds that "the language and rhetoric of the adjudicated constitution, and its relationship with new constitutionalism more generally, is that of belittling – rather than enabling – the political realm."[24] Although Jones's reference to 'belittling' might come forth to some as slightly abrasive, there is importance and urgency in the jist of what Jones is saying here. My study relates to an investigation into the 'language and rhetoric' emanating from especially the Constitutional Court and how this 'language and rhetoric' against the background of the adjudicated constitution is not necessarily 'belittling' but at least substantively circumspect. Circumspect in the sense of the justices sitting on the Constitutional Court, whether intentionally or unintentionally, coming forth as being the ultimate voice on how the Constitution should be understood against the background of important matters of moral worth. This is further exacerbated by the mere text of the Constitution alluding to commitments that may be difficult to accomplish, and here, Jack Balkin's thoughts come to mind when he states that: "All constitutions exist in a fallen condition, no matter how good people think they are. They make promises they cannot keep at the time they are enacted, commitments only imperfectly realized, guarantees that often are not guaranteed in practice and that may never be realized at all."[25]

Whilst the South African Constitution entrenches, for example, the right to life, dignity and equality as fundamental to this new moral order, the Constitution itself provides no guidance to the justices of the Constitutional Court as to the practical moral content of these rights and the impact they should have on institutions, associations, families and the daily lives of people living in South Africa. Thus, whilst, for example, grounding its jurisprudence in dignity, the Constitution does not tell us what dignity is.[26] The Constitution also provides no value-based

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[23] Jones 2020:82.
[24] Jones 2020:82.
[25] Balkin 2011:6.
[26] "Dignity is not bestowed by persons or institutions. It does not derive its meaning from any human action or status. Dignity is rather a given, universally shared reality. It is not itself a moral principle but rather the source of all moral principles. Human dignity is the norm by which all forms of human acting and deciding are to be judged. But these formal judgements do not yet tell us what human dignity is" (Meeks 1984:x).

hermeneutical key in this regard. In a similar vein is the adoption of the elusive concept of *ubuntu* as a central hermeneutical key to interpreting and applying the concepts of dignity, freedom and equality in the Bill of Rights. Wessel Bentley, in referring to the broader context of South Africa as being a constitutional democracy, writes: "The Constitution would allow the judiciary to become the formal 'watchdog' of any entity in South African society, including Church and State, using the values of the Constitution to ensure basic rights and overall cohesion of the community…. The Constitution nevertheless created space for the Church to fulfil its prophetic role… ."[27] The first part of this observation of Bentley is predicated on the assumption that the content and meaning of these values of the Constitution are objectively ascertainable by the judiciary. The hypothesis of this thesis is that this is a flawed assumption.

The Concise Oxford Dictionary[28] defines objective as something "…(1)…Belonging not to the consciousness or the perceiving or thinking subject, but to what is presented to this, external to the mind, real. 2. (Of person, writing, picture, etc.) dealing with outward things, exhibiting actual facts uncoloured by exhibitor's feelings or opinions;…" We can discern something of the conundrum of the concept "objective" in Benjamin Cordoza's words:[29]

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background, every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

George Braden,[30] arguing that when judges realise that in the constitutional field, the process is "primarily political, not judicial", and faced with the consequential wielding of power by them, they resort to creating a rule to curb their power, writes:

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27 Bentley 2012:91.
28 Fowler & Fowler 1964:830.
29 Cordoza 1921:9-10.
30 Braden 1948:571-572.

> Here the justice seems to be saying: 'I admit that Justice Robert's mechanical method of squaring the statute and the Constitution was nonsense. Of course, we wield power. But this is potentially dangerous. Therefore, we must create a rule which is sufficiently objective to circumscribe us and our successes in our exercise of political power. Thus, the Supreme Court goes galloping off in search of objectivity. This approach is admittedly a far cry from the deceptiveness, self induced or not, of the mechanistic approach. But will it produce anything more satisfactory either to the justices themselves or to the public?

Central to the reasoning in this thesis will be that, in order for organised religion to enjoy protection under the right to freedom of religion and to feel included in a country that is labelled as diverse and tolerant, members of the Church, not least of all those that are educated in our institutions of especially higher education, must be freed and enabled to enter the debate concerning giving content and meaning to the words written in the Constitution. Part of getting there is to duly take cognisance of the subjective strands present in the judgments by the Constitutional Court. In other words, further effect, against the background of the South African Constitution, needs to be given to Sanford Levinson's view that: "Indeed, much contemporary writing and painting is explicitly self-referential in its demand that the reader-viewer confront the extent to which language and image are unavoidably ambiguous, and its assertion that any given ascription of narrative line or meaning is the product of an interchange between object and viewer rather than an attribute of the object itself."[31] In other words, the language and image of the Constitution are unavoidably ambiguous, and this is illustrated by unveiling central subjective strands emanating from the Constitutional Court of South Africa regarding matters of loaded moral worth. What is brought to the fore are substantive interchanges between the Constitution and the viewer, in this instance, the judge against the background of these interchanges being self-referential.

Regarding the Church as such, from my reading, South African theologians have restricted themselves to how Christian ethical principles do or should play a role without engaging in whether or not there is a prior theological exercise necessary which entitles them to give input, to use the railway metaphor alluded to earlier, in the design of the train itself and not merely to

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[31] Levinson 1982:377.

be passengers giving input on how to make the trip on the train a more just, humane or pleasing experience. Thus, for example, Clint Le Bruyns opines: "The 'good' in political life is reflected in our moral consensus document, the national Constitution, which includes a 'Bill of Rights'."[32] In effect, Le Bruyns presupposes an objectively ascertainable consensus about the said objective values the Constitutional Court has held are already in the Constitution and which are the building blocks for its jurisprudence.

Having been alerted to the above examples related to misplaced views in support of objectivity (whether direct or indirect), one should, as alluded to earlier, be concerned as to the possibility of similar misplaced views that may be doing the rounds in education institutions in South Africa, especially law faculties and schools (not to even mention faculties or departments of political science, theology and religious studies). These institutions are imperative for the proper cultivation of knowledge regarding what a constitution (and constitutionalism) actually should mean for a democratic and diverse society such as South Africa. This placing of the Constitution on a pedestal by some sectors within 'the Church' aligns with what Jones refers to as 'constitutional idolatry'. Jones refers to constitutional idolatry as "drastically or persistently over-selling the importance and effects of written constitutions."[33] This form of idolatry also, as argued by Balkin, runs the risk that people will "confuse what is just with what is constitutional", Balkin adding that, "Their language of justice becomes too closely linked with the ways that they reason about the Constitution. As a result, they find it difficult to think about rights, or reform, or justice except in the ways that the Constitution-in-practice permits."[34] Balkin elaborates,

> … fidelity to the Constitution requires us to speak and think in the language of the constitutional tradition and its characteristic concepts and categories. We must phrase our claims about what is just and unjust in terms of this constitutional discourse. And it is by no means clear that everything worth saying about justice and injustice can be said in this language. Some ways of thinking about human rights and self-government can be expressed only very awkwardly, if at all, in the language of our Constitution and its distinctive concepts

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32 Le Bruyns 2012:61.

33 Jones 2020:2.

34 Balkin 2011:11. Balkin refers to the idolatry of the rule of law itself "when viewed as a substitute for justice, the idolatry of legal reason as a solution to all moral and social problems, the idolatry of mathematic precision in legal reasoning, the idolatry of chauvinism, and the idolatry of degraded and unreasoning forms of patriotism and nationalism (as opposed to their healthier versions)" (Balkin 2011:83).

> and doctrinal glosses. We may well be unaware of how much the increasing formalisms, the gradual encrustations of constitutional language, hedge and limit our imaginations, obscure our understanding rather than illuminate it. We may be unaware of this precisely because these concepts and categories seem so natural to us as students of the Constitution – because we work with them daily, so that they have become the familiar and regular tools of our constitutional understanding.[35]

What Balkin says here is what this thesis is concerned about and is aimed at bringing the reader to the realisation that the judiciary is speaking a certain language under the banner of the Constitution and that, consequently, matters related to justice and injustice are confined to the parameters fixated by this language, this subjective language. This subjective language is also inextricably connected to policymaking and the selection by the judiciary of certain values above others without convincing reasoning accompanying such choices. In this regard, Michael Perry (in this specific instance, regarding the US context) comments: "[v]irtually all of modern constitutional decisionmaking by the [Supreme] Court – at least that part of it pertaining to questions of human rights … must be understood as a species of policymaking, in which the Court decides, ultimately without reference to any value judgment constitutionalized by the framers, which values among competing values shall prevail and how those values shall be implemented."[36] Eventually this leads to a dominant language that excludes other languages on justice and injustice and that limits our imaginations, convictions and understandings rather than advancing them. The subjectivities connoted to such language, going by unnoticed over the years, runs the risk of making it more challenging for society to awaken to the mesmerising effects of such a language. As alluded to earlier, this study in no manner purports to have discovered the 'myth of objectivity' regarding especially the courts' interpretation of legislation, the common law or customary law and the same applies to views on what is included in constitutions, especially the human rights, principles and values included in many constitutions.

Considering what has been said up to now, attention needs to be given regarding the debate amongst Western philosophers concerning the extent to which the rules of reasoning for

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35 Balkin 2011:128.
36 Perry, *The Constitution, the Courts, and Human Rights* cited in Levinson 1982:378.

different moral positions are what Charles Taylor terms "outlook-independent"[37] and Alasdair MacIntyre describes as "neutral tradition-independent",[38] or whether they are no more than subjective justifications for a specific moral outlook. This will include an engagement with the argument that having "killed off" God, post-Enlightenment Western philosophers held on to old virtues whilst trying to find a substitute foundation for these virtues. Central to this are attempts based on obtaining agreement by means of 'reason', something which is believed to lead us into universal agreement regarding a particular moral matter.

The problems posed by Western moral philosophy, where there is no objectivity or pole outside of the autonomous person to measure or judge a conclusion, will also be more closely investigated. In this regard, the primary European authors who will be consulted are Alasdair MacIntyre, Taylor and Friederich Nietzsche.[39] Consequently, the problematic nature of relying on objectivity, as based on the autonomy of human reason, will be confirmed. Following this, African views will be presented, and here, the focus will be on, in contrast to, the Western emphasis on the autonomy of reason, God. On closer scrutiny, European and African theorists appear to be *ad idem* that there is no such thing as an objective value system or objective values. When it comes to making normative value judgments, the life story and context of the person making such a judgment will, of necessity, impinge on her judgment. As Paulinus Odozor argues: "In the end, the most compelling answer to the question of why one should be moral seems to be supplied by one tradition or another,"[40] or as Alasdair MacIntyre opines: "When analytical philosophers do reach substantive conclusions, as they often do, those conclusions only derive in part from analytic philosophy. There is always some other agenda in the background, sometimes concealed, sometimes obvious. In moral philosophy, it is usually a liberal political agenda."[41] This introduces the realisation that both the aforementioned Western and African approaches rely on some or other form of subjectivity related to the law and morality. This brings to light forms of subjectivity represented in broader categories or schools

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[37] Taylor 1994:19-21.
[38] MacIntyre 1988:345-346.
[39] MacIntyre 1981; MacIntyre 1988; Taylor 2007; Nietzsche 2003.
[40] Odozor 2014:68.
[41] Knight 1998:260.

of thought, in this instance, Western versus African perspectives. Here, the question arises as to which of these the Constitutional Court shows allegiance to.

Although this Western philosophical view can be juxtaposed with that of what is a significant part of the African view, which seemingly remains rooted in the belief that God is the reference point for morally what is right and wrong, and not secular liberal ideology, subjectivity looms large in both hermeneutical lenses. In this regard, the literature will be assessed as to whether or not, in principle, there is any difference between the Western and African view when it comes to using an objective pole outside of itself, its tradition, its ideology, its culture when making moral choices; more particularly, whether subjectivity inevitably is present when moral choices are made. The African authors who will be used are Samuel Kunhiyop, John Mbiti and Paulinus Odozor.[42]

The debate amongst legal philosophers in the 20th going into the 21st century around the issue of indeterminacy in the law, must be traced. Primarily, Herbert Hart, Ronald Dworkin, the American Realists and the Critical Legal Studies Movement (CLS) will be covered. In the process, an analysis of the "solutions" offered to this indeterminacy by these various authors will be necessary with the aim not of evaluating the cogency of the solutions but with the view to problematizing the question of "indeterminacy" and "objectivity". Central to this exercise will be engaging with the question of whether or not the philosophy of law inevitably involves articulated or unarticulated value assumptions. In this process, it will be required to explore the questions and methods used by the American Realists and the CLS movement as a credible method to analyse/deconstruct selected judgments of the Constitutional Court regard being had to the primary research question.

In conclusion, some insights will be brought to the fore regarding the implications related to the Constitutional Court's jurisprudential approach, whether express or implied, on civil society, more specifically, on traditional religion. This, in turn, relates to the idea, whether

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[42] Kunhiyop 2008; Forster 2016; Odozor, see footnote 40.

expressly or tacitly, of the Constitution already containing objective values and meanings and the justices merely being mouthpieces for these values and meanings. To allow traditional religions (as well as other systems of foundational beliefs such as atheists and agnostics) to participate on platforms related to determinations of moral matters as well as to educate society in the misnomer of there being such an objective value system in the Constitution and the purported neutral role of the justices gives positive effect to the protection of the fundamental right to freedom of religion, belief and opinion. Religion plays a substantial role in South African society, and, as will be dealt with in this thesis, the Constitutional Court has expressly recognised this. Many aspects of society are governed by some or other belief (whether religious or non-religious), and most South Africans identify themselves with some or other religion.[43] The South African judiciary, especially the Constitutional Court, has a sterling record of support and protection of religious rights and freedoms, deriving this protection from the South African Constitution's Bill of Rights.[44] The Constitutional Court's confirmation of the importance of freedom of religion, belief and opinion is bolstered by the Constitutional Court's expressed endorsement of the Constitution as supportive towards the protection and promotion of diversity.[45]

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[43] See for example, Schoeman 2017:1-7.

[44] Section 15(1) of the South African *Constitution* reads as follows, "Everyone has the right to freedom of conscience, religion, thought, belief and opinion." There have been numerous challenges presented before the South African Constitutional Court pertaining to religious matters. In this regard, see *S v Lawrence, S v Negal, S v Solberg* 1997 4 SA 1176 (CC) (hereafter *Lawrence*); *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) (hereafter *Prince*); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) (hereafter *Christian Education*) and *MEC for Education: KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) (hereafter *Pillay):*493-494. These judgments had important things to say regarding the importance of religion and the right to freedom of religion, see for example, *Prince:*par. 38; *Christian Education South Africa:*par. 19; *Lawrence:*par. 92 and *Pillay:*493-494, 506. Also see *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA):par. 90. South Africa is also party to a number of international instruments regarding the protection of religious freedom, namely: Art. 18 of the *International Covenant on Civil and Political Rights*; the *African Charter on Human and Peoples Rights* Art 8; Articles 1.1, 1.2, 2.1, 2.2, 4.1, 4.2 and 7 of the *UN Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief*; Art. 9 of the *Convention for Protection of Human Rights and Fundamental Freedoms*; and Art. 18 of the *Universal Declaration of Human Rights*. Further protection is evident through Section 31 of the Constitution, which provides specific protection to cultural, religious and linguistic groups.

[45] See *Pillay*:paras. 64-65, 75-76, 104, 107; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC):paras. 107, 134-135; *Lawrence*:paras. 146-147; *Christian Education*:paras. 24-25; *Prince:*paras. 49, 79, 147, 170 as well as *Minister of Home Affairs v Fourie, Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC):par. 95.

1.7 RESEARCH METHODOLOGY

The research method in Chapter 2 will involve the collation and structuring of critical engagement, as well as dialogue, with the chosen conceptual literature. The primary method in Chapter 3 will be an in-depth and critical analysis/exegesis of the texts of the chosen judgments. This will require lengthy extracts from the chosen cases, which for purposes of this thesis, qualitatively must be seen as different from the general use of quotations. In this regard, careful attention will be paid to the narrower and wider context of the text, inclusive of the words and concepts used in a particular text. Furthermore, careful attention will be had to the relationship between the particular text and the rest of the text of the particular judgment, other judgments, unproved express or implied assumptions, undefined terms and concepts, mutually exclusive understandings of concepts, words and phrases, and how these are dealt with by the justices. This confirms not only the identification and magnification of central subjective strands emanating from the Constitutional Court (which forms part of the heart of this thesis) but also that such identification is accompanied by in-depth scrutiny.

The reasons for the cases chosen include: Firstly, *ex facie,* the Constitution is silent on all the issues which had to be decided. Secondly, they touch on issues about which there are strongly held contradictory convictions. Thirdly, these convictions are deeply personal and subjective. Fourthly, the source of these convictions is more often than not rooted in religious belief and the source documents. Certain of the cases also involve a balancing out of competing rights and interests which by definition require that choices be made. Some of the cases chosen also allow for comparison of approach by the Constitutional Court justices on profoundly moral issues spanning over a period from 1995 to 2019, which helps ensure an accurate historical and up to date record of the thinking in the Constitutional Court. Furthermore in this regard, in two of the cases chosen the judgments were written by the Chief Justice at the time of the judgment, with a gap of 22 years in between. Three of the cases were also chosen to help analyse and compare the use of the concept of *Ubuntu*.

In general, this study basically spans the range of an empirical, philosophical, interdisciplinary and critical approach. Added to this are my experiences over many years as, amongst others, a

jurist. Sources consulted are mainly comprised of scholarly articles, monographs, edited books, case law as well as legislation.

1.8 STRUCTURE

Chapter 1 – This chapter includes the research problem, hypothesis, background and importance of the study, primary research question, secondary research questions, the methodology followed as well as a brief overview of what Chapters 2, 3 and 4 are all about.

Chapter 2 – This chapter will focus on the general and legal philosophical proposition of whether or not, where value choices are involved, objectivity is achievable. The first part of it will traverse the debate amongst Western philosophers concerning the extent to which the rules of reasoning for different moral positions are what Taylor terms "outlook-independent" and MacIntyre describes as "neutral tradition-independent", or whether they are no more than subjective justifications for a specific moral outlook. This will include an engagement with the argument that having "killed off" God, many prominent Western philosophers, post the Enlightenment, held on to old virtues whilst trying to find a substitute foundation for these virtues. Central strands to all these attempts being reason, the autonomy of people and the use of the concept of objectivity as a rationalisation for a particular moral argument. The recent emergence of "emotivism" and the argument that all moral arguments are rationally interminable or merely "expressions of preference" will also be covered. This chapter will highlight the nature of the problems posed by Western moral philosophy regarding the popular belief that it is the autonomous person who serves as a measure or judge of a conclusion. In this regard, an underlying subjectivity that does not arise from religion (in the traditional sense) is critically unearthed. This, in turn, goes to show that the judiciary, even though presenting itself as an independent, neutral and objective entity, cannot escape the reigning subjective climate of the day. In this regard, the primary authors who will be used are Alasdair MacIntyre, Charles Taylor and Friederich Nietzsche. The chapter will then juxtapose this Western philosophical view with that which forms a substantive part of the African view, which seemingly remains rooted in objectivity, namely the belief that God is the reference point for morally what is right and wrong. This will be explored at greater depth with a view to assessing

whether, in principle, there is any difference between the Western and African view when it comes to using an objective pole outside of itself, its tradition, its ideology, its culture when making moral choices; more particularly, whether subjectivity inevitably is present when moral choices are made. This, in turn, relates to supporting the argument that in substance, the Western and African approaches inevitably both end up in subjectivity, the one using the autonomous self as a reference point, the other God – but both involve a subjective process. The African authors who will be used are Samuel Kunhiyop, John Mbiti and Paulinus Odozor.

The second part of the chapter will address the question of the achievability of objectivity where judges make rulings on issues involving values – in the literature, characterised as the problem of the indeterminacy of the law. After the clarification of certain words and concepts, I will briefly trace the debate amongst legal philosophers in the 20th century going into the 21st century around the issue of indeterminacy in the law. Primarily, H. L. A. Hart, Ronald Dworkin, the American Realists and the CLS Movement will be covered. I also will analyse the “solutions” offered to this indeterminacy by these various authors with the aim not of evaluating the cogency of the solutions but with the view to problematizing intimations in support of objectivity, whether express or not. Central to this exercise will be engaging with the question of whether or not law inevitably involves articulated or unarticulated value assumptions. This chapter will also explore the questions and methods used by the Realists and the CLS Movement as a credible method to analyse/deconstruct selected judgments of the Constitutional Court, regard being had to the primary research question.

Chapter 3 – In this chapter, I will analyse/deconstruct selected Constitutional Court judgments, *inter alia*, using the questions posed by and the methods of the American Realists and the CLS Movement. I will engage with the judgments with the aim of discerning what conclusions can be extrapolated from such analysis, bearing in mind the primary research question. The analysis in this chapter will focus on the reasoning of the Constitutional Court justices and the source/s used by them to arrive at their conclusions. The goal of this chapter will be to ascertain and examine not only the articulated but also the unarticulated source(s) and assumptions the justices use. Accordingly, I will not engage with the merits of the conclusions reached by the

justices. The method used will be geared towards uncovering how the conclusions were reached and what can be extrapolated from this.

In this chapter, in essence, by means of a careful analysis of the select Constitutional Court decisions, I will evaluate whether, when adjudicating, justices of that court are merely objectively making clear the value system already contained in the Constitution. In doing this, *inter alia*, cognisance will be taken of the arguments in Chapter 2 of this thesis. In this process, the aim is to discern at what stage the choice of justices of the Constitutional Court takes place. In other words, do the justices come with a particular worldview to the facts of the case, or do they only arrive at a view after argument by counsel and assessing the facts before them?

This chapter will be divided into three main parts. The first part will focus on *S v Makwanyane*[46] (hereafter "the death penalty matter") and *DE v RH* (hereafter "the adultery matter").[47] The second part will analyse two judgments of the Constitutional Court dealing with the use of corporal judgment. The cases are *Christian Education South Africa v Minister of Education*[48] (hereafter "the school punishment matter") and *Freedom of Religion South Africa v Minister of Justice and Constitutional Development (*hereafter "the parental punishment matter").[49] The third part will focus on the use of *ubuntu* as a hermeneutical lens by the Constitutional Court. Three cases primarily have been chosen for this part of the chapter. The death penalty matter, *Linde and Two Others v Minister of Health*[50] (hereafter "the unborn child matter") and *City of Tshwane Metropolitan Municipality and Afriforum and Another*[51] (hereafter "the street naming matter").

The chosen methodology will require lengthy extracts from the said judgments. Not only will this enable the desired analysis, but it also will ensure that the justices writing the judgments,

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46 *Makwanyane*.
47 *DE v RH* CCT 182/14.
48 *Christian Education*.
49 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34.
50 Case No CCT 258/17.
51 [2016] ZACC 19.

more often than not intentionally nuanced, are accurately portrayed. Prior to analysing the said judgments, I will briefly set out what has been described as the “two-stage” approach when the Constitutional Court interprets and applies the Constitution.

Chapter 4 – The focus of this chapter will be the contribution and relevance of the research in Chapters 2 and 3 for civil society with a focus on religious communities. Inextricably related to this is the importance of the education of members belonging to such ‘worlds of faith’ regarding strands of subjectivity brought to light through a selection of Constitutional Court judgments. It also will explain how the aforementioned is relevant to the protection of the right to freedom of religion as well as the advancement of diversity. This also will necessitate critical thought on the nature of the law, the advancement of participation in a liberal democracy and the parameters of diversity, tolerance and constitutional adjudication.

Chapter 5 – In addition to summing up the fundamentals of the research reported in Chapters 2, 3 and 4, this chapter will include concluding remarks.

CHAPTER 2

THE PROBLEM OF OBJECTIVITY AND INDETERMINACY IN LAW

2.1 INTRODUCTION

In this chapter, I first deal with the general philosophical proposition of whether objectivity is attainable where value choices are made, after which I specifically investigate what has been characterised as the problem of the indeterminacy of the law. *Apropros* the former, I look into Western and African philosophical perspectives, central to which is whether or not an objective, and thus independent of bias, reference point exists when making moral judgments and decisions. As regards the latter, the same question will be addressed, but specifically within the context of judges handing down judgments. In this regard, the focus will be on complex and nuanced moral issues involving value-laden choices by judges. Here, the purpose will be to facilitate my focus later on in this thesis on findings by justices of the Constitutional Court pertaining to selected judgments involving matters of substantive moral worth.

2.2. AS A GENERAL PHILOSOPHICAL PROPOSITION, IS OBJECTIVITY IN VALUE CHOICES ATTAINABLE?

2.2.1 Introduction

The first part of this chapter focuses on the underlying premise of the overarching hypothesis of this thesis, namely, as a general philosophical proposition, where value choices are involved, subjectivity is bound to become a realisation. It will traverse the debate amongst Western philosophers concerning the extent to which the rules of reasoning for different moral positions are, as previously stated in this thesis, what Charles Taylor terms "outlook-independent" and Alasdair MacIntyre describes as "neutral tradition-independent" or whether they are no more than subjective justifications for a specific moral outlook. This will include a reference to the argument that having "killed off" God, many prominent Western philosophers, post the Enlightenment, held on to old virtues whilst trying to find a substitute foundation for these

virtues. Central strands to all these attempts being reason (that will allow for agreement across communities), the autonomy of the person and the use of the concept of objectivity as a rationalisation for a particular moral argument (which is aligned with the view of reason being universal across cultures and traditions). Accompanying this is the mistaken belief of talking in a language that is agreeable to everyone. The recent emergence of "emotivism" and the argument that all moral arguments are rationally interminable or merely "expressions of preference" will also be covered as this also relates to influences in support of the inescapability of subjectivity. There will be no in-depth engagement with the various philosophical attempts to deal with these problems – later on in this chapter, I will touch on some of these attempts within a jurisprudential context – and I also do not engage with the merits or demerits of the various arguments mentioned above. My purpose will be to, through these arguments and problems, test the proposition or intimation that objectivity is achievable where value choices are made. While *inter alia*, there will be reference to Taylor and Nietzsche, the primary European author used will be Alasdair MacIntyre. Given the great number of philosophers produced by the Enlightenment and the focus of this thesis, there was a need to limit the research in this regard. The reasons for this choice include that whilst his writings are contemporary, MacIntyre's writings involve a critical engagement with the conceptual thinking of leading past thinkers of the Enlightenment.

The chapter will then juxtapose this Western philosophical view with that of a substantive African view, which *seemingly* remains rooted in objectivity, namely the belief that God is the objective reference point for, morally speaking, what is right and wrong. This will be explored with a view to assessing whether, in principle, there is any difference between the Western and African view when it comes to using a seemingly objective pole outside of itself, its tradition, its ideology, and its culture when making moral choices; more particularly, whether subjectivity inevitably is present when moral choices are made. I discovered a paucity of accessible African philosophers concerning the focus of this chapter. It would seem that one of the reasons for this is that central to the thinking of African philosophers is an assumption concerning objectivity and God as the reference point for moral decisions. (In any event, it will be seen in Chapter 3 that the Constitutional Court has allowed itself to be influenced far more by Western jurisprudence than African jurisprudence.) The African authors who will be used are Samuel Kunhiyop, John Mbiti and Paulinus Odozor.

In summation, therefore, this first part of the chapter critically explores the concept of objectivity so as to confirm the effervescence of subjectivity when it comes to understanding the law and, therefore, the Constitution and the application thereof. Accompanying this is the identification of two main streams of ideological foundations that not only confirm substantive presuppositional points of departure when exercising constitutional adjudication but also motivate the inclusion of forms of subjectivity other than Western ones pertaining to constitutional adjudication. Naturally emanating from this is the confirmation that only certain strands of subjectivity come forth in the selected judgments, in the sense of an overly Western presence.

2.2.2 Western thinking

The question of whether there is such a thing as objectivity when it comes to value choices is a question that European philosophers for many years have been *ad idem* about; there is no such objective value system. As Charles Taylor, agreeing with Alasdair MacIntyre's reasoning in *After Virtue*, writes in *After MacIntyre*:[52] "What is supposed to be an outlook-independent meta-ethical finding, setting the rules of reasoning for all possible moral positions, turns out to be just the preferred interpretation of one ideal among others. … People like MacIntyre and myself want to accuse the Hares and the Stevensons of - to put it polemically and brutally - trying to force through their own ethic of disengaged freedom under the guise of an independently established, rationally undeniable meta-ethic."

In their analysis of the Enlightenment and the centuries thereafter leading into the 21st century, Western philosophers such as Taylor and MacIntyre argue that having "killed off" God, this period is characterised *inter alia*, by clinging on to old virtues and trying to find an objective substitute foundation for these virtues. Thus, Michael Tanner, in his reasoning and reflection on Friederich Nietzsche, writes:[53] "For all sorts of reasons, philosophers of the last 300 years

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52 Taylor 1994:19-21.
53 Tanner 1994:33-37.

or so have been concerned to stand by the moral precepts that they have inherited, while attempting to find new foundations for them, including the limiting case of denying that they need foundations… .” Here, Tanner highlights one of the stratagems to deal with the conundrum of referring to value choices in the absence of an objective reference point; namely, there is no need for an objective reference point. Whilst this raises profound dilemmas concerning the making of moral value choices, for the purposes of this thesis, what is important is that this stratagem simply underlines the lack of objectivity when it comes to value choices. This is important to bear in mind when looking at the selected judgments of the Constitutional Court, something that will be elaborated upon later on in this thesis. In an interview (responding to a question), MacIntyre states:[54] “The Enlightenment's central project had been to identify a set of moral rules, equally compelling to all rational persons. That project has failed, and its heirs were a number of rival standpoints, Kantian, utilitarian, contractualist and various blends of these, whose disagreements multiplied in such a way that 20th-century culture has been deprived of any widely shared, rational morality but has inherited instead an amalgam of fragments from past moral attitudes and theories.” Dealing with the consequences of “the failure of the Enlightenment project” in his argument MacIntyre writes:[55]

> I take it then that both the utilitarianism of the middle and late 19th century and the analytical moral philosophy of the middle and late 20th century are alike unsuccessful attempts to rescue the autonomous moral agent from the predicament in which the failure of the enlightenment project of providing him with the secular, rational justification for his moral allegiances had left him….. A central characteristic of moral fictions which comes clearly into view when we juxtapose the concept of utility to that of rights is now identifiable: they purport to provide us with an objective and impersonal criterion, but they do not.

Later, he continues:[56]

> ... Yet both the thinkers of the Enlightenment and their successors proved unable to agree as to what precisely those principles were which would be found undeniable by all rational persons. One kind of answer was given by the authors of the encyclopaedia, a second by Rousseau, a third by Bentham, a fourth by Kant, a fifth by the Scottish philosophers… . Nor has subsequent history diminished the extent of such disagreement. It has rather enlarged it.

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[54] Knight 1998:258.
[55] Knight 1998:65-68.
[56] Knight 1998:104.

> Consequently, the legacy of the Enlightenment has been the provision of an ideal of rational justification which it has proved impossible to attain.

In highlighting the various attempts by philosophers to address the vacuum created by substituting God with autonomous reason, MacIntyre keeps driving their arguments to their logical conclusion. The result each time is the same – whose rationality? Thus, whilst providing an abstract reference point, autonomous reason, MacIntyre asks a prior question – who in practice decides how to define autonomous reason? And how do they do this without imposing their own subjective version of reason? In his reasoning, MacIntyre argues that liberalism has overtly or covertly sought to fill this vacuum, MacIntyre commenting that:[57] "… Liberals have, for reasons which are obvious in the light of the history of their doctrines, been reluctant to recognise that their appeal is not to some tradition-independent rationality as such." MacIntyre goes on to argue, however, that increasingly, there are liberal thinkers who are conceding that there are rival traditions which have contesting conceptions of "practical rationality and of justice". He opines that given that liberalism is the strongest claimant in "human history" to provide a universal tradition-independent rationality and that even it fails to do so, "provides the strongest reason that we can actually have for asserting that there is no such neutral ground, that there is no place for appeals to a practical-rationality-as-such or a justice-as-such to which all rational persons would by their very rationality be compelled to give their allegiance. There is instead only the practical-rationality-of-this-or-that-tradition and the justice-of-this-or-that-tradition. Liberalism, like all other moral, intellectual, and social traditions of any complexity, has its own problematic internal to it, its own set of questions which, by its own standards, it is committed to resolving."[58]

At the heart of this conundrum was the Enlightenment's pronouncement of "the death of God" and the elevation of reason and the autonomous human being to take God's place. The quest thereafter for an objective reference point, for a universal ethic/norm outside of people, was plagued by subjectivity. MacIntyre succinctly highlights the unbridgeable divide between the subjective nature of our rational process and the quest for an objective reference point/process

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57 MacIntyre 1988: 345-346.
58 MacIntyre 1988: 345-346

to keep our subjective agendas in check. As we have seen, one response to this conundrum is to deny the need for an objective foundation for our moral reasoning. Even though this response is an attempt to obviate the adverse consequences of a lack of objectivity when it comes to making moral choices (as already stated, it is not in the purview of this thesis to enter into this debate), it is undergirded by the acknowledgement that objectivity is not achievable where value choices are made.

Another response is the brutal honesty of Nietzsche; MacIntyre comments:[59] "For it was Nietzsche's historic achievement to understand more clearly than any other philosopher - certainly more clearly than his counterparts in Anglo-Saxon emotivism and continental existentialism - not only that what purported to be appeals to objectivity were in fact expressions of subjective will, but also the nature of the problems that this posed for moral philosophy." MacIntyre goes on to highlight Nietzsche's rational dismissal of the various attempts by the Enlightenment to "discover rational foundations for an objective morality." These include "basing morality on inner moral sentiments, on conscience, on the one hand, or on the Kantian categorical imperative, on universalizability, on the other."[60] MacIntyre concludes that Nietzsche's "solution" to this conundrum is for people to admit that "the rational and rationally justified autonomous moral subject of the 18th century is a fiction, an illusion; so, Nietzsche resolves, let 'will' replace 'reason' and let us make our souls into autonomous moral subjects by some gigantic and heroic act of the will… ."[61]

In his book *Beyond Good and Evil*, written in 1885, Nietzsche argues that as a result of "the herd instinct of obedience", "commanders" in society hypocritically rationalise their exercise of power in terms of simply obeying, for example, what is in the interests of the common good. And so he writes:[62] "They know of no way of defending themselves against their bad conscience other than to pose as executors of more ancient or higher commands (commands of ancestors, of the Constitution, of justice, of the law or even of God), or even to borrow herd

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59 MacIntyre 1981:107-108.
60 MacIntyre 1981:107-108.
61 MacIntyre 1981:107-108.
62 Nietzsche 2003:120-121.

maxims from the herd's way of thinking and appear as 'the first servant of the people' for example, or as 'instruments of the common good'." Tanner says this shocks us but argues:[63]

> And yet we have been made uneasy, since the whole issue of obedience has been raised, and while we are only too pleased to obey what he believed to be right, the question is why we have this belief, when we have abolished the commander (God) - those of us who have... But on the other hand it would be foolish not to agree that if we have abandoned the original validating belief, we need something new in its place. For it is all too easy to be like 'the English' and think we know 'intuitively' what is right and wrong - it would be remarkable if we did, since we have no other substantial intuitive knowledge.

What this reasoning by Nietzsche starkly demonstrates is the argument for the absence of objectivity when making a value judgment. Tanner focuses our minds on the shocking consequence of this conundrum, highlighted by Nietzsche and the need to find something in the place of God. What is important for this thesis is that the questions flowing from this conundrum must be answered truthfully and not be influenced by the apparent shocking consequences of a conclusion that there is no objectivity in moral reasoning and choices. In other words, we must not propagate objectivity to mask the conundrum which follows on from the subjectivity, not least of all an inevitable lack of certainty and the imposition of a judge's personal philosophy onto a society. I deal with this at greater length in the second part of this chapter. (I also touch on a possible response to this conundrum in Chapter 5.) In *After Virtue*, MacIntyre introduces the reader to "emotivism" and writes:[64] "The most striking feature of contemporary moral actions is that so much of it is used to express disagreements, and the most striking feature of the debates in which these disagreements are expressed is their interminable character. I do not mean by this just that such debates go on and on and on - although they do - but also that they apparently can find no terminus. There seems to be no rational way of securing moral agreement in our culture." Later, MacIntyre highlights three characteristics of these debates/disagreements and, in the process, unveils emotivism:[65] "The first is what I shall call,… . The conceptual incommensurability of the rival arguments… . Every one of the arguments is logically valid or can be easily expanded so as to be made so; the conclusions do indeed follow from the premises. But the rival premises are such that we possess no rational

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63 Tanner 1994:36.
64 MacIntyre 1981:6.
65 MacIntyre 1981:8-12.

way of weighing the claims of one as against another." We are once again faced with the same question-begging conundrum attached to all attempts to arrive at a decision by means of reason – subjectivity. Arguing that using reason to decide which premise/claim is reasonable leads us nowhere else but into a sea of subjectivity (this will be dealt with at greater length in Chapter 3). MacIntyre continues: "A second,…., characteristic of these arguments is that they do nonetheless purport to be impersonal rational arguments and, as such, are usually presented in a mode appropriate to that impersonality. … . A third salient characteristic of contemporary moral debate is intimately related to the first two. It is easy to see that the different conceptually incommensurable premises of the rival arguments deployed in these debates have a wide variety of historical origins… ." He elaborates on this proposition by highlighting that over the past 300 years, words such as virtue, justice, piety, duty and, even, ought, "have become other than they once were." He then poses the question as to how we ought to record the genesis of these changes. MacIntyre responds to his own question:

> One philosophical theory which this challenge specifically invites us to confront is emotivism. Emotivism is the doctrine that all evaluative judgments and more specifically all moral judgment are nothing but expressions of preference, expressions of attitude or feeling, in so far as they are moral or evaluative in character… . Factual judgments are true or false; and in the realm of fact there are rational criteria by means of which we may secure agreements as to what is true and what is false. But moral judgments, being expressions of attitude or feeling, are neither true nor false; and agreement in moral judgment is not to be secured by any rational method, for they are not.

MacIntyre continues:[66] "What I have suggested to be the case by and large about our own culture – that in moral argument, the apparent assertion of principles functions as a mask for expressions of personal preference – is what emotivism takes to be universally the case." In effect MacIntyre, by driving their arguments to their logical conclusion, unmasks emotivism as in substance no different to the reasoning of Nietzsche; the only difference being the brutal honesty of Nietzsche. However, both schools of thought argue that when it comes to making moral choices, subjectivity in all its forms is unavoidable.

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66 MacIntyre 1981:18-19.

As will be seen in the second part of this chapter, this struggle has been at the forefront of jurisprudential thinking concerning the indeterminacy of the law for much of the twentieth and twenty-first centuries. This struggle is merely an application of the wider philosophical debate over the last 300 years to law.

2.2.3 African perspective

Seemingly, in stark contrast to this Western conundrum, reflecting on Africa, Samuel Kunhiyop writes:[67]

> Africans regard debate about the existence of God as ridiculous. They take it as a given. God is the foundation and explanation of all creation and existence. If he did not exist, nothing else would exist. In Africa, knowledge of God is never sought for theoretical reasons or to satisfy intellectual curiosity. He is sought for practical reasons, and the appropriate response to him is practical devotion shown by living in the way he prescribes. This is the moral path of life, for God is the ultimate source of all morality: 'God made man; and it is he who implants in him the sense of right and wrong.'

Thus, in Africa, it would seem as if "the commander" has not been killed off and that there is an objective reference point, when it comes to value choices. However, when one digs beneath the surface, one is driven to a position not dissimilar to the European position. John Mbiti,[68] answering questions arising from a talk on translating the New Testament Text, opines that at the centre of all African religion is the acknowledgement of, and belief in, God. Dealing with the translation of the Bible, he uses the picture of seeing trees through an open window and seeing the trees through an opaque window to highlight the importance of cultural background in the translation and application of the text. In this he is *ad idem* with MacIntyre's approach of the indispensability of tradition, culture and belief as prisms for judging rationality. Extrapolating from this, one immediately discerns the presence of subjectivity, Paulinus Odozor writes:[69]

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[67] Kunhiyop 2008:16.
[68] Forster 2016.
[69] Odozor 2014:250.

> The point of all this is to show that African societies and persons do not all share one monolithic way of making moral decisions. Their world is as complex as anyone else's, and like people elsewhere they too are guided by many and different considerations in the search for moral truth. Therefore, as is the case with the Catholic moral tradition, traditional African moral reasoning is partly deontological, partly teleological, partly everything else, depending on the issue at stake, the view of God the individual has, and understanding of the human good in question which needs to be preserved, articulated, or enhanced.

Earlier, Odozor writes:[70]

> Thus every question one raises in regard to the validity of a moral rule can be answered only by another moral rule, which in turn can be answered only by another rule, and so on. Kant's answer to this question was that every rational being recognises that he is bound by moral rules. Thus to be moral is to be rational. But such answers cannot really be considered answers; they beg the question. Nor is the consequentialist alternative the solution. To answer that I should be moral because of some effects or some consequences from my action still leaves open the question about the justification of all moral discourse. In the end, the most compelling answer to the question of why one should be moral seems to be supplied by one tradition or another. Religious traditions, for example, give various answers to this question.

2.2.4 Conclusion

Returning to the question posed at the beginning of this chapter, on closer scrutiny, European and African philosophers thus appear to be *ad idem* about the conundrum of subjectivity when it comes to making moral choices. That when it comes to making normative value judgments, the life story and context of the person making such a judgment will, of necessity, impinge on her judgment. To intimate that there is already a moral value system in the Constitution itself and that judges are only its mouthpieces (and the phrase "objective normative value system") suggests that there are moral values which are akin to mathematical theorems. Thus, where a document purportedly contains such a value system, the task of the interpreter is to discern and then apply the theorem in the document. Furthermore, this implies that this task excludes the interpreter from being influenced by her life story and beliefs. This task also does not permit any agenda, no matter how noble the agenda. But how realistic is this? Understanding the Constitution as an already given formula related to moral issues presupposes an objective

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[70] Odozor 2014:68.

reference point outside of the interpreter. A means one can use can measure by, to decide on what the "right" answer is. In Europe, prior to the Renaissance, such a reference point purportedly was God. Post-Renaissance, various unsuccessful attempts have been made to replace God. In fact, to be an interpreter may include the construction of meaning and not the 'finding' of it. In this regard, Stanley Fish comments that "Interpretation is not the art of construing but the art of constructing. Interpreters do not decode poems; they make them."[71] Fish has argued that "the objectivity of the text is an illusion and, moreover, a dangerous illusion because it is so physically convincing. The illusion is one of self-sufficiency and completeness. A line of print or a page is so obviously *there*. . . that it seems to be the sole repository of whatever value and meaning we associate with it."[72]

Even where, as in Africa, there remains a substantive acknowledgement of God as a reference point outside of the interpreter, on closer scrutiny, objectivity is clouded by culture and belief systems. This also attests to very broad strands of subjectivity regarding regional nomenclatures of culture, tradition and ideology. God and God's teachings are not mathematical equations to be applied. God meets people in their particular subjective contexts. Indeed, applying the reasoning of philosophers such as MacIntyre, Taylor and Nietzsche, in effect, there is no, in principle, hermeneutical divide between pre- and post-Renaissance, nor between a European and an African hermeneutic. Although unpalatable, it is difficult to fault the logic of Nietzsche that what purports to be appeals to objectivity are, in fact, expressions of subjective will; that there is nothing to morality but expressions of will – that my morality can only be what my world creates. The value of Nietzsche is to alert society to this conundrum. The next part of this chapter will deal with how select legal philosophers have attempted to deal with this conundrum.

[71] Stanley Fish, *Is there a text in this class?,* cited in Levinson, "Law as Literature", 381.
[72] Levinson, "Law as Literature", 381.

2.3 PROBLEMATISING INDETERMINACY OF THE LAW

2.3.1 Introduction

Building on the first part of this chapter, the focus now moves to the achievability of objectivity, specifically where judges make value choices. Mirroring the general philosophical conundrum concerning objectivity where value choices are made, dealt with earlier, legal philosophers of the 20th and 21st centuries agree that when it comes to "hard cases",[73] indeterminacy looms large. Thus, H. L. A. Hart speaks of the "open texture" of law: "… languages like English are… irreducibly open textured." He continues: "The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case."[74] Others highlight the choice of judges. Touching on this issue, in a publication seeking to obtain a "measure of convergence between the values underlying various constitutional texts", Davis *et al.* write:[75] "Cognisant of this controversy and complexity about indeterminacy, … ." Karl Llewellyn writes that:[76] "… In any case doubtful enough to make litigation respectable", the rule system contains mutually contradictory "available authoritative premises." Duncan Kennedy comments:[77] "…substantive and formal conflict in private law cannot be reduced to disagreement about how to apply some neutral calculus… . The opposed rhetorical modes lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future." Ronald Dworkin, referring to the Constitution of the United States of America (hereafter "the US"), writes:[78] "The 'vague' standards were chosen deliberately, by the men who drafted and adopted them, in place of the more specific and limited rule that they might have enacted. But

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73 MacCormick writes: "Dworkin's theory of law has as its nodal point the topic of hard cases… . The phrase signifies those litigated disputes in which, even apart from any dispute about the facts of the matter, there is a dispute between the parties as to the bearing of the law on whatever facts can be proven… ." (MacCormick 1984:186).

74 Hart 1961:132.

75 Davis, Richter & Saunders 2015:454.

76 Llewellyn 1931:1222, 1237 & 1238-1239.

77 Kennedy 1976:685.

78 Dworkin 1978:133.

their decision to use the language they did caused a great deal of legal and political controversy, because even reasonable men of goodwill differ when they try to elaborate, for example, the moral rights that the due process clause or the equal protection clause brings into the law."

This issue of indeterminacy is central to a philosophical analysis of whether or not the South African Constitution, especially the Bill of Rights, is immune from subjectivity. Bearing this in mind, the purpose of this section is two-fold, namely: (1) Briefly tracing the debate amongst legal philosophers in the 20th going into the 21st century around the issue of indeterminacy in the law, and (2) Analysing the "solutions" offered to this indeterminacy with the aim not of evaluating the cogency of the solutions, but with the view to problematizing the question of "indeterminacy". This slots in with the main hypothesis of this study, which is the unveiling of subjective strands specific to selected judgments by especially the Constitutional Court regarding important moral matters (and the subsequent implications of this for civil society). By tracing the debate around the issue of indeterminacy in the law, the determinacy of subjective strands in constitutional adjudication is further bolstered, and the same applies to problematizing the question of "indeterminacy" through analysis of "solutions" regarding this indeterminacy.

Two legal philosophers I mainly will focus on are Hart and Ronald Dworkin. Hart because of his stature and deep influence on legal philosophy throughout the legal world. Dworkin because he has had a significant effect on South African judges since the advent of constitutionalism in South Africa in 1994. (By this should not be implied that, just as is the case with Hart, the scholarship of Dworkin has also not had a deep influence on legal philosophy throughout the legal world). My focus in dealing with Dworkin will be on the issue of the indeterminacy of the law. This must not be construed as being critical of his call to judges to use the law to promote justice. In addition, I will deal with the American Realists and the CLS Movement as I am of the view that they present the most logical and consistent critique of the various endeavours to deal with indeterminacy in the law.

In order to comply with the purpose of this second part of the chapter, and bearing in mind *Carmichele supra's* reference to an "objective normative value system"[79] contained in the Constitution, it will be helpful to clarify the words/concepts "normative/norm". Knowing all too well that to do proper justice to investigating the concepts "normative/norm" will require an investigation which parameters far exceed the purpose of this study, I find Hans Kelsen's insights rather helpful in providing the reader with some clarity as to "normative/norm" against the background of the focus of this thesis. Kelsen argues that[80] "…the so-called *Pure Theory of Law* defines the law as an aggregate or system of norms, as a normative order." He continues: "Now, what is a norm? A norm is a specific meaning, the meaning that something ought to be or ought to be done, although actually it may not be done. There are different kinds of norms, norms of thinking, that is, logical norms, and norms of acting, that is, moral and legal norms." Building on this, he writes: "The act by which the norm is created (an 'is-statement') must be distinguished from the norm created by the act ('ought-statement') – for instance: A legislative act and the law or statute created by it. The act is a fact, the norm is the meaning of this fact…. Since the norm is not a fact but the meaning of a fact, its existence is different from the existence of a fact." Illustrating his argument, he opines: "If we ask for the reason of the validity of the Ten Commandments, that is to say, why we ought to obey the Ten Commandments, the usual answer is: because God issued the Ten Commandments; but this answer, referring to a fact, is not correct. The correct answer, referring to a norm, is: because we ought to obey the commands of God."

For a moment, looking at the subject matter of this thesis, the Constitution would be the is-statement, the fact. Indeed, somewhat different to the illustration of Kelsen, part of the is-statement would be that in terms of sections 2 and 8 of the Constitution, in law, we must obey the Constitution. The conundrum this thesis addresses is the process adopted by judges to arrive at the ought statement, the norm, when interpreting and applying the Constitution, including sections 2 and 8 when, for example, dealing with religious freedom.

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[79] See footnote 2 above.
[80] Kelsen 1959:107-110.

2.3.2 Indeterminacy debate traced and analysed

2.3.2.1 Traditional approach

Under different guises during the 20th century into the 21st century, an all-pervasive approach to the duty of a judge is summed up in Hutchinson *et a*l.,[81] a publication that for many years was widely used by many law schools in South Africa. The authors therein argue that the function of a judge "is to interpret, to declare and to apply the existing law of the state and not to make new or fresh law… ." They continue that,

> If there is an authoritative rule of law which covers the facts, the judge simply applies the existing law and declares the rights of the parties in accordance with that rule. If, however, the judge can find no existing authoritative rule of law which is applicable to the facts, it is his duty to decide the rights of the parties *not arbitrarily* (my emphasis) but *in accordance with fundamental principles of justice* (my emphasis) … . The reason for the decision, when abstracted from the facts peculiar to the case…, amounts in effect to a principle, and is termed the *ratio decidendi* of the case. This principle possesses binding force, with the consequence that a new rule of law, or precedent, has been evolved and constituted.

I will refer to this approach to law as the traditional approach. Later, dealing with the qualities that a law should possess, the authors highlight, *inter alia*, the need for "certainty, comprehensiveness".[82] H. Weschler,[83] an example of an amplified version of the traditional approach, argues that when the US Supreme Court decides whether actions are consistent with the Constitution, central to the process followed by the judges must be "reasoning and analysis which transcend the immediate result." Referring to the criteria to be used by judges, he writes: "I revert then to the problem of criteria as it arises for both courts and critics – by which I mean criteria that can be framed and tested as an exercise of reason and not merely as an act of wilfulness or will."[84] Juxtaposing it with the *ad hoc approach* in politics, Weschler argues that the "main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons

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[81] Hutchison et al. 1991:5-6.
[82] Hutchison et al. 1991:15.
[83] Weschler 1959:1.
[84] Weschler 1959:11.

quite transcending the immediate result that is achieved. To be sure, the courts decide or should decide only the case they have before them. But must they not decide on the grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply?"[85] He then concedes that there is another dimension involved when it comes to constitutional interpretation, namely, that judges are confronted with "political" choices "among competing values or desires".[86] However, Weschler then attempts to address the mischief of subjectivity. Quoting an American judge (Judge Hand), he writes:[87]

> At all events, is not the relative compulsion of the language of the Constitution, of history and precedent – where they do not combine to make an answer clear – itself a matter to be judged, so far as possible, by neutral principles – by standards that transcend the case at hand? … *This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are – or are obliged to be – entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved* (my emphasis).

Weschler continues:[88] "Of course, the courts ought to be cautious to impose a choice of values …, based upon the Constitution, only when they are persuaded, on an adequate and principled analysis, that the choice is clear. That I suggest is all that self-restraint can mean, and in that sense, it is always essential, whatever issue may be posed. The real test inheres, as I have tried to argue, in the force of the analysis."[89] Notwithstanding this argument, in opposing a mechanistic approach to resolving the conflict flowing from the need at times to prioritise competing constitutional values, he continues: "It has a virtue, on the other hand, insofar as it recognises that some ordering of social values is essential; that all cannot be given equal weight if the Bill of Rights is to be maintained." Referring to the examples, Weschler concludes his argument:[90]

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85 Weschler 1959:15.
86 Weschler 1959:15.
87 Weschler 1959:17, 19.
88 Weschler 1959:25.
89 Weschler 1959:25.
90 Weschler 1959:34.

> But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms… . Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, *is there a basis in neutral principles* (my emphasis) for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school - segregation cases.

At first blush, the traditional approach and the amplification of it appears reasonable and conducive to certainty and comprehensiveness. However, even a superficial analysis of this approach reveals the problem of indeterminacy, of a lack of objectivity, of the imprint of the judge's personality/philosophical worldview on rulings, particularly rulings involving values. I now turn to Weschler's attempt (referred to above) to distinguish *ad hoc* political choices from judges who have to make "principled" decisions. According to him, central to such "principled" decisions are reason and analysis with the aim of arriving at a decision which "transcends the immediate result." To achieve this, he argues that further requirements are that decisions must be based "on grounds of adequate neutrality and generality". The questions which such an approach begs are self evident. Weschler concedes as much when he acknowledges that constitutional interpretation requires a court to make a choice among competing "values or desires" and that, at times "some ordering of social values is essential". He attempts to address this conundrum by once again reverting to the argument that any such choice must be the result of analysis and reason, with the aim of arriving at a decision where the "reasons… in their generality and their neutrality transcend any immediate result that is involved." However, on closer analysis, Weschler's approach involves the judge making decisions which involve making choices among competing values. The fact that a judge can construct an argument as to why she chooses one value over another does not make the decision objective or value-free. It also does not guarantee "certainty and comprehensiveness", as another judge using the same tools and approach can come to a completely different conclusion.

2.3.2.2 The American Realists (hereafter "the Realists")

It is this conundrum of the traditional approach and amplified version of it, which was forcefully addressed during the early part of the 20th century by a school of legal philosophers

referred to as "the Realists". Theirs was not a uniform approach. However a strand running throughout their argument was that no law existed until it was actually applied by a judge. Subjectivity, and thus indeterminacy, was a cornerstone of the philosophy of the Realists. They were also deeply sceptical of the role of neutrality when decisions were made by courts. Dealing with the Realists, Mark Tushnet[91] makes the point that they argued that "the law's purportedly rational rules, doctrines, and principles (the traditional approach) failed to explain what actually happened" when judges handed down judgments. Mark Tushnet argues that their approach threatened "a central tenet of liberal political theory, that a legal system autonomous from the contests of will and power in the political arena was necessary, and perhaps sufficient, to protect individuals from oppression… . When … (one) counterposed objectivity and subjectivity, (one) implicitly (invoked) the fear of the wilfulness of subjective values as a ground for the objectivity of a law that could protect us."[92]

Andrew Altman[93] argues that the realist analysis of this indeterminacy can be presented at two levels. At the one level, the Realists argued that in any given case, there were always multiple potential points of indeterminacy due to rule vagueness. Central to the other level was their rejection "of a distinction central to the doctrine of precedent, namely, that between holding and *dictum*. The holding in a case referred to the essential grounds of the decision and, thus, what subsequent judges were bound by. The *dicta* were everything in an opinion (judgment) not essential to the decision, ... The realists argued that in its actual operation, the common-law system treated the distinction as a vague and shifting one."[94] Still referring to the Realists' position, Altman continues:

> Subsequent judges were indeed bound by the decision itself, that is, by the finding for or against the plaintiff, and very rarely was the decision in a precedent labeled as mistaken. But this apparently strict obligation to follow precedent was highly misleading, according to the realists. For later judges had tremendous leeway in being able to redefine the holding and the *dictum* in precedential cases… . The common-law judge thus faced an indeterminate legal position in which he had to render a decision by choosing which of the competing rules was to govern the case. In other words, while the realists claimed that all cases implicated a

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91 Tushnet 1984:624-625.
92 Tushnet 1984:624-625.
93 Altman 1986:208-209.
94 Altman 1986:208-209.

> cluster of rules, they also contended that in any cluster there were competing rules leading to opposing outcomes.[95]

Altman, referring to Llewellyn as perhaps the leading proponent of the realist school of thought, refers to Llewellyn's argument that: "…it is precisely the existence of competing authoritative rules for each case which creates the radical indeterminacy problem."[96] Llewellyn comments that:

> When it comes to presenting a proposed statutory construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still, unhappily, requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point. ... Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon.[97]

He continues:[98] "There may even be a slender hope that putting such material out baldly, may lead an occasional court to cease driveling about some compelling 'legislative' intent which flatly controls the court, even in cases where no such intent existed or can be found, and to settle down instead to a court's own real and responsible business of trying to make sense out of the legislation, so far as text and context may allow."

In his classic realist statement,[99] Llewellyn tabulates examples of "Canons of Construction" with the divide between "Thrust But Parry/Thrust And Counterthrust" to illustrate/undergird his argument concerning the room for manoeuvre which judges have. The 46 examples he uses are quotes by judges from State Courts and the Federal Court in the US. I highlight five examples, each from the State Courts and from the Federal Court, to illustrate his argument. Each assertion is by judges of equal status responding to different sets of facts:

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95 Altman 1986:208-209.
96 Altman 1986:211.
97 Llewellyn 1960:521.
98 Llewellyn 1960:528-529.
99 Llewellyn 1960:522-535.

“Thrust But Parry

1. A statute cannot go beyond its text. 1. To effect its purpose a statute may be implemented beyond its text.

10. A statutory provision requiring liberal construction does not mean disregard of unequivocal requirements of the statute. 10. Where a rule of construction is provided within the statute itself the rule should be applied.

12. If language is plain and unambiguous it must be given effect. 12. Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.

16. Every word and clause must be given effect. 16. If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage.

26. There is a distinction between words of permission and mandatory words. 26. Words imparting permission may be read as mandatory and words imparting command may be read as permissive when such construction is made necessary by evident intention or by the rights of the public.

Thrust And Counterthrust

2. [T]he two [statutes] are in pari materia and must be construed together. 2. [T]he rule of in *pari materia* is resorted to only in cases where the meaning of a statute is ambiguous or doubtful.

3. The meaning of a word may be ascertained by reference to the meaning of words associated with it. 3. A word may have a character of its own not to be submerged by its association.

6. The heading of a statute, or a section thereof, may not be used to … restrict the language of the statute itself. 6. The heading here considered is part of the context of the statute.

7. [T]he presumption [is] that a proviso ‘refers only to the provision to which it is attached’. 7. [A] proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used.

8. [T]here is no need to refer to the legislative history where the statutory language is clear. 8. But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination.”

At the heart of the theory of the Realists is that due to competing rules of law in any given matter, judges need to make a choice. And that they do this by employing various strategies (laden with subjectivity) to justify their decisions.

2.3.2.3 Hart's response

H. L. A. Hart's *The Concept of Law* remains a seminal work in legal philosophy. In it, *inter alia,* he responded to the indeterminacy argument of the Realists. Fundamental to Hart's approach to indeterminacy is the "open texture" of law.[100] Central to this is the limit "inherent in the nature of language, to the guidance which general language can provide." He argues that whilst principles of interpretation can diminish uncertainty as regards what a judge should rule in different cases, they cannot eliminate uncertainty for, amongst other reasons these principles themselves require interpretation and cannot "provide for their own interpretation."[101] Addressing the situations where there is uncertainty notwithstanding that a general rule has been laid down, Hart writes:[102]

> If in such cases doubts are to be resolved, something in the nature of choice between open alternatives must be made by whoever is to resolve them … . The discretion thus left to him by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice… .Whichever device, precedent or legislation, is chosen for the communication of *standards of behaviour (general rules)* – (my emphasis), these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture.

Hart argues that not only is such indeterminacy inevitable but that, in effect, there is a necessity for such choice. He argues that all legal systems, in different ways, "compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social

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[100] Hart 1961:121-127.
[101] Hart 1961:23.
[102] Hart 1961:124.

issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case… ."[103] Hart opines that legal theory tends to either ignore or exaggerate the resultant indeterminacy, central to which is our inability to anticipate the future. Alerting us to various techniques legal systems use to address this conundrum, Hart highlights some of them. Central to these techniques is creating an opportunity for lawgivers/makers to make a choice given a specific set of facts. Thus, for example, general standards such as "*a fair rate*" and "*reasonable*" (my emphasis) are legislated. The legislator is then empowered to make subsequent regulations as to what "*a fair rate*" is. Alternatively, a judge can look to previous judgments as to what "*reasonable*" is in similar circumstances.[104] Common to these techniques is a choice and, thus, inevitably, indeterminacy. Hart writes:[105]

> In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes or in developing and qualifying rules only broadly communicated by authoritative precedents. None the less these activities ... must not disguise the fact that both the framework within which they take place and their chief end-product is one of general rules. These are rules the application of which individuals can see for themselves in case after case, without further recourse to official direction or discretion.

Developing on this, Hart addresses a phrase attributed to Chief Justice Hughes:[106] "The law (or the Constitution) is what the court says it is." Using the example of a scorer in a game, he distinguishes between the game and the scorer's application of the rules of the game. Thus, he argues although, at one level, the score of a game, is what the scorer says it is, this must be distinguished from the game and the rules which the scorer must follow when scoring the game. In other words, it would be false to say that the score is what the scorer says it is, which means that there is no rule for scoring save for what the scorer, in his discretion chooses. Thus, the scorer, in exercising his discretion in an "open texture" context, is bound by "a core of settled meaning". Hart ties up the scorer in a game illustration with: "It is this that makes it true to say

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[103] Hart 1961:25-27.
[104] Hart 1961:25-27.
[105] Hart 1961:132-133.
[106] *Charles Evan Hughes and The Supreme Court* (1951) cited in Hart 1961:250.

that the scorer's rulings are, though final, not infallible. The same is true in law."[107] Applying this example to law, Hart opines:[108]

> Whatever courts decide, both on matters lying within that part of the rule which seems plain to all, and those lying on its debatable border, stands till altered by legislation; and over the interpretation of that, courts will again have the same last authoritative voice. Nonetheless there still remains a distinction between a constitution which, after setting up a system of courts, provides that the law shall be whatever the Supreme Court thinks fit, and the actual constitution of the United States – or for that matter the constitution of any modern State. 'The constitution (or the law) is whatever the judges say it is', if interpreted as denying this distinction, is false. At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision.

Hart then emphasizes that judges, on coming into office, find rules accepted as standards for judges. This both circumscribes the judge and allows for "creative activity" as a judge. Hart argues that such standards will not continue to exist without the majority of judges adhering to these "standards of adjudication". This, however, does not make the judge the author of the standards.[109] I have already touched on some of the techniques which Hart argues the law and judges use when "exercising the creative function left to them by the open texture of law in statute or precedent." Hart adds:[110]

> Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or 'mechanical' deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the *purpose* (my emphasis) of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work *injustice* (my emphasis) or offend *settled moral principles* (my emphasis). Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer. At this point judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity 'legislative'. These virtues are: *impartiality and neutrality* (my emphasis) in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision. No doubt because a plurality of such principles is always possible it cannot be demonstrated that a decision is uniquely correct: but it may be made acceptable as the

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[107] Hart 1961:140.
[108] Hart 1961:141-142.
[109] Hart 1961:141-142.
[110] Hart 1961:200.

> reasoned product of informed impartial choice. In all this we have the 'weighing' and 'balancing' characteristic of the effort to do justice between competing interests.

The fundamental difference between Hart and the Realists is that Hart hopes for a judge who can do this in an impartial and neutral way. The Realists argue that this is not possible, that any such weighing and balancing act will have the imprint of the judge's own view of what type of world she feels she should be facilitating. In other words, any reasoned basis will be *ex post facto* her decision of what type of world she should be helping to develop. Llewellyn's earlier "Thrust But Parry/Thrust And Counterthrust" examples illustrate this argument of the Realists. Indeed, recognising the inherent problem with his approach when it comes to judges interpreting and applying values, Hart writes:[111] "Does the morality, with which law must conform if it is to be good, mean the accepted morality of the group whose law it is, even though this may rest on superstition or may withhold its benefits and protection from slaves or subject classes? Or does morality mean standards which are *enlightened* (my emphasis) in the sense that they rest on rational beliefs as to matters of fact and accept all human beings as entitled to equal consideration and respect?" Hart concedes that this problem is exacerbated when dealing with constitutional law: "If so much uncertainty may break out in humble spheres of private law (the main focus of his book), how much more shall we find in the magniloquent phrases of a constitution…?"[112] Thus Hart acknowledges indeterminacy in law. However, he primarily sees this question as a functional one, which can be addressed by functional methods. Therefore, he sees "human inability to anticipate the future", as at the root of this indeterminacy. If one accepts this analysis, his functional solutions make a measure of sense. However, even in his own argument, we find clear indications that this functional analysis cannot be sustained. Therefore, for example, he highlights the "open texture" of language. Hart in effect, also concedes that when dealing with values, particularly in a constitution, subjectivity is inevitable. He thus raises these flags but does not meaningfully deal with them. Obvious questions include the possible role the ideology/philosophical worldview of a judge plays when making the choice between competing interests when deciding on giving content to words and concepts he makes use of for his functional solutions such as *injustice or settled moral principles, general rule, standards of behaviour, a core of settled meaning, standards of*

[111] Hart 1961:201.
[112] Hart 1961:12.

correct adjudication, reasonable, enlightened, fair, impartiality, neutrality (all my emphasis**).** Each such word or concept requires judges to make choices.

The techniques of the law and judges, and the virtues of judges, which Hart highlights, and his argument that indeterminacy is necessary to enable judges' flexibility merely underlines his failure to grapple with the deeper questions arising from indeterminacy. To begin with, Hart does not address the subjective dimension to deciding what "a general rule" is, what "the core of settled meaning" is, which is the foundation of his theory. No doubt, in this regard, he would highlight the need for the judicial virtues of impartiality and neutrality. However, this, in turn, requires disregarding that judges have worldviews and are motivated by wanting to help create a society consistent with how they view justice and injustice. Furthermore, Hart's argument that, although it cannot be demonstrated that a judge's decision is uniquely correct, a decision is made acceptable as long as it is a "reasoned product of informed impartial choice" is at every point question-begging. Fundamentally different value conclusions can be reached using reason given the same set of facts.[113] This is particularly true when it comes to values such as dignity, freedom and equality, the cornerstone values of the South African Constitution.[114] The fact that a judge can justify a conclusion with reason does not deal with the problem of indeterminacy.

Thus, a concept such as "dignity" would be in Hart's argument "the general rule". It is possible to be neutral about applying the concept to the set of facts before you, in the sense that having arrived at a meaning for dignity in a specific situation, you apply it irrespective of the identity of the litigants. However, the question is, how did you arrive at the meaning of dignity in the first place? Can a judge ever do that in an impartial and neutral way? And how does it help answer this question if a judge justifies her conclusion with reason, particularly as reason can be used to arrive at totally different conclusions? An illustration of this is the "Thrust But Parry, Thrust And Counterthrust" previously given examples of Llewellyn. Altman, touching on some of these and other questions, juxtaposes Hart and the Realists: "For Hart, then, the

[113] Juxtapose German and South African courts on whether unborn children are human life worthy of dignity, using very similar constitutional provisions. This will be dealt with in Chapter 3 of this thesis.

[114] Section 7(1) of the Constitution.

indeterminacy of law is a peripheral phenomenon in a system of rules which, by and large, does provide specific outcomes to cases. The realist analysis of indeterminacy sees it as both more pervasive and deeper than the indeterminacy Hart attributes to the legal order. For the Realist, there is no way to confine indeterminacy to some peripheral region of the law."[115] Later, Altman[116] continues by dealing with three concessions Hart makes to the Realists whilst at the same time coupling the concessions with a major qualification "designed to show that actual indeterminacy is far less radical than realism suggests." He writes: "First, Hart concedes that 'there is no single method of determining the rule for which a given authoritative precedent is an authority'. But he quickly adds: 'Notwithstanding this, in the vast majority of decided cases, there is very little doubt. The headnote[117] is usually correct enough.' "

It is simply question-begging, though, for Hart to assert that the headnote usually provides a sufficiently accurate statement of the correct rule. The realist point is that there is nothing that can be thought of as the "correct" rule for which a precedent stands, and so there is no standard against which one can say that a given rule is "correct enough". On the realist analysis, the headnote, or indeed a later opinion, states only one of any number of competing rules which may, with equal legitimacy, be said to constitute the holding of a case.

Turning to Hart's second concession to realism, "that there is no authoritative or uniquely correct formulation of any rule to be extracted from cases" and his treatment of this problem. Altman argues that even if Hart is correct that notwithstanding this problem, there often is general agreement about a formulation which "straddles the different versions of the rule", Hart fails to meet the essence of the challenge of the Realists. This essence being that such general agreement may be "the result of some more fundamental political value choice which is agreed upon and not because the law/rule determines the outcome. Altman writes: "Realism is not

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[115] Altman 1986:207-208.
[116] Altman 1986:209-211.
[117] "A headnote typically provides a brief summary of the facts, the ruling by the court, and a summary of the reasons of the court in support of its ruling" (Irwin Law, headnote, *Canadian Online Legal Dictionary*, https://irwinlaw.com/cold/?subject=legal-research-and-writing (accessed on 12 June 2023).).

committed to denying broad agreement. *It is simply committed to the view that the agreement cannot be explained by the determinacy of the law* (my emphasis). …"[118]

Altman continues that Hart's third concession is that "courts invariably engage in narrowing and widening the rules which precedents lay down." But that despite this, the doctrine of precedent has produced "a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule". Altman responds: "The problem with this claim, though, is that it misses the crucial realist point regarding the availability of competing rules: let each legal rule be as precise as is humanly possible, the Realists insist that the legal system contains competing rules which will be available for a judge to choose in almost any litigated case."[119]

Returning to Hart's illustration of the scorer and the rules of the game, the scorer must apply, and that there is a distinction between a constitution and the court which interprets and applies it. Altman's searching questions of Hart's solution lays bear the inadequacy of Hart's attempts to address the problem of indeterminacy, which inevitably flows from judges having to make choices. The challenge of the Realists is not that a constitution is a blank canvas. It is that it is a canvass full of competing rules the interpretation and application of which goes way beyond a scorer simply using his discretion to apply the rules of the game. What is required is for a scorer, the judge, to make a subjective choice concerning which of the competing rules to choose and apply.

2.3.2.4 Dworkin's response to Hart and the issue of indeterminacy[120]

According to Altman, one of the principal criticisms which Dworkinians have made of Hart is that:[121]

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[118] Altman 1986:209-211.
[119] Altman 1986:209-211.
[120] Dworkin developed a very detailed and complex theory of law. This thesis only will deal with some of the foundational arguments of Dworkin.
[121] Altman 1986:212-213.

> …the law is more than just legal rules. It is also the ethical principles and ideals of which the rules are an (albeit imperfect) expression, and it is these principles and ideals which help to guide judges to a determinate outcome. Indeed, the Dworkinian might try to use the realist indeterminacy analysis to his advantage: if the law were simply a collection of rules,…, it would be afflicted by exactly the kind of deep and pervasive indeterminacy which the realist posits.

Altman continues:

> Thus, Dworkin argues that adjudication requires the invocation of principles which take judges 'well past the point where it would be accurate to say that any 'test' of pedigree exists… .' Moreover, such principles are, on Dworkin's view, binding on judges and so we must realise that 'legal obligation… (is)… imposed by a constellation of principles as well as by an established rule.' Indeed, it is this constellation of principles which must guide the judge to a determinate outcome when the relevant legal rules are in competition with one another.[122]

Altman then poses the obvious question to Dworkin's hypothesis: which principles are legally binding? He answers: "Dworkin's answer is that they are those which belong to 'the soundest theory of the settled law'. The settled law consists of those legal rules and doctrines which would be accepted as authoritative by the consensus of the legal community."[123] Dworkin,[124] setting out his hypothesis on how the use of principle addresses the problem of indeterminacy in hard cases (see footnote 73), argues:

> Principles have a dimension that rules do not - the dimension of weight or importance. When principles intersect…, one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension, that it makes sense to ask how important or weighty it is.

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122 Altman 1986:212-213.
123 Altman 1986:213.
124 Dworkin 1978:26-27.

Dworkin contrasts this with where two rules conflict, arguing that in such a case only one rule can be valid. In other words, he sees rules as merely functional, not involving the question, and thus a choice of which rule is weightier or more important. Developing his hypothesis when confronted by hard cases, Dworkin argues that it is also necessary to distinguish between principles and policies. He writes:[125] "Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole… . Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favour of anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle." He continues: "The justification of a legislative program of any complexity will ordinarily require both sorts of argument… . If courts are deputy legislatures, then it must be competent for them to do the same. ... But if the case at hand is a hard case when no settled rule dictates a decision either way, then it might seem that a proper decision could be generated by either policy or principle."[126] He concludes this line of reasoning:[127] "I propose, nevertheless, the thesis that judicial decisions in… hard cases… , characteristically are and should be generated by principle not policy." Turning to the principles which should be binding on the courts, Dworkin[128] argues that: "If the institutional legal right does conflict with morality, in spite of the influence that morality must have on the right answer in a hard case, then jurisprudence must report the conflict accurately, leaving to the judge both the difficult moral decision he must then make and the lie he may be forced to tell."[129] Chaskalson illustrates this conundrum which Dworkin argues judges face, by means of a judgment[130] by the late Judge Didcott before he became a justice of the Constitutional Court. Quoting from it, he writes:[131]

> This dilemma is reflected in the judgment of a South African judge who had to determine whether or not the case before him on review had been conducted in accordance with justice: "The trouble is that it was not. It may have been in accordance with the legislation, and because what appears in the legislation is the law, in accordance with that too. But it can hardly be said to have been 'in accordance with justice.' Parliament has the power to pass the statutes it likes, and there is nothing the Courts can do about that. The result is law. But

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[125] Dworkin 1978:82-83.
[126] Dworkin 1978:82-83.
[127] Dworkin 1978:84.
[128] Dworkin 1978:327.
[129] An example of what Dworkin terms an institutional legal right would be a statute.
[130] *Re Dube*, 1979 (3) SALR 820 (N).
[131] Chaskalson 2003:593.

> it is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation." He then examined the law and reached a conclusion that did not involve a lie: "The proceedings were therefore contrary not only to justice, but to the Act as well, with the result that, on this occasion at least, it is possible to apply the Act and to do justice simultaneously".

Here we see that the hermeneutic, in effect, used by both Chaskalson and Didcott, was whether something was "in accordance with justice." This approach involves a choice by the judge, including what content must be given to the concept of justice given the circumstances of the case before her and a choice, according to Dworkin, of whether or not to lie to ensure that justice is done. Dealing specifically with the application of his theory to constitutional cases (almost invariably hard cases), by way of illustration, Dworkin uses a seminal decision of the US Supreme Court dealing with segregation at schools[132] (hereafter, "the *Brown* decision"). This case involved whether segregation in American government schools was in conflict with the equality before the law clause in the Constitution. Some sixty years before it, the Supreme Court ruled that it was not in conflict with the equality provision (hereafter "the *Plessy* decision"). In the *Brown* decision, the same court ruled that it was in conflict with the equality provision. Stripped of all legalese, these two decisions by the same court are in fundamental opposition to one another on the same issue. The only difference being a gap of sixty years between the decisions.

Developing his argument at addressing the obvious indeterminate problem presented by these two decisions, Dworkin, at one point, distinguishes between the concept of fairness and specific conceptions of fairness as an illustration.[133] He explains that when he appeals to the concept of fairness, he is appealing to what fairness means, and it is his view of what fairness means that is "the heart of the matter". Thus, he argues that his appeal to fairness is a moral question, whereas his description of what he thinks fairness is is an answer to the moral question. He writes: "Once this distinction is made it seems obvious that we must take what I have been calling 'vague' constitutional clauses as representing appeals to the concepts they employ, like legality, equality, and cruelty." An illustration he then gives concerns whether or not capital

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[132] *Brown vs Board of Education*, 347 U.S. 483 (1954).
[133] Dworkin 1978:135-136.

punishment is "cruel and unusual punishment" as envisaged by the US Constitution. He argues that when it was included by the framers of that constitution, the framers laid out a moral principle, not a particular conception of what cruelty is. Dworkin writes:[134] "Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel?"

Dworkin continues, "(Having regard to this distinction, the) Court can enforce what the Constitution says only by making up its own mind about what is cruel… . If those who enacted the broad clauses had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this, that is, they would have offered particular theories of the concepts in question."[135] Extrapolating from this argument, Dworkin argues that it is a mistake to call these clauses "vague". He writes: "The clauses are vague only if we take them to be botched or incomplete or schematic attempts to lay down particular conceptions. If we take them as appeals to moral concepts, they could not be made more precise by being more detailed. … If courts try to be faithful to the text of the Constitution, they will for that very reason be forced to decide between competing conceptions of political morality."[136] Summing up his argument *apropos* constitutional cases, Dworkin, in effect, challenges courts to an activist role of giving content to the moral concepts referred to in the US Constitution.[137] Dworkin concludes:[138]

> Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place. It is perfectly understandable that lawyers dread contamination with moral philosophy, and particularly with those philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason. But better philosophy is now available than the lawyers may remember. Professor Rawls of Harvard, for example, has published an abstract and complex book about justice which no constitutional lawyer will be able to

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[134] Dworkin 1978:135-136.
[135] Dworkin 1978:135-136.
[136] Dworkin 1978:135-136.
[137] Dworkin 1978:147.
[138] Dworkin 1978:149.

> ignore.[139] There is no need for lawyers to play a passive role in the development of a theory of moral rights against the state, however, any more than they have been passive in the development of legal sociology and legal economics. They must recognise that law is no more independent from philosophy than it is from these other disciplines.[140]

Neil MacCormick, reflecting on Dworkin, questions whether he effectively deals with indeterminacy. He notes Dworkin's approach to the nature of ethical theorising. In this regard, he writes:[141]

> It is the theory that the distinctively moral point of view … is developed by construction of a consistent and coherent set of principles which most adequately justify and make sense of unintuitive moral judgments.[142] … This he calls a 'constructive model' of morality in contrast to the alternative possible 'natural model', which would postulate that moral principles are not created but discovered by people, being a kind of description of an

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[139] Rawls 1973. At 387-388 Rawls writes: "There can, in fact, be considerable differences in citizens' conceptions of justice provided that these conceptions lead to similar political judgments. And this is possible, since different premises can yield the same conclusion. In this case there exists what we may refer to as overlapping rather than strict consensus". D'Agostina (Original Position, *The Stanford Encyclopedia of Philosophy,* https://plato.stanford.edu/entries/original-position (accessed on 8 June 2023)) writes as follows concerning Rawls' overlapping consensus: "(Overlapping consensus) depend(s), in effect, on there being a morally significant core of commitments common to the 'reasonable' fragment of each of the main comprehensive doctrines in the community."

[140] The hypothesis of this thesis is that in South Africa, to the extent that the Constitutional Court intimates that it is objective in its judgments or merely applying what already is in the Constitution, is doing precisely the opposite to what Dworkin warns against.

[141] MacCormick1984:182-183.

[142] A prominent English jurist of the twentieth century, Lord Devlin, who ideologically would have been at variance with Dworkin, in another form propagated 'intuition' as a reference point. Dealing with the relationship between morals and the criminal law in England; in a lecture in 1958, he opined as follows (Devlin 1965:7): "The law, both criminal and civil, claims to be able to speak about morality and immorality generally. Where does it get its authority to do this and how does it settle the moral principles which it enforces? Undoubtedly, as a matter of history, it derived both from Christian teaching. But I think that the strict logician is right when he says that the law can no longer rely on doctrines in which citizens are entitled to disbelieve. It is necessary therefore to look for some other source." Later, in partial answer he writes (1965:15): "English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man… . It is the viewpoint of the man in the street- or to use an archaism familiar to all lawyers – the man in the Clapham omnibus (there literally is no such thing as the Clapham omnibus) … . For my purpose I should like to call him the man in the jury box, for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous. This was the standard the judges applied in the days before Parliament was as active as it is now and when they laid down rules of public policy. They did not think of themselves as making law but simply as stating principles which every right-minded person would accept as valid. It is what Pollock called 'practical morality', which is based not on theological or philosophical foundations but 'in the mass of continuous experience half-consciously or unconsciously accumulated and embodied in the morality of common sense.' … . Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral." This approach of Devlin, in effect is not far removed from that of John Rawls's "overlapping consensus" hypothesis. See also earlier in this chapter on the relationship in effect between morality and intuition.

objective moral reality. If we adhered to the 'natural model' we would not be able to take a high handed way with troublesome intuitions as the 'constructive model' authorizes. … The correlation of this view of ethical constructivism with the work of Rawls… , is obvious.

MacCormick continues:[143]

> Certainly as the foregoing sketch account of adjudication in hard cases implicitly supposes, there must be more to any account of a legal system than simply an account of different sorts of rules and their interrelations. The making and implementing of such laws presupposes and involves reference to values which can be and sometimes must be rendered explicit in statements of principle or policy. … What that says, however, is only that a good description (or definition) of the law must be expanded beyond a mere account of 'rules'… . No doubt the legal system of the Soviet Union and the Republic of South Africa (obviously referring here to pre 1994) is pregnant with principles as well as with rules, and should be seen and grasped as such. The principles, however, may be from my point of view very bad ones; I may rightly wish to proceed from description to criticism - and the mere observation that law comprises principles and policies as well as rules in no way impedes that proceeding, nor justifies the thesis that expository and censorial jurisprudence are, after all, identical… .

MacCormick opines:[144] "Thus a hard case is one in which each party has some ground on which to assert at least a *prima facie* right. The problem for the court is not one of inventing a right and applying it retroactively. It is a problem concerning which right to uphold in preference to the other." MacCormick concludes this line of thinking:

> If we go on and say, along Dworkinian lines, that judges should decide to which right to give preference by making recourse to a kind of 'constructive' argument, we are left to conclude that the decisions can only be justified in a theory-relative way. Since there may be honest and rationally irresoluble differences of theory between different judges, the decision contains an irreducibly dispositive element. Each judge tries to work out which right ought to prevail. The court's decision determines which is to prevail; it establishes a preference, it does not merely record the preestablished preference of one (*prima facie*) right over another in the genetic circumstances of the case.[145]

The *Brown* and *Plessy* decisions graphically illustrate the problem raised by these searching questions of MacCormick. Consistent throughout the reasoning of Dworkin is that at every

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143 MacCormick 1984:191-192.
144 MacCormick 1984:192.
145 MacCormick 1984:192.

critical juncture of a decision by a judge which involves morality in some way, a judge must make a choice between competing values, whatever word is used for values. As MacCormick reasons: "The problem for the court is not one of inventing a right and applying it retroactively (in line with a 'constructive model'). It is a problem concerning which right to uphold in preference to the other."[146] Dworkin clearly articulates that not only are principles and ideals central to the substance of the law but also that this fact facilitates greater determinacy in the law. As is the case with Hart, the building blocks for this theory as regards determinacy and indeterminacy, are once again question begging. The initial step of deciding on a principle requires a value choice. Indeed when confronted by conflicting principles, Dworkin's theory involves another value choice, deciding on which principle is more important. It is also difficult to understand why, on the one hand, he argues that if two rules conflict, one of them cannot be a valid rule. Whereas, if two principles conflict, he does not see the same problem and simply argues that principles can be weighed, whereas rules cannot be weighed. Dworkin's refinement of his theory also does not address the problem of subjectivity and, thus, indeterminacy. Thus, for example, not only is distinguishing policy from principle a subjective value decision, he concedes that, at times, there is even a problem deciding on whether something is a principle or a policy.

Furthermore, whilst at one level, his distinction between a concept and specific conceptions of the concept is helpful, at another level, it merely reinforces the question of indeterminacy. Whilst there is merit in his argument that judges need the freedom and flexibility to decide on what, for example, equality means at a given time in history, his example of the *Brown* case, whilst illustrating that this distinction allows judicial flexibility, at the same time undergirds the argument that in *Brown* the court made a value choice in their own image of what American society should look like. Just as was the case in *Plessy*, some sixty years before *Brown*, where the court, using the same words of the Constitution, came to a totally different conclusion. It does not help to say that the *Plessy* approach, in effect, was one of prejudice and not of principle. This merely begs the question, according to what principle? There can be no doubt that the courts in *Plessy* and *Brown* believed they were being faithful to the intention of those

[146] MacCormick 1984:192.

who adopted the Constitution. Furthermore, the *Plessy* court no doubt did not see their approach as strict or narrow but as faithful to the Constitution. Dworkin's conclusion that if courts tried to be faithful to the text of the Constitution, "they will for that very reason be forced to decide between competing conceptions of political morality", does not solve but merely illustrates the conundrum of indeterminacy.

This indeterminacy is further reinforced by Dworkin's "constructive model". The mere fact that a set of principles is consistent and coherent and makes sense of our intuitive moral judgments does not make the law determinate. The legal system in existence in South Africa prior to 1994 for many white South Africans met these requirements. If anything, this "constructive model" exacerbates indeterminacy. Furthermore, the "creation" of moral principles by people presupposed by the "constructive model", as opposed to the discovery of moral principles in the so-called "natural model" at the outset, is unashamedly subjective. Where the test is what judgment will best protect individual rights and advance the common good, even Dworkin's mythical Hercules[147] will want to create a society in his own image. History is littered with leaders who saw themselves as a Hercules.

2.3.2.5 The Critical Legal Studies Movement's[148] response to Dworkin and the issue of determinacy/indeterminacy of the law

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[147] In his argument, Dworkin created a fictional judicial character, Hercules. Altman writes (1986:212-213): "Even though the fictional, judicial Hercules has powers far beyond those of mortal judges, Dworkin tells us that mortal judges are committed both to the logical possibility of such a character and to the task of trying to arrive at the outcome he would arrive at were he to be hearing their cases. Mortal judges thus can and do appeal to principles in reaching determinate outcomes, and, in doing so, they are giving force to pre-existing obligations, and not simply making a political choice among competing legal rules."

[148] Legal Information Institute "critical legal theroy, critical legal studies: an overview and issues", https://www.law.cornell.edu/wex/critical_legal_theory (accessed on 8 June 2023): "Critical legal studies (CLS) is a theory that challenges and overturns accepted norms and standards in legal theory and practice. Proponents of this theory believe that logic and structure attributed to the law grow out of the power relationships of the society… . The basic idea of CLS is that the law is politics and it is not neutral or value free…. CLS was officially started in 1977… , but its roots extend back to 1960 when many of its founding members participated in social activism surrounding the Civil Rights movement and the Vietnam War. … CLS has borrowed heavily from Legal Realism. … CLS includes several subgroups with fundamentally different, even contradictory, views… ."

Given that CLS is not a one-dimensional school of thought with only one agenda, I will be focusing on specific scholars within the school who deal with indeterminacy, more particularly Kennedy, Braden and MacCormick.

Altman writes:[149] "CLS scholars accept the Dworkinian idea that legal rules are infused with ethical principles and ideals. Moreover, they take such principles as seriously as Dworkinians in that they conceive of the articulation and examination of such principles to be one of the major tasks of legal theory... Yet, one of the main themes of CLS work is that the incorporation of ethical principles and ideals into the law cuts against Dworkinian efforts to rescue legal determinacy. The operative claim in CLS analysis is that the law is infused with irresolvably opposed principles and ideals." Altman continues:[150] "While the realists stress competing rules, CLSers stress competing, and indeed irreconcilable, principles and ideals. Yet, the basic theme is the same: the judge must make a choice which is not dictated by law… . Thus, from the CLS perspective, the jurisprudential invocation of principles only serves to push back to another stage, the point at which legal indeterminacy enters and judicial choice takes place." This view resonates with Lourens du Plessis[151] who, focussing on the judge herself when she makes decisions, opines that "covert and subconsciously held … assumptions can … have a more decisive impact on interpretive outcome than overt and consciously reasoned assumptions." Kennedy,[152] writing about how American lawyers approach private law, reasons:

> I argue that there are two opposed rhetorical modes for dealing with substantive issues, which I will call individualism and altruism[153]… (the) substantive and formal conflict in private law cannot be reduced to disagreement about how to apply some neutral calculus that will 'maximise the total satisfaction of valid human wants'(quoting Hart). The opposed

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149 Altman 1986:216-217.

150 Altman 1986:216-217.

151 Du Plessis 2002:91.

152 Kennedy 1976:1685.

153 Kennedy, (1976:1685 & 1766-1767), conceding that there is a measure of movement and flexibility within the two schools of thought he delineates, in broad terms describes individualism as "wanting to harmonise with an insistence on rigid rules rigidly applied" and altruism as wanting to resort to "standards in administration". The individualist attempts at a comprehensive rational theory of the form and content of law. He insists that there is "a rational basis for a presumption of non-intervention or judicial passivity. The altruist, who can do no better with the problem of neutrality, is an activist all the same, arguing that the judge should accept the responsibility of enforcing communitarian, paternalist and regulatory standards wherever possible….Individualism is associated with the body of thought about man and society sometimes very generally described as liberalism… ." Opining that "modern individualism" accepts the unattainability of its ideal, Kennedy continues: "In its pure form, (the individualist) theory makes the judge a simple rule applier, and rules are defined as directives whose predicates are always facts and never values. So long as the judge refers only to facts in deciding the question of liability, and the remedial consequences, he is in the realm of the objective. …The utopian counter-program of altruist justice is collectivism. It asserts that justice consists of order according to shared ends… . The direct application of moral norms through judicial standards is therefore far preferable to a regime of rules based on moral agnosticism… . Good judging, in this view means the creation and development of values, not just the more efficient attainment of whatever we may already want" (Kennedy 1976:1770-1772).

> rhetorical modes lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.

Extrapolating from his own argument, and in effect from the reasoning of legal philosophers such as Altman and Du Plessis, Kennedy argues that there comes a "moment of truth" for a judge when she needs to make a choice between two conflicting possible decisions, where reason is not the determining factor. Central to such a decision is the judge's vision of humanity and society and what the judge believes about how society should operate in the future. Using his delineation between the world views of individualism and altruism described in footnote 153, he writes of this moment:[154] "In terms of individualism, the judge has suddenly begun to act in bad faith. In terms of altruism she has found herself. The only thing that counts is this change in attitude, but it is hard to imagine anything more elusive of analysis." This position of Kennedy is echoed in the writings of Braden (1948). As we earlier also saw in the analysis of Llewellyn, by means of a detailed analysis of how different US Supreme Court justices defend their interpretation and application of the US Constitution, Braden demonstrates his hypothesis concerning subjectivity when interpreting and applying the Constitution of the US. He argues that judges, overtly or covertly, faced with the reality of their power and subjectivity when interpreting and applying the Constitution and the danger flowing from this, seek to "create a rule which is sufficiently objective to circumscribe (themselves and their) successors

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[154] Kennedy 1976:1776.

in (their) exercise of political power."[155] Highlighting various limitations on the freedom of a judge, he addresses what he terms "self-imposed" limitations. According to him, examples of this would include the urge for "consistency", "avoidance of confusion", and:[156]

> … a hybrid in that it may be a limiting factor or it may not. This is what may be called the 'concept of the judicial function'. If a justice believes he should have no power it is conceivable that he may put his belief into practice. On the other hand if he believes that he should have great power, his freedom may be enhanced by a sort of auto-intoxication. But several caveats must be entered. First, the word 'believes' is stressed because it is important to distinguish between belief and profession of belief. Nothing is easier for a justice than to profess not to do that which he does. Second, a justice's concept of the judicial function may simply be an expression of his scheme of values-e.g., this is important, I must pass on it; that is not important, ergo I have no power to pass on it…..*These are all factors limiting the freedom which a justice in theory enjoys, a freedom to reshape contemporary American society according to his own scheme of values* (my emphasis).

Braden goes on to argue that at all times, judges have a choice. This choice involves two possible strategies. Either to be truthful and to admit that central to his decision is his "own scheme of values" or to rationalise his decision by arguing that it is "based entirely and objectively on external factors." The challenge for the latter option is whether the judge can justify her decision in such a manner that another judge will look at the external factors and find the same answer. Braden, in effect, argues that because different judges will find different

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155 Braden (1948:571-573). In this regard, specifically dealing with the interpretation of a constitution he responds to this approach: " … the usual constitutional issue acquires non-legal overtones that set it off from most ordinary litigation. The more insistent the overtones the more difficult it is to confine the issue within legal boundaries, the more necessary it is to rely on extraneous materials to aid in decision. Furthermore, the nature of the wording of constitutional provisions adds to this difficulty… . The less definite the provision the more likely it is to be litigated, the more likely are judges to quarrel over meaning or to stray beyond the four corners of the document, and the more likely that over a period of time different courts will read the provisions differently in the light of their own times. The upshot is that where the Court usually acts, its freedom is greatest. If the court had to speak on every broad issue that came to it, it might in the short run formulate a comprehensive constitutional philosophy for its day. But it sits as a court of law and it has at hand a wealth of techniques that enables it to broaden or narrow, resolve or avoid, the constitutional issues brought before it. This compounds the confusion. For example, the Court can make something 'constitutional' or 'unconstitutional' without saying so, or it can assist or hinder another arm of government without addressing itself to the constitutional issue of distribution of power. The Supreme Court starts, then, with a fundamental document, the more important provisions of which are hopelessly vague. It is presented with momentous questions, but they come to it via a system that is flexible enough to permit reshaping of the issues. To all this can be added a century and a half of gloss wherein each generation interpreted the document to fit its environment. With the changes in external factors through the history of the country, the stock of interpretations has become large and varied so that today the Court has almost unlimited verbal devices for justifying anything it does. Small wonder then, that individual justices search for ways to control themselves and their brethren."

156 Braden 1948:577.

answers, the inevitable conclusion is that all decisions are infused with a judge's own scheme of values. Commenting on a footnote by Chief Justice Stone, he writes: "Here then is a statement of a basic formula for constitutional decisions in certain areas. It is not a statement which can be found in the Constitution… . It is rather one man's explanation of why he finds the Due Process and Commerce Clauses to be limitations on government in some instances and not in others. Put another way, it is simply a part of one man's set of values for a society which he holds strongly enough to be willing to enforce when the opportunity arises."[157]

Concluding his argument concerning the theories of constitutional interpretation by judges, he writes that on closer analysis of judgments, all reasoned arguments by judges are "little more than a front for policy-making." In the absence of "absolutes", he concludes that there can never be objectivity in constitutional law and that every decision "involves a weighing of competing values". In this conclusion, he is *ad idem* with Dworkin. Where he differs is his reasoning that, in effect, subjectivity, and thus indeterminacy, is integral to any such weighing of competing values. His challenge to judges is to take ownership of this reality and be honest about it. He writes:[158] "Hence the justice who wants to tell the world how he decides cases … must say: 'This is what I believe is important in our civilisation, and I shall do all I can to preserve it.' And forthwith set forth his creed'." Altman,[159] reflecting on key strands of thought of the CLS school, highlights the CLS thinking that the "ideological controversy in politics is reproduced in the law." Thus, the interpretation and application of law involves making choices between "irreconcilable opposed ideologies". Linking up to the general philosophical proposition of a lack of objectivity in moral reasoning, covered earlier in this chapter, he continues:

> In this respect the CLS position may be usefully analogized with Alasdair MacIntyre's diagnosis of the ethical thought of modern culture. MacIntyre argues that such thought is

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[157] Braden 1948:580-581: Here Braden gives the footnote of Chief Justice Stone and then reflects: "Chief Justice Stone's thesis appears to be something like this: 'I am first of all a man of reason. I believe in reason and its power in the marketplace of discourse. I am also a democrat. I believe that our governments are to be run by the government. Therefore I shall use my great power as a Supreme Court justice sparingly, but I shall use it when it is necessary to preserve the democratic process or to protect those injured by unreason under circumstances where political processes cannot be relied on to protect them.' "

[158] Braden 1948:593-594.

[159] Altman 1986:222.

> internally incoherent. This state of incoherence is due to the fact that modern ethical thought amounts to an amalgam of fragments of irreconcilable ethical views. Conventional philosophers not only fail to perceive the utter incoherence of modern ethical thought, but operate on the assumption that it is largely in good order. For them the issue is the best way to systemize that thought, not whether it is so self-contradictory that systematization is impossible. The result is that the debates fought out among conventional ethical philosophers, such as Rawls and Nozick, do not join the issue with MacIntyre's position. He repudiates the assumptions which the conventional antagonists share. In a very similar way, the debate between Dworkin and his conventional critics fails to join the issue with CLS. They assume a doctrinal coherence which CLS repudiates, and so the conventional debate takes place in terms which are largely irrelevant to the CLS position.[160]

Altman argues that whilst the CLS school does concede that there are formal constraints on judges which politicians do not have in political debate, such as *stare decisis* and the framer's intent, he alerts us to the CLS response that this does not salvage law from indeterminacy. He writes:[161] "What they do claim is that beneath these legal forms one can find all of the significant ideological controversies of the political culture. The substance of the political debates is replicated in judicial argument, even if the form of the debates is distinctive. The legal form fails to screen out or significantly reduce the range of ideological conflict present within the general political culture… ." Altman concludes:[162]

> CLS has picked up and elaborated upon the realist contention that the law largely fails to determine the outcome in cases which are brought to litigation. Among the important advances of the CLS analysis over that of their realist forerunners are: the effort to take seriously and to analyse the conflicting ethical visions and principles which infuse legal doctrine; the painstaking attempts to display doctrinal inconsistencies and incoherencies; and the effort to show how debates in the political arena are replicated in unsuspected corners of private-law doctrine. I believe that these are substantial advances on the realist position and that they can be parlayed into powerful arguments which are thus far unmet by Dworkinians or indeed, by conventional legal philosophers of any stripe.

2.4 CONCLUSION

An analysis of the literature reveals a common thread in all the theories dealing with giving content to written law. Either an articulated or unarticulated grappling with the conundrum of

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160 Altman 1986:222.
161 Altman 1986:227-229.
162 Altman 1986:235.

the indeterminacy of the law. This conundrum is exacerbated when dealing with constitutional values such as dignity, freedom and equality, as opposed to the more modest philosophical demands of private law. In South Africa, this value-laden nature and purpose of law is compounded by the overall purpose of the Constitution,[163] which is the supreme law in South Africa.[164] Whilst the traditional approach at face value denies such a conundrum, it uses phrases and concepts such as "not arbitrarily" and "in accordance with fundamental principles of justice" as reference points for determinacy without furnishing an explanation of how these phrases and concepts can ever be determinate.[165] The amplified version of this traditional approach fares no better. For it, the gatekeepers are reason, neutrality, reasoned analysis and principled decisions, which must transcend the immediate result of the facts before a judge. It concedes that there will be cases where a choice of values is involved but merely reverts to the same gatekeepers to ensure determinacy. These gatekeepers are question-begging when it comes to the issue of indeterminacy. Revealing is Weschler's reply to his own question:[166] "Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? *I should like to think there is, but I confess that I have not yet written the opinion* (my emphasis). To write it is for me the challenge of the school-segregation cases." (My research to date indicates that he never wrote that opinion.)

Indeed, Weschler concedes that, at times, there is a need to prioritise competing constitutional values to have an ordering of social values. This exercise by a judge, by definition, requires subjective choices. The extent to which these gatekeepers, also used in various guises by both Hart and Dworkin (and also Rawls), are question-begging is crystallised by the Realists and the CLSers. Their contribution lies mainly in alerting legal philosophers to the need at a deeper level to grapple with the question of what actually happens when judges hand down their judgments. In their quest to resolve indeterminacy in the law, particularly where values such

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163 In the preamble to the South Africa *Constitution*, *inter alia*, the purpose of the Constitution is to "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights… ." Central to this are dignity, freedom and equality (sec. 7(1) of the Constitution).

164 Sec. 2 of the Constitution.

165 See footnote 81.

166 Weschler 1959:34.

as dignity, equality, freedom and justice are involved, philosophers such as Hart, Dworkin and Rawls, in effect, have developed complex theories constrained by pragmatism. Therefore, Hart writes of "settled moral principles", "general rules", "a core of settled meaning" and that all legal systems, in different ways, "compromise between social needs". Dworkin writes of "the soundest theory of the law" and whether something is "in accordance with justice". These approaches of Hart and Dworkin involve a choice by the judge, including what content must be given to these concepts given the circumstances of the case before her and a choice, according to Dworkin, of whether or not to lie to ensure that justice is done. Both argue that these should be used as a reference point to help judges determine the outcome of a conflict of rules, in Hart's case, or principles, in Dworkin's reasoning. However, despite conceding that judges have choices, they fail to give objective determinate reference points which judges can use to decide on how to compromise between two social needs or ensure that justice is done. Their attempts to give such a reference point, rather than solving the problem, merely further illustrate the conundrum of indeterminancy.

Indeed Dworkin concedes that reasonable men and women "of goodwill differ" on a constitutional concept such as equality. We have seen him argue that principles have a dimension that rules do not - the dimension of weight or importance. And that "… When principles intersect…, one who must resolve the conflict has to consider the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one." Notwithstanding his illustration of the scorer and the rules of a game, that a judge is required to maintain the standards required, not make the standards, we have seen Hart also conceding that given the "open texture" of law, there are times when judges must make a choice "between competing interests which vary in weight from case to case." Thus, in effect and in substance, Hart and Dworkin agree judges inevitably must make subjective choices about which values/interests/rights are more important than others, dependent on the facts before them. And that presented with the same set of facts, judges will make different choices. A graphic illustration of this is the *Plessy* and *Brown* decisions and the decisions of the German and South African Constitutional Courts concerning whether unborn children are human life worthy of dignity (see footnote 113).

Likewise, Rawls's reference point of "overlapping consensus rather than strict consensus" articulates a pragmatic compromise to the question raised by the determinacy/indeterminacy of the law. He, in effect, concedes that determinacy ("strict consensus") is not achievable, only indeterminacy ("overlapping consensus"). Furthermore, he refers to what D'Agostino refers to as "a morally significant core of commitments common to the reasonable fragment of each of the main comprehensive doctrines in the community" without objective reference points which can be used to give content to "morally significant", "core" and "reasonable". Another thread running through the various attempts at addressing indeterminacy is the reliance on intuition. Although the specific word intuition is not used by all the writers, at some point of their theory, each writer, in effect, to an extent, relies on intuition as to what is fair, what is just, what is reasonable. An illustration that this reliance further aggravates indeterminacy is a comparison between the approach of Lord Devlin and Dworkin to homosexuality and the law.[167] Intuition is relied on by both to sustain their respective theories.[168] Notwithstanding this, they arrived at fundamentally different conclusions on the issue of homosexuality and the law. The quest to address indeterminacy seems to blind writers to an ever-present prior question.

The focus of Chapter 3 of this thesis will be to uncover this "another stage" through an analysis of various judgments of the Constitutional Court. Central to this exercise will be addressing the question of what is happening when the justices write their judgment. This will include discerning unexpressed assumptions. In this regard, Du Plessis, reflecting on theories of statutory interpretation, writes:[169] "A theoretical position is made up of multifarious interacting factors and forces, some of which result from conscious, reasoned choice while others emanate from intuitive perception. Covert and subconsciously held (theoretical) assumptions can, precisely because of an interpreter's uncritical unawareness of them, have a more decisive impact on the interpretive outcome than overt and consciously reasoned assumptions."

This proposition of Du Plessis is borne out by the CLSers' deconstruction of the reasoning of judges in cases which come before them. This deconstruction method involves not simply

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[167] Nordahl 1995.
[168] See footnote 142.
[169] Du Plessis 2002:91.

accepting words and concepts as given in the various quests for determinacy in the law but constantly peeling back the outer skins of these words and concepts. Thus, not being content to accept at face value the use of "settled moral principles", "general rules", "a core of settled meaning", "the soundest theory of the law", "overlapping consensus", "morally significant", and "reasonable" as objective reference points devoid of subjectivity or indeterminacy.

Central to this deconstruction in Chapter 3 will be the careful analysis of conflicting ethical/moral principles contained in the reasoning of the justices. In addition, such careful analysis will involve "painstaking attempts" to unmask "doctrinal inconsistencies and incoherencies" in the reasoning of the justices (which also point to subjectivities) and to show how debates in the wider public forum are replicated in their reasoning. In this regard, although not focusing on the law, in principle, there is no difference to the philosophical conundrum highlighted by MacIntyre and Nietzsche earlier in this chapter. In Chapter 3, the approach of the CLS school, inclusive of aspects of the Realist school, will be used when deconstructing the selected judgments of the Constitutional Court.

CHAPTER 3

ANALYSIS OF SELECT CONSTITUTIONAL COURT JUDGMENTS

3.1 INTRODUCTION

Building on the foundations laid in Chapter 2, the goal of this chapter is, by means of a careful analysis of select Constitutional Court decisions, to address the question underpinning the research problem and the overarching hypothesis of this thesis, namely, whether when adjudicating, justices of the Constitutional Court are merely as mouthpieces of the Constitution objectively making clear the "objective normative value system" and/or the values already contained in the Constitution. The method of the CLS school and of the Realists will be used in this exercise. As we have seen in Chapter 2, this method involves analysing the reasoning of judges. In doing this, *inter alia*, regard will be had to choices made, expressed and unexpressed assumptions, implied and expressed personal preferences, the autonomy of the law from contesting worldviews and desired political/social outcomes, the role of dispassionate reason, the availability of contradictory value systems and authoritative premises and "the irreducible conflicts within plurality and dissenting positions"[170] which flow from the said contradictions. When doing this, I will be mindful of the conclusions reached in Chapter 2, in essence, that both as a general philosophical proposition and where judges make value choices, objectivity is not achievable, and strands of subjectivity are inevitable.

Regard also will be had to the various techniques used by judges to rationalise a conclusion, *inter alia,* as illustrated by Llewellyn.[171] Central to this approach will be addressing the question of what is happening when judges write their judgment. As previously stated, Du Plessis, reflecting on theories of statutory interpretation, writes: "A theoretical position is made up of multifarious interacting factors and forces, some of which result from conscious, reasoned choice while others emanate from intuitive perception. Covert and subconsciously held

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[170] Tushnet 1984:627.
[171] Llewellyn 1960:521-535.

(theoretical) assumptions can, precisely because of an interpreter's uncritical unawareness of them, have a more decisive impact on the interpretive outcome than overt and consciously reasoned assumptions."[172] Thus, for example, did the process the Constitutional Court judges followed involve or require express or implied subjective assumptions and choices? Was there an autonomy of the law from contesting worldviews and desired political and social outcomes? This will include an analysis as to whether the reasoning involved was dispassionate and discerning and whether the justices relied on an objective reference point and or objective evidence when they made their choices. I will not engage with the merits of the conclusions reached by the justices. The aim is to ascertain how the conclusions were reached and what can be gleaned from this with the research question in mind. This will require, at times, lengthy extracts from judgments. Not only will this enable the desired analysis, but it also will ensure that the justices writing the judgments are accurately portrayed.

This chapter is divided into three parts. Regarding "Part A", the death penalty matter[173] and the adultery matter"[174] the following: In general, these cases have been chosen for a number of reasons. Firstly, *ex facie,* the Constitution is silent on all the issues which had to be decided. Secondly, they touch on issues about which there are strongly held contradictory convictions. Thirdly, these convictions are deeply personal and subjective. Fourthly, the source of these convictions is more often than not rooted in religious belief and the source documents for such belief. More particularly, the death penalty matter has been chosen because it is widely regarded as the first seminal decision of the Constitutional Court, wherein all 11 justices wrote judgments (an unusual event) in which their hermeneutical key was revealed. The adultery matter was also chosen as it involved a process of balancing out of rights.

Regarding "Part B", The school punishment and the parental punishment matters[175]", the following: These cases have been chosen for several reasons. Firstly, *ex facie,* the Constitution

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[172] See footnote 169.
[173] *S v Makwanyane* – footnote 46.
[174] *DE v RH*– footnote 47.
[175] *Christian Education South Africa v Minister of Education* (the school punishment matter) and *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* (the parental punishment matter) – footnotes 48 & 49.

is silent on the issues which had to be decided. In other words, a literal reading of the Constitution does not deal with the use of corporal punishment in schools and homes. Interpretation and extrapolation are required. Secondly, they touch on issues about which there are strongly held contradictory convictions. Thirdly, these convictions are deeply personal and subjective. Fourthly, the source of these convictions is more often than not rooted in religious belief and the source documents for such belief. Fifthly, they also involve a balancing out of competing rights and interests. Furthermore, a comparison of the two matters is instructive, particularly given the overlap of subject matter. The 16-year gap between the judgments and that the latest judgment was handed down in 2019 also ensures an accurate historical and up to date record of the thinking in the Constitutional Court.

Regarding "Part C", *ubuntu* as a lens when interpreting and applying the Constitution, the following: Three cases primarily have been chosen for this part, namely, the death penalty matter, the unborn child matter[176] and the street naming matter.[177] There are several reasons why these three matters have been chosen. In general, the death penalty and unborn child matters have been chosen for several reasons. Firstly, *ex facie,* the Constitution is silent on the death penalty and the unborn child. Secondly, they touch on issues about which there are strongly held contradictory convictions. Thirdly, these convictions are deeply personal and subjective. Fourthly, the source of these convictions is more often than not rooted in religious belief and the source documents for such belief. Fifthly, the death penalty matter and the unborn child matter share a striking similarity as regards the negotiations leading up to the adoption of the clause dealing with the right to life in the Interim Constitution. *Apropos* the death penalty matter, in addition to the above reasons, seven of the eleven justices in that matter refer to *ubuntu.* Moreover, when regard is had to when the judgments in the death penalty matter and the unborn child matter were delivered, they cover a span of some 22 years of the jurisprudence of the Constitutional Court.

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[176] *Linde and Two Others* – footnote 50.
[177] See footnote 51.

The street naming matter, whilst overtly not dealing with convictions rooted in religious belief and the source documents for such belief, was chosen for the following reasons: Firstly, as in the death penalty matter, the main judgment was written by the head of that court. Secondly, in the absence of any explicit reference to *ubuntu* in the Constitution, the Chief Justice assigned a special status to it. Thirdly, there is a dissenting judgment written by two justices of that court, *inter alia*, highlighting differences concerning the status of *ubuntu* when it comes to interpreting and applying the Constitution. Fourthly, a comparison between the approach in it and the approach in the unborn child matter is instructive. Lastly, it and the unborn child matter, are relatively recent judgments, thus reflecting the present position of the Constitutional Court.

Regarding further introductory issues the following: The purpose of the exercise is to illustrate what is happening when the justices of the Constitutional Court write judgments where a moral choice is involved. Each part of this chapter will involve an analysis of the said judgments and conclusions because of this analysis. In this process other Constitutional Court judgments, and one from the Supreme Court of Appeal, also will be referred to. All but the death penalty matter was decided in terms of the Constitution. As will be seen hereafter, the Interim Constitution was in place when the death penalty matter was decided. Other than where any differences are highlighted hereafter between the Interim Constitution and the Constitution, in effect, there are no germane differences between these two constitutions for purposes of this thesis. (To avoid any confusion, I will, where necessary, underline that reference is being made to the Interim Constitution.) Before I proceed with the analysis, a brief reference to the "two-stage" approach in constitutional matters. In essence, the "two-stage" approach involves first deciding whether a right is being infringed and, if so, whether such infringement can be justified. In the death penalty matter, Chaskalson P held as follows:[178] "[100] Our (Interim) Constitution deals with the limitation of rights through a general limitation clause. … this calls for a 'two-stage' approach, in which a broad rather than a narrow interpretation is given to the fundamental rights enshrined in chapter 3 (of the Bill of Rights), and limitations have to be justified through the

[178] *Makwanyane*:paras. 100-104 set out in more detail the two-stage approach.

application of s 33[179]… .” Throughout its existence up to the present day, the Constitutional Court has embraced this “two-stage” approach to matters brought before it.

3.2 PART A – THE DEATH PENALTY AND ADULTERY MATTERS

3.2.1 Death penalty matter: *S v Makwanyane and Another* 1995 (3) SA 391 (CC)

Chaskalson P[180] wrote the main judgment. The facts of the matter were that the trial court had convicted two men on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. The trial court had sentenced them to death on each of the counts of murder and to long terms of imprisonment on the other counts. The Appeal Court confirmed the convictions and concluded that the circumstances of the murders were such that the men should receive the heaviest sentence permissible according to law.

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179 Reference here is to the Interim Constitution – Section 33 of it in part reads: “33 (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation –
shall be permissible only to the extent that it is –
reasonable; and
justifiable in an open and democratic society based on freedom and equality; and
shall not negate the essential content of the right in question,
and provided further that any limitation to –
(aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2); or
a right entrenched in section 15, 16, 17, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.”
The equivalent justifying section in the Constitution is s 36 which reads: “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
the nature of the right;
the importance of the purpose of the limitation;
the nature and extent of the limitation;
the relation between the limitation and its purpose; and
less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.” The only significant differences are the presence of “necessary” in section 33 and that whereas section 36 includes dignity in 36 (1), it is absent in 33 (1) (a). These differences have led to no significant differences of approach by the Constitutional Court in its application of the Interim Constitution and the Constitution.

180 The first presiding Justice of the Constitutional Court was called, “The President”, thus “P”.

The germane issue before the Constitutional Court was whether the death penalty was permissible in terms of the Interim Constitution. At the outset, Chaskalson P holds that: "[5] It would no doubt have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty, or that it is permissible in the circumstances sanctioned by law. This, however, was not done, and it has been left to this Court to decide whether the penalty is consistent with the provisions of the Constitution. That is the extent and limit of the Court's power in this case." He continues:

> [8] Chapter 3 of the Constitution sets out the fundamental rights to which every person is entitled under the Constitution and also contains provisions dealing with the way in which the chapter is to be interpreted by the Courts. It does not deal specifically with the death penalty, but in s 11 (2) it prohibits 'cruel, inhuman or degrading treatment or punishment'. There is no definition of what is to be regarded as 'cruel, inhuman or degrading' and we therefore have to give meaning to these words ourselves.

Given the silence of the Interim Constitution and the Constitution on the issues dealt with in both the cases under consideration, we need to look carefully at the reasoning of the Court to understand what is happening. Tushnet, concerning what actually is happening when a court writes a judgment, opines that one view is that:[181] "…, the explanation of what the Court does lies in the reasons the Court gives for doing it." In other words, Tushnet is arguing that from the reasons given for a conclusion, we can extrapolate the agenda or ideological position of a judge. Obviously, if he is correct, then any claim to objectivity is unsustainable. With this view in mind, we now turn to the reasoning of Chaskalson P and, indeed, the reasoning of all the other justices I will refer to in this chapter.

3.2.1.1 Problematising choices made by Chaskalson P

Where, as in the present case, *ex facie* the Interim Constitution, the law is silent on the issue to be decided, the immediate problem which presents itself if the interpretation by the justice is to be an objective process to discern the "objective normative value system" or the objective

[181] Tushnet 1984:630.

values contained in the Interim Constitution, is the choice of what Chaskalson P describes as "The relevant provisions of the Constitution" (he deals with these at paragraphs [7] – [11] of the death penalty matter). This choice is the building block for "the reasons the Court gives for doing it." Chaskalson P's choice also is not prescribed by the Interim Constitution. His choice emphasises that the Interim Constitution provides a bridge between the past,

> [7] …characterised by strife, conflict, untold suffering and injustice" and a future "founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex." These words are taken from the first paragraph of the provision on National Unity and Reconciliation with which the Interim Constitution concludes. As authority for him relying on these words, he refers to section 232 (4) of the Interim Constitution. In part it reads: "(4) In interpreting this Constitution a provision in any Schedule, including the provision under the heading 'National Unity and Reconciliation', to this Constitution shall not by reason only of the fact that it is contained in a Schedule, have a lesser status than any other provision of this Constitution which is not contained in a Schedule, and such provision shall for all purposes be deemed to form part of the substance of this Constitution.

Further choices by Chaskalson P are sections 8, 9, 10 and 11 (2)[182] of the Interim Constitution. In clothing these provisions with content, he authorises: "[9]…an approach which, whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution." He concludes this aspect:

> [10] …, I need say no more in this judgment than that s 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of chap 3 of which it is part. It must also be construed in a way which secures for 'individuals the full measure' of its protection. Rights with which s 11 (2) is associated in chap 3 of the Constitution, and which are of particular importance to a decision on the constitutionality of the death penalty, are included in s 9,… ;s10 … ; and s 8… . Punishment must meet the requirements of 8, 9 and 10; and this is so whether these sections are treated as giving meaning to s 11(2) or as prescribing separate and independent standards with which all punishments must comply.

He concludes this choice in paragraph [11], where he juxtaposes the South African Government's position that the death penalty conflicts with s 11(2) and should be declared

[182] Sec. 8 - Equality (1) Every person shall have the right to equality before the law and to equal protection of the law… . Sec. 9 – Life – Every person shall have the right to life. Sec. 10 – Human Dignity – Every person shall have the right to respect for and protection of his or her dignity. Sec. 11 – Freedom and security of the person - … (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

unconstitutional with that of the Attorney-General of the Witwatersrand. The latter argued that the death penalty is a necessary and acceptable form of punishment and that it is not cruel, inhuman or degrading within the meaning of s 11(2). Furthermore, he argued that: "[11] If the framers of the Constitution had wished to make the death penalty unconstitutional, they would have said so, and that the failure to do so indicated an intention to leave the issue open to be dealt with by Parliament in the ordinary way. It was for Parliament, and not the Government, to decide whether or not the death penalty should be repealed, and Parliament had not taken such a decision."

These choices by Chaskalson P and how he frames them present a number of problems for a purported objective interpretation and application of the Constitution.

Firstly, he gives no reasons for his choice of provisions of the Interim Constitution upon which he bases his judgment. It would seem as if he assumes that his choice and reasons for his choice, are self-evident and in no need of justification. Of particular significance in this regard is his agreement that *ex facie* the Interim Constitution it is silent both on whether or not the death penalty is a competent constitutional penalty and on what is to be regarded as "cruel, inhuman or degrading" punishment. Having regard to this, his choice of provisions, and particularly his "choice" of omissions, assume special importance.

Two glaring omissions by him are his failure to give content to the opening line of the Interim Constitution[183] and those provisions in the Interim Constitution dealing with the Attorney-General's argument that it was for Parliament to decide.[184] Turning to the first omission. Having regard to this omission would be to be consistent with his reliance on s 232 (4) referred to above. Indeed, it could be argued that the reference to the need to submit to God does not need s 232 (4) as it is part of the main body of the Interim Constitution and not "merely" part of a Schedule or whatever which is in need of s 232 (4) to clothe it with constitutional authority.

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183 "In humble submission to Almighty God".

184 For example, Schedule 4, VI reads: "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

To give meaning and content to the provisions of the Interim Constitution chosen by him, he relies, *inter alia*, on a multiplicity of court judgments and human rights documents.[185] Not one of these makes reference to God or to source documents associated with God, such as the Torah, the Christian Scriptures or the Koran.[186] All these source documents grapple with giving content and meaning to concepts such as dignity, equality, freedom, cruelty and inhumanity. This notwithstanding, and despite the opening line of the Interim Constitution, Chaskalson P restricts himself only to secular authoritative sources and fails to give reasons for this choice. At best, this is arbitrary. At worst it discloses a personal choice by him linked to a secular worldview. What is clear is the subjective nature of his choice or the absence of an objective reference point used to make his choice.

I now turn to the second omission. Given his assertion that the Interim Constitution is silent on the death penalty added to the explicit constitutional provisions on the separation of powers and that the Attorney-General specifically argued that this silence indicated that Parliament should decide this issue, it is difficult to support this omission on objective, non-arbitrary and rational grounds. In the judgment, not only does Chaskalson P not refer to germane sections of the Interim Constitution, he simply fails in any manner to grapple with the separation of powers argument. The only issue raised by him to rebut the Attorney-General's argument, is an account of the "legislative history" of the section dealing with section 9 of the Interim Constitution and the death penalty.

Referring to other jurisdictions and highlighting that he is involved with the interpretation of a constitution and not simply of ordinary legislation, he concludes that: "[16] …it is not unusual for the courts (in countries where like in South Africa, the Constitution is the supreme law), to have regard to the circumstances existing at the time the Constitution was adopted, including the debates and writings which form part of the process." He continues:

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185 See for example, paras [3]-[92] in *Makwanyane*.

186 In the General Household Survey (2013) conducted by Statistics South Africa, in excess of 86 per cent of the South African population defined itself as either Christian, Jew or Muslim (Schoeman 2017).

> [17] Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process. … The Multi-Party Negotiating process was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the *travaux preparatoires* relied upon by the international tribunals. Such background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered will determine the weight to be given to it.

He concludes:

> [19] Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution. These conditions are satisfied in the present case. [20] Capital punishment was the subject of debate before and during the constitution-making process, and it is clear that the failure to deal specifically in the Constitution with this issue was not accidental.

Relying on reports submitted to the Court, he further concludes:[187]

> [25] In the constitutional negotiations which followed, the issue was not resolved. Instead, the 'Solomonic solution' was adopted. The death sentence was, in terms, neither sanctioned nor excluded, and it was left to the Constitutional Court to decide whether the provisions of the pre-constitutional law making the death penalty a competent sentence for murder and other crimes are consistent with chap 3 of the Constitution. If they are, the death sentence remains a competent sentence for murder in cases in which those provisions are applicable, unless and until Parliament otherwise decides; if they are not, it is our duty to say so, and to declare such provisions to be unconstitutional.

At best for Chaskalson P footnote 187 suggests more ambivalence about the legislative history involved than he permits when deciding not to accept the Attorney-General's argument that it was Parliament's responsibility to decide on the death penalty. Furthermore, it is striking that Chaskalson P chose not to deal with specific provisions of the Interim Constitution relating to

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[187] Central to his argument is what is contained in the Sixth and Seventh Reports of the Technical Committee on Fundamental Rights dated 15 July 1993 and 29 July 1993 respectively. In the former, the right to life provision permits capital punishment under certain circumstances. The comment attached reads: "… . The unqualified inclusion of the right will result in the [designated authority] having to decide on the validity of any law relating to capital punishment or abortion." In the latter, the right to life is unqualified. The comment attached reads: "The Ad Hoc Committee appointed by the Planning Committee recommends the unqualified inclusion of this right in the Chapter. We support this proposal." The Seventh Report is introduced as follows: "The Committee has revised the Chapter on Fundamental Rights proposed in its Sixth Progress Report in view of discussions at the meeting of the Negotiating Council on 21 July 1993 and subsequent submissions received up to 26 July 1993." A scrutiny of the minutes of the Negotiating Council meeting of 21 July 1993, reveals clear differences of opinion concerning the death penalty. As a result of this the Chairperson decides as follows: "What I'm going to suggest ladies and gentlemen is in accordance a procedure which I think you adopted yesterday, that we identify this … as a point of difference amongst us and refer this ultimately together with others that might arise to the Planning Committee for them to suggest a mechanism which could be a further debate here,…, in order to help us resolve this matter." I have been unable to locate any evidence that the said Planning Committee did indeed suggest a mechanism to address the impasse concerning the death penalty. Furthermore in Minute 2107 of the Negotiating Council, dated 28 July 1993 and thus after the 26th July referred to in the Seventh Report as the cut off date for submissions, it is clear from item 5.1.3.4 that there was still at that point significant differences of opinion concerning the death penalty. More particularly it reads: "5.1.3 It was agreed to go through the report section by section. Furthermore, background information was given on each section, where necessary, by the Technical Committee. During the course of the discussion the following was noted: … 5.1.3.4 "Life" Item 3 refers: *It was suggested that Item 3 (2) be deleted ('A law in force at the commencement of subsection (1) relating to capital punishment or abortion shall remain in force until repealed or amended by [the legislature]). Other participants did not agree with this view.* Extensive debate proceeded around this item after which it was agreed to refer this item and any other points of difference that arose from the debate to the Planning Committee to suggest a mechanism to attempt to resolve the issues concerned." From these minutes it is clear that when the Seventh Progress Report relied on by Chaskalson P was concluded, there was no finality between the negotiating parties – furthermore *ex facie* the said minutes of 28 July 1993, the debate *inter alia*, is about whether Parliament should do the changing of the law. The Seventh Report seems, *prima facie* to have had no regard to the said discussions of 28 July, if one has regard to the dates contained in the preamble to the Seventh Report. Thus Chaskalson's conclusion that all parties agreed that the issue had to be decided by the Constitutional Court is questionable.

the separation of powers when dealing with this argument. He does not give any reasons for why he made this choice.

In addition, an analysis of all the extracts of Chaskalson P highlighted above on the guidelines to be followed when deciding whether or not to have regard to the legislative history of a constitutional provision reveals the ever-present danger of subjectivity and arbitrariness. Subjectivity and arbitrariness permeate concepts and phrases such as "circumstances existing at the time the constitution was adopted", "The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it", "background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded", "Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution", and "It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution."

Precisely the same problem of subjectivity and arbitrariness is attached to his clothing his chosen provisions with content when he authorises: "[9]…an approach which, whilst paying due regard to the language that has been used, is 'generous' and 'purposive' and gives expression to the underlying values of the Constitution." Another example is his words: "[10] …, I need say no more in this judgment than that s 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of chap 3 of which it is part. It must also be construed in a way which secures for 'individuals the full measure' of its protection."

These phrases are all question-begging and share a common problem, namely, in the midst of competing value systems and worldviews, no objective reference point to use to make this approach non-arbitrary and objective. They all are permeated by the inevitability of the person making the decision to decide what she (subjectively) believes is "generous", "purposive" and "the full measure" of a right. This hermeneutical approach to the Interim Constitution and the

Constitution is an all-pervasive stumbling block to objectivity when seeking to give meaning and content to any right in the Bill of Rights.

A central building block of his judgment is that the death penalty is a cruel, inhuman or degrading punishment within the meaning of s 11(2) of the Interim Constitution. At the outset of his rationale on this question, he writes: "[26]…. In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment." In effect, he likewise finds that it is an inhuman and degrading punishment. However, he continues: "… The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of s 11(2) of our Constitution." Central to the ordinary meaning of the word cruel is the mental and emotional attitude of a person/society to the suffering/pain of another person.[188] Thus, whilst the suffering/pain dimension is present in the death sentence, in effect, Chaskalson P, without any substantiation, is assuming that whenever the death penalty is imposed, society is indifferent to or delights in the said suffering/pain.

Although Chaskalson J, in effect, disavows any personal bias in arriving at the meaning of s11 (2), he approaches the task with the strong conviction that "in the ordinary meaning of the words", the death penalty is undoubtedly cruel, inhuman and degrading. In the absence of any explanation of or substantiation for this assumption, the only conclusion to be drawn is that this assumption must then reflect his personal worldview on the issue. If one adds to this presumption of cruelty, inhumanity and degradation the subjective latitude which accompanies his hermeneutical approach set out above, it is difficult to conceive of Chaskalson P arriving at any conclusion other than one which is consistent with his worldview that the death penalty is cruel, inhuman and degrading, and thus in conflict with s11 (2).

In this regard, Chaskalson J's attempt to be dispassionate by drawing a distinction between the "ordinary" meaning and the technical meaning in terms of s 11 (2) of cruel, inhuman and

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[188] The Concise Oxford Dictionary of Current English, defines cruel as indifferent to, delighting in, another's pain; painful, distressing (Fowler & Fowler 1964).

degrading punishment is unpersuasive. It can be argued that when convenient, a generous and purposive approach is taken to interpretation, and when convenient a technical approach - the common thread being what is required to advance a specific worldview. (I further will deal with the arbitrary nature of this choice in Part B of this chapter when I contrast his choice to that of Mogoeng Mogoeng CJ in the parental punishment matter.) What reinforces this conclusion are a number of other occasions where his own bias/presumption/worldview is apparent. Thus, he writes: "[33] The death sentence is a form of punishment which has been used throughout history by different societies. It has long been the subject of controversy. As societies became *more enlightened* (my emphasis), they restricted offences for which this penalty could be imposed." He continues [33]:

> … According to Amnesty International, 1831 executions were carried out throughout the world in 1993 as a result of sentences of death, of which 1419 were in China, which means that only 412 executions were carried out in the rest of the world in that year…. Today, capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half the countries of the world, including the democracies of Europe and our neighbouring countries, Namibia, Mozambique and Angola.

In these lines, he equates the abolition of the death penalty with enlightenment, thus, in effect, prejudging what he is purporting to decide in an objective manner. In the absence of any objective substantiation for this value judgment, the only conclusion to be arrived at is that his use of the words "more enlightened" reflects his own worldview, his own presupposition.

Chaskalson P's approach to public opinion in South Africa is striking. For purposes of his judgment, he accepts that the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder and that a dispassionate approach would readily concede the presence of contesting worldviews and authoritative premises on the issue. He responds to this contest simply by reverting to the question begging question and concludes: "[87] …. . The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether *the Constitution* allows the sentence."[189]

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[189] Dispassionate reason would suggest that Parliament would enact a Constitution which reflects the will of the people. This is another reason which calls into question the reasoning of Chaskalson P set out above and read with footnote 187.

Not only is this once again a question begging approach, but undergirding his assertion, “As societies became more enlightened, they restricted the offences for which this penalty could be imposed”, is that over time people and societies become more enlightened. He thus uses the developing mores of societies when it advances an abolitionist argument, whereas a few paragraphs later when society does not develop in an “enlightened” way, he avoids being guided by public opinion by reverting to the position that the Court’s duty is to answer the question, which at the outset, he stated the Constitution does not specifically answer. (Cf Madlanga J’s approach to public opinion highlighted hereafter in the adultery matter – in that matter the Constitutional Court followed what it assumed was public opinion on the issue.) In effect, he makes the value judgment that the worldview of the majority of South Africans is unenlightened as compared to those with the worldview that the death penalty is not an acceptable form of punishment.

Furthermore, as alluded to earlier, by equating abolition with being enlightened, he reveals his own bias. A bias which makes his “rational” and “legal” conclusion inevitable, for it is inconceivable that given the context he has sketched of the emergence and purpose of the Interim Constitution, already referred to above, that he would decide that the Interim Constitution would give birth to an “unenlightened” stance on the death penalty.

Another illustration of this choice of convenience can be extrapolated from paragraphs [57] - [62]. Citing court decisions from the US and Germany, which emphasize that any punishment, inclusive of the death penalty, must be cognizant of the dignity of the convicted person, he moves on to a Canadian case, *Kindler v Canada*.[190] Whilst the judges were divided as to whether or not the death penalty could ever be justified, they all agreed that it was an invasion of the dignity of the convicted person. Notwithstanding this, on a different point of law, the court refused by a vote of four to three not to set aside the Minister of Justice’s decision to extradite an accused person to the US, even though he faced the possibility of the death penalty there. Chaskalson P concludes his reference to this case as follows:

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190 (1992) 6 CRR (2d) 193 (SC).

> [62] ….In balancing the international obligations of Canada in respect of extradition, and another purpose of the extradition legislation - to prevent Canada from becoming a safe haven for criminals, against the likelihood that the fugitives would be executed if returned to the United States, the view of the majority was that the decision to return the fugitives to the United States could not be said to be contrary to the fundamental principles of justice. *In their view, it would not shock the conscience of Canadians to permit this to be done* (my emphasis).

Chaskalson P cites this case with approval, notwithstanding it taking cognizance of public opinion. There is no attempt by him to reflect on this authority before he summarily dismisses the relevance of the collective conscience of South Africans when it comes to the death penalty.

Of note in the *Kindler* case is the finding of the Human Rights Committee of the United Nations, to which Kindler took his case,[191] highlighted by Chaskalson: "[64] … In *Kindler's* case, … it was held that the method of execution, which was by lethal injection, was not a cruel method of execution and that the extradition did not, in the circumstances, constitute a breach of Canada's obligations under the International Covenant. [65] The Committee also held in *Kindler's* case that prolonged judicial proceedings giving rise to the death row phenomenon do not *per se* constitute cruel, inhuman or degrading treatment."

Chaskalson P rationalises away this seeming acceptance of the death penalty under certain circumstances by concluding that: "[67] Despite these differences of opinion, what is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words and that it was because of the specific provisions of the International Covenant authorising the imposition of capital punishment by Member States in certain circumstances that the words had to be given a narrow meaning." A careful reading of the *Kindler* case before the Human Rights Committee (hereafter "Kindler UN") does not support this bald assertion by Chaskalson P. Article 6 of the *International Covenant on Civil and Political Rights* entrenches the right to life. It also does not prohibit the imposition of the death penalty under specified circumstances for the most serious crimes. Article 7 seeks to protect people from being

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[191] *Joseph Kindler v Canada* (United Nations Committee on Human Rights) Communication 470/1991, 30 July 1993.

subjected to cruel and inhuman treatment. At 14.2 of Kindler UN, we read: "… the Committee recalls its General Comment on Article 6 … , which provides that while States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use. The General Comment further notes that the terms of Article 6 also point to the desirability of the abolition of the death penalty. This is an object towards which ratifying parties should strive." It continues at 15.1:

> As regards the … claims that Canada violated article 7 of the Covenant, this provision must be read in the light of other provisions of the Covenant, including article 6, paragraph 2, which does not prohibit the imposition of the death penalty in certain limited circumstances. Accordingly, capital punishment as such, within the parameters of article 6, paragraph 2, does not *per se* violate article 7. According to 15.2, "As to whether the 'death row phenomenon' associated with capital punishment, constitutes a violation of article 7, the Committee recalls its jurisprudence to the effect that 'prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies'… . The Committee has indicated that the facts and the circumstances of each case need to be examined to see whether an issue under article 7 arises.

It can be gleaned from the above extracts that whilst the Human Rights Committee desires the ending of the death penalty, Chaskalson P's assertion that the Committee was compelled by Article 6(2) to give the words of Article 7 a narrow meaning is not sustainable. A reading of the *Kindler* UN decision also reveals no evidence to support his conclusion that the death penalty is regarded as a cruel and inhuman punishment within the ordinary meaning of those words. Another illustration of selective interpretation is found in paragraphs [68] and [69]. These paragraphs refer to The European Convention on Human Rights. In *Soering v United Kingdom*[192] the court debated articles 2 and 3 of the said Convention in the context of the death penalty. Chaskalson P writes:

> [68]… . This case was also concerned with the extradition to the United States of a fugitive to face murder charges, for which capital punishment was a competent sentence. It was argued that this would expose him to inhuman and degrading treatment or punishment in breach of art 3 of the European Convention on Human Rights. Article 2 of the European Convention protects the right to life but makes an exception in the case of 'the execution of a sentence of a Court following (the) conviction of a crime for which this penalty is provided by law'. The majority of the Court held that art 3 could not be construed as prohibiting all

192 (1989) 11 EHRR 439:paras 103, 105 & 111.

> capital punishment, since to do so would nullify art 2. It was, however, competent to test the imposition of capital punishment in particular cases against the requirements of art 3 – the manner in which it is imposed or executed, the personal circumstances of the condemned person and the disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, were capable of bringing the treatment or punishment received by the condemned person within the proscription. [69] On the facts, it was held that extradition to the United States to face trial in Virginia would expose the fugitive to the risk of treatment going beyond the threshold set by art 3. The special factors taken into account were the youth of the fugitive (he was 18 at the time of the murders), an impaired mental capacity, and the suffering on death row which could endure for up to 8 years if he were convicted. Additionally, although the offence for which extradition was sought had been committed in the United States, the fugitive, who was a German national, was also liable to be tried for the same offence in Germany. Germany, which has abolished the death sentence, also sought his extradition for the murders. There was accordingly a choice in regard to the country to which the fugitive should be extradited, and that choice should have been exercised in a way which would not lead to a contravention of art 3. What weighed with the Court was the fact that the choice facing the United Kingdom was not a choice between extradition to face a possible death penalty and no punishment, but a choice between extradition to a country which allows the death penalty and one which does not. We are in a comparable position. A holding by us that the death penalty for murder is unconstitutional does not involve a choice between freedom and death; it involves a choice between death in the very few cases which would otherwise attract that penalty under s 277(1) (a), and the severe penalty of life imprisonment.

I have given this quote in *extenso* to illustrate how interpretation can be influenced by a subjective approach to justify a certain conclusion. Chaskalson P, in effect, has over-emphasized the one feature of the facts of the case, that the court had a choice to send the fugitive either to the US, where the death sentence is permitted, or Germany, where it is not permitted. In this regard, the Human Rights Committee in the *Kindler* matter (Kindler UN), referring to the *Soering* matter, wrote as follows:

> 15.3 …In this context the Committee has had careful regard to the judgment given by the European Court of Human Rights in the *Soering v United Kingdom* case … . It notes that important facts leading to the judgment of the European Court are distinguishable on material points from the facts in the present case. In particular, the facts differ as to the age and mental state of the offender, and the conditions on death row in the respective prison systems. … The Committee has also noted in the Soering case that, in contrast to the present case, there was a simultaneous request for extradition by a State where the death penalty would not be imposed.

Clearly, what Chaskalson P chooses to emphasise, was simply one of the considerations in the *Soering* matter. Furthermore, his words, "What weighed with the Court was the fact that the choice facing the United Kingdom was not a choice between extradition to face a possible death penalty and no punishment, but a choice between extradition to a country which allows

the death penalty and one which does not" shifts the focus or over emphasizes what is helpful for his conclusion that not only is the death penalty *per se* cruel and inhuman but also that it is unnecessary.[193]

The European Court made its choice based on the particular facts of the matter, not on the principle of whether or not the death penalty *per se* is cruel and inhuman. It is clear from a reading of their finding that they did not find that capital punishment *per se* was cruel and inhuman. Had the facts been different, there is nothing to suggest that it would not have chosen to extradite the fugitive to the US. The comparable position Chaskalson P refers to is germane to the debate concerning justification/proportionality, not whether the death penalty *per se* is cruel and inhuman.

The only reasonable inference one can draw from this reasoning of Chaskalson P, is that he unwittingly has permitted his personal belief system,[194] equating the abolition of the death penalty with being enlightened, to influence his reasoning. In itself, one cannot deny Chaskalson P the right to have such a personal belief system. The conundrum is that he is purporting in an objective manner to decide what the Interim Constitution says. At this stage, it is important to repeat that the Interim Constitution does not specifically deal with the death

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193 See footnote 179 where the "necessary" requirement of the justification argument is set out.

194 In the *Weekly Mail & Guardian* of 17 Feb 1995, the following report is found concerning the make up of the court presiding in the death penalty matter: "At least five of the 11 judges are on record as expressing abolitionist views. (Staff Reporter "What the judges say about hanging" *Mail & Guardian,* https://mg.co.za/article/1995-02-17-what-the-judges-say-about-hanging/ (accessed on 11 June 2024). The Weekly Mail & Guardian could find no record of any of the 11 having declared themselves in favour of the death penalty. Judge John Didcott endorsed the 1988 relaunch of the Society for the Abolition of the Death Penalty in South Africa, saying "convinced as I am that capital punishment degrades a society that resorts to it, I warmly support efforts to abolish it." Judge Kate O'Regan, when interviewed for membership of the court, was asked whether she belonged to the Society for the Abolition of the Death Penalty. She replied that while she was not a member, she did indeed endorse the aims of the society. Judge Albie Sachs said in his interview that he had 'campaigned strongly and with conviction for the abolition of capital punishment'. Constitutional Court president Judge Arthur Chaskalson and Judge Richard Goldstone are also known to be opposed to the death penalty. So is Judge Sydney Kentridge, who is a temporary member of the court in Goldstone's absence. This imbalance of opinion has caused some concern. The South African Police Services and South Africa's Attorneys General raised the issue of potential bias in the arguments they submitted to the court, but did not call on these judges to stand down. But it is inevitable that judges will have, at some stage in their professional lives, have expressed views on many of the matters before the court. The test for them is whether they can rise above their set views and base their decisions on the arguments before them. Their role, after all, is to test the law against the Constitution, not against their personal opinions." (The last sentence of this report is an illustration of the misconception being addressed in this chapter, and indeed in this thesis.)

penalty, nor does it define cruel, inhuman or degrading punishment. Given Chaskalson P and his fellow justices' choice to reject the argument that it is for Parliament to make this decision, it is their task to answer these questions, in theory, in an objective and dispassionate manner.

One of the submissions Chaskalson P had to contend with was that the Indian Supreme Court found that "by no stretch of the imagination can it be said that the death penalty… either *per se* or because of its execution by hanging constitutes an unreasonable, cruel or unusual punishment."[195] Chaskalson responds to this:

> [78] The wording of the relevant provisions of our Constitution is different.[196] The question we have to consider is not whether the imposition of the death sentence for murder is 'totally devoid of reason and purpose', or whether the death sentence for murder 'is devoid of any rational nexus'[197] with the purpose and object of s 277 (1) (a) of the Criminal Procedure Act (the provision permitting the death sentence in South Africa). It is whether, in the context of our Constitution, the death penalty is cruel, inhuman or degrading, and if it is whether it can be justified in terms of s 33.

In drawing a distinction, here once again, Chaskalson P relies on distinguishing between the "ordinary" meaning of cruel, inhuman and degrading and the "narrow" meaning of these words, determined by whether or not a constitution permits the death penalty in certain circumstances. In effect, his argument is where the latter is the case, then a "narrow" definition is justified. If not, then one must find in line with the "ordinary" meaning of the word. I have already dealt with this purported "ordinary" meaning of the word. What is instructive is to have a closer look at the Indian Supreme Court decision and whether it does not, in effect, at a deeper level, express a view different to what Chaskalson P says it does. He writes:

> [76] The (Indian) Court then dealt with international authorities for and against the death sentence, and with the arguments concerning deterrence and retribution. After reviewing the arguments for and against the death sentence, the Court concluded that '… the question whether or not (the) death penalty serves any penological purpose is a difficult, complex and intractable issue (which) has evoked strong, divergent views. For the purpose of testing the

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195 *Bachan Singh v State of Punjab* (1980) 2 SCC 684.

196 Art. 21 of the Indian Constitution provides that: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

197 Questions posed and answered by the Indian Supreme Court in arriving at its conclusion.

constitutionality of the impugned provisions as to death penalty… on the grounds of reasonableness in the light of arts 19[198] and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or another, as to which of these antithetical views, held by the Abolitionists and the Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally deeply divided in their opinion on this issue, is ground among others, for rejecting the petitioners' argument that retention of the penalty in the impugned provision, is totally devoid of reason and purpose' . It accordingly held that s302 of the Indian Penal Code (permitting the death penalty) 'violates neither the letter nor the ethos of art 19'.

[77] The Court then went on to deal with art 21. It said that if art 21 were to be expanded in accordance with the interpretative principle applicable to legislation limiting rights under art 19 (1), art 21 would have to be read as follows: 'No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by a valid law'. And thus expanded, it was clear that the State could deprive a person of his or her life by 'fair, just and reasonable procedure'. In the circumstances and considering the indications that capital punishment was considered by the framers of the Constitution in 1949 to be a valid penalty, it was asserted that 'by no stretch of the imagination can it be said that the death penalty… either *per se* or because of its execution by hanging constitutes an unreasonable, cruel or unusual punishment' prohibited by the Constitution.

Chaskalson P concludes:

[79]… . The majority of the Court rejected the argument that the imposition of the death sentence in such circumstances is arbitrary, holding that a discretion exercised judicially by persons of experience and standing, in accordance with principles crystallised by judicial decisions, is not an arbitrary discretion. To complete the picture, it should be mentioned that long delays in carrying out the death penalty in particular cases have apparently been held in India to be unjust and unfair to the prisoner, and in such circumstances the death sentence is liable to be set aside.[199]

A careful analysis of these extracts does not support the conclusion that the Indian Supreme Court, in a mechanistic manner, dealt with the moral issues before it. Whilst it did take into account that the indications are that the framers of the Indian Constitution considered capital punishment to be a valid penalty, of obvious importance to it were concepts similar to cruel, inhuman and degrading, namely, whether a punishment was unjust or unfair. The use of the

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198 Art. 19 guarantees the freedoms of speech, of assembly, of association, of movement, of residence, and the freedom to engage in any occupation. These freedoms can only be restricted if such restrictions are reasonable for the attainment of a number of purposes defined in art. 19.

199 *Triveniben v State of Gujarat* [1992] LRC (Const) 425 (Sup Ct of India); *Daya Singh v Union of India* [1992] LRC (Const) 452 (Sup Ct of India).

expression *per se,* when dealing with whether the death penalty is an "unreasonable, cruel or unusual punishment", simply is not consistent with the conclusion of Chaskalson P that it made its decision based solely on the fact that the Indian Constitution under certain circumstances permitted the death penalty. Furthermore, if this was the case, it would make no sense setting aside the death penalty in specific cases as unjust and unfair as a result of long delays in carrying out the sentence.

Clearly, although at times different words and concepts are used, like Chaskalson P, the Indian Court, throughout its reasoning, was deeply mindful of the underlying moral issues involved. It does that court a disservice to suggest that it was not and that it was hamstrung by the provision in Article 21, which permitted the death sentence. In addition, Chaskalson P fails to have regard to the Indian Court's observation "that persons of reason, learning and light are rationally and deeply divided in their opinion on (the death penalty)" when he asserts as an objective fact that the death penalty is an unjustifiably cruel and inhuman punishment.

Another striking feature of Chaskalson P's approach to decisions, which needs to be distinguished from the Interim Constitution to support his conclusions, is that, in effect, he is saying that when arriving at their decisions, they did not adopt an approach which, whilst paying due regard to the language that has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution, but acceded to a mechanistic and legalistic approach to the human rights documents they were interpreting and applying. This is illustrated by Chaskalson P's use of the Hungarian Constitutional Court's approach to the issue. Referring to Hungary, Chaskalson P holds:

> [83] An individual's right to life has been described as '(t)he most fundamental of all human rights', and was dealt with in that way in the judgments of the Hungarian Constitutional Court declaring capital punishment to be unconstitutional. The challenge to the death sentence in Hungary was based on s54 of its Constitution which provides: '(1) In the Republic of Hungary everyone has the inherent right to life and to human dignity, *and no one shall be arbitrarily deprived of these rights* (my emphasis). (2) No one shall be subjected to torture or to cruel or inhuman or degrading punishment.' [84] Section 8, the counterpart of s 33 of our Constitution, provides that laws shall not impose any limitations on the essential content of fundamental rights. According to the finding of the Court, capital punishment imposed a limitation on the essential content of the fundamental rights to life and human dignity, eliminating them irretrievably. As such it was unconstitutional… . For the present purposes it is sufficient to point to the fact that the Hungarian Court held capital

> punishment to be unconstitutional on the grounds that it is inconsistent with the right to life and the right to dignity.

Although the qualification to the right to life is not exactly the same in India, Hungary and the authoritative documents governing the United Nations Human Rights Committee and the European Court of Human Rights, what they do have in common is a qualified right to life. This notwithstanding, those jurisdictions arrive at different conclusions. It begs the question to explain away the different conclusions by asserting that the one jurisdiction was more enlightened than the other, as already alluded to. In effect, beneath the surface, wittingly or unwittingly, Chaskalson P is making that value judgment when, at the outset, he states: "[33] … . As societies became more enlightened, they restricted the offences for which this penalty could be imposed." Or later with approval refers to a dissenting judgment in the *Soering* case: "[81] In some instances, the dissent focused on the right to life. In *Soering's* case before the European Court of Human Rights, Judge De Meyer, in a concurring opinion, said that capital punishment is 'not consistent with the present state of European civilisation'… ."

Perhaps the most obvious illustration of a subjective/arbitrary choice is Chaskalson P's decision not to be influenced by Tanzanian jurisprudence. He writes:

> [114] There is support for part of the Attorney-General's argument in the judgment of the Tanzanian Court of Appeal[200]… . It was held in this case that the death sentence amounted to cruel and degrading punishment, which is prohibited under the Tanzanian Constitution, but that, despite this finding, it was not unconstitutional. The Constitution authorised derogations to be made from basic rights for legitimate purposes, and a derogation was lawful if it was not arbitrary and was reasonably necessary for such purposes. The legitimate purposes to which the death sentence was directed was a constitutional requirement that 'everyone's right to life shall be protected by law'. The death sentence was a mandatory penalty for murder, but it was not considered by the Court to be arbitrary because decisions as to guilt or innocence are taken by Judges. There was no proof one way or the other that the death sentence was necessarily a more effective punishment than a long period of imprisonment. In the view of the Court, however, it was for society and not the courts to decide whether the death sentence was a necessary punishment. The court was satisfied that society favoured the death sentence and that in the circumstances 'the reasonable and necessary' standard had been met. Accordingly, it held that the death sentence was a lawful derogation from the prohibition of cruel and degrading punishment, and thus valid.

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[200] *Mbushunu and Another v The Republic* Criminal Appeal 142 of 1994 (30 January 1995).

> [115] The approach of the Tanzanian Court of Appeal to issues concerning the limitation of basic rights seems to have been influenced by the language of the Tanzanian Constitution and rules of interpretation developed by the Courts to deal with that language. The relevant provisions of our Constitution are different and the correct approach to the interpretation of the limitations clause must be found in the language of s33 construed in the context of the Constitution as a whole. It is for the Court, and not society or Parliament, (as we have already seen, this is a choice he makes as the Interim Constitution is silent on this), to decide whether the death sentence is justifiable under the provisions of s33 of our Constitution. In doing so we can have regard to societal attitudes in evaluating whether the legislation is reasonable and necessary, but ultimately the decision must be ours. If the decision of the Tanzanian Court of Appeal is inconsistent with this conclusion, I must express my disagreement with it.

Chaskalson P seeks to circumvent the obvious problem the Tanzanian Court presents him with by stating that it "seems to have been influenced by the language of the Tanzanian Constitution and rules of interpretation by the Courts to deal with that language." His use of the word "seems" indicates that he is unsure of this conclusion. A comparison of the language provides an obvious cause for this uncertainty. It is correct that the words used by the two Constitutions are not identical. However, given the hermeneutical approach espoused by Chaskalson P and his fellow justices, the need to be generous, purposive and to give the full measure of a right when interpreting and applying rights in a Constitution, there is no difference of substance when analysing the words used by the two Constitutions. For example, the Tanzanian Constitution uses the words derogations, legitimate, arbitrary and reasonably necessary. The comparable words in the South African Constitution are limitations, reasonable, justifiable and necessary.

Chaskalson P gives no reason why the broader context within which rights are interpreted and applied in Tanzania is any different in principle from the context in South Africa.[201] *Ex facie* his reasoning in the passages cited, there is no justification whatsoever by Chaskalson P as to why, for example, there is any difference in meaning between "derogation" and "limitation" – he merely makes the observation in a footnote that "the judgment (Tanzanian Court) refers to 'derogations' and not to 'limitations' as in the Constitution". Nor what the difference in substance is when coming to interpreting and applying the full measure of a right between the words used by the two Constitutions when dealing with the justification of the derogation or

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[201] Tanzania achieved independence from her colonial master in 1961.

limitation of a right. Likewise, he does not give any detail about how the rules of interpretation might have developed differently in Tanzania. The implied suggestion is that the Tanzanian Court has failed to be generous in its approach to giving the full measure of the human rights to her citizens when interpreting and applying her constitution. This might be the case, but Chaskalson P is silent in this regard.

The most striking failure by Chaskalson P to grapple with the jurisprudence of a fellow African Court decision is contained in the words, "The legitimate purposes to which the death sentence was directed was a constitutional requirement that 'everyone's right to life shall be protected.' " He simply does not attempt to engage the Tanzanian Court on this point. It is not important whether Chaskalson P agrees with this reasoning. What is important is that the Tanzanian Court seeks rationally to justify the death penalty based on the very right which Chaskalson P emphatically holds is fundamentally undermined by the death penalty. It begs the question for Chaskalson P at the end of his treatment of the Tanzanian decision to say that it is for the Constitutional Court to decide what the Constitution says. And here it must be remembered that one of the decisions he chooses to make is that the present matter is for the Court to decide on, and not Parliament. It is thus of no analytical value to use this to draw a distinction between South Africa and Tanzania. By doing this, he is simply using his own choice to justify another choice.

Chaskalson P, in approaching his values-based decision, assumes a number of things without laying a foundation for these assumptions. What makes a decision enlightened? Which Europe is being referred to when he quotes Judge De Meyer with approval? Why must a South African values-based decision be influenced by the state of "European civilisation"? Why not be influenced by Chinese and Indian civilisations, both of which have retained the death penalty? Indeed, why not be influenced by a fellow African country, Tanzania?

As already indicated, Chaskalson P attempts to extricate himself from this conundrum by repeatedly highlighting that the Court's task is simply to interpret and apply the Constitution. However, it is clear from his reasoning that to do this requires not an objective mechanistic and mathematical process, but a process which at every stage requires subjective assumptions and

value choices, precisely because, according to Chaskalson P, the Constitution is silent on the death penalty and on what cruel, inhuman and degrading punishment is. One obvious source for these assumptions and value choices would be his own personal value system and worldview.

In dealing with the second stage of the two-stage approach to the interpretation of the Bill of Rights, Chaskalson P finds: "[102] Under our Constitution (the question is)… whether the decision of the State is justifiable according to the criteria prescribed by s33. It is not whether the infliction of death as a punishment for murder 'is not without justification'. It is whether the infliction of death as a punishment for murder has been shown to be both reasonable and necessary and to be consistent with the other requirements of s33." Turning to the application of s 33, he writes:

> [104] The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirements of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'.

In his own words, almost at every point when applying s 33, a subjective choice is involved. He thus talks of "weighing up of competing values (and interests)", "an assessment based on proportionality", the absence of an "absolute standard which can be laid down for determining reasonableness and necessity", "This is inherent in the requirements of proportionality, which calls for the balancing of different interests" and "regard must be had to … (reasonableness) and the underlying values of the Constitution".

Furthermore, given the plurality of South African society, giving content to the nature of the envisaged new society, as already alluded to, for example, by Chaskalson P in [7] of the death penalty matter, involves endless choices by the court, and every other arm of the State, beginning with what is the nature of the envisaged society.

3.2.1.2 The reasoning of other justices of the Constitutional Court in the death penalty matter

We now turn to the judgments of some of the other justices of the Constitutional Court. Only select issues will be highlighted which emerge from their reasoning. Some of their judgments also will be traversed later in this chapter, particularly where I deal with *ubuntu* as a hermeneutical lens.

3.2.1.2.1 Ackermann J

Ackermann J concurs fully in the judgment of Chaskalson P. In his judgment, he places particular emphasis on the "inevitably arbitrary nature of the decision involved in the imposition of the death penalty… ." His reasoning is instructive and germane. He writes:

> [165] In paras [44]-[46] of his judgment the President has referred to the relevant statutory provisions prescribing the tests to be applied for the imposition of the death sentence and the guidelines laid down for their application by the Appellate Division of the Supreme Court. In the end, whatever guidelines are employed, a process of weighing up has to take place between 'mitigating factors' (if any) and 'aggravating factors' and thereafter a value judgment made as to whether 'the sentence of death is the proper sentence.' I am not suggesting that the statutory provisions could have been better formulated or that the Appellate Division guidelines could be improved upon. The fact of the matter is that they leave such a wide latitude for differences of individual assessment, evaluation and normative judgment, that they are inescapably arbitrary to a marked degree. There must be many borderline cases where two Courts, with the identical accused and identical facts, would undoubtedly come to different conclusions. I have no doubt that even on a Court composed of members of the *genus* Hercules and Athena[202] there would in many cases be differences of opinion, incapable of rational elucidation, on whether to impose the death penalty in a particular case, where its imposition was, … , dependent on the application of widely formulated criteria and the exercise of difficult value judgments.

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[202] Dworkin's lawyer "of superhuman skill, learning, patience and acumen" – see footnote 147.

In essence, these words of Ackermann J echo the inevitability of subjectivity/arbitrariness when value judgments need to be made. Ackermann J's reasoning applies to his own value choice concerning the constitutionality of the death penalty. As we have seen, the interpretative principles enunciated by Chaskalson P are "widely formulated criteria". The judgments involved in deciding on the constitutionality of the death sentence, we also have seen, indeed, are both hotly disputed value judgments and difficult judgments.

Ackermann J is one of the justices who, in *Carmichele,* held:[203] "Our constitution is not merely a formal document regulating public power. It also embodies,…, an objective normative value system." Earlier in *Carmichele*, Ackermann J quotes Justice Blackmun with approval.[204] Central to Justice Blackmun's reasoning is the inherent contradiction between consistency and fairness when deciding on the imposition of the death sentence. Ackermann J, quoting him, writes: "[161]… '(i)t soon became apparent that discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due to the defendant when life is at stake. … evolving standards of decency required due consideration of each individual defendant when imposing society's ultimate penalty… . (T)he consistency and rationality promised in *Furman*[205] are inversely related to the fairness owed to the individual when considering a sentence of death. *A step toward consistency is a step away from fairness* (my emphasis)." Extrapolating from this reasoning, from a hermeneutical standpoint, one concludes that where there is a choice between conflicting value judgments, inconsistency/arbitrariness is inevitable. Furthermore, in practice, not only is a step toward objectivity (which rationally is needed for consistency) a step away from fairness, rationally and inherently making a value judgment also cannot be objective. Ackermann J thus needs to make an election. If he abides by his reasoning in the death penalty matter that where discretion/choice is involved, arbitrariness must follow, he rationally cannot assert that the Constitution contains "an objective normative value system" when it requires justices constantly to make "normative value judgments".

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203 See footnote 2.
204 Par. 162.
205 See footnote 207.

A further illustration of the subjective nature of the choices judges make emerges when one compares the reasoning of the Indian and Tanzanian Courts with that of Ackermann J and his fellow justices concerning whether decisions by judges imposing the death penalty are arbitrary. Along with Tanzania, India replies in the negative. Chaskalson P, supported by Ackermann J, chooses to follow "enlightened" Europe, Canada and parts of the United States by answering in the affirmative. Once again, which stance is "correct" is not the issue – the issue is that there are two choices which can be made and defended in a rational manner.

3.2.1.2.2 Didcott J

In concurring with Chaskalson P, Didcott J makes use of a decision by Chief Justice Gubbay[206] and several cases from the United States of America.[207] It must be noted that Gubbay CJ was not called on to address the issue of whether the death penalty was inherently inhuman and degrading or inherently unjustifiable. Didcott J's reliance on him thus has this clear handicap. Nevertheless, in dealing with the quotes used by Didcott J, I will assume that, in effect, his attack was on the death sentence itself, which is the impression created by Didcott J. Before referring to them, he writes:

> [177] Whether execution ranks also as a cruel, inhuman or degrading punishment is a question that lends itself to no precise measurement. It calls for a value judgment in an area where personal opinions are prone to differ, a value judgment that can easily become entangled with or be influenced by one's own moral attitudes and feelings. Judgments of that order must often be made by courts of law, however, whose training and experience warns them against the trap of undue subjectivity. Such a judgment is now required from us, at all events, and would have been inescapable whichever way the question was answered.

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[206] *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others* 1993 (4) SA 239 (ZS). The specific issue to be decided by the court was whether the inordinate delay between the imposition of the death sentence, February 1987 and November 1988 respectively, and the proposed implementation of it, in March 1993, was in conflict with the constitutional provision against torture, inhuman and degrading treatment.

[207] *Furman v State of Georgia* 408 US 238 (1972); *The People v Anderson* 493 P (2d) 880 (1972); *District Attorney for the Suffolk District v Watson and Others* 381 Mass 648 (1980).

He then quotes Gubbay CJ: "[177] … . Gubbay continued thus (at 248 BC): '(A)n application of this approach to whether a form of… punishment…is inhuman or degrading is dependent upon the exercise of a value judgment … ; one that must not only take account of the emerging consensus of values in the civilised international community ... , but of contemporary norms operative in Zimbabwe and the sensitivities of its people.' "

At every turn of these two extracts, there are explicitly or implicitly admissions of the unavoidability of subjectivity when judges make value judgments. Thus, Didcott J speaks of "no precise measurement", "a value judgment in an area where personal opinions are prone to differ", and "a value judgment that can easily become entangled with or be influenced by one's own moral attitudes and feelings". He, in effect, concedes that the question could be answered either way. Even his bulwark against such subjectivity, trained and experienced courts of law, he qualifies with the words "undue subjectivity". Either an approach to interpretation is objective or subjective, and any presence of any measure, due or undue, of subjectivity renders the decision subjective.

Likewise, explicit or implicit, in the words of Gubbay CJ, is a subjective value judgment which must be made. Such judgment would require a choice as to what "the emerging consensus" is, which part of the international community qualifies as "civilised" and what are the contemporary norms and sensitivities of the people of, in this case, Zimbabwe. From the reasoning of Chaskalson P we see that the two most populous nations in the world, India and China,[208] have a fundamentally different view to that of Gubbay CJ. By necessary implication, according to him, this makes them not as civilised as the abolitionist nations and not part of the "emerging consensus". If one has regard simply to population density, then Gubbay CJ also has made a choice as to how to determine what the "emerging consensus" is in a manner which ignores population density.

[208] According to World Population Review in 2018, China had 1,409,517,397 people, India 1,339,180,127 people and the US was the third most populated country with 324,459,463 people (World Population Review "World Population by Country." https://worldpopulationreview.com/ (accessed on 12 June 2023).

Furthermore, central to Chaskalson P's reasoning when rejecting the death penalty is the arbitrary nature of the decision to impose the death sentence. In this extract from Didcott J, the choice he writes of must by the need of logical necessity also involves arbitrariness, notwithstanding his said bulwark against "undue subjectivity". The question being addressed by this thesis is not whether this conundrum can be avoided but whether the conundrum exists in the first place. Another inconsistency is, on the one hand, Didcott J's rejection of the argument that the Court must have regard to public opinion, and yet, on the other hand, he endorses Gubbay CJ of the need *inter alia*, to have regard to the "contemporary norms operative in Zimbabwe and the sensitivities of its people". This choice by Didcott J is another illustration of subjectivity, of arbitrariness when it comes to the hermeneutical principles to be applied when interpreting and applying the Constitution.

Now let us look at the subjective lens with which Didcott J approaches the issue. At the outset, it must be noted that when The Abolition of the Death Penalty Society was relaunched in 1988, Didcott J sent his support.[209] Agreeing with various sentiments of Gubbay CJ, he writes: "[177]… I take that view here, too, where such norms and sensitivities are demonstrated, above all else, by the altruistic and humanitarian philosophy which animates the Constitution enjoyed by us nowadays. [178] Capital punishment was discussed at length in *Furman v State Of Georgia* ... , a case handled by the Supreme Court of the United States of America in which a *comparably liberal philosophy* (my emphasis) was expounded by a number of the Judges hearing it." Here he explicitly states that the lens through which he interprets and applies the Constitution, is a liberal one. This choice is underlined by the judgments he relies on. All but one of them are from the United States of America. Although he cites a Zimbabwean case, he fails to deal with the Tanzanian case referred to by Chaskalson P, which would have been important to test the veracity of the assumptions of Gubbay CJ referred to above, particularly as regards Africa.

He also omits to give reasons as to why such a liberal philosophical lens must be used when interpreting and applying the Constitution. The only presumption which will explain this, is

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[209] See footnote 194.

the presumption that a society envisaged by the Constitution is only possible if one interprets and applies the Constitution through a liberal lens. Whether or not he is correct, once again, is not the issue. The issue is that value judgments inevitably require personal and subjective choices. And the Constitution is silent on what philosophical lens to use when interpreting and applying the Constitution. Although words such as dignity, freedom, equality and *ubuntu* at face value can be consistent with a liberal philosophical lens, such an approach assumes that there is only one conceptual framework which can be used when giving meaning to these words/concepts. In turn, this assumes only one universal meaning for these words/concepts. In Didcott J's case and a number of other justices, this one meaning is as envisaged by a Western liberal worldview. This involves reading into the Constitution a worldview about which the Constitution is silent.

Another assumption highlighted in Didcott J's judgment, and in all the other judgments of the various justices, is that the death sentence inherently involves the destruction of the person's humanity, her personality, of her dignity. Once again, this is a matter of personal opinion, not an objective fact. Thus, for example, some Biblical scholars are of the view that the climax and full revelation of the nature of God is revealed in John's Gospel, not in the resurrection of Jesus Christ but in the death of Jesus Christ on the cross.[210] Countless followers of Jesus Christ embraced their execution with joy, although outwardly, the Romans devised extremely cruel methods of execution. Another dimension to this view is that it is treating a person with dignity at a profound level when that person is given the opportunity to take full responsibility for their actions. In the same vein is the Tanzanian Court's assertion, already referred to, that "The legitimate purposes to which the death sentence was directed was a constitutional requirement that 'everyone's right to life shall be protected by law'…"

Once again, the issue is not which worldview is "correct" or better. What is important when assessing whether the Constitution contains an "objective normative value system" or whether justices are merely mouthpieces of what is already in the Constitution is whether, when making

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[210] Matthee 1988.

decisions to give content to a value such as dignity, there is more than one worldview to choose from.

The same question-begging problem presents itself when one has regard to the various American decisions relied on by Didcott J. Thus, for example, in the *District Attorney for Suffolk* case, Hennesy CJ is quoted by Didcott J: "[179]: '… . (T)he death penalty is unacceptable under contemporary standards of decency… We conclude…that the death penalty, … is impermissibly cruel… when judged by contemporary standards of decency.' " A comparison of judgments on the death penalty even only in the US,[211] where some States have abolished the death penalty and others not, let alone the rest of the world, indicate the arbitrary and meaningless value of a reference to "contemporary standards of decency."

Another illustration of the subjective nature of the choices made is Didcott J's approach to the argument of deterrence. He writes of it: "[182] The debate surrounding that question, an old one both here and elsewhere, has often been marked by the production of statistical evidence tendered to show that the death penalty either does not or does serve a uniquely deterrent purpose, as the case may be… . Such statistics, when analysed, have always turned out to be inconclusive in the end." Didcott J's solution is as follows: "[183] Without empirical proof of the extent to which capital punishment worked as a deterrent, neither side can present any argument on the point better than the appeal to common sense that tends to be lodged whenever the debate is conducted." He concludes the paragraph: "The second school of thought (the realistic threat of conviction and sentence) is the one which gets to grips with the realities of the matter, in my opinion, appraising them with a lot more plausibility and persuasiveness than any that attaches to the stark proposition of the first school (the possibility of the death penalty in itself)."

In effect, his answer to this "inconclusive" debate is "common sense", as defined by Didcott J. He simply states what his opinion is without laying an objective foundation for such an opinion

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[211] See for example, paras. 198-199 in the death penalty matter.

– plausibility and persuasiveness are no substitutes for testable evidence required to justify a claim to objectivity.

3.2.1.2.3 Kentridge AJ

Noting his agreement with Chaskalson P, Kentridge AJ chooses to emphasise certain points. He writes:

> [198] Section 35 of the Constitution requires us to 'promote the values which underlie an open and democratic society based on freedom and equality'. We are thus entitled and obliged to consider the practices of such societies. That exercise shows us that most of the countries which we would naturally include in that category have abolished capital punishment... .These countries include the neighbouring States of Namibia, Angola and Mozambique. The principal exceptions are the great democracies of India and the United States. In each of those countries the written Constitution expressly contemplates the legitimacy, subject to safeguards, of the death penalty… . It is therefore understandable that the Supreme Courts of those two countries have found themselves unable to hold that the death penalty is *per se* unconstitutional. Nonetheless, in our attempt to identify objectively the values of an open and democratic society, what I find impressive is that individual judges of great distinction (in the United States and India) … have held, notwithstanding those constitutional provisions, that the death penalty is impermissible when measured against the standards of humanity and decency which have evolved since the date of the respective Constitutions. Similarly, Courts to which considerable respect is due, such as the Supreme Court of California … and the Supreme Judicial Court of Massachusetts … have held the death penalty to be a 'cruel and inhuman punishment' and therefore in conflict with their respective state constitutions. In the California case that decision was arrived at notwithstanding clauses in the state constitution which, like the United States Constitution, recognise the existence of capital punishment… . [199] The reference to 'evolving standards of decency' is taken from the judgment of Warren CJ in *Trop v Dulles* 356 US 86 (1958) at 101 where, speaking for the Court, he adopted as the measure of permissible punishment under the Eighth Amendment of the United States Constitution 'the evolving standards of decency that mark the progress of a maturing society'. Commenting on this *dictum* in *Thompson v Oklahoma* 487 US 815 (1988) Scalia J (dissenting) said at 865: 'Of course, the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views.' This is a pertinent warning which I have, I hope, kept in mind. I believe, nonetheless, that there is ample objective evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies.

He then turns to the issue of public opinion: "[200] … . If we were simply to defer to public opinion, we would be abdicating from a constitutional function. Yet, were public opinion on the question clear, it could not be entirely ignored. The accepted mores of one's own society must have some relevance to the assessment of whether punishment is impermissibly cruel and

inhuman.” He avoids developing what relevance public opinion should have by finding that there was no evidence before the Court concerning public opinion on the matter.

An analysis of these extracts by Kentridge AJ reveals question-begging assumptions and selective reasoning and evidential standards in his pursuit “to identify objectively the values of an open and democratic society”. In his selection of societies which must be considered, he recognises the problem to his reasoning, which India and the United States present. His response is a reference to their written Constitution, which expressly contemplates the legitimacy of the death penalty. This does not address a prior question, namely that both those societies have not seen fit to amend their Constitutions to outlaw capital punishment. He refers to “objective evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies.” Whilst the said written Constitutions might compel their Courts to swim against such “evolving standards of civilisation”, the objective evidence is that their written Constitutions, which in an open and democratic society can be amended, permit capital punishment.

This leads to the question, whose “standards of civilisation” is he referring to? A further problem of Kentridge AJ’s reasoning is the implicit assumption that the Indian and United States Courts would arrive at a different conclusion had their written Constitutions been silent on the issue. In this regard, this argument of his is undermined by his reference to the California case, which held the death penalty to be in conflict with the state constitution “notwithstanding clauses in the state constitution which, like the United States Constitution, recognised the existence of capital punishment.” In effect, he is thus arguing that, unlike the Californian Court, the Indian and the majority in the United States Supreme Court were not morally evolved enough to find a way to outlaw the death sentence notwithstanding the provisions in their respective Constitutions.

A further problem for Kentridge AJ's reasoning is African countries such as Botswana[212] and Tanzania, both of which had a far longer tradition and experience of freedom and democracy than South Africa in 1995 when he penned his judgment. Added to this is the assumption that other forms of government, to that of Western Europe, do not permit of or aspire to freedom and being governed by representatives placed there by the citizens of the country. In any event, the existence of countries such as India, the United States, Tanzania and Botswana is objective evidence of different choices being made by different countries and fatal to Kentridge AJ's assertion that there is "ample objective evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies."

Another inconsistency and inherent contradiction in his reasoning is his treatment of the role of public opinion compared to his assertion concerning "evolving standards of decency". In effect, he discards the argument concerning public opinion, given the absence of admissible evidence in this regard. In his judgment, there is no reference to admissible evidence as regards "evolving standards of civilisation" and "evolving standards of decency", and yet he concludes "that there is ample objective evidence" of such moral evolution.

A further problem is his implicit position that even if public opinion were proved, it would have a limited influence on a constitutional decision. The immediate question which presents itself when he quotes with approval, "the evolving standards of decency that mark the progress of a maturing society", is which part of society is he referring to? The majority or that part of society, no matter how big or small, who share his view of what is decent? He cautions himself against this danger by his reference to Scalia J, but then, without evidence, immediately makes his assertion about "ample objective evidence", not having presented any objective evidence in his judgment, as he requires *apropos* public opinion.

[212] Botswana achieved its independence in 1964. It is a parliamentary democracy. It permits the death penalty.

3.2.1.2.4 Kriegler J

Whilst agreeing with the conclusions reached by Chaskalson P and endorsing the bulk of his reasoning, Kriegler J highlights an additional emphasis and a "[205] …somewhat different line of reasoning". He writes;

> [206] The basic issue, as Chaskalson P points out in the opening and concluding paragraphs of the main judgment, is whether the Constitution has outlawed capital punishment in South Africa. The issue is not whether I favour the retention or the abolition of the death penalty, nor whether this Court, Parliament or even overwhelming public opinion supports the one or the other view. The question is what the Constitution says about it. [207] In answering that question the methods to be used are essentially legal, not moral or philosophical. To be true the judicial process cannot operate in an ethical vacuum. After all, concepts like 'good faith', 'unconscionable' or 'reasonable' import value judgments into the daily grind of courts of law. And it would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large. Nevertheless, the starting point, the framework and the outcome of the exercise must be legal. The foundation of our State and all its organs, the rules which govern their interaction and the entrenchment of the rights of its people are to be found in an Act of Parliament (the Constitution) … . That Act entrusts the enforcement of its provisions to courts of law. The 'Court of final instance over all matters relating to the interpretation, protection and enforcement' of those provisions is this Court, appointment to which is reserved for lawyers. The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics.

This statement of Kriegler J is an example of what can be described as the traditional approach described in Chapter 2. An analysis of his judgment reveals that his purported mechanistic and dispassionate approach to the issue at hand does not bear scrutiny. At the outset, having agreed with Chaskalson P that the Constitution does not state specifically either that the death sentence is not a competent sentence or that it is permissible, he attempts to simplify the choice the Court must make by asserting that the only "question is what the Constitution says about it." As we see from the rest of his judgment, and indeed from the judgments which go before his, the issue faced by the Court requires addressing profound philosophical and ethical questions.

The objective fact is that given the constitutional structure and dispensation Kriegler J describes, judges are called on to make calls outside of their training and expertise, particularly about giving content to concepts such as life, dignity and freedom. Or about what is cruel, inhuman or degrading, all of which are inherently of an ethical, religious or philosophical

nature. Simply because judges feel ill-equipped to address these questions does not release them from the responsibility delegated to them by the Constitution. There is nothing new about this. Judges daily, must make decisions concerning areas of life which are outside of their expertise. That is why the use of expert evidence is so central to the fabric of the practice of law in South African courts.[213] From his judgment, we learn that the Court was: "[211] …favoured with literally thousands of pages of material in support of and opposed to the death penalty, ranging from religious, ethical, philosophical and ideological to the mathematical and statistical." Nevertheless, it is striking that although he concedes that the judicial process cannot operate in an ethical vacuum and that abstract concepts, particularly when it comes to constitutional adjudication, "import value judgments into the daily grind of courts of law", he fails in any way to explain how he managed those value judgments before arriving at his emphatic finding concerning the death penalty.

More particularly, he does not explain his choice not to engage with the religious, ethical, philosophical and ideological evidence presented to the court before making his value judgment. Nor which ethical framework he used when he made his value choice. The two most obvious explanations for the omissions are either that he assumed that all South Africans shared the same ethical framework, and thus, there was no need to set it out, or that he used an ethical framework with the accompanying assumptions and worldview without being aware of it.

By way of illustration, there is no attempt to engage the Tanzanian Court's reasoning, diametrically opposed to his, that a legitimate purpose for the death sentence was that it protected "everyone's right to life". Neither is there any attempt by him to engage the reasoning of those courts, such as the Indian and Tanzanian Courts, who, unlike him found in certain circumstances that the death penalty is reasonable. He states that: "[209]… . As I am satisfied that s 277(1) (a) (which permits the death penalty) does not meet the threshold test of reasonableness, I find it unnecessary to ask whether it is justifiable in the kind of society postulated." Having conceded that a concept such as "reasonable" imports a value judgment into his task, not only does he fail to set out what the threshold test is, he also omits to explain

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[213] Morris 1975:ch. 6.

why he chose the threshold test he chose. A scrutiny of his reasoning reveals a dismissive attitude to any reasoned choice inconsistent with his choice.

Once again, the question is not which is the more rational or morally superior approach. It is that judges and courts when it comes to an issue which by its very nature is a moral issue, such as the use of the death penalty, have no option than to be sages when they make their choices. Central to being a sage is a personal worldview concerning the content of concepts such as dignity, freedom, equality and cruel and inhuman punishment. Because a judge fails to refer to his worldview does not mean he does not use it when interpreting and applying these concepts. In this regard, Jonathan Sumption (who served as a justice of the Supreme Court in Britain) states that:

> It is a vice of lawyers that they think and talk about law as if it was a self-contained subject, something to be examined like a laboratory specimen in a test-tube. But law does not occupy a world of its own. It is part of a larger system of public decision-making. The rest is politics: the politics of ministers and legislators, of political parties, of media and pressure groups and of the wider electorate … What do we mean by the rule of law, the phrase which so readily trips off the tongues of lawyers? Is it, as cynics have suggested, really no more than a euphemism for the rule of lawyers?[214]

3.2.1.2.5 Mahomed J

Concurring with Chaskalson P, Mahomed J highlights additional arguments. Distinguishing between political and legal decisions, he writes:

> [266] The difference between a political election made by a legislative organ and decisions reached by a judicial organ, such as the Constitutional Court, is crucial. The legislative organ exercises a political discretion, taking into account the political preferences of the electorate which votes political decision-makers into office. Public opinion therefore legitimately plays a significant, sometimes even decisive, role in the resolution of a public issue such as the death penalty. The judicial process is entirely different. What the Constitutional Court is required to do in order to resolve an issue is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different provisions; legal

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[214] Sumption 2019:3. Also see Sumption's elaboration on, what he refers to as, "the expanding empire of law". Sumption observes that until the 19th century, the law dealt with a short list of categories, whilst today, law is within "every corner of human life" (Sumpton 2019:4).

> precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solutions; factual and historical considerations bearing on the problem; the significance and meaning of the language used in the relevant provisions; the content and the sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by a judicious interpretation and assessment of all these factors to determine what the Constitution permits and what it prohibits.

Later, he concludes:

> [277] In my view, the death sentence does indeed constitute cruel, inhuman or degrading punishment within the meaning of those expressions in s11 (2). [278] Undoubtedly, this conclusion does involve in some measure a value judgment, but it is a value judgment which requires objectively to be formulated, having regard to the ordinary meaning of the words used in s11(2); its consistency with the other rights protected by the Constitution and the constitutional philosophy and humanism expressed both in the preamble and the post-amble to the Constitution; its harmony with the national ethos which the Constitution identifies; the historical background to the structures and objectives of the Constitution; the discipline of proportionality to which it must legitimately be subject; the effect of the death sentence on the right to life protected by the Constitution; its inherent arbitrariness in application; its impact on human dignity; and its consistency with constitutional perceptions evolving both within South Africa and the world outside with which our country shares emerging values central to the permissible limits and objectives of punishment in the civilised community."

George Braden, as far back as 1948, responding to the philosophical approach to judicial decision-making enunciated by Mahomed J, writes:[215] (Given the cogency of Braden's description of the process at this point, I have given this quote *in extenso*):

> To talk, … , of simply laying a statute alongside an article of the Constitution to see if the former squares with the latter, now seems almost like dredging up an antiquity. Justices may always have been sufficiently sophisticated to know that the judicial process is not that simple, that in the constitutional field the process is primarily political, not judicial; but it is only recently that they have admitted as much and have begun to discuss publicly their methods of deciding cases. One can hardly blame the current bench for indulging in this sort of self-analysis, so obviously designed to minimize the significance of 'personal predilections'….Yet without some external measuring stick of predilection i.e., a substitute for 'personal', no justice has any satisfactory way to avoid either sticking his neck out or being a cipher. If he takes the latter course, he will presumably feel thoroughly frustrated and, if enough colleagues are of like mind, will be effectively helping to destroy the Court's power. Instead, he may acknowledge the political power he possesses and then go on to demonstrate that he has chosen a particular course of action which will narrow the scope of this power. Here the justice seems to be saying: 'I admit that (the)… mechanical method of

215 Braden 1948:571.

> squaring the statute and the Constitution was nonsense. Of course, we wield (political) power. But this is potentially dangerous. Therefore, we must create a rule which is sufficiently objective to circumscribe us and our successors in our exercise of political power. Thus, the Supreme Court goes galloping off in search of objectivity.

Braden, after analysing the various attempts by United States justices to address this question, concludes:[216] "Each theory collapses, on analysis, into little more than a front for policy-making… There is no objectivity in constitutional law because there are no absolutes. Every constitutional question involves a weighing of competing values… . Hence, the justice who wants to tell the world how he decides cases… must say:[217] 'This is what I believe is important in our civilisation, and I shall do all I can to preserve it' And forthwith set forth his creed". In a similar vein, Mark Tushnet writes:[218] "According to Realism, all law is policy; thus one might conclude, as liberal Realists did, that all that matters was the policy choice made." He continues: "The courts must await a case with real facts before they can act, but once a case is in hand, they are free to use it, and to construct its facts, for the policy goals they wish to advance." An analysis of the extracts from Mahomed J above is consistent with the views expressed by Braden and Tushnet. Every feature highlighted by him as to what distinguishes a court decision on matters involving a value choice from a political choice requires a weighing up of conflicting values and choices.

Thus, as we saw when dealing with Chaskalson P's judgment, judges make subjective choices as to which provisions are relevant. Likewise, there is flexibility as to what all make up the context of the text and what the interplay is between the chosen provisions. Subjective choice also determines which international law will be used to support a conclusion. Likewise, choice determines which facts and historical considerations are pertinent. The significance and meaning of language, particularly abstract concepts such as dignity, freedom and equality, and the sweep of the ethos expressed in the structure of the Constitution defies objective definition.

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[216] Braden 1948:593-594.
[217] Rutledge 1947 as quoted by Braden 1948:571.
[218] Tushnet 1984:634.

Finally, the conflicting considerations Mahomed J writes of, by definition, also involve subjective choices. Thus, for example, having as a goal to be a "civilised community" is question begging without providing an objective reference point to measure whether something is civilised or not. Particularly when the three most populous countries in the world have the death penalty (see footnote 208), and fellow African countries such as Botswana and Tanzania.

3.2.1.2.6 O'Regan J

An analysis of her judgment reveals that, unlike Kriegler J, O'Regan J does not employ the hermeneutic of the traditional approach. Concurring with Chaskalson P, she sees helping bring about a new society in line with the vision of the Constitution as central to the role of the Constitutional Court. This is her hermeneutical key when interpreting and applying the Constitution. In this process, she recognises that choices are involved. She writes:

> [321] The Constitution entrenches certain fundamental rights. Included amongst these are the right to life, (s9), the right to respect for and protection of dignity (s 10) and the right not to be subjected to cruel, inhuman or degrading punishment (s 11 (2)). The prisoners allege that the death penalty is in conflict with each of these. The language of each of these rights is broad and capable of different interpretations. How is this Court to determine the content and scope of these rights? This question is at least partially answered by s35 (1) of the Constitution, which enjoins this Court, in interpreting the rights contained in the Constitution, to 'promote the values which underlie an open and democratic society based on freedom and equality.'… [323] In interpreting the rights in chap 3, therefore, the Court is directed to the future: to the ideal of a new society which is to be built on the common values which made a political transition possible in our country and which are the foundation of its new Constitution… s 35 (1) instructs us, in interpreting the Constitution to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition.

Turning to section 9 of the Constitution (Every person shall have the right to life), she writes:

> "[324] In choosing this formulation the drafters have specifically avoided either expressly preserving the death penalty or expressly outlawing it… . The question is thus left for us to determine whether this right or any of the others enshrined in chap 3, would *prima facie* prohibit the death penalty." She continues: "[326] … . But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity." She argues that such a right to life incorporates the right to dignity. She reasons: "[328]… . The importance of dignity as a founding value of the new Constitution cannot be overemphasised… . [329] …The new Constitution rejects this (apartheid) past and affirms

> the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution. … [330] … (quoting Cory J with approval) '(i)t is the dignity and importance of the individual which is the essence and the cornerstone of democratic government'."

Ex facie these extracts, O'Regan J acknowledges that the rights the court must interpret and apply are broad and capable of different interpretations. She also highlights that when it comes to the death penalty, the drafters of the Constitution specifically avoided permitting or outlawing it. Given this apparent vagueness, in seeking to address the obvious danger of arbitrariness when interpreting and giving content to the Constitution, she *inter alia* states that s 35(1) of the Constitution must be central to the hermeneutical approach of the court. The keywords in this section are open, democratic, freedom and equality. In other words, in interpreting and applying the Constitution, the court must facilitate the achievement of these values and goals.

An immediate question raised by this reasoning, is what reference point must be used to decide what is open, democratic, freedom and equality? Her judgment assumes a universally held view on these concepts. It is revealing that in the body of her reasoning concerning life, dignity, democracy, freedom and equality, the individual features prominently. The community she is part of and the interconnectedness between her and that community, when dealing with these concepts, receives no attention. The individual is her point of departure when choosing one of those different interpretations she refers to. She provides no reasons for this choice. The reason for this omission can be explained either by an unexpressed assumption/personal worldview that she herself is not conscious of or which does not need explaining or defending as she believes that is the universally acceptable hermeneutical approach for the germane concepts in a document such as the Constitution.

The reality is that dependent on the point of departure one chooses, one can come to a totally different conclusion. By way of illustration is her reliance (in par. [330]) on the aphorism coined by Ronald Dworkin, "Because we honour dignity, we demand democracy". This quote

is taken from an article by him dealing with abortion and euthanasia.[219] Central to Dworkin's reasoning and conclusion that the individual woman must be given complete control over her body and have the right to choose to have an abortion is his understanding of freedom, dignity, equality, democracy and how he views women operating in such a society. By way of illustration, juxtaposing the approach of the German Constitutional Court[220] with the US Supreme Court's approach (which at the time was in line with Dworkin's approach) to one of the philosophical points of departure when dealing with the value of unborn children and the rights of the pregnant woman, Kommers writes:[221]

> The image of the human person in American constitutional law is that of an autonomous moral agent unconnected to the larger community in any meaningful sense. It is the image of a woman alone, isolated and independent, and bounded by little more than self-interest. German constitutional law, by contrast, has a strong community orientation, and it tells the story of human solidarity, a story that tries to join public virtue to liberty, one that speaks of social integration and the wholeness of life. As the court has said in another context: 'The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favour of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value'.

Inter alia, using this lens, the German Court came to a fundamentally different conclusion on the issue of the status of the unborn child to that of the American Court at the time, and indeed to that of Dworkin (this will be dealt with at greater length later in this chapter). Once again, the point is not which approach is correct. What is important is that when a judge is confronted with interpreting and applying rights which are broad and capable of different interpretations, similarly broad hermeneutical standards capable of different interpretations do not address the conundrum of arbitrariness. Depending on which worldview lens the court chooses, it can arrive at diametrically opposing conclusions. This impasse is exacerbated when, as in the present case, the framers of the Constitution specifically avoided preserving or outlawing the death penalty.

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219 Dworkin 1993.

220 A reading of the death penalty judgment and many other judgments of the Constitutional Court, supports the conclusion that the German Constitution and the interpretation and application of it, has had a pronounced influence on the Constitutional Court. For example, see *Carmichele*:961 – footnote 2.

221 Kommers 1994:31.

Another illustration of how the worldview of a judge impacts her judgment is how constitutionally to cater for a pregnant woman who chooses to have an abortion whilst being mindful of the sanctity of all human life. Central to this is how a judge views unborn human life. Thus, Ackermann, quoting a German Constitutional Court decision,[222] writes:[223] " '[W]herever human life exists, human worth accrues, and it is irrelevant whether the bearer [of the right] is aware of this worth and whether she can defend it or not. The potential abilities that from the very beginning *endure in being human* (my emphasis) are sufficient to ground human worth'." Referring to a second German Constitutional Court matter[224] (in 1993), Ackermann writes:[225]

> In the Second Abortion case (the court) held that the 'Basic Law compels the state to protect human life. Human life is also present in the unborn, who is also entitled to state protection' and in this context explained that - '[h]uman dignity already accrues to the unborn human life, and not only to human life after birth or when its personality has developed.' The Court held, moreover, that, in the case of the unborn, one is already dealing with an individual whose genetic identity and accordingly its uniqueness and distinctiveness has already been fixed, and who –'in the process of its growth and self-involvement - *develops as a human being and not towards becoming a human being*' (emphasis supplied).

This is in marked contrast to the decisions of the US Supreme Court, decided at a similar time to the two said German matters.[226] This reasoning of Ackermann and the German Constitutional Court reveals a very different philosophical view on unborn human life to that of someone like Dworkin or the two American matters referred to in footnote 226. It matters not what the exact wording of the respective Constitutions is. How a judge (subjectively) views unborn human life will impact on how a court interprets and applies various clauses of a constitution when deciding on whether or not unborn human life warrants constitutional protection and a balancing act with the rights of the pregnant woman.

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222 39 [BVerfGE] 1 (First Senate) (F.R.G.) 1975 (hereafter, "the first German matter").
223 Ackermann 2012:127.
224 88 [BVerfGE] 203 (Second Senate) (F.R.G.) 1993 (hereafter, "the second German matter").
225 At 159.
226 *Roe v Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. V Casey*, 112 S. Ct. 2791 (1992).

Thus, whereas Kriegler J argues that a judge's task is simply that of a lawyer interpreting the Constitution, in the example of O'Regan J, it is clear that judges have a conscious or unconscious personal philosophical framework which will have a material impact on their interpretation. (In the analysis of the corporal punishment matters and the use of *ubuntu* hereafter, this once again will become apparent.) I now turn to certain aspects of the judgment dealing with adultery.

3.2.2 The adultery matter: *DE v RH*, CCT 182/14

This matter involves whether, in terms of the Constitution, the non-adulterous spouse continues to have a right of action in terms of the *actio iniuriarum*[227] against the third party for injury or insult to self-esteem. Madlanga J, writing for the Constitutional Court, found that the answer to this question: "[11] … lies in whether nowadays the act of adultery meets the element of wrongfulness… ." required by the *actio iniuriarum*. Tracing the origins of the claim, he writes that such are deeply rooted in patriarchy. He continues: "[14] … . As time went on, South African courts began questioning the discriminatory nature of the claim. Making contentions based on Christian principles of fidelity, which are applicable both to husbands and wives, Barlow advocated that the delictual claim be available to wives as well. Not long thereafter… the claim was (made) available to wives… . [15] Reverting to the issue at hand, must the claim continue to exist?" In answering this question, he turns to s39(2)[228] of the Constitution for his hermeneutical key. He writes:

> [16] Without doubt it is open to courts to develop the common law… . Today the power must be exercised in accordance with the provisions of section 39(2) of the Constitution which requires that common law be developed in a manner that promotes the spirit, purport and objects of the Bill of Rights. This entails developing the common law in accordance with extant public policy. In du Plessis[229] Kentridge AJ quoted the case of Salituro with approval: 'Judges can *and should* adapt the common law to reflect the changing social, moral

[227] In a footnote, Madlanga J writes: "This is the general remedy for the infringement of personality rights. Its main aim is to protect plaintiffs against wrongful and intentional infringement of these rights and allows for the recovery of damages if infringement is proved." At the time of the hearing of this matter South African courts recognized a claim by the non-adulterous spouse against the offending third party – see *Viviers v Kilian* 1927 AD 449. It was thus part of the common law at the time of the hearing of this matter.

[228] Sec. 39(2) "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[229] *Du Plessis and Others v De Klerk and Another* 1996(3) SA 850 (CC).

> and economic fabric of the country. *Judges should not be quick to perpetuate rules whose social foundation has long since disappeared*. Nonetheless there are significant constraints on the power of the (J)udiciary to change the law… . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform… . The (J)udiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society (emphasis added by Madlanga J)'.

At this nor at any other point in the judgment does Madlanga J make a reference to any objective evidence as regards what the germane "changing social, moral and economic fabric of the country" is. At best, in the following paragraph, he concedes that determining such is "fraught with difficulties". He, however, opines that is no longer the case. He writes:

> [17] Public policy is now infused with constitutional values and norms.[230] In Barkhuizen[231] this Court said: 'Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is deeply rooted in our Constitution and the values which underlie it. … What public policy is… must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights.'

On closer scrutiny, this solution by him to this question "fraught with difficulties" is merely question-begging. It is he who must decide on the content of the values underlying the Constitution. Therefore, in effect, it is he and his fellow justices of the Constitutional Court who must give content to these values. The subjective nature of this process is identical to what we have already seen in the analysis of the death penalty matter. At every point in the process, a subjective value choice by him is required. There is an attempt by him to deal with this conundrum by an appeal to reasonableness and objectivity. And so he writes:

> [19] In the context of the *actio iniuriarum* under which the present claim falls, the Appellate Division said: 'In determining whether or not the act complained of is wrongful the Court

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[230] Madlanga J in a footnote, refers to *Carmichele* (see footnote 2) where the Constitutional Court held that: "[36]…the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. We would add, too, that this duty upon Judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2)."

[231] *Barkhuizen v Napier* 2007(5) 323 (CC):paras. 28-29.

> applies the criterion of reasonableness - … . This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (i.e. the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful.' … [21] Any analysis of the *mores* of our society must include an assessment of constitutional norms as Barkhuizen detailed; public policy is now steeped in the Constitution and its value system… .

Describing the test for reasonableness as an objective test does not make it objective. Once again, as he seeks to give content to this objective test, we are back to a question-begging conundrum. He continues: "[22] I now turn to whether the act of adultery is wrong for purposes of the claim in issue here. If it is not, that is the end of the matter, as there can be no delictual liability without wrongfulness. Based on the above test, changing – and indeed softening - attitudes towards adultery bear relevance to public policy and, therefore, wrongfulness." In this reasoning, we see how he moves between reasonableness, prevailing norms of society and the values underlying the Constitution in his quest to deal with indeterminacy by means of an objective test. This is without providing an objective reference point to decide whether something is reasonable and how to decide on the content of the values underlying the Constitution. He also provides no objective evidence for what the prevailing norms of South African society or the softening attitude towards adultery are when it comes to marriage and adultery. The views expressed in this regard are either personal, anecdotal or dependent on what a few countries chosen by him have decided when it comes to the law and adultery. Under the heading, "Changing Attitudes", Madlanga J, citing the abrogation of adultery as a crime, various cases and academics concludes:

> [26]… . I am not mentioning this to suggest that the value of marriage as an institution has diminished. Quite the contrary is true. This Court has expressed itself favourably towards the institution (he cites a number of cases to this effect). [27] What I do say, however, is that our modern day idea of the sacrosanctity of marriage and its concomitant protection by the law are by no means what they were in, say, the times of King Henry VIII, who - because of Roman Catholic tenets, at a time when there was not much separation between church and state - could not even get a divorce and was forced to decree that thence forth the Church of England would be separated from the papal authority of the Roman Catholic Church. Needless to say, he was then free to follow his heart's desire, although he was excommunicated by the Pope for this conduct. We have come a long way from those strictures and gymnastics. That is because times are changing, and the law – though still recognizing the sanctity of marriage – has moved with the times both in its conception of the institution of marriage and the punitive extremes to which it will go to protect it.

Once again, he provides no objective evidence to support his sweeping observations in this extract. I will return to his reference to King Henry VIII. The same subjective and arbitrary approach can be seen in his reliance on foreign law to support his conclusions. He finds support for his view in decisions emanating from Western Europe, the United States of American and various non-African Commonwealth countries. He makes no reference to South American countries. Turning to Africa, he states that the position reveals a "chequered pattern." On closer analysis of those African countries he chooses, including Zimbabwe, Namibia, Botswana, Kenya and Cameroon, it is only the Seychelles which is supportive of his position. He attempts to ameliorate this by quoting from a 2013 Namibian case, which, whilst upholding a claim for adultery, finds that "It may well be that in this age, society views with less disapprobation than in the past the commission of adultery." However, that Namibian court continues, as quoted by Madlanga J: "[36]…. 'There are also degrees of reprehensibility in the delict of violating the marital relationship ranging from the isolated chance encounter to the sustained continuing invasion of the sanctity of the marital relationship. It must, however, be remembered that marriage remains the cornerstone and the basic structure of our society. The law recognizes this still today, and the court must apply the law.' "

Madlanga J concludes this analysis of foreign law: "[37] Taking the foreign law that I have tracked as a whole, it appears that the general trend is towards the abrogation of a civil claim (for adultery)…. The wave of change seems to be moving – certainly preponderantly – in one direction." (To strengthen his conclusion, he speculates that: "[38] …the retention of the claim by some countries is not necessarily an indication that these countries would not abolish it even if called upon to do so. In certain cases, it may well be that the issue of abolition has never arisen for judicial determination.") In his reliance on foreign law, he does not explain why he makes the choices he makes. Furthermore, his attempts to ameliorate the position in Namibia suggest that his choices of countries are informed by what would support his conclusions. This also emerges from his speculation as to why, in effect, the African countries he refers to have persisted in holding that adultery is legally wrongful. There is simply nothing in the judgment to support his speculation. Once again, it is of no consequence for this thesis whether his choices are good or bad choices. What is important is that he makes subjective choices. He

then deals with the constitutional significance of marriage, more particularly the cases of *Dawood* and *Fourie* and writes:[232]

> [41] Without derogating from the above pronouncements (extracts from Dawood and Fourie about the importance of marriage) by this Court, it is crucial to look closely at the context in which they were made. Dawood concerned the insufferable impact on marriage relationships of statutory provisions governing the immigration of, and grant of residence permits to, foreign spouses of South Africans. Of importance, there it was the law itself that rendered cohabitation and the meaningful enjoyment of the marriage relationship intolerable. Similarly, in Fourie it was the law that precluded same-sex couples from getting married. In both these cases, the removal of legal obstacles amounted to the protection of marriage. [42] Here, we face different considerations. The applicant wants the law to use punitive measures to come to his aid as the non-adulterous spouse. In this case, the marriage deteriorated without obstruction or intervention by the law. The distinction is not insignificant. It is one thing for the law to protect marriages by removing all legal obstacles that impede meaningful enjoyment of married life. It is quite another for spouses to expect the law to prop up their marriage which – for reasons that have nothing to do with the law – is weakening or disintegrating. …[44] … . The obligation pre-eminently rests on the spouses themselves to protect and maintain their marriage relationship. Subject to some cultural variations, love, trust and fidelity are the bedrock on which a marriage relationship is built. Whittle or take that away, the relationship may perish. It is the spouses that must avert anything negative befalling the foundation of their marriage.

Madlanga J then highlights various international charters, all of which identify "the right to marry and to found a family and talk of the family as the natural and fundamental unit of society." He continues:

> [48] In the light of these international instruments and the fact that adultery is deleterious to marriage relationships, an argument may be made that there continues to be sufficient reason for the law to protect marriages from adultery. [49] Does the African Charter assist the applicant? At first blush, it appears so.[233] But, for the same reasons I advanced when dealing with this Court's judgments on the protection of marriage, there cannot possibly be any cogent reason for this instrument to be read to require of states parties to strengthen a weakening marriage or breathe life into one that is disintegrating on its own. If the duty imposed by the African Charter is not to be rendered nugatory, we must give content to it. The Constitution itself undoubtedly forms the basis for the protection of marriage. This Court has reinforced this in the *Dawood*-type context. That serves to comply with the duty imposed by the African Charter.

232 *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); *Minister of Home Affairs and Another v Fourie and Another* 2006(1) SA 524 (CC) (hereafter "the marriage matter").

233 *African Charter on Human and People's Rights*, June 1981 – art. 18 reads "1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals. 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community."

He then turns to "Determination on wrongfulness":

> [51] On the yardstick for wrongfulness, the Afrikaans language - … - refers to the *algemene regsgevoel van die gemeenskap*, the rough translation of which would be 'the community's general sense of justice'. This is a concept that has also been referred to as 'the *boni mores* of society' or 'the legal convictions of the community'. All are about public policy. Does public policy – a notion that is now informed by our constitutional values – tell us that the delictual claim founded on adultery must still be part of our law? Put differently, in this context, is it reasonable to impose delictual liability? [52] The answer lies in the relevant constitutional norms: those in favour of the non-adulterous spouse and those in favour of the adulterous spouse and the third party. What also comes into the equation are the softening and current trends and attitudes towards adultery. The constitutional norms and changing attitudes are not necessarily separate notions: constitutional norms also inform present day attitudes towards adultery. [53] Of relevance in respect of the adulterous spouse and the third party are the rights to freedom and security of the person,[234] privacy,[235] and freedom of association.[236] These rights do not necessarily weigh less just because the two have committed adultery.

Turning to the right of a non-adulterous spouse, he writes: "[60] The right of a non-adulterous spouse that is implicated by the act of adultery is the right to dignity."[237] After a discussion of these various rights, he concludes:

> [62] Nevertheless, this potential infringement of dignity (of the non-adulterous party) must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person. These rights demand protection from state intervention in the intimate choices of, and relationships between, people. This must be viewed in light of current trends and attitudes towards adultery both nationally and internationally. These attitudes also demonstrate a repugnance towards state interference in the intimate personal affairs of individuals. [63] I am led to the conclusion that the act of adultery by a third party lacks wrongfulness for purposes of a delictual claim of *contumelia*…; it is not reasonable to attach delictual liability to it. That is what public policy dictates. At this day and age it just seems mistaken to assess marital fidelity in terms of money.

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[234] Sec. 12 of the Constitution provides: "(1) Everyone has the right to freedom and security of the person… . (2) Everyone has the right to bodily and psychological integrity, which includes the right-…(b) to security in and control over their body; … "

[235] Sec. 14 of the Constitution reads: "Everyone has the right to privacy."

[236] Sect. 18 of the Constitution provides: "Everyone has the right to freedom of association".

[237] Sect. 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

To analyse Madlanga J's reasoning, it would be helpful to highlight some extracts from one of the cases referred to by Madlanga J, namely the marriage matter. In this case, the *Marriage Act* precluded same-sex couples from getting married. The decision which was required was whether this was consistent with the Constitution. Sachs J, having affirmed various previous decisions affirming the importance of marriage as an institution and highlighting the various legal provisions in place to recognise and protect marriage, children, the vulnerable party in marriage and society itself, writes:

> [70] Marriage law thus goes well beyond its earlier purpose in the common law of legitimizing sexual relations and securing succession of legitimate heirs to family property. And it is much more than a mere piece of paper. As the SALRC[238] Paper comments, the rights and obligations associated with marriage are vast. Besides other important purposes served by marriage, as an institution it was (at the time the SALRC Paper was produced) the only source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights. [71] The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew… . [72]… . It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way. … [74] The law should not turn its back on any persons requiring legal support in times of family breakdown. It should certainly not do so on a discriminatory basis; … ."

As regards Sachs J in the marriage matter (see footnote 232) and the qualifying hermeneutical key when interpreting the Constitution: "[94]… . The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom." As is seen throughout this chapter, in other word formulations by the various justices, this is another hermeneutical key fraught with subjectivity. The reality is, for example, that what Sachs J finds promotes dignity in this matter, other African countries find the exact opposite when it comes to recognizing same-sex unions (see footnote 395). Once again, for the purposes of this thesis, the issue is not which moral position is correct. The issue is the subjective nature of a concept such as dignity when it intersects with an issue such as whether or not same-sex unions should be sanctioned by the law.

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[238] Discussion Paper 104 published by the South African Law Reform Commission (SALRC) (2003).

On further analysis of the adultery matter, the following:

At the outset, it is striking that in the marriage matter, the centrality of marriage as a public institution is highlighted. To this end, the court is prepared to be an activist in its approach and, in the process goes beyond simply coming to the assistance of the specific parties involved. Part of its aim is to promote and protect the institution of marriage as a public institution. In the adultery matter, the court focuses on the individuals in the marriage, not the public institution of marriage. Thus, Madlanga J reasons that parties to the marriage concerned must not expect the law to prop up their marriage. This contrasts with Sachs J's holding, alluded to earlier, that the law should "not turn its back on any person requiring legal support in times of family breakdown." Central to this choice by Madlanga J is his view that adultery is no longer seen as it used to be by the public. He writes: "[51] … . Put differently, in this context, is it reasonable to impose…liability (for adultery)? [52] The answer lies in the relevant constitutional norms: those in favour of the non-adulterous spouse and those in favour of the adulterous spouse and the third party. What also comes into the equation are the softening and current trends towards adultery."

As we have already seen, Madlanga J's reasoning makes sweeping generalized statements concerning the prevailing attitude to adultery without supplying objective evidence to back them. Here, his selectiveness, both as to source and as to interpretation of the sources, to support his conclusions is striking. By way of illustration, is his superficial assessment of what was at stake with the stand off between the Pope and King Henry VIII. Whilst the King no doubt had a personal agenda, the underlying issue involved, *inter alia*, that marriage as a sacrament had to be defended against attacks on it, including by King Henry's adultery. The present Roman Catholic Church and, albeit in a modified form, the Anglican Church, retain marriage as a sacrament.[239] One of the Roman Catholic Church's bases for opposing adultery, in addition to it being a direct assault on marriage, is that it constitutes an injustice towards the innocent

[239] Wikipedia Contributors, *sacrament*, https://en.wikipedia.org/wiki/Sacrament (accessed on 9 June 2023).

party,[240] which also would be consistent with the underlying values of the Constitution referred to by Madlanga J.

Furthermore, as already alluded to, the reasoning that public policy is no longer "fraught with difficulties" because it is now rooted in the values underlying the Constitution is question-begging. It is Madlanga J himself who is giving content to these values without any objective evidential support. Thus, for example, all the African countries he mentions, except Seychelles, undermine his conclusion about the general trend of public opinion. This notwithstanding, he indulges in speculation to ameliorate the negative impact on his conclusion of what the general trend is in Africa.

When compared to the Constitutional Court's approach to public opinion in the death penalty matter, one is confronted by another inconsistency in the reasoning of the Constitutional Court. In the death penalty matter, the Court was unambiguous. Its task was to declare what the Constitution stated, irrespective of public opinion. In this matter, in arriving at its conclusion, the Court, *inter alia*, relies on the reasoning that judges "can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared." It is of note that in the marriage matter, a number of the parties involved argued that the prevailing view of marriage is a permanent commitment between one man and one woman. In that matter, as in the death penalty matter, this public opinion notwithstanding, the Court chose not to be influenced by public opinion or *mores*.

Madlanga J and his fellow justices will argue that the qualification to having regard to public opinion or *mores* is that the court can only have regard to changing *mores* or public opinion if such is consistent with the values underpinning the Constitution. Once again, this is question-begging and requires a moral choice by the court, particularly where the Constitution is silent on the issue, as is the case with the death penalty, abortion and, indeed, adultery.

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[240] Catholic Online, *adultery*, https://www.catholic.org/encyclopedia/view.php?id=247 (accessed on 9 June 2023).

This drives one once again to the conclusion that underpinning decisions by the Constitutional Court is policy, informed *inter alia*, by the worldviews of the judges themselves. Thus, for example, where the policy is actively to promote and defend a certain view of marriage, as in the marriage matter, the court elevates the public nature of the institution of marriage. Marriage is seen as far more than merely a commitment between the two people involved. It is described as a public institution which must be nurtured and protected. However, when the policy is to move away from "Christian principles of fidelity" to "(move) with the times" to a liberal Western view on adultery (as seen in the foreign case law cited by Madlanga J), the focus of the court moves from protecting and promoting the institution itself to its duty to the individuals concerned in the particular broken marriage. Once again, as in the death penalty matter, in doing this, the court chooses a European lens over an African lens. And once again the issue before us is not which lens is correct, but that there is more than one lens to choose from and that the judge makes a choice in the absence of a dispassionate objective reference point to guide her decision.

3.2.3 Conclusions

Unlike other courts in South Africa, the Constitutional Court and its judgments are not subject to any other court.[241] Thus, it is empowered even to make a ruling with profound moral implications without giving reasons for its ruling (as we will see when dealing with the unborn child matter later in this chapter). One of the effects of this is that justices of that court can arrive at conclusions and/or make rulings in the knowledge that such conclusions and/or rulings, in law, cannot be challenged. A consequence of this, no doubt an unintended one, is that justices are able to make assumptions, express personal views and promote a certain view of what South African society must look like, involving deeply held moral values, without an evidential foundation being laid for such, safe in the knowledge that such, in law, cannot be challenged. Indeed, as already stated, they are able even to make profound moral choices for

[241] Sec. 2 read with sec. 167(3) (a) of the Constitution. Sec. 2 reads: Supremacy of Constitution – This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." Sec. 167(3)(a) reads: "The Constitutional Court – is the highest court in all constitutional matters;"

South African society, as in the “unborn child matter”, without giving reasons, also safe in the said knowledge.

This is helpful for the analytical method used in this chapter, as the justices are more likely to drop their guard when they know their judgments and reasoning, in law, cannot be challenged. And it is in those moments when one is able to extrapolate express or unexpressed assumptions, the promotion of a personal worldview and so forth from the reasoning of the justices. As du Plessis writes:[242] “… . Covert and subconsciously held (theoretical) assumptions can, precisely because of an interpreter’s uncritical unawareness of them, have a more decisive impact on interpretive outcome than overt and consciously reasoned assumptions.”

In the extracts dealt with in this part of the chapter, we have been alerted to many examples of this happening. I highlight some. To give meaning and content to the provisions of the Interim Constitution chosen by Chaskalson P, he relies, *inter alia*, on a multiplicity of court judgments and human rights’ documents. None of these refer to God or to source documents associated with God, such as the Torah, the Christian Scriptures, or the Koran. All these source documents grapple with giving content and meaning to concepts such as dignity, equality, freedom, cruelty and inhumanity. This notwithstanding, and despite the opening line of the Interim Constitution, “In humble submission to Almighty God”, he restricts himself only to secular authoritative sources and fails to give reasons for this choice. At best, this is arbitrary. At worst it discloses a personal choice by him linked to a secular worldview. What is clear is the subjective nature of his choice or the absence of an objective reference point used to make his choice.

Another example analysed was Chaskalson P’s choice of the phrase, “As societies become more enlightened”, when describing the movement towards the abolition of the death sentence in different parts of the world. Not only was no objective evidential basis laid for this choice, but he also did not attempt to address how he could use this phrase, notwithstanding that the three most populous countries in the world, and African countries such as Botswana and

[242] Du Plessis 2002:91.

Tanzania, have the death penalty. In this phrase, he revealed his own personal assumption worldview that the abolition of the death penalty would make South Africa more enlightened. This immediately calls into question whether he can be objective when deciding on whether or not the Constitution, which, in his words, "provides a bridge between… (an unjust) past and a future founded on the recognition of human rights" (see [7] of the death penalty matter), permits according to him an "unenlightened" punishment such as the death sentence.

A further example is the inconsistency and selectiveness of the justices when it comes to their choice of foreign law. Particularly striking in this regard is the bias in favour of European-based jurisprudence, as opposed to African and other non-European-based jurisprudence. Examples of this are the manner in which Chaskalson P and his fellow justices in the death penalty matter and Madlanga J in the adultery matter embrace European jurisprudence on the issues of the death penalty and adultery. In the process, without providing any objective basis for it, they rationalise away any possible impact decisions from countries like Tanzania, Botswana, Namibia, or India might have on South African jurisprudence. Particularly striking in this regard was the way the justices rationalised away the reasoning of the Tanzanian Court, which decided that the death penalty served the purpose of protecting everyone's right to life. All the justices in the death penalty matter came to a totally different conclusion to that of the Tanzanian Court on this issue and chose not to deal with this glaring and fundamental difference. The only reasonable explanation for these different conclusions is that the South African justices had a different vision of humanity and society in this regard to that of the Tanzanian judges, and accordingly made their subjective choice. Another example in this regard was that whereas Chaskalson P and his fellow justices reasoned that the imposition of the death penalty was always arbitrary, the Tanzanian and Indian Courts argued that where a discretion is exercised judicially by persons of experience and standing a decision by them is not arbitrary.

Considering the death penalty matter, it goes even further than this divide between Western and African/Indian jurisprudence. We have seen that justices of the Constitutional Court choose decisions from the United States of America which support their conclusions, whilst ignoring decisions in the same country which do not. Alternatively, they are selective in their

interpretation and application of certain Western legal structures, such as the *European Convention on Human Rights,* where such interpretations are needed to support the abolition of the death penalty. Simply saying that they chose one option over the other because it was "more enlightened", part of the "emerging consensus of values in the civilised international community", or that "evolving standards of decency" required the abolition of the death penalty, begs a prior question. This is particularly given the presence of the death penalty in the countries already mentioned and in the absence of dispassionate objective evidence to support this choice.

(We also will see in Part C of this chapter in the Constitutional Court's treatment of German jurisprudence when it comes to the unborn child; in effect, the Constitutional Court's inconsistency and selectiveness to justify its decision that in terms of the Constitution unborn children are not human life worthy of dignity.)

Another striking illustration of personal worldviews being used as a lens to give content to the Constitution is the assumption by Didcott J, without any supporting objective evidence in this regard, that a liberal lens must be used when interpreting the Constitution. This is supported by the foreign case law he chooses to support his conclusions. In a similar vein, we saw O'Regan J's arbitrary choice of using the individual as the lens through which to interpret the Constitution. (As we will see later in this chapter, when the unborn child matter is analysed, using either the individual or the community she is part of as a lens to interpret the Constitution can lead to very different results.)

It is important to remember in this respect that the Constitution is silent about which lens should be used when giving content to concepts such as dignity, freedom and equality. It is, therefore, for example, of no assistance when Sachs J, in the marriage matter, states that the test is whether the achievement of human dignity, equality and freedom is being retarded or promoted without him giving an objective source/reference point to measure whether such is being achieved or not. (We will see in Part B hereafter Sachs J conceding that there is no absolute standard by which to decide.)

A further example is the use of the concept "civilised' in different forms by various of the justices in the death penalty matter. At no stage do any of the justices provide any objective and/or independent evidence to explain what they mean by "civilised". In effect, it is assumed by the justices that the reader of their judgments will know what they mean by "civilised" and share their view of what "civilised" means. The fallacy of this assumption, in effect, is highlighted by Chaskalson P when, for the purposes of his judgment, supported by all the other justices, he accepts that the majority of South Africans support the retention of the death penalty.

Their problem in this respect is compounded when they alert the reader to countries such as Tanzania, Botswana, India and the United States of America, all of which still have the death penalty. If they rely on the argument that abolishing the death penalty will make South Africa more "civilised", at the very least, they would then need in an objective and dispassionate manner to have to deal with their reasoning of why, in effect, they say the majority of South Africans, and the people in these other countries, are not "civilised".

Another example is, in the absence of objective evidence, the sweeping statement by Madlanga J in the adultery matter concerning the prevailing attitude to adultery. This statement revealed a choice made by him as to what the prevailing attitude is; alternatively was an unsubstantiated assumption which had a direct impact on his final ruling that adultery in law was not "wrongful".

Furthermore, his assertion that the trend of public opinion is against the traditional view of adultery ends up with him having to use a Eurocentric lens to defend his conclusion as to what the values underlying the Constitution are when it comes to adultery. The only African country he mentions that supports his conclusion is Seychelles. All the other African countries he mentions do not support his conclusion. Once again, it must be emphasised that the Constitution is silent on adultery. The Constitutional Court justices had to make a choice as to how adultery should be viewed. The analysis in the first part of this chapter clearly demonstrates the subjective nature of the choice eventually made by Madlanga J and his fellow justices in the adultery matter.

A recurring feature in the reasoning of the justices in the matters analysed is what has been described by me as a "question-begging approach". Thus, for example, when justifying a conclusion about giving content to the word dignity, the justice rationalises it by saying that that is what dignity requires when the very question facing her is what dignity requires. She thus reaches a conclusion about the content of dignity without providing an objective and non-arbitrary reference point for her conclusion. And as we saw, saying something is objective does not make it objective.

Reflecting on what the deconstruction of the reasoning process in the death penalty and adultery matters has revealed, Kennedy's arguments[243] (dealt with in Chapter 2) resonate with what has emerged.

Firstly, in constitutional law, which is values-driven, giving content to concepts such as dignity, freedom and equality "cannot be reduced to disagreement about how to apply some neutral calculus that will 'maximise the total satisfaction of valid human wants'(quoting Hart). The opposed rhetorical modes lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future."

Secondly, as we saw in Chapter 2, Kennedy argues that there comes a "moment of truth" for a judge when he needs to make a choice between two conflicting possible decisions, where reason is not the determining factor. Central to such a decision is the judge's vision of humanity and society and what the judge believes about how society should operate in the future.

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243 Kennedy 1976:1685.

Thirdly, writing of this moment and what happens within a judge, Kennedy writes *inter alia*, that "it is hard to imagine anything more elusive of analysis." What is clear is the subjective nature of the process leading up to and after "this moment of truth".

As we also saw in Chapter 2, Braden argues[244] that judges, overtly or covertly, faced with the reality of their power and subjectivity when interpreting and applying the Constitution, and the danger flowing from this, "create a rule which is sufficiently objective to circumscribe (themselves and their) successors in (their) exercise of political power." This argument by Braden is consistent with what we have seen in the reasoning of the various justices of the Constitutional Court in the death penalty and adultery matters, particularly their attempts to clothe their choices in objectivity. (This will also be apparent in Parts B and C of this chapter.)

The quest to address indeterminacy seems to blind judges to an ever-present prior question, clearly stated by Altman:[245] "While the realists stress competing rules, CLSers stress competing, and indeed irreconcilable, principles and ideals. Yet, the basic theme is the same: the judge must make a choice which is not dictated by law… *Thus, from the CLS perspective, the jurisprudential invocation of principles only serves to push back to another stage the point at which legal indeterminacy enters and judicial choice takes place* (my emphasis)."

I now will analyse two matters covering largely the same subject matter, the use of corporal judgment, separated by some 16 years, to further illustrate these arguments by Kennedy, Braden and Altman, and indeed the overarching hypothesis of this thesis.

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244 Braden 1948:571-573.
245 Altman 1986:216-217.

3.3. PART B – CORPORAL PUNISHMENT MATTERS

3.3.1. The school punishment matter: *Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)*

In this matter, Sachs J writes: "[1] The central question in this matter is: when Parliament enacted a law to prohibit corporal punishment in schools, did it violate the rights of parents of children in independent schools who, in line with their religious convictions, had consented to its use?" Referring to the multiplicity of intersecting constitutional values and interests involved in the matter, he writes:

> [15] … .The overlap and tension between the different clusters of rights reflect themselves in contradictory assessments of how the central constitutional value of dignity is implicated. On the one hand, the dignity of the parents may be negatively affected when the State tells them how to bring up and discipline their children and limits the manner in which they may express their religious beliefs. The child who has grown up in the particular faith may regard the punishment, although hurtful, as designed to strengthen his character. On the other hand, the child is being subjected to what an outsider might regard as the indignity of suffering a painful and humiliating hiding deliberately inflicted on him in an institutional setting. Indeed, it would be unusual if the child did not have ambivalent emotions. (Sachs J furnishes no evidence to support this assumption by him.) It is in this complex factual and psychological setting that the matter must be decided. [16] The (parents')… basic argument was that (their) rights of religious freedom as guaranteed by ss 15 and 31[246] had been infringed, and that those rights should be viewed cumulatively… . [17] The (Minister) contended,.. , that the governing provision was s 31 and not s15. The corporal punishment was delivered in the context of community activity in a school and accordingly it could only attract constitutional protection if in terms of s 31(2) it was not inconsistent with any other provision of the Bill of Rights… .

For purposes of his judgment, Sachs J accepts that parents' religious rights under ss 15 and 31(1) are both in issue. Furthermore, he assumes, without deciding, that corporal punishment as practised by the relevant school is not "inconsistent with any provision of the Bill of Rights as contemplated by s 31(2)." The issue before him thus was to decide whether, under s36,[247]

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[246] Sec. 15(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion. Sec. 31(1) Persons belonging to a… religious… community may not be denied the right, with other members of that community – (a) to … practice their religion…; and (b) to form, join and maintain … religious … associations… (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

[247] See footnote 179.

the said law outlawing corporal punishment was "reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality." Turning to the hermeneutical lens he must use to answer the question before him, he writes:

> [30] Our Bill of Rights, through its limitations clause (s 36), expressly contemplates the use of a nuanced and context-sensitive form of balancing… . [31] … . 'In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list… . Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. *There can accordingly be no absolute standard for determining reasonableness* (my emphasis).'

He continues:

> [33] Before setting out to apply the above approach to the facts of this case, I feel it necessary to comment generally on difficulties of proportionality analysis in the area of religious rights. The most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders. *Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly according to their reasonableness* (my emphasis)… However religion is not always merely a matter of private individual conscience or communal sectarian practice… many major religions regard it as part of their spiritual vocation to be active in the broader society… . They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution… . [34] The result is that religious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way. [35] … . The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding.

In his reasoning, he quotes with approval the Canadian case of *P v S*:[248]

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[248] 108 DLR (4th) 287:317.

> [41]… .'(I)n ruling on a child's best interests, a court is not putting religion on trial nor its exercise by a parent for himself or herself, but is merely examining the way in which the exercise of a given religion by a parent throughout his or her right to access affects the child's best interests. I am of the view, finally, that there would be no infringement of the freedom of religion provided for in s 2(a) were the Charter to apply to such orders when they are made in the child's best interests. As the Court has reiterated many times, freedom of religion, like any freedom, is not absolute. It is inherently limited by the rights and freedoms of others. Whereas parents are free to choose and practice the religion of their choice, such activities can and must be restricted when they are against the child's best interests, without thereby infringing the parents' freedom of religion.'

Later, Sachs J highlights the Minister's argument that the state has an interest in protecting pupils from degradation and indignity. He sums up the parents' response as follows: "[43]… . The appellant replied that for believers, including the children involved, the indignity and degradation lay not in the punishment, but in the defiance of the scriptures represented by leaving the misdeeds unpunished; subjectively, for those who shared the religious outlook of the community, no indignity at all was involved. It argued further that internationally, there was widespread judicial support for the view that physical punishment only became degrading when it passed a certain degree of severity.[249]" After a reasoning process, he finds that the said law constitutes a reasonable and justifiable limitation of the parents' rights in terms of sections 15 and 31 of the Constitution. He concludes: "[51] … . The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience… . What they are prevented from doing is to authorize teachers, acting in their name and on school premises, to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos."

On the surface, Sachs J attempts to balance out the "irreducible conflicts within plurality and dissenting positions"[250] in an even-handed, dispassionate and reasoned manner. On closer analysis, however, he does not achieve the aim of "the autonomy of the law inasmuch as it

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249 Sachs J cites the European Court of Human Rights and a number of cases which have stopped short of finding that all cases of physical discipline constitute a violation of the right to freedom from inhuman or degrading punishment. These cases have held that, amongst other factors, the severity and effects of the punishment, as well as age of the child, are relevant. On the other hand Sachs J highlights that there are European countries which have prohibited corporal punishment entirely.

250 Tushnet 1984:627.

might be untouched by contesting worldviews". Highlighting that the issue before him is whether the outlawing of corporal punishment is "reasonable and justifiable, in an open and democratic society based on human dignity, freedom and equality", he sets out the hermeneutical lens he must use to answer this question. Every point of this lens involves a subjective choice by him. He himself declares that "There can accordingly be no absolute standard for determining reasonableness". He compounds this inevitable subjectivity when he goes on "to comment on difficulties of proportionality analysis in the area of religious rights." In his comment, he juxtaposes the competing rights, writing that they belong "to completely different conceptual and existential orders. Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly according to their reasonableness." In these words, he declares his own view that reason has no significant role in religious conviction, whereas it is central to secular humanism. Leaving aside the fact that this view is in stark contrast to the views of many men and women of "religious conviction", going back to St Paul,[251] having decided that the test he must use includes reasonableness, he then asserts, without furnishing any reasons or evidence for this assertion, that the foundation of one of the conflicting interests which he must balance, primarily does not involve reason whereas the other interest involved is driven by whether or not something is reasonable.

Therefore, at the outset, before he even begins to balance the conflicting interests, he illustrates his own bias by, in effect, opining that underlying the teaching in Christian Scriptures, in this case, *apropos* corporal punishment, is faith, not reason.[252] Furthermore, as Chaskalson P did in the death penalty matter, he only has regard to secular source documents when arriving at his decision, even though the source documents of Jews, Christians and Muslims have teachings on the issue at hand. What is important to note here is not the choices he makes but the fact

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251 Examples from St Paul include the opening chapters of his letter to the Romans and in 1 Corinthians 15 where he sets out the rational evidence for the resurrection of Jesus concluding that if it is not true then Christ followers are most to be pitied. A classic example of reason leading a man to accepting Christian orthodoxy is recorded in GK Chesterton's *Orthodoxy* (first published in 1908).

252 A recent example of a person through the use of reason extracting what he considers to be moral and practical teachings about life in a modern world from the Judeo-Christian Scriptures, including the raising and disciplining of children, is clinical neuro psychologist, Jordan Peterson. His lectures on the Old Testament are freely available on the internet. For purposes of this thesis, it is irrelevant whether one agrees with his conclusions. What is important is his use of reason when interpreting and applying the said Scriptures.

that he makes a choice without giving objective reasons or independent evidence for such a choice. Alternatively, his choice is premised on his own understanding that religious conviction is based primarily on faith.

He further reveals his own understanding of Christ's teaching about rendering unto Caesar what is Caesar's, without engaging theological understandings of this teaching, very different to his understanding, which will have a direct impact on the issue he is called on to decide. His observations/conclusions in paragraphs [34], [35] and [51], highlighted above, fail to engage with this complexity.[253] Once again, whether he is correct or not in his understanding and conclusion is not relevant – what is important is that he has chosen a specific understanding of Christ's teaching and rationalized his conclusion based on that understanding. In other words, he has not merely provided an objective framework for competing worldviews to be balanced out. He has provided a competing worldview of his own.

Sachs J further attempts to justify his conclusion, which confirms his and the law's lack of autonomy in this matter. In this regard, he holds that people can be allowed to practice their religion, provided it is in the best interests of the child and that "certain basic norms and standards" prevail. He uses "reasonableness" to decide these questions, without setting out an objective reference point to determine what is reasonable, what is in the child's best interest or whether corporal punishment in all cases undermines the dignity of a child. Having from the outset stated that the one party's foundation primarily does not involve reason, whereas the other one does, undermines any attempt at being dispassionate and neutral concerning whose approach is reasonable.

With this subjective conceptual approach to the Constitution, philosophically, it is not possible for a judge in a dispassionate manner to discern purported objective values already contained in the Constitution.

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[253] An example of the complexity of this teaching of Jesus is found in "Bonhoeffer and the Sovereign State", Elshtain 1996:27-30 or extracts from the Confessing Church's Barmen Declaration (8.15, 8.18 and 8.22-5 of the declaration) at 225 of *Bonhoeffer* (Metaxas 2010).

3.3.2 The parental punishment matter: *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34

We saw in the school punishment matter the Constitutional Court writing that: "(51)… . The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience… . What they are prevented from doing is to authorize teachers, acting in their name and on school premises, to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children." In the parental punishment matter, some 16 years later, in effect this precisely is what the issue was before the court. Should parents who follow their conscience when it comes to using "reasonable and moderate" chastisement, which involves corporal punishment, in raising their children in their homes, be criminalised? All 11 justices of the Constitutional Court were unanimous that the Constitution required that such parents face criminal sanctions.

At the outset, in this judgment at paragraph [31], Chief Justice (CJ) Mogoeng Mogoeng makes his choice as to which provisions in the Constitution he will use to decide on "the constitutionality of moderate and reasonable chastisement." He justifies this choice by stating that: "[30] … there is merit in the approach that recognises that prolixity must be avoided where that can be achieved without watering down the quality of reasoning or the soundness of judgment… ." The primary chosen provision is the right to be free from all forms of violence from either public or private sources in section 12 (1) (c). The right to dignity in section 10 also receives some attention.[254] Whether or not this was a correct choice is not pertinent to this thesis. What is important is that upfront, he makes a choice about which provisions are pivotal and then develops his judgment using these choices of his as the point of departure. There is no objective reference point for his choice.

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[254] Sec. 12 (1) reads: "… . (1) Everyone has the right to freedom and security of the person, which includes the right - (a) not to be deprived of freedom arbitrarily or without just cause; (b) not to be detained without trial; (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel , inhuman or degrading way." Sec. 10 reads: "… . Everyone has inherent dignity and the right to have their dignity respected and protected."

In the school punishment matter, we saw that for purposes of his judgment, Sachs J accepts that parents' religious rights under sections 15 and 31(1) are both at issue. Furthermore, he assumes, without deciding, that corporal punishment as practised by the relevant school is not "inconsistent with any provision of the Bill of Rights as contemplated by section 31(2)." As we saw, the issue before Sachs J was to decide whether, under section 36, the law outlawing corporal punishment in all schools, and thus a limitation of parents' rights, was "reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality." What the present judgment does, is decide that Sachs J's assumption was incorrect as regards corporal punishment, more particularly, that it conflicts with sections 12 (1) (c) and 10 of the Constitution.

Back to the parental punishment matter. Having made this choice of provisions, the Chief Justice then makes another choice: "[39] Turning to the language of section 12, the operative words are 'free from all forms of violence'. The first question is whether we ascribe a highly technical meaning to the word 'violence' or give it its ordinary grammatical meaning … ." The very formulation of the question clearly points to his answer. A neutral formulation would not have included the adjective, "highly" before "technical". The use of "highly" immediately discloses that the question in effect is a rhetorical question, not a question to be considered in a dispassionate and objective manner. He also does not explain in any meaningful way why in this case, it is better to look to the "ordinary grammatical meaning" rather than a "technical" meaning. Thus, for example, as we saw in the death penalty matter, reflecting on what meaning to give to "cruel and inhuman punishment" in the Constitution, Chaskalson P writes: "[26] … . The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of s 11 (2) of our Constitution." One can only assume that this approach of Chaskalson P would be seen as "highly technical" by Mogoeng Mogoeng CJ and his fellow justices in the present judgment.

It is irrelevant for the purposes of this analysis as to who was "correct" in their approach. The important thing is that the two Chief Justices made fundamentally different choices on the same point and that these choices immediately set the trajectory of their reasoning and conclusion.

Thus, as it also did in the case of the definition of equality in section 9, where the Constitutional Court did not merely give equality its ordinary grammatical meaning (for example, *Minister of Finance and Another vs Van Heerden Case* 2004 (6) SA 121 (CC) – hereafter "the equality matter") if the Chief Justice had started off with the point of departure in the death penalty and equality matters, he legitimately could have arrived at a different conclusion.

Another choice by the Chief Justice, which cemented this trajectory, is his choice of the dictionary meaning of the word violence, viz., "behaviour involving physical force intended to hurt, damage or kill someone or something." For this, he relies on the 6th edition of the *Oxford English Dictionary*. He does not say why he chose this definition. What is clear is that having opted to start with the ordinary grammatical meaning of violence, his choice of definition made his conclusion unavoidable. As an illustration, another definition he could have chosen is from the *Oxford English Dictionary, The Definitive Record of the English Language*. In the second edition (1989),[255] violence is defined as: "1. a. The exercise of physical force so as to inflict injury on, or cause damage to, persons or property; action or conduct characterized by this". Had he chosen this definition, the said trajectory would have taken his reasoning to a different conclusion. "Moderate and reasonable chastisement" by definition would not "inflict injury on… (a child)." If it did, then it would not be "moderate and reasonable" as no society would countenance legitimising "injuring" a child.

Whereas in the definition chosen by him, the intention required ("to hurt") is, by definition, precisely why corporal punishment is used by a parent, as pointed out by the Chief Justice in his reasoning. He thus chooses a self-fulfilling definition, that is self-fulfilling for his conclusion. Other definitions include: "1a**:** the use of physical force so as to injure, abuse, damage, or destroy…"[256] This definition also could have taken the Chief Justice's reasoning in a different direction, as, once again, there is no reference to an intention to hurt but rather to

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[255] Oxford English Dictionary, *violence*, https://www.oed.com/search/dictionary/?scope=Entries&q=violence (accessed 9 June 2023).

[256] Merriam-Webster Dictionary, *violence,* https://www.merriam-webster.com/dictionary/violence (accessed 9 June 2023).

injure. Although the definition of violence in *Collins English Dictionary*[257] seems to support the choice of the Chief Justice, on closer scrutiny, it also presents a problem for his choice: "1. Violence is behaviour which is intended to hurt, injure or kill people." However, the synonyms given are revealing: "brutality, bloodshed, savagery, fighting." These synonyms indicate what is understood by "hurt" in its definition and are far removed from the intention in "moderate and reasonable chastisement". What is striking in this regard is that the Chief Justice acknowledges that:

> [32] Freedom of Religion (the applicant) *rightly* (my emphasis) seeks to distinguish reasonable and moderate chastisement from the kind of assault and abuse of children that every campaign or challenge to end this common law defence is actually intended to curb. … [33] … . They only seek to protect and preserve parental entitlement to lovingly discipline their children just or almost as positively as alternative methods reportedly do. [34] … . It bears repetition that one of Freedom of Religion's major concerns is the apparent conflation of reasonable and moderate chastisement with blatant child abuse and brutal assault by holding them out as being inherently fundamentally the same.

Notwithstanding this acknowledgement and describing this desired distinction as "right(ly)", he then chooses a definition of violence which makes such a distinction impossible. Had he chosen a definition where the intention is to injure, as opposed to hurt, the distinction sought by the applicant could have been sustained. Furthermore, if he had adopted the hermeneutical approach in the death penalty and equality judgments, freed from the shackles of his decision to give violence an ordinary grammatical meaning of his choice, he could have looked at section 12 (1) (c) in the context of the rest of that section.

One reading of that section would fully support the distinction sought by the applicant. The other sub-clauses refer to the arbitrary deprivation of freedom, detention without trial, torture and cruel, inhuman or degrading punishment - very far removed from the aim of parents to "lovingly discipline their children". In fact, for a moment, the Chief justice seems to grasp this distinction when he writes concerning section 12 (1) (c): "[42]… . We have a painful and shameful history of widespread and institutionalised violence." This clearly is distinguishable

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[257] Collins Online Dictionary, *violence*, https://www.collinsdictionary.com/dictionary/english/abhor-violence (accessed 9 June 2023).

from parents lovingly disciplining their children. He, however, in effect immediately thereafter conflates "reasonable and moderate chastisement with blatant child abuse and brutal assault." when he states: "And section 12 exists to help reduce and ultimately eradicate that widespread challenge."

The context of the whole of section 12 is central to interpreting and applying "violence" in section 12 (1) (c) if regard is to be had to the hermeneutical approach in the death penalty and equality judgments. Primarily, using the ordinary grammatical meaning of the word violence, chosen by him as the launching pad for his reasoning, involves a choice by him not to have regard to section 12 as a whole. This approach is different to the hermeneutical approach to the death penalty and equality matters. This approach arguably can be described as a "highly technical" one, in effect sacrificing substance for form. As highlighted repeatedly, the important consideration here is not whether he made a correct choice but that he made a choice in the context of being able to make another choice, without providing an objective foundation for his particular choice. A further illustration of this subjectivity is the Chief Justice's decision as to where the court's decision must be located. In this regard, he opines: "[37] A proper determination of the constitutionality of chastisement requires that it be located within a criminal law setting, which is its natural habitat." Having chosen to resolve the issue largely on section 12 (1) (c) of the Constitution, objectivity requires that at least the Chief Justice should provide an objective foundation for why he decides to locate his final decision within a criminal law setting rather than within section 12 as a whole.

Resorting to a criminal law definition of assault, which is helpful for his reasoning, begs the very question the Constitutional Court was asked to decide, namely, whether "reasonable and moderate chastisement" amounts to "unlawful …force", as required by the criminal act of assault. Implicit in this choice of the Chief Justice is that the criminal law informs section 12 of the Constitution, not the other way around. Once again, it is irrelevant which was the "correct choice". What is important is that a subjective choice was made, which had a direct impact on the outcome.

Turning to the court's reliance on the dignity provision in the Constitution. What is highlighted in paragraphs [45] and [46] in the present judgment is trite and question-begging – when it comes to children a society must always strive to act in their best interests, central to which is their dignity and security. The applicant obviously argued that the use of moderate and reasonable chastisement within the context of a loving family is consistent with the picture painted in these paragraphs, for example, the need to treat children with dignity and to provide them with "a secure and nurturing environment free from violence, fear, want and avoidable trauma." The Chief Justice then opines: "[47] There is a sense of shame, a sense that something has been subtracted from one's human whole, and a feeling of being less dignified than before, that comes with the administration of chastisement to whatever degree."

Obviously, I cannot deny that this might have been the Chief Justice's own personal experience of corporal punishment. However, using another anecdotal example, it was not my experience, neither at home nor at school, where I received such punishment in abundance! And that is the point – the Chief Justice cannot make such a finding as an objective fact -– if it was objective that would mean my experience of corporal punishment must be the same as his. It is thus unsustainable for him to conclude as an objective fact without any objective evidential foundation that: "[48] That said, moderate and reasonable chastisement does impair the dignity of a child and thus limits her section 10 constitutional right." Stating it does not make it an objective fact.

To further illustrate the subjective nature of this choice, the already quoted extracts by Sachs J from the earlier school punishment matter on corporal punishment in private schools are instructive: "[15] … . The child who has grown up in the particular faith may regard the punishment, although hurtful, as designed to strengthen his character. On the other hand, the child is being subjected to what an outsider might regard as the indignity of suffering a painful and humiliating hiding deliberately inflicted on him in an institutional setting… ." Summing up the parents' view, Sachs J in the school punishment matter continues later:

> [43] … the appellant replied that for believers, including the children involved, the indignity and degradation lay not in the punishment, but in the defiance of the scriptures represented by leaving the misdeeds unpunished; subjectively, for those who shared the religious outlook of the community, no indignity at all was involved. It argued further that internationally,

> there was widespread judicial support for the view that physical punishment only became degrading when it passed a certain degree of severity.

Notwithstanding this engagement by Sachs J concerning whether or not corporal punishment infringes the dignity of children, in the present judgment, Mogoeng Mogoeng CJ in one line, simply asserts it as a fact without any reasons/evidence for this assertion. One would have thought that, at the very least, he would have engaged with the reasoning of Sachs J in this regard and dealt with why there is widespread international support for the submissions of the applicant. This is more so as obviously what was important for Sachs J in his judgment was that: "[51] …the parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience… . What they are prevented from doing is to authorise teachers, acting in their name and school premises, to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children."

This is precisely what the Chief Justice and his fellow justices are doing in this judgment: forcing parents to make a choice between obeying a law of the land or following their conscience. The question here is not whether they are correct in doing this, but the absence of objective evidence for their choice that, as a fact, "moderate and reasonable chastisement" in the context envisaged by parents, and indeed by the Judeo-Christian Scriptures *inter alia*, quoted by the Chief Justice, does impair the dignity of a child.

If the Chief Justice had made different choices as set out above, then the task of the Constitutional Court would have been to set out guidelines to help parents distinguish between "moderate and reasonable chastisement", which would not impair the dignity of the child, and violence as envisaged by section 12 (1) (c) of the Bill of Rights. The choice made by the Chief Justice is far less burdensome for the court. Given its choices, it is quite correct that "all forms" means exactly that – all violence as defined by his chosen all-embracing definition of the ordinary grammatical meaning of violence. And violence, as defined by the Chief Justice, will always impair the dignity of the child at the receiving end of such violence. Once these subjective choices were made, the rest of the judgment was not needed. No society would ever

accept that assaulting and humiliating children can ever be justified on any grounds. It can never be in the best interests of a child to assault them and impair their dignity.

Another example of subjectivity and the question-begging approach of the Constitutional Court in this judgment are the Chief Justice's words: "[61] 'in our kind of democracy' " and "[69], 'commonsensical approach' " when referring to the methods of discipline promoted by those opposed to "moderate and reasonable chastisement". In the absence of any definition of what he means by "our kind of democracy" in the context of the issue he is faced with opens the door for justices to justify what they want to justify. So, for example, what makes our democracy different to those democracies that allow "moderate and reasonable chastisement"? In fact, at [25], the Chief Justice specifically writes that "comparable democracies retain the …defence of reasonable and moderate chastisement." There is no objective answer to this question in this judgment. Likewise, the use of the expression "the commonsensical approach" when referring to the approach he chose to support when it comes to disciplining children. He provides no objective foundation for this assertion. Is it the most "commonsensical approach", according to the 11 justices who handed down the judgment? It begs the question they were faced with. Merely asserting that something is "commonsensical" does not make it "commonsensical" – all it conveys is that the 11 justices in their subjective view, believe that it is the most "commonsensical".

3.3.3 Conclusions

The matter faced by the court in the school punishment matter was whether the law outlawing corporal punishment in private schools was "reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality." In the process of answering this question, Sachs J, at the outset of his reasoning, opined that religious conviction is primarily based on faith, whereas the competing interest in the matter assesses an issue on whether or not it is reasonable. He laid no evidential and/or objective foundation for this assumption. It, in effect, was his subjective philosophical position. Having expressed this view upfront, it is difficult to imagine that he can be objective or autonomous from one of the

competing world views and desired political/social outcomes in the matter, as he balances out the conflicting/competing/contesting interests using "reasonableness" as the final arbiter. Compounding the subjectivity involved is his own admission that there was no absolute standard for determining what was reasonable. Using "what was in the best interests of the child" as a pivotal reference point to address subjectivity takes the matter no further and is merely question-begging. According to what or whom are the questions which need to be answered before there can be any semblance of objectivity. He also raised the problem of how to disentangle the religious from the secular and how to answer the poser of what belongs to the citizen's Caesar and what to the believer's God. His answer once again is question-begging. Using "certain basic norms and standards" as a measuring rod to answer these questions takes us back to the same question: according to who or what?

It is instructive to compare the two corporal punishment matters. When applying his mind to whether or not corporal punishment undermines the dignity of a child, Sachs J acknowledges that there is widespread international support for the view that physical punishment only becomes degrading when it passes a certain degree of severity. He also highlights the complexity of the issue by setting out the parents' position that the child's dignity is undermined by the defiance of Scripture. In stark contrast, Mogoeng Mogoeng CJ, without laying an objective foundation for it, finds as a fact that corporal punishment always undermines the dignity of the child. He makes no reference to other jurisdictions when he makes this finding, nor the complexity of the issue highlighted by Sachs J. A number of subjective choices were necessary for Mogoeng Mogoeng CJ to reach his conclusion. He chose not to engage with the reasoning of Sachs J. He chose not to deal with the arguments of the parents raised by Sachs J. He chose not to have regard to other jurisdictions. He chose to reach a conclusion without objective evidence. Once again, the choices he made are not important. What is important is that he made subjective choices when he could have made others, which had a direct effect on the outcome of the matter.

Turning to the parental punishment matter itself, we have seen that from the outset and at every material juncture, Mogoeng Mogoeng CJ and his fellow justices made choices which set the trajectory for their eventual decision. Having decided on which provisions in the Constitution

are germane, crucial is the court's choice not to adopt "a highly technical approach", but rather to give the word violence its ordinary grammatical meaning. We saw that this was in contrast to the approach of the court in the death penalty and equality matters referred to above. No explanation was given by the court as to why it chose a different hermeneutical approach to these earlier decisions. Compounding this choice was to locate the provision in section 12 in criminal law and not in the wider context of section 12. We saw that had it has been located in the wider context of section 12, there could have been an end result in line with what the parents wanted.

We also saw that a specific definition of violence was preferred over other definitions. No foundation was laid for the preferred choice. An analysis and application of the various definitions revealed that a different conclusion could have been reached by the court if another definition was chosen. We thus see a myriad of subjective choices being made without any objective evidential basis being laid for such choices. Choices which had a direct impact on the reasoning and conclusions of the court. Had other choices been made, then the court could have allowed the distinction sought by the parents.

Further corroboration of the subjective nature of the reasoning process is the use of the expressions "in our kind of democracy" and "commonsensical approach" when referring to the methods of discipline promoted by those opposed to "moderate and reasonable chastisement". Mogoeng Mogoeng CJ simply assumed a meaning of these expressions without laying any objective evidential foundation for them. The former expression opens the door completely to justify anything which the court wants to justify. This is central to the final section of this chapter on *ubuntu* as a hermeneutical lens. Likewise, using "commonsensical" as a lens, without an objective framework for deciding what is "commonsensical", permits the 11 men and women on the court to decide for themselves what is and is not "commonsensical" – far removed from merely objectively making clear the values already contained in the Constitution.

Part A of this chapter ended with a quote by Altman.[258] "While the realists stress competing rules, CLSers stress competing, and indeed irreconcilable, principles and ideals. Yet, the basic theme is the same: the judge must make a choice which is not dictated by law… . *Thus, from the CLS perspective, the jurisprudential invocation of principles only serves to push back to another stage the point at which legal indeterminacy enters and judicial choice takes place* (my emphasis)."

I will now analyse the use of *ubuntu* to further help uncover at what stage the choice of justices of the Constitutional Court takes place.

3.4 PART C – *UBUNTU* AS A PHILOSOPHICAL LENS: *S v Makwanyane and Another* 1995 (3) SA 391 (CC), *City of Tshwane Metropolitan Municipality and Afriforum and Another* [2016] ZACC 19, *Linde and Two Others v Minister of Health*, CCT 258/17, H and *Fetal Assessment Centre*, CCT 74/14

3.4.1 Introduction

This part of the chapter will be divided as follows:

i. An analysis of the justification by the justices of the Constitutional Court for the use of *ubuntu* as a hermeneutical lens.

ii. The process used by the justices of the Constitutional Court to define *ubuntu*. (In this process, including in i. above, in addition to the three cases identified earlier in this chapter, other judgments will be referred to.)

iii. Conclusions.

[258] Altman 1986:216-217.

3.4.2 Justification of the use of ubuntu

We have seen Kriegler J, in the death penalty matter, hold that when answering the question of what the Constitution says about the death penalty, "the methods to be used are essentially legal, not moral or philosophical… . The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics." In contrast to Kriegler J, in the death penalty matter, Mokgoro J writes:

> [301] Now that constitutionalism has become central to the new emerging South African jurisprudence, legislative interpretation will be radically different from what it used to be in the past legal order. In that legal order, … , courts engaged in simple statutory interpretation, giving effect to the clear and unambiguous language of the legislative text - no matter how unjust the legislative provision. The (majority) view of the Court in *Bongopi v Chairman of the Council of State, Ciskei, And Others* 1992 (3) SA 250 (Ck) at 265 H-I,.. , is instructive in this regard: 'This court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the current public attitudes or standards in regard to these policies is not its function.'

> [302] With the entrenchment of a Bill of Fundamental Rights and Freedoms in a supreme Constitution, however, the interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. *This can often only be done by reference to a system of values extraneous to the constitutional text itself* (my emphasis), where these principles constitute the historical context in which the text was adopted and which help to explain the meaning of the text… . [303] While it is important to appreciate that in the matter before us the Court had been called upon to decide an issue of constitutionality and not to engage in debate on the desirability of abolition or retention, it is equally important to appreciate that the nature of the Court's role in constitutional interpretation, and the duty placed on courts by s 35[259], will of necessity draw them into the realm of making necessary value choices. [304] … . By articulating rather than suppressing values which underlie our decisions, we are not being subjective. On the contrary, we set out in a transparent and objective way the foundations of our interpretive choice and make them available for criticism.

She then highlights the need to have regard to public international law and foreign case law for guidance in constitutional interpretation. Thereafter, she continues:

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[259] Sec.35 of the Interim Constitution amongst other things states that when interpreting the Bill of Rights a court "shall promote the values which underlie an open and democratic society based on freedom and equality".

> [304] … . However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality… . [305] In *Dudgeon v United Kingdom* (1982) 4 EHRR 149 the European Court of Human Rights,… expressed the view that '… in a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt… .

The justice then distinguishes between enduring values and fluctuating public opinion. Her response to the argument that the overwhelming public opinion is in favour of the retention of the death penalty, *inter alia,* is: "[305] … . The values intended to be promoted by s35 are not founded on what may well be uninformed or indeed prejudiced public opinion… ." She continues: "[307] In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is the value of ubuntu – a notion now coming to be generally articulated in this country."

In effect, what she is saying is that a core part of the philosophical lens that the Constitutional Court must use when interpreting and giving meaning and content to the Constitution is the concept of *ubuntu*. In other words, *ubuntu* is the "system of values extraneous to the constitutional text itself", which she argues must be used as the reference point when making the moral choices she says the Constitutional Court must make. This is her answer to O'Regan J's assertion and question in the death penalty matter, referred to earlier in this chapter: " [321] … . The language of each of these rights is broad and capable of different interpretations. How is this Court to determine the content and scope of these rights? This question is at least partially answered by s35 (1) of the Constitution, which enjoins this Court in interpreting the rights contained in the Constitution to 'promote the values which underlie an open and democratic society based on freedom and equality'. [322] No one could miss the significance of the hermeneutical standard set… . "

The building block for Mokgoro J's choice of *ubuntu* as her theoretical framework when interpreting the Interim Constitution is found in that Constitution. She writes:

> [307]… . The post-amble of the Constitution expressly provides: '…(T)here is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation… .' Not only is the notion of *ubuntu* expressly provided for in the epilogue of the (Interim) Constitution, the underlying idea and its accompanying values are also expressed in the preamble. These values underlie, first and foremost, the whole idea of adopting a Bill of Fundamental Rights and Freedoms in a new legal order.

Some twenty-one years later, in the street naming matter, the Chief Justice held: "[8] … we also need to take steps to breathe life into the underlying philosophy and constitutional vision we have crafted for our collective good and for the good of posterity… . We all have a duty to transform our society." Responding to the approach of earlier court decisions, he writes: "[18] Our peculiarity as a nation impels us to remember always that our *Constitution* and law could never have been meant to facilitate the frustration of real justice and equity through technicalities… . We cannot emphasise enough that form should never be allowed to triumph over substance." Central to his theoretical framework for this hermeneutical approach is *ubuntu.* He finds:

> [11] All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision *must* (my emphasis) embrace the African philosophy of '*ubuntu*'. '*Motho ke motho ka batho ba bangwe*' or '*umuntu ngumuntu ngabantu*' (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, … .

In a separate concurring judgment in the street naming matter (the third judgment), Jafta J writes:

> [171] By making many of the remarks which the second judgment (a dissenting judgment by Froneman and Cameron JJ, referred to hereafter) finds objectionable, the first judgment (by Chief Justice Mogoeng Mogoeng, referred to above) articulates the repudiation of the shameful past by the Constitution and its 'aspirationally egalitarian ethos' which was affirmed in Makwanyane (the death penalty matter) and many other decisions of this Court. It is the Constitution itself which defines how transformation of our society should be pursued and not the first judgment which merely serves as its mouthpiece… .

It is thus clear that a cornerstone of the "hermeneutic standard set" embraced by the Constitutional Court when determining the content and scope of rights is the philosophical concept of *ubuntu*. (In the death penalty matter, seven of the eleven justices refer to it.)

Apropos the conundrum of indeterminacy/subjectivity/arbitrariness, this presents fundamental problems. Langa J, reflecting on the philosophical lens which must be used when interpreting and applying the Constitution in the death penalty matter, writes:

> [222] *Implicit* (my emphasis) in the provisions and tone of the Constitution are values of a more mature society,.. . [223] The ethos of the new culture is expressed in the much-quoted provision on National Unity and Reconciliation which forms part of the Constitution… . It describes the Constitution as a 'bridge' between the past and the future: … and finally, it suggests a change in mental attitude from vengeance to an appreciation of the need for understanding, from retaliation to reparation and from victimisation to *ubuntu. The (Interim) Constitution does not define this last-mentioned concept* (my emphasis).

Therefore, contrary to the stated approach of Kriegler J, according to the majority of the justices in the death penalty matter, confirmed by Chief Justice Mogoeng Mogoeng in a matter twenty-one years later, central to the method used when interpreting and applying the rights in the Constitution, is the philosophical concept of *ubuntu,* and not only "legal" methods to the exclusion of "moral or philosophical".

An analysis of the reasoning of the seven justices in the death penalty matter who assign *ubuntu* a central role when interpreting and applying the Constitution, and the reasoning in the street naming matter twenty-one years later by Mogoeng Mogoeng CJ reveals that the justification for such a choice rests on two pillars. On the one hand, one reference to it is in the Interim Constitution. On the other hand, an unsubstantiated assumption about its importance in the value system of South African society.

As has been highlighted, the specific reference to it is found in the epilogue (post-amble)[260] of the Interim Constitution. There, it is used as a positive concept juxtaposed with the negative concept of victimisation. Referring to this reference to *ubuntu*, Chaskalson, in the death penalty matter, writes: “[131] Although this commitment has its primary application in the field of political reconciliation, it is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of *ubuntu*, ours should be a society that ‘wishes to prevent crime… (not) to kill criminals simply to get even with them’.” He thus argues that it implicitly also is one of the concepts to be incarnated in a new society through the Interim Constitution. He nor any of the other justices provide any objective evidence to support such a conclusion.

Ex facie the epilogue, there is no explicit indication that it must be used as the (or a) pre-eminent hermeneutical lens to interpret and give content to the Interim Constitution. When arriving at this conclusion, the other justices also reason that this is implied. Thus, Mokgoro J, in the death penalty matter, writes: “[307] … . Not only is the notion of *ubuntu* expressly provided for in the epilogue of the (Interim) Constitution, the underlying idea and its accompanying values are expressed in the preamble.” And Madala J, in the same matter, relying on the reference to *ubuntu* in the epilogue, writes: “[237] …The concept *ubuntu* appears for the first time in the post-amble, but it is a concept that permeates the Constitution generally,… .” Or Sachs J, also in the death penalty matter, referring *inter alia* to *ubuntu* as a value in the Interim Constitution, writes: “[392] Accordingly, the idealism that we uphold with this judgment is to be found not

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260 “National Unity and Reconciliation – This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which amnesty shall be dealt with at any time after the law has been passed. With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.”

in the minds of the Judges, but in both the explicit text of the Constitution itself and the values it enshrines."

The Chief Justice, namely, Mogoeng Mogoeng, in his assertion in the street naming matter about the centrality of *ubuntu* as a hermeneutical lens, did not have the support of the explicit text Sachs J refers to. He and his fellow justices had to rely on the additional implicit reasoning of justices Mokgoro, Madala and Sachs. Thus, they had to assume that *ubuntu*'s "underlying idea and its accompanying values" are implicitly expressed in the Constitution, or implicitly "permeate" the Constitution, or implicitly are "enshrined" in the Constitution. This conundrum of the Chief Justice was identified by two of his fellow justices, Cameron J and Froneman J, who, as referred to above, wrote the dissenting judgment in the street naming matter. At one point of their judgment, they reason: "[137] Again, we agree that it would be beneficial if all South Africans approached matters with appreciation and respect for others. But the Constitution does not impose that as an obligation on citizens, either by enjoining the adoption of the *ubuntu* worldview, or otherwise. And, again, the Constitution does not allow the judiciary to impose that obligation generally, least in the naming of streets, which falls within local authorities' constitutional competence."

What is important for this thesis is not who made the correct decision, nor indeed what the correct decision was in the two matters, but that subjective choices were made concerning the centrality of *ubuntu* as a hermeneutical lens when interpreting and applying the Interim Constitution and the Constitution. It is important to highlight that when making this choice, there was only one explicit reference to *ubuntu* in the Interim Constitution and no such explicit reference in the Constitution. It also is telling that the two justices who dissented in the street naming matter, were white, whereas the other nine justices were black. It would be shortsighted not to conclude from this that the life stories of the justices played a part in their choices.

3.4.3 Process used to define *ubuntu*

3.4.3.1 Arbitrary nature of the defining of **ubuntu**

The Interim Constitution does not define *ubuntu* (as already indicated, the Constitution makes no mention of the concept). Thus, Langa J, reflecting on the ethos of the new culture, writes in the death penalty matter: "[223] …; and finally, it suggests a change in mental attitude from vengeance to an appreciation of the need for understanding, from retaliation to reparation and from victimisation to *ubuntu*. The Constitution does not define this last-mentioned concept."

The immediate problem is obvious.

Justices in the Constitutional Court have sought to define it. The logical problem is what measure can be used objectively to decide whether the chosen definition and, more importantly, the practical application of it is "correct"? Indeed, how does one decide that one definition is "wrong" and another "right"? Accepting that the Interim Constitution makes one reference to it as one of the values to be used when interpreting and applying the Interim Constitution and that the Constitutional Court in its jurisprudence has embraced it as a key hermeneutical standard, notwithstanding there being no reference to it in the Constitution, how is the concept defined? Apart from Sachs J, all the justices in the death penalty and street naming matters make no meaningful reference to any "objective" evidence upon which they base their understanding of *ubuntu*. Thus, for example, Langa J, having just stated that the Constitution does not define *ubuntu*, immediately proceeds to define it. In the process, he writes:

> [227] It was against the background of the loss of respect for human life and the inherent dignity which attaches to every person that a spontaneous call has arisen among sections of the community for a return to *ubuntu*. A number of references to *ubuntu* have already been made in various texts, but largely without explanation of the concept (here in a footnote he refers to the judgments of Chaskalson P, Madala J, Mahomed J and Mokgoro J). It has however always been mentioned in the context of it being something to be desired, a commendable attribute which the nation should strive for.

He thus underlines the absence of an objective definition. The inescapable conclusion is that when using *ubuntu* as a hermeneutical lens, it is the justices themselves who decide on what it means and what it does not mean. This contrasts with Sachs J's assertion that the idealism upheld in the death penalty matter "is to be found not in the minds of the Judges, but in both the explicit text of the (Interim) Constitution itself and the values it enshrines." Yet in the same judgment Mokgoro J opines as regards how that court must make moral choices: "This can often only be done by a reference to a system of values extraneous to the constitutional text itself." Likewise, the importance of what is in the minds of the justices themselves is underlined by the Chief Justice in the street naming matter, holding that that court must "take steps to breathe life into the underlying philosophy and constitutional vision" for South Africa. To this end, he authorises the Constitutional Court, where appropriate, not to frustrate "real justice through technicalities". The question begging nature of this mandate by the Chief Justice is illustrated in the dissenting judgment by justices Cameron and Froneman. Responding to this mandate, they write:

> [151] So, in our view, this Court should not be asking the question 'where is the harm?' If it has been established, although open to some doubt, that the Municipality is obliged to follow certain procedures in changing the street names, and that it has not done so, then the harm is the unlawful act itself. [152] And, as we have suggested, the implications are broader than street names, important as they are. It is an issue of the rule of law… . The Court should not suggest that adherence to the rule of law in some cases is of no value. It is always of value… .

Thus, with his understanding of *ubuntu*, the Chief Justice determines that the prescribed rules for changing street names should not be allowed to frustrate justice. Two of his fellow justices argue that that reasoning is a fundamental challenge to the rule of law. The point I seek to make is underlined by the history of this matter.[261] Along the same lines of Sachs J, in the street naming matter, Jafta J (the third judgment) concurring with the Chief Justice, writes: "[171] … . It is the Constitution itself which defines how transformation of our society should be pursued and not the first judgment which merely serves as its mouthpiece."

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[261] This matter went through the High Court, The Supreme Court of Appeal and the Constitutional Court – in the process 19 judges were involved. Ten of those judges were overruled by the Chief Justice and the eight justices who agreed with him. See [100] of the street naming matter.

Earlier in the third judgment, he writes:

> [164] I am also troubled by the statement in the second judgment which implies that a cultural tradition founded in history rooted in oppression may find recognition in the Constitution… . [165] How can that unquestionably transformative Constitution be expected to recognise cultural traditions rooted in the racist past? … . The fact that the oppressive racist history exists at the level of fact does not mean that it deserves any recognition in the Constitution.

Responding to criticism of their reasoning, particularly in the third judgment, Cameron J and Froneman J write:

> [129] It is a grave insinuation that we seek to justify the protection of cultural rights under the guise of racism. We explicitly state that '[t]he Constitution protects culture, yes, but not racism'. We find it regrettable that the third judgment then proceeds to state that 'there can be no justification for recognition of cultural traditions or interests' based on a sense of belonging to the place where one lives if those interests are 'rooted in the shameful racist past,' as if that was what we sought to justify. We leave history to assess the warrant for that charge. [130] What does concern us is the broad statement in the third judgment that embraces the implication of the first judgment (the one written by the Chief Justice), that any reliance by white South Africans, particularly white Afrikaner people, on any historically-rooted cultural tradition finds no recognition in the Constitution, because that history is inevitably rooted in oppression. [131] What does that mean in practical terms? Does it entail that, as a general proposition, white Afrikaner people and white South Africans have no cultural rights that pre-date 1994, unless they can be shown not to be rooted in oppression? How must that be done? Must all organisations with white South Africans or Afrikaners as members now have to demonstrate that they have no historical roots in our oppressive past? *Who decides that, and on what standard?* (my emphasis) [132] This will be of concern not only to white South Africans, or to Afrikaners. It may also be of concern to those who take pride in the achievements of King Shaka Zulu, despite the controversy about his reign, and those who nurture the memory of Mahatma Gandhi's struggles in South Africa, despite some repugnant statements about black Africans.

This exchange between the justices in the street naming matter clearly exposes the flawed nature of the assertion that justices are merely mouthpieces of the Constitution. All the justices involved declare their support of the concept of *ubuntu*, with the qualification that two of the justices argue that it is not obligatory to use it as a lens and yet come to deeply divided decisions in their quest "to breathe life into the underlying philosophy and constitutional vision" for South Africa, underpinned by *ubuntu*. To all the philosophical/value-based decisions referred to in the street naming matter, and indeed the other matters referred to, the question posed by Cameron J and Froneman J is crucial, "Who decides that, and on what standard?" The same

question can be posed in response to the Chief Justice's earlier finding in the street naming matter, where he writes:

> [10] This case highlights the need to familiarise ourselves with our vision in the Preamble to our Constitution. It also sounds a clarion call to South Africans of all races to take to heart the foundational values of our Constitution like human dignity, equality, the advancement of human rights and freedoms, non-racialism and non-sexism. *When our actions are informed and driven by these facets of our constitutional project* (my emphasis), then a proposed change of names of landmarks, streets and institutions would only attract *constitutionally-inspired and constructive* opposition (my emphasis). …[16] Nothing that *objectively* (my emphasis) encourages or seeks to perpetuate the stereotypes, prejudice or discriminatory practices of the past is to be tolerated.

Once again, who decides and on what standard do they decide that "actions are informed and driven by our constitutional project" when the opposition is "constitutionally inspired and constructive" and when conduct "objectively" encourages past injustice? It is a circuitous, question-begging argument. Without an autonomous definition of *ubuntu*, it is a question begging to assert that the Constitution is always underpinned by the underlying values of *ubuntu.* Or that *ubuntu*'s "underlying idea and its accompanying values" are implicitly expressed in the Constitution, or implicitly "permeate" the Constitution, or implicitly are "enshrined" in the Constitution. Without an objective definition of it, contrary to what Sachs J writes, what *ubuntu* is is in the minds of the justices as they comply with the directive of the Chief Justice to breathe life into the Constitution. Furthermore, in his pursuit of incarnating *ubuntu* into his interpretation and application of the Constitution, the Chief Justice authorises the court not to frustrate justice through technicalities.

In the response of Cameron J and Froneman J to this directive, that it is, in fact, the rule of law which is at stake, and not a mere technicality, we have seen in effect that what *ubuntu* is is firmly embedded in the minds of justices. To repeat Cameron J and Froneman J's question, "Who decides that, and on what standard?' This also emerges in the approach of Mahomed J and Mokgoro J in the death penalty matter. Referring to the concept of *ubuntu* in the post-amble to the Interim Constitution, Mahomed J writes:

> [263] … . The need for *ubuntu* expresses the ethos of an *instinctive* (my emphasis) capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by. [264] It is against this historical background and ethos that the constitutionality of capital punishment must be determined.

He gives no evidential foundation for these sweeping statements as to what *ubuntu* is. In this omission, he also fails to give a non-arbitrary reference point to give content to what it means to "have an instinctive capacity for and enjoyment of love towards our fellow men and women", to recognise "innate humanity" of others and to give expression to "collective community". His use of the word "instinctive" also is revealing. By definition, "instinctive" is not susceptible to rational, objective assessment as to whether the instinct is reasonable or not.[262] Later, Mahomed J continues:

> [277] In my view, the death sentence does indeed constitute cruel, inhuman or degrading punishment within the meaning of those expressions in s11 (2). [278] Undoubtedly, this conclusion does involve in some measure a value judgment, but it is a value judgment which requires objectively to be formulated, having regard to the ordinary meaning of the words used in s11(2); its consistency with the other rights protected by the Constitution and the constitutional philosophy and humanism expressed both in the preamble and the post-amble to the Constitution; its harmony with the national ethos which the Constitution identifies; the historical background to the structures and objectives of the Constitution; the discipline of proportionality to which it must legitimately be subject; the effect of the death sentence on the right to life protected by the Constitution; its inherent arbitrariness in application; its impact on human dignity; and its consistency with constitutional perceptions evolving both within South Africa and the world outside with which our country shares emerging values central to the permissible limits and objectives of punishment in the civilised community.

At every point of his reasoning a choice is required, a choice which requires another choice, a reference point for the choice. He concedes this when he writes that "undoubtedly, this conclusion does involve in some measure a value judgment". However, he immediately seeks to salvage the problem he identifies, "but it is a value judgment which requires objectively to be formulated…" What follows are various measures he opines will ensure objectivity.

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[262] See Sachs J in the school punishment matter where he writes: "[33]… . Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly according to their reasonableness… ." It has been seen in this chapter that a central reference point for the Constitutional Court when it makes choices, must be reasonableness, which, as also has been seen in this chapter, is required *inter alia*, by sec. 36 of the Constitution – footnote 179.

Turning to these measures, we see the question-begging and/or arbitrary nature of each of these measures. Thus, for example, we have seen earlier in this chapter what the problem is with the "ordinary" meaning of cruel. When it comes to the death penalty, the Constitution is silent. It is thus the justices who must decide what the content of the "constitutional philosophy", "humanism", and "national ethos" is. To argue that we must turn to *ubuntu* for an answer to these questions merely raises another question. It also does not explain how a judge's "instinct' can be formulated objectively. Mokgoro J, referring to the need for *ubuntu,* writes:

> [307] … . Not only is the notion of *ubuntu* expressly provided for in the epilogue of the (Interim) Constitution, the underlying idea and its accompanying values are also expressed in the preamble… . [308] Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu,* describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our *rainbow* heritage, *though it might have operated and still operates differently in diverse community settings* (my emphasis)… . It is values like these that s35 requires to be promoted."

She acknowledges in this reasoning that *ubuntu* "operates differently in diverse community settings." This acknowledgement does not address the underlying arbitrary problem she alerts the reader to – how does the Constitutional Court decide which incarnation of it is consistent with the "ethos" of the Constitution*?*

In addition to those already referred to, illustrations of this conundrum can be found in the Constitutional Court's approach to a problematic decision, for them, of the Tanzanian Court in the death penalty matter, Sachs J's treatment of his own research and the Constitutional Court's decision in the unborn child matter.

3.4.3.2 Death penalty matter and the Tanzanian decision as an illustration

All the justices in the death penalty matter who rely on *ubuntu* in their reasoning, find that *ubuntu* and the death penalty are mutually exclusive. In his judgment, Langa J in seeking to define *ubuntu*, quotes from a judgment of the Court of Appeal of the Republic of Tanzania:[263] "[224]… .'The second important principle or characteristic to be borne in mind when interpreting our Constitution is a corollary of the reality of co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the other. In effect this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and *vice versa*'." Langa J then continues: "[225] An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own." Langa J then in effect finds that the death penalty is cruel, inhuman and degrading and thus bereft of *ubuntu*.

The Tanzanian decision referred to by Chaskalson P in the main judgment of the death penalty matter, referred to earlier in this chapter, was handed down some three years after this Tanzanian decision relied on by Langa J. As previously stated, in that judgment, the Tanzanian Court *inter alia* found that the death penalty was constitutional in that it "was directed (at the) constitutional requirement that 'everyone's right to life shall be protected by law'." Langa J relies on the Tanzanian Court to help define *ubuntu.* And yet he finds that the death penalty is inimical to *ubuntu,* whereas the Tanzanian Court found the death penalty had a legitimate purpose, which is directly linked to the right to life. Thus, whilst, according to Langa J, a foundation for both courts included his understanding of *ubuntu*, they arrived at fundamentally opposed conclusions on the issue of the death penalty.

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[263] *DPP v Pete* [1991] LRC (Const) 553:566 b-d.

Once again, the issue is not which is the correct application of the hermeneutical lens of *ubuntu*. The philosophical poser is whether subjectivity, arbitrariness and indeterminacy can be avoided with such a lens, especially where it is not objectively defined. Obviously conscious of this conundrum, Mokgoro J argues: "[304] … . By articulating rather than suppressing values which underlie our decisions, we are not being subjective. On the contrary, we set out in a transparent and objective way the foundations of our interpretive choice and make them available for criticism."

Whilst articulating the values used as a lens when interpreting and applying the Constitution has philosophical merit, it is unclear how such an exercise addresses subjectivity/arbitrariness when interpreting and applying the Constitution. Here we are dealing with a concept not defined by the Interim Constitution, and indeed not even mentioned by the Constitution. Giving content to it presupposes a subjective view of what it is. As already indicated, all the justices who refer to *ubuntu*, give no authority for what they say it means. They simply state their own understanding of it and, more importantly, their own interpretation and application of it to the death penalty.

Chaskalson P, quoting from the concluding provision of National Unity and Reconciliation, writes "[130]... .'These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.' " He continues: "[131] Although this commitment has its primary application in the field of political reconciliation, it is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of *ubuntu*, ours should be a society that 'wishes to prevent crime… (not) to kill criminals simply to get even with them'." He uses the lens of *ubuntu* without defining it. To the extent that he assumes a meaning of the concept, he likewise furnishes no standard which can be used to assess the accuracy of his assumptions. Consequently, his assumption of the content of *ubuntu* also fails to engage the Tanzanian Court's stance on the justifiability of the death penalty.

When Langa J gives his definition of the concept, there is no attempt by him to give an authority independent of his own opinion to test his definition of *ubuntu*. The closest he gets to this is

the passage already quoted from the Tanzanian Court of Appeal. We have seen that notwithstanding his relying on this passage, he and the Tanzanian Court come to a fundamentally different conclusion as regards the justifiability of the death penalty. We have seen that the Tanzanian court, in its reasoning, in fact, finds that a justifiable reason for the death sentence is the constitutional duty to protect the life of everyone, the very right Langa J and his fellow justices say make the death penalty an anathema to *ubuntu*. Extrapolating on *ubuntu,* Langa J writes, "[232] … . Society cannot now succumb to the doctrine of an eye for an eye. Its actions must be informed by the high values which reflect the quality of this nation's civilisation." Firstly, in these words, he concedes that there are philosophical doctrines which are different to his. Secondly, he supplies no justification for, in effect, finding that the eye for an eye doctrine is inconsistent with *ubuntu*. Indeed, it can be argued that underlying the Tanzanian court's justification for the death penalty is the eye for an eye doctrine – to protect the life of everyone requires the lives of murderers to be taken (*lex talionis*).

3.4.3.3 Sachs J's treatment of his own research

Responding to submissions concerning the need for the Constitutional Court first to be apprised of the relevant expectations, sensitivities and interests of society as a whole before it pronounced on the subject of capital punishment, Sachs J writes:

> [358] The second issue that caused me special concern was the source of the values that we are to apply in assessing whether or not capital punishment is a cruel, inhuman or degrading punishment as constitutionally understood. The matter was raised in an *amicus* brief and argued orally before us by Ms Davids on behalf of the Black Advocates Forum. [359] … . In the past, she stated, the all-white minority had imposed Eurocentric values on the majority, and an all-white Judiciary had taken cognizance merely of the interests of white society. Now, for the first time, she added, we had the opportunity to nurture an open and democratic society and to have due regard to an emerging national consensus on values to be upheld in relation to punishment. [360] Many of the points she made had a political rather than a legal character and, as such, should have been directed to the Constitutional Assembly rather than to the Constitutional Court. Nevertheless, much of her argument has a bearing on the way this Court sees its functions and deserves the courtesy of a reply. [361] To begin with, I wish firmly to express my agreement with the need to take account of the traditions, beliefs and values of all sectors of South African society when developing our jurisprudence.

After highlighting various provisions in the Constitution and other sources for the values that need to be promoted by the Court, he writes: "[365] Above all, however, it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice." He continues, "[368] … . Ms David's concern is that when it comes to interpreting chap 3, and in particular the concept of punishment, the values of only one section of the community are taken into account… . [370]… . Our function as members of this Court – as I see it – is, when interpreting the Constitution, to pay due regard to the values of all sections of society, and not to confine ourselves to the values of one portion only, however exalted or subordinate it might have been in the past. Observing that in law reports and legal textbooks there are very few references to African sources as part of the general law of the country, he continues:

> [372] Appropriate source material is limited and any conclusions that individual members of this Court might wish to offer would inevitably have to be tentative rather than definitive. We would certainly require much fuller research and argument than we had in the present case. The paucity of materials, however, is a reason for putting the issue on the agenda, not a justification for postponing it. [373] The evolution of core values in all sections of the community is particularly relevant to the characterisation of what at any moment are regarded as cruel, inhuman and degrading punishments… . In my view, s 35 (1) requires this Court not only to have regard to public international law and foreign case law, but also to all the dimensions of the evolution of South African law, which may help us in our task of promoting freedom and equality. This would require reference not only to what in legal discourse is referred to as 'our common law', but also to the traditional African jurisprudence. [374] *I must stress that what follows relates to matters not properly canvassed in argument* (my emphasis). The statements I make should not be regarded as an attempt on my part to 'lay down the law'… . Rather, the materials are presented for their possible relevance to the search for core and enduring values consistent with the text and spirit of the Constitution. *It is unfortunate they were not placed before us to enable their reliability and the merits to be debated* (my emphasis); they are intended to indicate that, speaking for myself, these are the kinds of scholarly sources which I would have regarded as helpful in determining questions such as the present one, if Ms Davids had presented them to us rather than complain about their absence. I might add that there is nothing to indicate that, had these sources been properly presented and *subjected to the rigorous analysis which our judicial procedure calls for* (my emphasis), the decision of this Court would have been different. There does not appear to be any foundation for her plea that we postpone the matter. On the contrary, the materials that I will refer to point to a source of values entirely consistent with the overall thrust of the President's judgment and, in particular, with his reference to the constitutionally acknowledged principle of *ubuntu.*

Sachs J then highlights various studies and articles sourced by him, with a focus on punishments meted out in traditional African society. He writes that there are a number of references to capital punishment and that it is unfortunate that their import was never canvassed in the present matter. After a cursory analysis of the sources, he chooses his reasons:

> [381] Thus, if these sources are reliable, it would appear that the relatively well-developed judicial processes of indigenous societies did not in general encompass capital punishment for murder. Such executions as took place were the frenzied, extra-judicial killings of supposed witches, a spontaneous and irrational form of crowd behaviour that has unfortunately continued to this day in the form of necklacing and witch-burning. In addition, punishments by military leaders in terms of military discipline were frequently of the harshest kind and accounted for the lives of many persons. Yet the sources referred to above indicate that, where judicial procedures were followed, capital punishment was in general not applied as a punishment for murder. [382] In seeking the kind of values which should inform our broad approach to interpreting the Constitution I have little doubt as to which of these three contrasted aspects of tradition we should follow and which we should reject. The rational and humane adjudicatory approach is entirely consistent with and re-enforcing of the fundamental rights enshrined in our Constitution; the exorcist and militarist concepts are not.

He concludes: "[383] We do not automatically invoke each and every aspect of traditional law as a source of values, just as we do not rely on all features of the common law… . I am sure that there are many aspects and values of traditional African law which will also have to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order."

As a general proposition, none of the opinions of the justices in the death penalty matter and street naming matter on the meaning of *ubuntu* were "subjected to the rigorous analysis which our judicial procedure calls for." This includes Sach J's own conclusions. He says as much when he stresses "that what follows relates to matters not properly canvassed in argument" and that it "is unfortunate that they were not placed before us to enable their reliability and the merits to be debated."

His attempts to address the obvious lacunae concerning the meaning of *ubuntu* sets him apart from his fellow justices, who merely assume a universal meaning. In this, he possibly endeavours to do justice to his assertion that the court's idealism is to be found in the Constitution and not the minds of the judges. However, the arbitrary nature of this endeavour is apparent from his own observations concerning his research. Furthermore, given the Chief Justice's clear directive about the need to use the prism of *ubuntu* when giving content to the values in the Constitution, Sachs J's attempts do not provide any objective measures by means of which the court can decide on what are the "many aspects and values of traditional African law which will also have to be discarded", or when the source of these values are "entirely

consistent (with the)… principle of *ubuntu"*. There is no autonomous reference point identified by him that one can use to decide what to embrace and what to discard.

3.4.3.4 Comparison of the death penalty and street naming matters with the unborn child matter

3.4.3.4.1 Death penalty matter/unborn child matter comparison

It is instructive to compare the approach of Chaskalson P, supported by all the justices of the Constitutional Court, with the approach of the Constitutional Court some 17 years later in the unborn child matter. In the unborn child matter, three women had asked the High Court in the Gauteng Local Division for an order declaring that unborn human life "is life as envisaged in section 11 of the Constitution… and must be accorded dignity in terms of section 10[264] of the Constitution." Furthermore, the women asked the court for an order declaring that "the unborn life's right to dignity and life must be considered when striking a balance between the rights of the pregnant woman and of the…unborn life." In addition, certain consequential relief was sought[265] (hereafter "the Modiba judgment").

The application in the High Court, which was heard on 24 October 2016 (the *Modiba* judgment), was dismissed by Modiba J on 15 September 2017, some 11 months later. On the 9th of October 2017, the three women applicants filed an Application For Leave To Appeal to the Constitutional Court (hereafter "the application for leave to appeal").[266] Some four and a half months later, on the 21st of February 2018, the Constitutional Court dismissed the application for leave to appeal on the basis that it "bears no reasonable prospects of success."

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[264] Sec. 10 reads: "Everyone has inherent dignity and the right to have their dignity respected and protected." Sect. 11 reads: "Everyone has the right to life." For the equivalent sections in the Interim Constitution, see footnote 182.

[265] *Linde and Two others v Minister of Health of The Republic of South Africa* Case No 37801/2015, Gauteng Local Division, Johannesburg.

[266] Attached as Appendix A.

The Constitutional Court furnished no reasons for its ruling and did not grant the women an opportunity to present oral arguments to it.[267]

At paragraph 19. b. xi of the application for leave to appeal, the women stated: "The Constitution is silent about the constitutionality of abortion. It is thus for our courts to make a constitutional normative value choice in this regard as was done in *S v Makwanyane and Another* (hereafter 'the death penalty matter')." This assertion by the women is supported by Chaskalson P's reference in the death penalty matter, highlighted earlier in this chapter, to the legislative history leading up to the adoption of the unqualified right to life provision in the Interim Constitution, as it applies to the death penalty and abortion (and by necessary implication the constitutional status of the unborn child).

As we have seen earlier in this chapter, the Constitutional Court went to great lengths to justify their value choice as regards the death penalty. *Apropos* the unborn child, it also made a value choice without giving any reasons for such a choice. In the absence of reasons for this value judgment by the justices of the Constitutional Court, they have restricted non-members of that court to only one option: to speculate as to their reasons.

I highlight some of the material as regards *ubuntu* placed before the justices in the application for leave to appeal, which they chose not to respond to when they made their ruling without reason.

At paragraphs 7, 8 and 9 thereof, the justices were alerted to the death of the undisputed figure of an annual figure of 73 614 foetuses. Throughout the application for leave to appeal, the justices were invited to use the lens of *ubuntu* when deciding on what constitutional value should be placed on the protection of foetuses and that they were more than "the contents of the uterus of a pregnant woman."[268] Any reasonable person will agree that the protection of the

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[267] Attached as Appendix B.
[268] Definition of the unborn child contained in the Definitions section of the *Choice on Termination of Pregnancy Act* 92 of 1996 (hereafter "the Abortion Act").

foetus relates to fundamental moral concerns pertaining to the commencement of human life, irrespective of whether he/she is viewed as a human being or not. *Inter alia*, at paragraph 28, the justices were alerted to the position in Germany where the national conversation about how to balance out the conflicting rights of the pregnant woman and the life within her presupposed an acknowledgement by all parties that unborn children were human life worthy of dignity, and that the state has a duty to protect the life of the unborn child at all stages of pregnancy.[269] It was argued that this approach of the German Court is in line with *ubuntu.*

At paragraph 31 of the application for leave to appeal, the Constitutional Court was alerted to the words of retired Constitutional Court justice Ackermann, who was part of the Constitutional Court in the death penalty matter: "It is respectfully submitted that the learned judge erred in not having any regard to the scholarly contribution of retired Constitutional Court Justice, Laurie Ackermann, in *Human Dignity: Lodestar for Equality in South Africa* (2012,…), referred to by the Applicants in their submissions, more particularly:

> a. That German dignity jurisprudence is singularly important for a proper understanding of dignity and its application to gestating human life under the South African Constitution;.. .[270]
>
> Further illustration of reliance on *ubuntu* in the application for leave to appeal can be seen in paragraph 19 thereof:
>
> "19… .
>
> a. … .

[269] The relevant provisions in the German Constitution are: Article 1(1): Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. Article 2 (2): "Every person shall have the right to life and physical integrity." These provisions are in substance the same as the equivalent provisions in the South African Bill of Rights.

[270] There is a strong German influence in the history of the genesis of the Constitutional Court. For example, in *Carmichele v Minister of Safety and Security*:961 F, justices Ackermann and Goldstone stated: "Our constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as an all guiding principle and stimulus for the Legislature, Executive and Judiciary.' The same is true of our Constitution. … It is within the matrix of this objective normative value system that the common law must be developed."

b. When it comes to interpreting and applying the Constitution to the declarator sought, regard must be had to:

i. The inextricably intertwined core values of life and dignity of all human life, particularly the need to defend the dignity and life of the most defenceless and innocent of human life;

ii. When interpreting and applying these core values, judges need to make normative value choices;

iii. No part of the law or life in South Africa can exist beyond the reach of constitutional values, even the most intimate spaces;

iv. When making these value choices, judges must seek to help bring about the type of society envisaged by the Constitution;

v. Central to this exercise must be a deep mindfulness of our past where *inter alia* some human life was made more important than other human life;

vi. A building block for this new society and a crucial lens through which the Constitution must be interpreted, is *Ubuntu*;

vii. Central to *Ubuntu* is recognising the innate humanity of all human life within a context of communality as opposed to the rampant individualism of non African jurisdictions;

viii. Repeated and deliberate attacks on the dignity of one human life compromises the dignity of all in South African society;

ix. *Ubuntu d*emands the nurturing and valuing of all human life;

x. Although other jurisdictions must be considered, our courts when making a value choice must at the end of the day use our own indigenous value systems as a premise from which to proceed;

xi. The Constitution is silent about the constitutionality of abortion. It is thus for our courts to make a constitutional normative value choice in this regard as was done in *S v Makwanyane and Another* (hereafter, “the death penalty matter”);

xii. No human life must be allowed to be variable;

xiii. No arbitrary measures must be permitted when it comes to the sanctity of all human life;

xiv. There are profound moral similarities between the post Nazi Germany and the post apartheid South Africa, which should give our courts pause for reflection when deciding on the foreign jurisdiction they should have regard to when dealing with gestating human life."

An analysis of the above extract reveals that the submissions of the applicants are based on the reasoning of the Constitutional Court in the death penalty matter.[271] As we have seen, central to these submissions were, firstly, the importance of *ubuntu* as a hermeneutical lens and, secondly, the practical content of *ubuntu.* Notwithstanding all the above, in the application for leave to appeal, the Constitutional Court dismissed the application without giving reasons, inclusive of not giving reasons as to why *ubuntu* was not applicable.

Once again, the issue is not whether this was a correct decision. It is that not only was a choice made concerning whether *ubuntu* applied and if so, what the content of *ubuntu* was in that context, it was made without the Constitutional Court giving reasons for this choice. It thus chose to give detailed reasons concerning why and how *ubuntu* must come to the assistance of convicted murderers, but not to give reasons why *ubuntu* does not assist unborn children.

In their reasoning in the death penalty matter, the conundrum of arbitrariness and inconsistency was highlighted. This conundrum is compounded in the unborn child matter, given the absence of reasons/reasoning. And here, it must be remembered that the Constitutional Court is the apex court in the country, and its decisions, including not to give reasons for a decision, are unappealable. There is thus no legal remedy against or firewall to prevent the justices, in effect, replacing a legal decision with a policy decision when they subjectively are of the view that such is warranted.

[271] See earlier in this chapter.

3.4.3.4.2 Street naming matter/unborn child matter comparison

A comparison between the Constitutional Court's approach to the impact *ubuntu* has on procedure in the two different matters (namely, the street naming matter and the unborn child matter) is instructive. In the street naming matter, we have seen what impact *ubuntu* had on the approach of the Chief Justice and eight of his fellow justices to procedural requirements of the law. In a nutshell, using the hermeneutical lens of *ubuntu*, the Chief Justice ruled that form must never be allowed to trump justice. We also have seen the two dissenting justices opine that the route followed by the Chief Justice undermined the rule of law. Thus, at least two of the justices of the Constitutional Court were of the view that the binding judgment of the Chief Justice went further than simply not allowing technicalities to trump justice. It struck at the heart of the rule of law. The relevance of highlighting the dissenting judgment is to highlight the deep conviction, driven by their understanding of *ubuntu*, of the majority of justices that, at all times, substance must trump form.

A crucial pillar of the *Modiba* judgment was that "The applicants fail to articulate the nature of the impact they contend the relief they seek will have on …gestating human lives" and (the applicants) failed to advance "evidence on the impact a woman's decision to terminate her pregnancy has on gestating human life."[272] In the unborn child matter, the Constitutional Court was alerted to the fact that the profound impact on the gestating human life within her of a woman's decision to terminate her pregnancy is self-evident. As an alternative, the Constitutional Court was alerted to the fact that it is self-evident that such "separation and expulsion" of the gestating human life from the mother's "uterus" (the description of an abortion in the Abortion Act – see footnote 268), will have profound physical effects for the said annual figure of 73 614 gestating human lives.[273]

In the absence of reasons, one is compelled to conclude that the Constitutional Court, in its understanding of *ubuntu*, chose not to distance itself from this legalistic/technical/formalistic,

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[272] Paras. 4-9 of the application for leave, Appendix A.
[273] Paras. 4-9 of the application for leave, Appendix A.

dispassionately one might say bizarre, approach of Modiba J, even when confronted with the undisputed statistic of the consequent termination of 73 614 foetuses *per annum* as opposed to being willing to overlook the legally prescribed procedures to change street names because *inter alia*, that is what *ubuntu* requires. Likewise, the Constitutional Court chose to abide the choice of Modiba J, not even to address the issue of *ubuntu* clearly raised by the applicants, despite its finding concerning the centrality of *ubuntu* in the street naming matter when it comes to the type of society envisaged by the Constitution. As alluded to in the previous subsection, any reasonable person will agree that issues related to the protection of the foetus touch on fundamental questions related to the commencement of human life, and for this very reason, questions related to the protection of the foetus (or as many would say, the unborn child) should be approached with the necessary attention.

Once again, which choice was correct and which not is not germane. What is relevant is that choices were made, and in this case, in the absence of reasons, such choices appear arbitrary and inconsistent.

Turning to the issue of not giving reasons for its decision, more particularly why *ubuntu* did not apply in the unborn child matter, it also is instructive to compare the approach of the Constitutional Court in *H and Fetal Assessment Centre*[274] (hereafter "the fetal assessment matter", decided some two years before the unborn child matter), to that of the unborn child matter. In this matter, the Constitutional Court had to decide whether a boy born with Down Syndrome had a claim for damages based on the alleged wrongful and negligent failure of the Fetal Assessment Centre to warn his mother that there was a high risk of him being born with Down Syndrome. His mother alleged that had she been warned, she would have chosen to undergo an abortion. In dealing with the matter, the Constitutional Court traversed a decision by the Supreme Court of Appeal[275] (hereafter "Stewart"). In *Stewart,* the court stated:

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[274] *H and Fetal Assessment Centre* CCT 74/14.
[275] *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA).

> [15] The nature and extent of the debate that has been raging is apparent from the cases and articles referred to and many more. The debate illustrates that for every argument there has been a counter argument and vice versa and there are hardly novel contentions being raised. Like Omar Khayam I have heard 'Great Argument About it and about: but evermore Came out by the same Door as in I went'. In view of the conclusion that I have arrived at I do not think it necessary to evaluate all the arguments. I intend to refer to the most significant issues in the debate only to demonstrate the kind of difficult questions that arise. [16] Whilst bearing in mind that the negligence of the medical practitioners did not cause the congenital defects, the starting point of the enquiry was aptly stated in the matter Speck v Finegold 408 A 2d 496 at 508 para 7 and 512: 'Whether it is better to have never been born at all rather than to have been born with serious mental defects is a mystery more properly left to the philosophers and theologians, a mystery which would lead us into the field of metaphysics, beyond the realm of understanding or ability to solve. The law cannot assert a knowledge which can resolve this inscrutable and enigmatic issue… . If it were possible to approach a being before its conception and ask it whether it would prefer to live in an impaired state, or not to live at all, none of us can imagine what the answer would be… . *We cannot give an answer susceptible to reasoned or objective valuation* (my emphasis). … .' [27] In those jurisdictions where these claims have been allowed the debate has not been resolved, but an answer has simply been favoured on selected policy considerations without striking a balance that takes all the relevant norms and demands of justice into account and without resolving the impossible comparison between life with disabilities and non-existence… . Making…(the) choice in favour of non-existence not only involves a disregard for the sanctity of life and the dignity of the child (see sections 10 and 11 of the Constitution), but involves an arbitrary, subjective preference for some policy considerations and the denial of others… .[28]… . I have pointed out that from whatever perspective one views the matter the essential question that a court will be called upon to answer if it is called upon to adjudicate a claim of this kind is whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law. For that reason in my view this court should not recognise an action of this kind.

Disagreeing with *Stewart*, writing for the Constitutional Court in the fetal assessment matter, Froneman J responds:

> [21] This was, in the end, also the approach of the Supreme Court of Appeal in Stewart. It found that for a child's claim to succeed it would require a court to evaluate the existence of children against their non-existence, an exercise 'that goes so deeply to the heart of what it is to be human that it should not even be asked of the law'. [22] It is as well to acknowledge the logic of this paradox right at the outset. But more important is to recognise that framing the question in this manner might inadvertently disguise a value choice. If one says that no harm has been done to the child by the medical expert's negligence, why do we say so? The answer given in our law and in many other jurisdictions is that we can establish harm only by comparing existence with non-existence. *But this risks hiding a value choice. And it is a choice that judges under our Constitution need to acknowledge openly and defend squarely when they make it* (my emphasis). [23] Not to do so says that there are areas of life and law where the values of the Constitution may be ignored. That is not the kind of choice that our Constitution allows judges to make. They must ensure that the values of the Constitution underlie all law, not that some part of the law can exist beyond the reach of constitutional values. [24] So acknowledging the paradox is not necessarily dispositive of the real issue, namely whether our constitutional values and rights should allow the child, in the circumstances of this case, to claim compensation for a life with disability. It may well be that the conclusion should be drawn that they do not so allow, but it is not a decision that lies outside the law. [25] We thus need to go further. If, despite this clarification that the

> proper approach *involves an inevitably evaluative legal choice in accordance with the Constitution* (my emphasis), we nevertheless conclude that the claim cannot be sustained at all, no matter what the facts of a particular case may be, …

In this extract, we see Froneman J emphasizing the need for the court to make "a value choice", which justices "under our Constitution need to acknowledge openly and defend squarely when they make it." He also uses the phrase "an evaluative legal choice". His choice of words explicitly requires subjective choices. Thus, the Supreme Court of Appeal chose the option that "That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law." Froneman J made another choice with profound possible implications of what it is to be human. Likewise, in the unborn child matter, Froneman J and his fellow justices, in effect, made the "evaluative" choice that unborn children must not be considered as human life worthy of dignity.

However, unlike in the death penalty and fetal assessment matters, in the unborn child matter, whilst the Constitutional Court made a "value choice", it did not "acknowledge (it) openly and defend (it) squarely." To adapt *Stewart*, in the absence of reasons, the Constitutional Court made a profound value choice which was not "susceptible to reasoned or objective valuation." Furthermore, as already highlighted when dealing with the choice not to give reasons in the unborn child matter, the balance of probabilities strongly supports the conclusion that this choice involved what *Stewart* describes as "an arbitrary, subjective preference for some policy considerations and the denial of others … ." An additional inconsistency is seen in how Froneman J and his fellow justices dealt with the use of foreign law. In the fetal assessment matter, Froneman J writes:

> [32] The relevant question then is what role foreign law can fulfil in considering this case. Where a case potentially has both moral and legal implications in line with the importance and nature of those in this case, it would be prudent to determine whether similar legal questions have arisen in other jurisdictions. In making this determination, it is necessary for this Court to consider the context in which these problems have arisen and their similarities and differences to the South African context. Of importance is the reasoning used to justify the conclusion reached in each of the foreign jurisdictions considered, and whether such reasoning is possible in light of the Constitution*'s* normative framework and our social context.

He goes on to highlight that the German Court acknowledges unborn children as human life: "[41] In Germany the …(Federal Court of Justice) reasoned that there is no direct duty to prevent the birth of a child with a foreseeable disability because human life might appear valueless if one was to accept such a duty." In the application for leave to appeal in the unborn child matter, Froneman J and his fellow justices are alerted to the German Court holding that unborn children are human life worthy of dignity and that this is wholly consistent with *ubuntu* as an interpretive lens. Despite this, the justices are once again inconsistent when they give reasons for their decision in the fetal assessment matter, as they did at length when defending the dignity of a convicted murderer in the death penalty matter, but are silent concerning why they are of the view that the German Court's approach and the lens of *ubuntu* do not assist the applicants in the unborn child matter.

3.5 CONCLUSIONS

The first and second parts of this chapter ended with the question posed by Altman:[276] "While the realists stress competing rules, CLSers stress competing, and indeed irreconcilable, principles and ideals. Yet, the basic theme is the same: the judge must make a choice which is not dictated by law… . *Thus, from the CLS perspective, the jurisprudential invocation of principles only serves to push back to another stage the point at which legal indeterminacy enters and judicial choice takes place* (my emphasis)."

The conclusions in Part A and Part B are further buttressed by how the Constitutional Court has approached and used the philosophical concept of *ubuntu.* These will not be repeated here unless necessary to address the question posed above by the CLS perspective or to highlight additional conclusions.

Absent reasons in the unborn child matter, it would be difficult to sustain any argument as to what went through the minds of the justices before they made their decision. If one adopts the

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276 Altman 1986:216-217.

reasoning of the Indian and Tanzanian Courts as to why judicial decisions are not arbitrary,[277] then by necessary inference the absence of reasons does make this decision arbitrary. Whilst the justices are "persons of experience and standing", one is not able to decide whether or not their decision was taken in accordance with "principles crystallised by judicial decisions" or whether or not their decision in effect was a political/policy decision, not a legal decision. What we can say with certainty is that the justices were required to make a choice as to whether *ubuntu* viewed an unborn child as human life, as more than the "contents of a woman's uterus", and without giving its reasons answered in the negative. Thus, for example, it did not attempt to present evidence or reasons for why *ubuntu* was to be given this content. In law, it was entitled to act in this manner. However, this merely illustrates technically what its powers are in terms of the Constitution.

In the street naming matter, the Chief Justice strongly distanced the Constitutional Court from such formalism at the expense of substance. The issue of substance before the court in the unborn child matter was a profound moral question, similar to that highlighted in the fetal assessment matter. In the latter, Froneman J, for the Constitutional Court, made it clear that the Constitutional Court needs to not only make a choice it must also acknowledge it openly and defend it squarely when they make it. In the unborn child matter, that court chose not to defend their concept of *ubuntu* and/or that it did not apply, notwithstanding being confronted with arguments of eminent jurists conflicting with their choice, such jurists including Ackermann, the judges of the German Court and by necessary implication, possibly the judges of the Supreme Court of Appeal in the *Stewart* matter. In this regard, part of the reasoning in *Stewart* bears repeating:

> [27] In those jurisdictions where these claims have been allowed the debate has not been resolved, but an answer has simply been favoured on selected policy considerations without striking a balance that takes all the relevant norms and demands of justice into account and without resolving the impossible comparison between life with disabilities and non-existence… . Making…(the) choice in favour of non-existence not only involves a disregard

[277] Chaskalson in the death penalty matter writes: "[79] … . The majority of the (Indian) Court rejected the argument that the imposition of the death sentence in such circumstances is arbitrary, holding that a discretion exercised judicially by persons of experience and standing, in accordance with principles crystallised by judicial decisions, is not an arbitrary discretion." And see [114] wherein Chaskalson P records the Tanzanian court's approach in this regard.

> for the sanctity of life and the dignity of the child (see sections 10 and 11 of the Constitution), but involves an arbitrary, subjective preference for some policy considerations and the denial of others… .

When one reflects on this apparent inconsistent approach of the Constitutional Court when making a profound moral choice, it is difficult to fault this reasoning in *Stewart*, particularly that such moral choices involve "an arbitrary, subjective preference for some policy considerations and the denial of others… ." The arbitrary nature of these choices is exacerbated by the absence of reasons, as the choice by the justices is then not "susceptible to reasoned or objective valuation." The argument of Llewellyn,[278] highlighted in Chapter 2, is supported by this selective and inconsistent approach of the Constitutional Court. It supports the view that what drives moral decisions by judges such as this one primarily is policy, not legal principles.

Turning to the death penalty and the street naming matters, where detailed reasons for the conclusions are given, a number of questions emerge concerning the use of *ubuntu* as a hermeneutical lens. We have seen that except for one reference to it in the Interim Constitution, there is no further explicit reference to it and, more particularly, no definition of it in either the Interim Constitution or the Constitution. This notwithstanding, we saw in the street naming matter the pivotal role assigned to it by the Chief Justice. Likewise, it was pivotal in the reasoning of some of the justices in the death penalty matter.

A telling feature is the demographic make-up of the justices in the two matters, more particularly of those who made or did not make *ubuntu* pivotal to their conclusions. In the death penalty matter, all the black justices relied on *ubuntu*. As we have seen, only two of the white justices referred to it, Chaskalson P and Sachs J. Chaskalson P's reference to it is brief. He argues that although the reference to *ubuntu* in the Interim Constitution "has its primary application in the field of political reconciliation, it is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of *ubuntu*, ours should be a society that 'wishes to prevent crime …(not) to kill criminals simply to get even with them'(of interest is that here he quotes not an African source, but Brennan J in the

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[278] Llewellyn 1960:521-535.

American matter of *Furman v State of Georgia* - see [131] of the death penalty matter read with footnote 207).” Here, he therefore assumes a meaning of *ubuntu*, but links it primarily to political reconciliation and a quote by an American judge. (A face value reading of the full post-amble - see footnote 260 - supports Chaskalson P’s view that *ubuntu* has its “primary application in the field of political reconciliation.”)

Sachs J is the other white justice who refers to it. As we have seen, he is the only justice in the death penalty matter who endeavours to do research and obtain evidence to sustain a particular meaning of *ubuntu*.

All the black justices assign a pivotal role to *ubuntu*. Despite this, they do not endeavour to present evidence or research to support their respective definitions of *ubuntu*. It is as if they make an “instinctive” (to quote Mahomed J at [263] of the death penalty matter), assumption. We also saw that Sachs J specifically highlighted the absence of any evidence which enabled the court to engage with the issue.

Turning to the street naming matter, the only reference the two white justices make to *ubuntu* is: “[137] Again, we agree that it would be beneficial if all South Africans approached matters with appreciation and respect for others. But the Constitution does not impose that as an obligation on citizens, either by enjoining the adoption of the *ubuntu* worldview, or otherwise. And, again, the Constitution does not allow the judiciary to impose that obligation generally, least in the naming of streets, which falls within local authorities’ constitutional competence.” In contrast, the remaining nine justices, all who are black justices, make *ubuntu* a pivotal hermeneutical lens, which all South Africans “must” embrace. It is revealing that, as was the case in the death penalty matter, the black justices assumed a meaning of *ubuntu* without any evidence being presented which could be engaged critically and rationally. As we have seen, the one justice in the death penalty matter, Sachs J, who attempted in a meaningful way to address the lacunae as far as research and evidence was concerned, was white.

It is difficult not to conclude that the assumption by the various justices was that, given their culture and their history as black people, there was no need to support their conclusions concerning the content of *ubuntu*. As a white person, Sachs J needed to do this. It is admitted that Chaskalson P's limited reliance on it is not consistent with this hypothesis. However, what distinguishes his use of *ubuntu* from the use of it by the black justices of the Constitutional Court is that firstly, he sought to limit it to political reconciliation (supported by a face-value reading of the entire post-amble), and secondly, when giving content to it he relied on an American decision, unlike Langa J who referred to a Tanzanian decision to support his argument.

It is also significant that one of the justices who declared that the Constitution embodies "an objective normative value system",[279] one of the foci of this thesis, Ackermann J, made no mention of *ubuntu* in the death penalty matter. Later, however, as an author, he describes *ubuntu* as a "black African concept". He writes:[280] "*Ubuntu* has been referred to, somewhat cursorily, in a number of Constitutional Court judgments but with very sparse reference to any literature on its meaning. From my limited hearsay knowledge of *ubuntu* it would appear to play a significant ongoing role in black culture, custom and ethics." He then refers the reader to the observations by Sachs J in paragraphs [371] – [372] of the death penalty matter that " 'our law reports and legal textbooks contain few references to African sources as part of the general law of the country' and that appropriate source material, implicitly including material relating to *ubuntu* 'is limited and any conclusions that individual members of this court might wish to offer would inevitably have to be tentative rather than definitive.' " He then refers to literature chosen by him in an attempt to give content to the concept. At one point, he writes:[281]

> Metz … contends that *ubuntu* embodies 'a communitarian perspective that differs from dominant Western moral theories, particularly in virtue of deeming relationships of a certain kind to have basic moral worth'. An approach like this is indeed commendable, but I have difficulty in accepting that it really differs from Western moral theories, particularly those that are communitarian, while at the same time postulating individual autonomy and responsibility. But Metz… goes further, contending that the idea of *ubuntu* expresses a moral claim indicating that being human is *'entirely constituted* by relating to others in a certain

[279] See footnote 2.
[280] Ackermann 2012:48.
[281] Ackermann 2012:79.

> manner' (Ackermann's emphasis)... . I have considerable doubts whether the claim for *ubuntu* has ever gone so far as suggested in the emphasised phrase. If it does, then it certainly conflicts with important Western moral theories that prize individual identity and particularly individual responsibility too much to countenance its sacrifice to the group.

Later, he concludes with an analysis of the meaning of *ubuntu* in the context of human dignity. For this, he relies heavily on extracts by the justices referred to in the death penalty matter. He concludes this analysis:[282] "If the concept of *ubuntu* should deny (I do not suggest that it does) individual morality, responsibility or accountability, that would be contrary to some of the most essential features of human dignity and human responsibility underlying the concept of freedom". (The decisive role assigned to *ubuntu* in the street naming matter was handed down three years after Ackermann's book was published.) These extracts by Ackermann buttress the arbitrary and subjective nature of making *ubuntu* pivotal to an analysis and application of the Constitution. Furthermore, they highlight the absence of an objective, universally accepted definition of *ubuntu.* It also supports the hypothesis that the stage it pushes back to when legal indeterminacy enters, and judicial choice takes place is rooted firmly in being black in South Africa. Therefore, the Chief Justice commences the street naming judgment by setting out the oppressive history of South Africa and holding that "African people in particular and black people in general" were at the receiving end of this "crime against humanity." (See – [2] of the judgment). Froneman J and Cameron J commence their dissent in the street naming matter as follows: "[79] The wounds of colonialism, racism and apartheid run deep. Understandably so, as the Chief Justice's judgment (first judgment) so passionately shows. And insensitivity to the continuing wounds by many of us who were not subject to these indignities can only exacerbate the fraughtness. So it is with humility that we dissent, but dissent we must."

As we have seen, the two white justices then arrive at a fundamentally different conclusion to all the black justices. All 11 of the justices involved are, by definition, experienced and competent lawyers. Yet they come to diametrically opposed conclusions, central to this being how they view *ubuntu* and the role it must play when interpreting and applying the Constitution. The only reasonable differentiation which explains what happened in this judgment is the colour and life experience of the justices. This does not mean that the justices

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282 Ackermann 2012:114-115.

consciously see themselves as black or white justices. As du Plessis writes:[283] "… . Covert and subconsciously held (theoretical) assumptions can, precisely because of an interpreter's uncritical unawareness of them, have a more decisive impact on interpretive outcome than overt and consciously reasoned assumptions."

The arbitrary and subjective nature of the use of *ubuntu* as a hermeneutical lens is compounded if we have regard to the arguments of Ackermann the author (2012) and, indeed Sachs J in the death penalty matter.

Being black, the justices may wittingly or unwittingly assume they know what *ubuntu* is, and thus the absence of any foundation laid by them before they express their views on what *ubuntu* is. However, it is clear from the references referred to by both Ackermann (as author) and Sachs J above that there is no universally accepted African definition of the concept. In this regard, Braden bears repeating:[284] "… so that today the Court has almost unlimited verbal devices for justifying anything it does… . Hence, the Justice who wants to tell the world how he decides cases…must say: 'This is what I believe is important in our civilisation and I shall do all I can to preserve it'. And forthwith set forth his creed' "

In the street naming matter, the Chief Justice directed that "to breathe life into the underlying philosophy and constitutional vision" of the Constitution so that South Africans can comply with their duty to transform South African society, all South Africans "must embrace the African philosophy of *ubuntu*… ." Clearly, *ubuntu* is central to his creed and in the street naming matter he and his fellow justices have set it forth as fundamental for the transformation of South African society. Given the arbitrary and subjective nature of the concept and how it has been used or not used, the matters highlighted in Part C of this chapter raise fundamental questions in response to the assertion that the Constitution contains objective values, of which justices of the Constitutional Court are merely mouthpieces.

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283 Du Plessis 2002:91.
284 Braden 1948:571-573, 594.

I conclude this chapter by referring to the main findings of this chapter, namely, that the general and legal philosophical proposition in Chapter 2, that objectivity is unattainable when moral choices are made, is borne out by the analysis of judgments of a moral nature by the South African Constitutional Court. In a nutshell, objectivity, where value choices need to be taken by the Constitutional Court, is unattainable. Strands of subjectivity in its jurisprudence are unavoidable. This was demonstrated by highlighting the subjective nature of the rationalising process occurring when Constitutional Court judgments touching on moral issues are written. The effect of this demonstration is to demythologise the purported objectivity of the Constitutional Court justices when they rule on moral issues. In the next chapter, the relevance of this demythologizing for civil society will be dealt with. *Inter alia*, it will be seen that this insight is a key to the advancement of greater participation by civil society, not least of all by religious communities, in the ongoing moral formation of South African society. And that this in turn, will result in more inclusivity and freedom of belief for all South Africans, be they religious or “a-religious”(I develop on this description in Chapter 5).

CHAPTER 4

IMPLICATIONS FOR CIVIL SOCIETY

4.1 INTRODUCTION

In the selected Constitutional Court judgments, which have been analysed in Chapter 3, there is an express or implied recognition concerning the complexity of South African society when it comes to religious and philosophical beliefs and opinions. Part of this recognition is the understanding by the justices of the Constitutional Court, of the need to accommodate this complexity. Thus, for example, in the marriage matter, Sachs J writes:[285]

> [94]… . The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom. [95] The hallmark of an open society and democratic society is its capacity *to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner… (and) to do so in a manner that it is not mutually destructive* … (my emphasis).[286]

The conundrum for the justices, already foreshadowed in Chapters 1 and 2 and confirmed by the analysis in Chapter 3, is, in the absence of objectivity, what reference point to use when deciding on what the limits should be when accommodating such complexity. By what standard do they decide whether a strongly held belief or opinion promotes or retards the achievement of human dignity, equality and freedom, or which basic norms and standards should be binding on all?

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[285] *Minister of Home Affairs*, see footnote 232.

[286] And again in the school punishment matter, Sachs J writes: "[35] … . The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. *Such a society can cohere only if all its participants accept that certain basic norms and standards are binding* (my emphasis)."

In the analysis of the selected Constitutional Court judgments, we have come to witness this problem. We have seen that simply saying or intimating that something is 'objective' or 'is what the Constitution says' does not make it objective; there is naturally the ever-present reality of the worldview of the justice intruding as purportedly nothing more than an objective interpretation and application of what is already in the Constitution. For example, Kriegler J's description of the role of judges in the death penalty matters that despite calls for value judgments by them, "… the starting point, the framework and the outcome of the exercise must be legal. … The 'Court of final instance over all matters relating to the interpretation, protection and enforcement' of those provisions is this Court, appointment to which is reserved for lawyers. The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics", is inaccurate, misleading and unhelpful. The result of this is that the worldview of the justices concerned, notwithstanding the attempts by them to gainsay this, highlighted in this thesis and supported by the broader philosophical traditions dealt with in Chapter 2, in effect, ends up being an undeclared competing worldview in this philosophical and belief/opinion complexity. If this is left unchecked, the ever-present danger is that in their constitutional role as the final arbiters of what "promotes or retards the achievement of human dignity, equality and freedom" or which "basic norms and standards" should be binding on all, these justices may overly use their power to impose their worldview.

It would be unrealistic to deny justices any form of subjectivity regarding decisions to be made on substantial moral issues. Nevertheless, to present such subjectivity in a manner that provides the impression that such subjectivity is all there is to such matters (or even by keeping silent on this) would be contrary to fostering a feeling of belonging, participation and inclusion of those people who do not share their worldview on the specific issues.

It is clear from the Constitution and the jurisprudence of the Constitutional Court, which also clearly emerges from the analysis of the selected cases in Chapter 3, that central to the society envisaged by the Constitution is one which allows for diversity and promotes tolerance.[287] In pursuit of this ideal, particularly given that justices of the Constitutional Court are the final

[287] See footnote 45.

arbiters in this arena, it is important that justices be made aware (or reminded) of their subjectivity related to constitutional adjudication. This is said with, as alluded to earlier, the fact that subjectivities are inescapable, but irrespective, that judges should aspire towards more nuanced intimations of due cognisance of 'other views' even where such 'other views' are not used as qualifiers for decisions made. This only will be possible if justices gain insight (even if it is through mere reminder) into the reality of the subjective nature of their present adjudication.

Equally important for this thesis, for civil society to fulfil its role, particularly that part of civil society made up of adherents of any of the traditional mainstream religions, the instilling of an awareness of the subjectivity of the justices is imperative.

This chapter begins by providing the context in which we who live in a liberal constitutional democracy in an African setting find ourselves in. It is argued that given the African context, underpinned *inter alia* by the elusive concept of *ubuntu*, ours is an even more complex and diverse society than Western liberal democracies where the space between the religious and the public sphere has not reached such distances as in many Western liberal democracies. In this regard, *inter alia*, the distaste for anything metaphysical and religious in, especially the public sphere, is explained and elaborated on. This is a theme throughout the chapter given a context which is deeply religious.

Referring to selected theologians in the Church (as an integral part of civil society) as an illustration, this chapter then turns to investigating some of the implications for civil society where it accepts without questioning the assertion (whether express or implied) that the Constitution already contains objective values and meanings, and that the justices are merely objective mouthpieces for these values and meanings in their constitutional adjudication. In this regard, there is the understanding that the only function of civil society is to implement the moral vision the justices say is already contained in the Constitution. At this juncture, an African perspective is introduced, where the perception is that the Constitutional Court is bound to a Western hermeneutical lens, which also brings to the fore the importance of an awareness of subjective categories lying behind law and jurisprudence.

The chapter then proceeds to dealing with the participation of civil society in the constitutional project. Included in this is touching on warnings that where the courts are not mindful of the substantive moral consensus that there may be in society or their own subjective worldviews and reasoning, it risks promoting a contempt of or disregard for the law and crucial parts of civil society. Illustrations are given in this respect, where justices pay lip service to these concerns but, in reality, wittingly or unwittingly, employ various methods to avoid implementing a majority moral consensus or handing down a nuanced judgment which is sensitive to the complexity and diversity of our society, not least of all, religious complexity. And in its place, wittingly or unwittingly, promote a competing worldview central to which is 'reason' as understood in a particular non-religious context, under the guise that they (the justices) simply are mouthpieces of the Constitution. Following on this, the importance of civil society actively engaging with the courts of the land is dealt with, and various examples of practical methods which can be used are given. This part of the chapter also will touch on the need for courts and religious communities to realise that like in other opinions, the religious have a right to participate in the public sphere using their own religious language. A thread running throughout this chapter will be a constant reminder that the context for the Constitutional Court is a country set in sub-Saharan Africa, not in the West. In other words, in bringing to light many of the subjective strands emanating from the Constitutional Court, the awareness has been instilled that other regional and contextual subjective strands may also compete for inclusion and that civil society and the Constitutional Court must be alerted to not only using a Western lens when giving content to the words and concepts in the Constitution.

The chapter then deals with the importance of imparting an understanding of the hypothesis of this thesis through the various educational facilities in the country, not least of all law schools. Here, *inter alia*, with reference to an African philosopher, it is emphasized that such education must be in line with the various 'worlds of meaning' found in our plural society. In this section, some illustrations are provided as to how and on what the law teacher can engage with students as they educate them.

Law and constitutional adjudication are what is investigated next in this chapter. Central to this discussion is what gives legitimacy to a constitution and the need for judges to be mindful of

this and, consequently, also to their role and limits. In this part of the chapter, "theologism" is introduced, which pertains to where judges, in effect, use their positions to promote their own particular 'world of meaning'. At this juncture, two practical reasons are covered which should make the justices of the Constitutional Court and civil society particularly vigilant against any such "theologism" – the fact that any decision by the Constitutional Court is unappealable and that substantive matters of moral importance in the life of South Africans, both as individuals and as a community, fall in large measure, under their jurisdiction.

The chapter will then end with a summary of what has been highlighted in the chapter. In this summary there will be a challenge to the Constitutional Court to acknowledge the subjective strands in their jurisprudence and adapt accordingly, particularly given the tremendous power and responsibility the Constitution gives them. The challenge to civil society will be that insight into the subjective nature of the reasoning process of the justices must empower them to fulfil their central role and responsibility as civil society and proactively engage the Constitutional Court to make sure its judgments are reflective of the diverse and complex society they are part of.

4.2 GIVING CONTEXT

The refraining by justices of the Constitutional Court from express recognition regarding the subjectivity (and belief-orientated views) of the moral decisions they make comes as no surprise when bearing in mind the lack of especially public expression regarding that which is metaphysical. Robin Collingwood comments, "Ours is an age when people pride themselves on having abolished magic and pretend that they have no superstitions. But they have as many as ever. The difference is that they have lost the art, which must always be a magical art, of conquering them. So it is a special characteristic of modern European civilization that metaphysics is habitually frowned upon and the existence of absolute presuppositions

denied”.[288] Collingwood adds: “In my own experience I have found that when natural scientists express hatred of ‘metaphysics’, they are usually expressing this dislike of having their absolute presuppositions touched.”[289] It is argued that these observations by Collingwood present a qualified and logical connection (although not the only qualified and logical connection) between the justices of the Constitutional Court and their silence on the subjectivity of their belief-driven points of view, and the same applies to the rest of the judiciary in South Africa as well as to the judiciary in other liberal democratic societies.

Then there is a strong current of exclusion of anything related to, in general, ‘belief’, ‘metaphysics’, ‘transcendence’ as well as ‘philosophy’ in the public sphere, more specifically and for purposes of this study, related to law (the application and teaching thereof) and included in this is the workings of the judiciary. This absence of any reference to or cognisance being taken of metaphysical points of departure also assists in explaining (even though not necessarily exhaustively) the avoidance by the justices of the Constitutional Court (and other courts) of expressiveness and openness regarding the subjective and belief-driven strands of views included in the constitutional adjudication practised by these justices. This, in turn, has implications for insights related to the nature of law and where law is approached in a so-called ‘neutral’ and ‘secular’ manner. Consequently, law is understood (and in many instances taught at our universities, whether expressly or tacitly) as separated from the religious and the metaphysical in general. And even where the religious or metaphysical may be dealt with or referred to, it is done so in a superficial and fleeting manner. In Chapter 3 we saw examples of this in the death penalty matter, the adultery matter and the school punishment matter.

Stephen Carter comments that: “The best explanation for the fear of public action motivated by religious belief rests on the reliance of liberalism on dialogue and rationality as indispensable components of its political theory, and the often unstated premise of many liberal theorists that reasoning and religious belief are mutually exclusive means for understanding

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[288] Collingwood 1939:46. Similarly, Collingwood states that, “ … the very possibility of metaphysics is hardly admitted without a struggle, and when, even if its possibility is admitted, its importance as a *conditio sine qua non* of science and civilization is almost universally denied” (Collingwood 1939:224).

[289] Collingwood 1939:44.

the world."[290] As already mentioned, an example of this is present in the school punishment matter,[291] where Justice Sachs states that: "[33] The most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders. Religious conviction and practice are generally based on faith. Countervailing public or private concerns *are usually not and are evaluated mainly according to their reasonableness* (my emphasis)." In this, the view that religion is synonymous to faith whilst countervailing public and private concerns is (usually) not and that the measure of reason exclusively applies to the latter is present and should not be. Even though Sachs J is not stating here that religious belief is unreasonable, note how he points to what the general boundaries of "faith" as well as the general application of "reasonableness" should be. The question here is: What does the judiciary rely on to qualify such an understanding? Implied in this is a belief that assumes religion to be exclusively the holder of faith and that the measure of rationality is to be applied mainly or generally to matters 'outside' of religion and faith. But the concern arising from this understanding is that faith finds application beyond the religious (call it belief, if you like), bearing in mind Steven Smith's comments that "… modern constitutional interpretation … is a religious enterprise in the sense that it depends on the (usually tacit) assumption of transcendent authority."[292]

This approach by liberalism is symptomatic of what Peter Berger refers to as liberalism's view that "meaning (understood as belief) is something that is embraced within the private sphere whilst the public sphere is consecrated to reason".[293] Carter states that liberalism conveys the message to those whose morality is inextricably connected to their religious beliefs that "they are not welcome in public dialogue until they start speaking the same language as everyone else."[294] This "same language" is ascribed to that which is 'rational'.[295] In the process, what is forgotten or ignored is that these views that are viewed as being rational themselves emanate

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[290] Carter 1987:986.
[291] *Christian Education South Africa*, see footnote 48.
[292] Smith 1996:159 in Campos, Schlag & Smith 1996.
[293] Berger 2007:301.
[294] Carter 1990a:492-493.
[295] Carter1990a:490.

from presuppositional or belief-laden points of departure, thereby overlapping with subjectivity.

What compounds this complexity is what justices use to decide on what is within the private or public spheres; in the process they also fail to grasp that different religious traditions, which in South Africa would include something like African traditional healing, do not compartmentalise the activities and tenets of their faith between sacred and secular/profane. Thus, for example, in the school punishment matter, Sachs J writes:[296]

> [34] The result is that religious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. *While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two* (my emphasis). It is in this area that balancing becomes doubly difficult, first because of the problems of *weighing considerations of faith against those of reason* (my emphasis), and secondly because of the problems of *separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way* (my emphasis). [35] … . The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that *certain basic norms and standards are binding* (my emphasis).

Here, Sachs J, whilst quoting Jesus Christ's use of a Roman coin to answer a question,[297] fails to grasp the profound nuance implied by Christ's response. A nuance which indeed soon led to a mass deadly persecution of Christians by Rome after the crucifixion and resurrection of Jesus Christ.[298] Sachs J cannot be blamed for this as he is not a theologian. Nevertheless, simply by seeing the conundrum as a problem of "weighing considerations of faith against those of reason" in a context where, in terms of section 36 of the Constitution, his reference points are what is reasonable and justifiable having regard to various factors, all of which requires the use of reason, he paves the way for inevitably always finding against the religious groupings in the country when it comes to deciding on the "certain basic norms and standards (that) are binding"

[296] *Christian Education South Africa* see footnote 48.
[297] Luke 20 verses 19-26.
[298] Also see my previous illustration of Dietrich Bonhoeffer in footnote 253.

which must apply to conduct he has decided falls within the "public sphere". This presupposition of Sachs J concerning the juxtaposition of faith and reason in its substantive belief is also flawed.[299] (In this particular case, this presupposition clearly had an impact on the outcome of the matter.) Therefore, although he cannot be blamed for not being a theologian, he must be made aware that this notwithstanding, he is acting as a theologian with very practical consequences for all people of faith in South Africa.

In a similar vein, Robert George states that most orthodox secularists believe that their views on matters related to rightness or wrongness are based on reason, which can only be dislodged by an irrational faith.[300] Then there is Susan Mendus, who observes that in modern political philosophy, a distinction is made between the 'right' and the 'good' and where the former should enjoy priority over the latter. In other words, a person may practise his or her own beliefs pertaining to what is good, as long as this does not come into conflict with views on the 'right', the latter signifying those matters that should give the government the authority to interfere.[301] However, who gets to choose what should resort under the 'good' and what should be categorised as the 'right'? As Susan Mendus points out, in the determination as to what the 'right' itself should be comprised of, a specific sense of what is good is required in the first place. This, in turn, involves the relevance of foundational beliefs, whether religious or non-religious.[302]

Furthermore, within the South African context, the elevation of the illusive concept of *ubuntu*, not susceptible to objective and rational assessment and definition, as the hermeneutical lens which "must" be used "in all matters of importance", renders the distinction between 'good' and 'right' impenetrable, using only subjective reason. What is more, what makes the South

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[299] Two examples will suffice in this regard. In John 20 verses 24-28 when Thomas doubts the resurrection, Jesus invites Thomas to touch His hands and His side to give Thomas tangible evidence to counter his doubt. In 1 Corinthians 15, St Paul sets out the rational case for believing in the resurrection of Jesus Christ, amongst other things, citing 500 eyewitnesses. In this chapter, to emphasize the rational basis for faith in Jesus Christ, St Paul writes that if He was not raised from the dead then Christians are most to be pitied. Elsewhere, St Paul also often calls on his readers amongst other things to be sober minded and sensible. (Also see footnote 251.)

[300] George 2001:6. Also see Carter 1990b:523 and Carter 2000:97.

[301] Mendus 1989:119.

[302] See Mendus 1989:119-120.

African context uniquely challenging is the attempt, on the one hand, to apply a Western liberal lens by some jurists whilst other jurists seek to apply a lens rooted in Africa. For example, in the death penalty matter, Didcott J, in effect, opines that the Constitution must be viewed through a "liberal philosophy" lens. Yet in the same judgment, Mokgoro J writes that the Constitution can often only be interpreted "by reference to a system of values extraneous to the constitutional text itself", namely *ubuntu*. Twenty-one years later, even though, unlike in the Interim Constitution, there is no reference to it in the Constitution, Mogoeng Mogoeng CJ in the street naming matter, in effect, prescribes that "all matters of importance in this country" "must" be interpreted and applied through the lens of *ubuntu*. To compound this complexity, Langa J, in the death penalty matter, writes that the Interim Constitution does not define *ubuntu*. When Langa J then attempts to give his (by necessary implication, subjective) definition of *ubuntu,* he refers, *inter alia*, to a Tanzanian Court of Appeal decision. This complexity is further compounded by Langa J, on the one hand, finding that the death penalty is anathema to *ubuntu* and in fundamental conflict with the right to life provision in the Interim Constitution; the Tanzanian Constitutional Court finding, on the other hand, that the legitimate purposes to which the death sentence was directed were a constitutional requirement that "everyone's right to life shall be protected". I will return to this ongoing uneasy, if not at a *prima facie* level adversarial, relationship between the values of Western liberal democracies and a country located within sub-Saharan Africa.

These observations regarding the status of reason as something not generally aligned with the religious when there are views contrary to religious views, and of reason as providing a basis for consensus across different beliefs and cultures as well as concomitant implications of this regarding inclusion in the public sphere, provides a better understanding of the approach taken by the Constitutional Court in deciding on matters of substantive moral weight. In other words, it is accepted that certain concepts and rights have meanings that society, in general, will agree with. There is the faith that the courts speak with a reasoned voice. However, we saw in Chapter 3 that the "reasoned voice" has clear strands of subjectivity involving choices informed wittingly or unwittingly by the worldview of the justices. As Alasdair MacIntyre opines concerning analytical philosophers, confirmed by legal philosophers and the analysis in Chapters 2 and 3 of this thesis: "When analytical philosophers do reach substantive conclusions, as they often do, those conclusions only derive in part from analytic philosophy.

There is always some other agenda in the background, sometimes concealed, sometimes obvious. In moral philosophy, it is usually a liberal political agenda."[303]

Rex Ahdar and Ian Leigh comment that liberalism became overtly secularised in ideological underpinning, consequently giving rise to the dominance of a theory with quite definite views of the good life, as opposed to the resolving of issues about the citizen's pursuit of the good life.[304] This gave rise to a "narrow and sectarian program enforcing its dogmas by force" instead of the application of "political arrangements by which persons of widely differing views can live together in relative harmony".[305] In fact, the hostility of public life to religion, according to Frederick Gedicks, can be traced to one of the conceptual foundations of liberal political theory, namely the distinction between public and private life.[306] Alasdair MacIntyre's view, therefore, makes sense, namely that: "On the dominant liberal view, the government is to be neutral as between rival conceptions of the human good, yet in fact what liberalism promotes is a kind of institutional order that is inimical to the construction and sustaining of the types of communal relationship required for the best kind of human life."[307]

Fundamental to this "best kind of life" for religious, and indeed non-religious, communities in South Africa is the recognition that, unlike this dominant liberal view, MacIntyre writes, "religion does not view the world as divided into that which God created and that which God did not create… and this necessitates in turn that the religious believer acts in accordance with her religious convictions within both spheres and not only in the private sphere."[308] Likewise, in their attempts to define *ubuntu*, we saw the justices of the Constitutional Court opining for example that it "must" serve as the hermeneutical lens in "all matters of importance". Grasping

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303 Knight 1998:260.
304 Ahdar & Leigh 2005:6.
305 Ahdar & Leigh 2005:6-7. Carter states that liberalism tends towards hegemony, not content on serving as a theory of organization of the state, rather having grown into a theory of organization of private institutions in the state, Carter 2000:26.
306 Gedicks 1992:674.
307 MacIntyre 1981:xiv-xv. Stanley Hauerwas states: "Liberalism seeks a philosophical account of morality that can ground the rightness or wrongness of particular actions or behaviour in a 'theory' divorced from any substantive commitments about what kind of people we are or should be – except perhaps to the extent that we should be rational or fair" (Hauerwas 1991:220).
308 De Freitas 2021:446-447.

the hypothesis of this thesis will enable religious and non-religious communities (I deal with this unsustainable distinction in Chapter 5), or communities who share the view of Didcott J that a liberal lens must be used, to engage with the Constitutional Court, indeed with one another when they present their competing worldviews to the Constitutional Court about what the good life is. It is hoped that this would help alert the justices of the Constitutional Court to the reality revealed by the analysis in Chapter 3 of this thesis, that they are not simply in a neutral and objective way following neutral and objective rules declaring what the Constitution has to say about the good life. But by using their particular worldviews as a lens, they are, in effect promoting competing worldviews on the moral question before them. This cannot but facilitate greater diversity and accommodation of diversity of belief by the Constitutional Court. In this regard, Shaun de Freitas writes: "If we differ about the good life, we are bound to differ about justice and rights, unlike the view taken by liberal legalists who aim to elude conflict about the good life by resorting to ideas of justice and rights – the right is determined (or given content) by the conception of the good, and without the latter, the right is empty."[309] In a nutshell, as in effect has been highlighted throughout this thesis, what needs to be grasped by the said justices and civil society as a whole, religious and non-religious, is that words such as dignity, freedom and equality have no meaning of substance until the justices of the Constitutional Court give them practical content in concrete circumstances, such as in the cases analysed in Chapter 3. And central to this practical content is whether the separation of the private and public spheres promotes diversity and inclusivity, not least of all of belief.

4.3 CIVIL SOCIETY AND TRADITIONAL RELIGION

4.3.1 Faith in the Constitutional Court

Sanford Levinson refers to a context in which the hero is understood to be the person who imprints the new understanding of the political order on the popular consciousness. And in our particular culture, says Levinson, we insert these new understandings, particularly if found in judicial opinions, onto what we call "the Constitution" and give forth that the "leader-judge"

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309 De Freitas 2021:445.

has provided a more in-depth inspection into its essence, rather than bending it to a new vision.[310] This is the approach taken by some theologians of the Church (see footnote 311 below, and indeed as we have seen in Chapter 1 the leadership of a significant denomination in South Africa (see footnote 22). Since the advent of the Interim Constitution and thereafter the Constitution, these theologians/the Church, in giving moral content to the concepts of dignity, equality and freedom, have embraced this fiction of the Constitution containing an objective value system, of which the justices are merely mouthpieces, and accordingly deferred to the Constitutional Court justices in these matters. Thus, Wessel Bentley,[311] in referring to the broader context of South Africa as being a constitutional democracy, writes: "The Constitution would allow the judiciary to become the formal 'watchdog' of any entity in South African society, including Church and State, using the values of the Constitution to ensure basic rights and overall cohesion of the community… . The Constitution nevertheless created space for the Church to fulfil its prophetic role… ."

This observation of Bentley is predicated on the assumption that the content and meaning of these values of the Constitution are objectively ascertainable by the judiciary and that only lawyers are qualified to interpret and apply them. Likewise, we have seen that Clint le Bruyns opines:[312] "The 'good' in political life is reflected in our moral consensus document, the national *Constitution,* which includes a 'Bill of Rights'." Along similar lines, Nico Koopman writes:[313] "Although the Bill of Rights is not an infallible document, we might state without hesitation that the vision of a human rights society is articulated very clearly in this document. Our paperwork has been completed successfully. In order to look good not only on paper but also on the playing field, we need to work hard at the establishment of a human rights culture." In effect, Le Bruyns and Koopman, along with Bentley, presuppose an objectively

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310 Levinson 1982:390.

311 Bentley 2012:91. Bentley, Le Bruyns, Koopman and Forster referenced hereafter, whilst primarily academics and not representatives of specific sections of the Church, are published South African theologians in reputable theological publications, as seen in the Bibliography of this thesis. Their line of thinking is in line with the approach taken by the Synod of the Dutch Reformed Church, in the Gaum matter, referenced at footnote 22. In my research I have not encountered any South African theologians who have published any papers in conflict with this line of thinking.

312 Le Bruyns 2012:61.

313 Koopman 2007:107.

ascertainable consensus about a purportedly objective value system in the Constitution, which the Constitutional Court justices say exists.

Furthermore, this argument of Koopman, more particularly that the "paperwork has been completed successfully", in effect asserts that there is no role for theologians to give "the paperwork" content; that this is for the justices of the Constitutional Court to do, and that once they have given content to "the paperwork", the task of the Church merely is to implement this content. In other words, the purported objective value system contained in the Constitution is not something which can be changed or developed by those within the Church and other religious circles. Thus, in effect, the Constitutional Court tells those within traditional religious circles what a human rights culture requires in matters such as marriage, sexuality, discipline, life, death, adultery, abortion, unborn children, and even how the relationship between church and state should be understood (which includes more far-reaching implications and influences related to the parameters that should be set for the exercise of religious rights and freedoms); and then it is for the Church and the religious community in general, to execute on this vision. This thesis shows that the foundation for the presupposition that the Constitution contains an objective value system or that the Constitution is referred to by the justices in any manner that may imply that the Constitution includes a shared objective take on matters related to moral worth is flawed. Not only is such an assumption at loggerheads with the general and legal philosophical discourse, as seen in Chapter 2, but a close and critical analysis of seminal decisions by the Constitutional Court in Chapter 3 also reveals the flaws in this reasoning.

The main implication of this conclusion is far-reaching for the prophetic ministry of the Church (and indeed for all of civil society, including other traditional religions), not to even mention the implications of this for public legal education, where members of different religious communities seek and expect an education that is aligned with their religious traditions and cultures. This is no light matter, considering the high level of representation of religions in South Africa. As already stated, the effect of the present reasoning of the aforementioned theologians in South Africa is that it is for the Constitutional Court to tell the Church what the content is of the objective value system in the Constitution, and then only does the Church and other traditional religions enter the picture as they help implement the moral vision of the

Constitutional Court. As things stand, the prophetic ministry of the Church is limited and circumscribed by what the Constitutional Court's moral vision for the country is.

Thus, the gatekeepers are the justices of the Constitutional Court, as they argue that it is for lawyers to extrapolate the objective value system from the Constitution as it is only they who have the necessary training, experience and expertise as lawyers. In Chapter 1, a railway metaphor was used involving civil society at present merely being passengers on a train and not being part of designing the train itself, the train being the purported objective value system espoused and imposed by the Constitutional Court justices. One of the reasons for this may be the flawed assertion, whether expressly or tacitly, or whether directly or indirectly, that the Constitution contains this objective value system or that the meaning of the values and rights included in the Constitution are aligned with a uniform reason which is perceived as finding expression through the courts. This flawed assertion has also entered some of our institutions of higher learning, where the teaching of the Constitution and of human rights conceals the intricacies of subjectivity such as is focused upon in this study. What most certainly is neglected in parts of the academy in South Africa (and in liberal democracies around the world) is the substantive integration of the religious in the lecturing halls of public institutions of higher education, such as universities, when it comes to the teaching of the law.[314]

There are, needless to say, a multitude of other causes resulting in many within the circles of traditional religions placing their faith in the courts' views on what the Constitution is telling us. A substantive cause of this (as alluded to earlier) is the rift between religion and the public sphere that has formed in Western societies since the dawn of the Enlightenment and possibly overlapping with this, explicit doctrinal views in support of the separation of Church and State. However, it is not part of the aim of this study to further explore this, the focus rather being the possible influence that the Constitutional Court's judgments have on those adherents of a traditional religion, and indeed wider civil society, regarding intimations that the Constitution

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[314] This should be common knowledge and there is an abundance of scholarship either directly or indirectly pointing to this. A good starting point would be reading Allan Bloom's, *The Closing of the American Mind: How Higher Education has Failed Democracy and Impoverished the Souls of Today's Students* (1987).

is reflective of objectivity or of a uniform take on the meanings of rights and values listed in the Constitution, as well as the moral connotations emanating from this.

When those in religious circles grasp the argument in this thesis, it is then for them to decide whether or not they want to engage in the design of the train itself, bearing in mind that, in effect, the justices of the Constitutional Court, their protests notwithstanding, are constantly developing the design of the train in their own image. This responsibility that the Church and other traditional religions have is succinctly expressed by David Louisell in the following:[315]

> But let us not, like mischievous children, seek to cast all responsibility onto the shoulders of others. A distinguished judge asked me not long ago, referring to some of the decisions I have discussed here, if I thought the Court would have trended the way it has if the strength of religious conviction had not first failed in the hearts and minds of the people? To the extent this is a valid inquiry, it revives the master observer Shakespeare's trenchant perception, which can be paraphrased: "The fault, dear fellow citizen, lies not in our Justices, but in ourselves."

Adherents of the Church, as well as those who are members of other traditional religions, also bear the responsibility of making their own religious views heard, also where such views come into opposition to views emanating from non-religious sources (and, of course, other religious sources). In this regard, Koopman,[316] referring to the Dutch theologian Johannes van der Ven, writes that his approach to moral formation "is helpful for the discourse on moral formation in South African society." He continues: "Van der Ven's conviction that religion has a crucial role to fulfil in public life and that the contribution of religion to our understanding of morality and to moral formation be acknowledged also enjoys support."[317] The effect of the argument in this thesis is that theologians in South Africa may be more challenged to engage fully in the merits or demerits of this conviction of Van der Ven if it is first understood that when the Constitutional Court hands down judgments, it is not merely extracting or interpreting clear objective words and concepts nor reasoning in a universally accepted language; rather, it is making moral and policy choices under the guise of merely applying universal reason or

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[315] Louisell 1976:33.
[316] Bentley 2012:116.
[317] Bentley 2012:116.

objectivity. Once this is grasped by theologians (and by law students also from diverse religious, cultural or traditional backgrounds), they may be more at liberty to engage in the debates about the duty, limits and extent of religious views in the moral formation of South African society by means of the Constitution. Dion Forster, writing about the relationship between the Church and the State, opines:[318]

> What is clear to me is that, regardless of the model of relationship that is prevalent… , the Church has a God-given mandate to engage both the State and the members of the Church to work for the transformation of society and the establishment of God's kingdom of justice and grace. (He concludes that): … the Church should advocate and work for the establishment of a just Secular State since this form of government will best suit the principles of equality, freedom and social justice that are central to the Gospel of Christ.

A pivotal pillar of the State in this regard is the Constitutional Court and its pronouncements. It is unclear whether Forster includes in this engagement the Church contributing toward what the content of this purported objective value system is or should be. What is clear is that the Constitutional Court has made this value system they say already exists in the Constitution*,* the foundation for the moral transformation of South Africa. Therefore, any meaningful engagement with the State as envisaged by Forster must, by necessity, include an engagement about the content of this purported objective value system at the outset, more particularly about whether it is an objective process. If the central subjective strands stemming from the Constitutional Court's adjudication are not critically exposed, then the urgency of such active participation by the Church regarding the application of the Constitution is weakened.

Justice Learned Hand commented that: "I often wonder whether we not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.

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[318] Bentley 2012:86-87. Although I agree with the jist of what Forster is implying here regarding the importance of the Church actively and critically engaging with the civil authorities of the day regarding important matters, his reference to "a secular just State" should, according to me at least, rather read as follows: "A State that is truly diverse and inclusive." Referring to "a secular" implies the marginalisation of religion not to even mention the assumptions accompanying the word "secular" in the sense that it is separate from "belief or moral convictions" which is not the case (this has been touched upon earlier in this thesis).

While it lies there it needs no constitution, no law, no court to save it."[319] This placing of too much hope in the Constitution and in constitutional adjudication is, in the South African context, a reality, and implied in this are those within religious circles who practise the same. As Justice Hand rightly alludes to, "it is in the hearts" of persons that liberty reigns and part of bringing this liberty to full (or at least, to improved) expression is refraining from the deification of constitutional adjudicating, which, as argued throughout this thesis, is also the harbinger of contestable subjectivity. An African voice in this regard is that of Boyana Tshehla, who writes:[320]

> When the current constitutional dispensation was ushered in, the general posture of the new order was an overall and unreserved embracement of South Africa's diversity of religious and cultural beliefs. This was a welcome step that seemed poised to undo the injustices of the past. However, it quickly became plain that what the Constitution promised was difficult or even impossible to actualise. Cases such as those instituted by Mr Prince,[321] exposed the reality that the law, with its *Western approach* (my emphasis), is ill-equipped to accommodate the religious and/or cultural diversity of a country like South Africa.

This note of despair by Tshehla can be addressed by civil society, not least of all by the religious community, if it grasps the hypothesis of this thesis. It is not the Constitution itself which is the problem, it is the "Western approach", clothed in objectivity, which is the stumbling block. To adapt Justice Hand's words and at the same time address Tshehla's despair, the Constitution needs to be interpreted and applied through the complex and diverse hearts of all the people of South Africa, not just the subjective hearts of the justices of the Constitutional Court. I will return to this theme in the next section when reflecting on words by justice Mokgoro in the death penalty matter. Be as it may, it is in the realisation of the subjectivity that emanates from the Constitutional Court that further momentum is gained in the realisation of competing ideological and contextual approaches and, consequently, to provide a more participatory element to those views that are currently marginalised.

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319 Cited in Hirschl 2004:153.
320 Tshehla 2024.
321 *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC).

4.3.2 Civil society and participation

Although the concept of civil society is fraught with various views, says Robert Wuthnow, voluntary associations form an important part of it, "and churches, along with other religious organizations, are thus an inescapable feature of civil society."[322] Wuthnow states that the importance of examining the relationship between Christianity (and, by implication, therefore, traditional religion in general) and civil society derives from the fact that civil society is widely regarded as a normative good, a desirable dimension of social life which is worth preserving. The reason for this is the connection between a good society and the instilling of moral values through families, schools, churches, and community organizations.[323] De Freitas comments that "Civil society has dynamic qualities which are essential to a democratic society. Taking into consideration the strong representation of Christianity in South Africa, the churches in this country certainly form one of the most well-represented forums of civil society. This should encourage them to play an effective role in the shaping of public policy and public interest in a democratic and constitutional South Africa."[324] Roelf Meyer is of the view that "ideally, the relationship between government and civil society will be mutually energising: not only can civil society engender democratisation, but in return the democratic structures of government facilitate and encourage lively participation by civil society."[325] Goran Hyden states that "it would be hard to imagine that constitutional arrangements, laws and regulations would work without being embedded in, and reflecting, the particular values and norms upheld by the groups and communities which make up a given society."[326] In this context, Hyden avers that civil society should be viewed as the forum in which these habits of the heart are nurtured and developed.[327]

As we have seen in Chapter 3, this sentiment is echoed *inter alia* by Madlanga J in the adultery matter and by Mokgoro J in the death penalty matter where arguing for *ubuntu* as a

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[322] Robert Wuthnow cited in De Freitas 2005:25-26. Also see rest of De Freitas 2005:26-27 for confirmation of the composition of civil society including the domain of the traditional religious.
[323] Robert Wuthnow cited in De Freitas 2005:22.
[324] De Freitas 2005:30.
[325] Roelf Meyer cited in De Freitas 2005:31.
[326] Goran Hyden cited in De Freitas 2005:33.
[327] Goran Hyden cited in De Freitas 2005:33-34.

hermeneutical lens, she writes: "[304] … . However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality… . [305] In *Dudgeon v United Kingdom* (1982) 4 EHRR 149 the European Court of Human Rights,… expressed the view that '… in a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt… ."

The justice then inadvertently illustrates the hypothesis of this thesis when she distinguishes between "enduring values" and "fluctuating public opinion" to allow her to reach a decision not in line with the community of which she is part. In response to the argument that the overwhelming public opinion is in favour of the retention of the death penalty, she writes: "[305] … . The values intended to be promoted by s35 are not founded on what may well be uninformed or indeed prejudiced public opinion… ." Therefore, if a moral consensus on an issue is not in line with her view of *ubuntu,* facilitated by the fact highlighted by Langa J in the death penalty matter that the Interim Constitution does not define it, she simply discards it by characterising it as "uninformed or indeed prejudiced". This immediately reminds us of the despair of Tshehla *supra* and my observation in that regard. It is not the Constitution which is the problem, it is the subjective Western approach to it which is the problem.

What this thesis relates to regarding the relevance and importance of civil society is also touched upon by what Stephen Gardbaum says regarding the concept of "republicanism", namely, as pointing towards something communitarian, meaning that it is in the particular role of the citizen within a common life mediated by the political community that the human good is attained – this exemplifies a specific morality of republicanism.[328] Gardbaum adds that republicanism posits a human good – a good common to all humans, fixed and immutable, but of course, this does not inform one as to what the good is "for it is a meta-claim about determination of the good rather than a claim about its content. In this regard, 'republicans' believe not simply that the good must be pursued through politics, but that the content of the

[328] Gardbaum 1992:723.

human good is active citizenship in a virtuous political community".[329] According to Gardbaum, the republican community does not argue that the good is whatever a community values, but rather the substantive moral claim that the good involves "living in and as a political community".[330] Similar to this line of thinking, George states that the law and government play a secondary role in upholding public morality, whilst private institutions play a primary role in this regard.[331]

Religious associations, families, private schools and some institutions of higher education with a religious ethos are but some of the examples of such private institutions. Within these entities, moral views are structured on important moral matters, matters dealing with, for example, pornography, prostitution, euthanasia, corporal punishment, the death penalty, cloning, discipline and worth ethic, reverence for all forms of life, fidelity, respect, manners, education, and the vices of gambling and substance abuse. Here, religion undoubtedly plays an integral role. Governments have time and again emphasised the importance of religious communities in the promotion of matters related to public morality and have, on many an occasion, sought the assistance of religious communities in assisting in finding solutions to fundamental concerns. David Cinotti rightly states that the question of what place religion would hold in society is not one for the courts alone; it is a continuous process involving society in the broader, more inclusive sense, adding that (and referring to the American context), Justice Scalia's assertion that the political process is the best way to address freedom of religious exercise, is the correct route to take. The reason for this being that such a political process may be more readily available in legislative bodies than in the courts.[332]

Broadening on this idea, Paul Brest comments that civic republicans must expand their focus beyond the judiciary, in fact, beyond government institutions. A civic republican conception of citizenship supposes that people must be engaged in framing the rules and administering the institutions which govern all aspects of their communal lives.[333] In striking parallel with the

329 Gardbaum 1992:724-725.
330 Gardbaum 1992:729 & 749.
331 George 2001:94.
332 Cinotti 2003:532.
333 Brest 1988:1626.

work of contemporary public choice theorists, liberal Republicans treat the judiciary as the primary, if not the only, law where deliberative democracy can take place.[334] In the words of Brest: "The question, then, is whether only the courts may participate in this ongoing process. The answer for civic republicans must be no – both because of the intrinsic importance of participation in such fundamental decisions and for an instrumental reason: Even if courts remain the primary agencies of constitutional change, judge-made doctrines are influenced by publicly held values and conventional morality."[335]

Carter is of the view that even though society has grown accustomed to the idea that rights are protected by judges, we should not be blinded to the fact that "to file a lawsuit before a judge is the analytical equivalent of asking state permission to exercise a constitutional right."[336] Having said this, Carter states that implied in this is the fact that the civil authorities should not always be seen as less likely than the individual to make a moral error, an idea which, says Carter, seemed to rely on the whole of the Enlightenment project related to politics.[337] Louis Fisher states: "Interest groups mobilize to apply pressure to whatever branch is the most responsive to their needs … No single branch, including the judiciary, can lay claim to having the last word, especially not in the volatile world of religious politics."[338] Regarding the American context, Fisher also refers to Chief Justice Earl Warren's view that: "the day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen."[339] This emphasises the importance of the Church and the other traditional religions in also forming publicly held views on substantive moral matters.

Traditional religions as a fundamental component of civil society, constitute the focus of this thesis, and the relevance of this was clearly expressed by the Constitutional Court itself. Justice Sachs, in the school punishment matter, states that:[340] "[36] For many believers, their

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[334] Brest 1988:1625.
[335] Brest1988:1628.
[336] Carter 2000:163.
[337] Carter 2000:163.
[338] Fisher 2001:92.
[339] Fisher 2001:93-94.
[340] *Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)* - see footnote 48.

relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe … Religious belief has the capacity to awaken concepts of self-worth and human dignity, which form the cornerstone of human rights." Justice Sachs in the marriage matter comments that although the rights of non-believers and minority faiths must be fully respected, the religious beliefs held by the great majority of South Africans must be taken seriously[341] and that: "[90]… religious organisations constitute important sectors of national life …".[342] Whilst at one level, Sachs J's observations and views are of comfort to the wider civil society as regards diversity and inclusivity, the despair of Tshehla *supra* and my observations concerning Mokgoro J's rationalisation above, looms large. In Chapter 3, I have analysed the judgment of Sachs J in the school punishment matter. It would be instructive at this point to highlight again portions of that judgment. At one point, he writes:

> [33] Before setting out to apply the above approach to the facts of this case, I feel it necessary to comment generally on difficulties of proportionality analysis in religious rights. The most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders. *Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly according to their reasonableness…* (my emphasis). [34] The result is that religious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day-to-day practice. *While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two* (my emphasis). It is in this area that balancing becomes doubly difficult, first because of the problems of *weighing considerations of faith against those of reason* (my emphasis), and secondly because of the problems of *separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way* (my emphasis). [35] … . The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that *certain basic norms and standards are binding* (my emphasis).

All the words and phrases of Sachs J highlighted by me above either beg prior questions or contain subjective presumptions/assumptions which have a direct bearing on the final

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[341] *Minister of Home Affairs and Another v Fourie and Another2006 (1) SA 524 (CC)* - the marriage matter. Par. 89. See footnote 232.

[342] The marriage matter. See footnote 232.

interpretation and application of the Constitution. The issue before the Constitutional Court involved an investigation in terms of section 36 of the Constitution, central to which are the words 'reasonable' and 'justifiable'. In other words, an argument based purely on reason inevitably would trump an argument based primarily on faith (by implication, non-reason). Sachs J obviously is entitled to his own opinions on the Christian Faith (the one involved in this particular matter); the problem, however, is when his subjective opinion upfront determines the inevitability of the conclusion. It is a bit like a judge considering an issue involving traditional medicine/healing and deciding that the physical and the emotional/psychological dimensions of traditional healing belong to two "completely different conceptual and existential orders" for purposes of the law. This is an imposition of a Western concept of medicine onto an African concept of medicine/healing. In the present matter, any Christian with a basic knowledge of Scripture will know that reason is fundamental to belief in Jesus Christ as the Son of God. Thus, for example, as previously highlighted, when Thomas doubts Him, Jesus shows him His hands and His side and invites Thomas to touch the holes in them.[343] Likewise, St. Paul sets out at great length the evidence for the resurrection of Jesus, including referring to 500 eyewitnesses, and argues that if Christ was not raised from the dead, Christians are most to be pitied. [344]

We are back to the despair of Tshehla *supra.* A similar problem presents itself with his words, "While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God,… and what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way." How does Sachs J decide what belongs to God and what belongs to Caesar, what activities are religious and which are not? The lens one uses is critical to answer these questions not only at a superficial level but at the level of the substance of the belief itself. Thus, for example, for Christians, a nuanced understanding of what Jesus was teaching in His response to the question concerning taxes is

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[343] John 20 verses 24-28 – see footnote 299.

[344] 1 Corinthians 15 verses 1-19 – see footnote 299. At an anecdotal level, my wife has been registered as a psychologist since 1984 and has lectured post graduate psychology students in child development. She can forward rational reasons for why using "reasonable and moderate chastisement" can be beneficial for the emotional and psychological development of children. Whether or not one agrees with her reasons is irrelevant. What is important is that as a psychologist and a woman of faith she can make a rational argument for it.

that everything belongs to God. Furthermore, the suggested compartmentalization simply does not do justice to the Christian Scriptures. The same would apply to African Traditional religion and Orthodox Judaism and Islam.

As we have seen in Chapter 3, Sachs J's qualifying words at the end of the quote, "certain basic norms and standards are binding", are repeated over and over in different forms by the various justices in the Constitutional Court. Here, I again highlight the despair of Tshehla *supra* concerning the use of a Western lens, or as MacIntyre sums up in his book title referred to in Chapter 2, *Whose Justice? Which Rationality?* Or as justices Cameron and Froneman ask in the street naming matter concerning whether a cultural practice can be shown to be rooted in oppression, dealt with in Chapter 3, "Who decides that, and on what standard?" In essence, the sympathetic sentiments of a Sachs J or a Mokgoro J are meaningless unless civil society, not least of all the religious communities in the country, having grasped the validity of the hypothesis of this thesis, are empowered and freed critically to engage with the Constitutional Court, not least of all about the hermeneutical lens they use when deciding on profoundly moral, religious and ethical issues.

Although it is not the aim of this thesis to delve into material ways in which civil society, and more specifically, the traditional religions, could get involved in expressing their views on important moral matters, some examples would be helpful. Firstly, there are clauses in the Constitution that instruct the National Assembly and the Council of Provinces with the responsibility for facilitating public participation in the national legislative process.[345] The Constitution also enjoins legislatures to facilitate public involvement in the legislative process.[346] Secondly, there are the Constitutional Court Rules, which permit a person with an interest in a matter before the Constitutional Court and who is not a party in the matter to be admitted as an *amicus curiae*. An *amicus curiae* assists the court by providing information or argument (usually by means of written submissions but also via oral submissions and evidence) concerning questions relating to law or fact. Although the *amicus* has no direct interest in the

[345] See Sections 59 & 72 respectively.
[346] See Section 118.

outcome of the case brought before the court, the *amicus* can have an interest in the case at hand (or can be a source of expertise on the matter relevant to the case being addressed).[347] A crucial option also open to civil society is proactively to approach the courts of the land as applicants. A perusal of South African decided cases reveals that there are matters which raise profound moral issues that have been brought to the courts of the land by various voluntary associations that help make up parts of civil society. At the same time, such perusal also reveals a paucity of such matters where church/religious groupings have taken the initiative in this manner. It is difficult to know why. One reason may be a lack of courage and fear of the cost of such action. Another may well be what I have already dealt with above when dealing with the thinking of Bentley *et al.,* namely the failure to grasp the hypothesis of this thesis resulting in such church/religious groupings simply deferring to the Constitutional Court when it comes to moral issues and only seeing their role as implementing the moral vision of the Constitutional Court justices.

Carter comments that religion has no inherent demarcation and does not view the world as divided into that which God created and that which God did not.[348] According to Hauerwas, Christian ethicists think that if they wish to remain political actors, they must translate their convictions into a non-theological idiom.[349] Hauerwas adds that the more theologians seek to find the means to translate theological convictions into terms acceptable to the non-believer, the more they substantiate the view that theology has little of importance to say in the area of ethics.[350] Richard Neuhaus states that it is a free and robust democracy that holds the 'religious' as an opinion in the same manner that "being aesthetic, psycho-analytic, Marxist, or just plain dumb" constitute opinions and therefore, religion should not be understood as a threat towards public life. The question should be about the free and equal participation of persons in the public sphere.[351] Whether religion should be allowed in the public sphere should not be a difficult question to answer if we are to support the view that all foundational opinions are to freely and equally participate in the public domain. Related to this, Robert Wuthnow states, "If

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347 De Freitas 2005:39.
348 Carter 2000: 72-73.
349 Hauerwas 2007:68.
350 Hauerwas 2007:69.
351 Neuhaus 1992:621.

separation of church and state provided the means of keeping religious conflicts at bay, for example, then the lingering question is whether such separation also excludes valuable sources of public opinion on which democratic government itself may depend".[352]

At this stage, it is important to make two further points. Firstly, the very fact that that part of civil society representing the various religious communities in South Africa must convince the Constitutional Court and parts of the rest of civil society that they are entitled to give input to the Constitutional Court in their own religious languages confirms the veracity of Tshehla's despair concerning that court being captive to using a Western lens. The extracts from Sachs J above, and indeed the extracts from the various Constitutional Court judgments analysed in Chapter 3, are clear evidence of this. South Africa is a deeply religious society, unlike Western Europe. There should be no need for the various religious communities in South Africa to be defensive. Secondly, what also emerges clearly from Chapter 3, and indeed from this chapter, is that the view that "the language of public debate must be secular" (rather, "non-religious") must be understood for what it is, namely, a category that represents competing worldviews, albeit such worldviews being non-religious. It is crucial that both the justices of the Constitutional Court and members of civil society, not least of all the members of religious communities, grasp this for there to be any hope of progress going forward as regards true freedom, tolerance and inclusivity.

4.3.3 Civil Society and Education

The realisation by civil society, importantly including traditional religions, of the subjective strands emanating from the Constitutional Court's jurisprudence is inextricably related to the teaching of law at our institutions of higher learning. When law students become legal practitioners appearing in the courts of South Africa, they will be freed to engage with the substance of what the moral value system in South Africa should be. Central to this engagement would be their own religious backgrounds and worldviews, including when some of them end up being judges. This gains significance bearing in mind that many of these students come to

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[352] Robert Wuthnow cited in De Freitas 2005:23.

university with specific religious backgrounds, fundamental to which is a commitment to furthering their religious convictions as they progress in all walks of life. This subjective make-up of students is partially aligned with Justice Pius Langa's comment that,[353]

> We can no longer teach the lawyers of tomorrow that they must blindly accept legal principles because of the authority. No longer can we responsibly turn out law graduates who are unable to critically engage with the values of the Constitution and who are unwilling to implement those values in all corners of their practices. A truly transformative South Africa requires a new approach that places the Constitutional dream at the very heart of legal education. It requires that we regard law as part of the social fabric and teach law students to see it as such … Constitutional and human rights law now form a much greater part of the curriculum … we must be careful that the influence of the Constitution does not become simply another set of cast-in-stone legal principles. The change to legal education is a change in mind-set, not simply a change in laws.

Of course, the problem is that this insight of justice Langa is of no substantive importance unless the students are made aware of a number of things, all of which emerged in Chapters 2 and 3 of this thesis. Firstly, the role of their own worldview when they become practitioners on their interpretation and application of "the values and human rights included in the Constitution". Indeed, that these values only become meaningful when concrete content is ascribed to them by the practitioner and judge. Before that "values" is simply a word. Secondly, the subjective strands in the present jurisprudence of the Constitutional Court and that other decisions could have been arrived at if another hermeneutical lens had been used by the justices. In this regard, our law faculties must be made aware that when interpreting and applying the values/underlying morals of the Constitution*,* the lens used must be rooted in our sub-Saharan African context, not in what Tshehla describes as a "Western approach". Otherwise, the Constitutional Court, under the guise of merely being a mouthpiece of what is already in the Constitution*,* will not be "accommodat(ing) the religious and/or cultural diversity of a country like South Africa", and in its place will merely be imposing a Western worldview on the country. A crucial place to address this is at our universities, and not only in the law faculties. (Obviously this educative process must also extend beyond universities to other institutions and courses of learning and training, such as in the Department of Justice and schools.) The elephant in the room in this regard possibly is a lack of confidence by the justices and teachers

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353 Langa 2006:356.

of law when it comes to embracing the philosophical and religious culture and context of sub-Saharan Africa. In this regard, the words of the African philosopher Paulinus Odozor dealt with in Chapter 2, are instructive and affirming:[354]

> … African societies and persons do not all share one monolithic way of making moral decisions. Their world is as complex as anyone else's, and like people elsewhere they too are guided by many and different considerations in the search for moral truth. Therefore, as is the case with the Catholic moral tradition, traditional African moral reasoning is partly deontological, partly teleological, partly everything else, depending on the issue at stake, the view of God the individual has, and understanding of the human good in question which needs to be preserved, articulated, or enhanced.

In a context such as South Africa, the reasoning of the court when seeking to inculcate and infuse "the values of the Constitution" into moral decisions it is making is in many instances inextricably related to/linked to matters of religious convictions, which in turn are connected to convictions on substantive moral matters. The understanding that one would like to promote in this regard is similar to what Levinson says regarding his own experiences as a scholar, namely:

> For some years I have organized my own courses in constitutional interpretation around the central question, 'But did the Court get it right?' as if one could grade any given opinion by whether or not it measured up to the genuine command of the Constitution. Answering such a question, of course, requires the development of a full set of 'principles and methods of correct interpretation,' and my courses have involved a search for such principles and methods … At the very least there is no reason to believe that the community of persons interested in constitutional interpretation will coalesce around one or another of these approaches. Moreover … there is no reason to regret this, for it is the result of a genuine plurality of ways of seeing the world, rather than of the obdurate recalcitrance of those who refuse to bend to superior argument.[355]

Although there are substantive protections and developments of freedoms related to 'the religious' in liberal democracies, there are many limitations placed on religious interests in such democracies, not least of all as reflected in the despair of Tshehla: democracies that also portend to be open to the flourishing of diversity. When the acclaimed Princeton University

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[354] Odozor 2014:250.
[355] Levinson 1982:385-386.

law professor George warns that things are going to get tougher for religious interests,[356] then one, unfortunately, struggles to think otherwise. Harold Berman, commenting on the contemporary education environment, states that since religion is considered to be the private affair of each citizen, the free exercise of religion is construed to consist merely of freedom of worship. On the other hand, says Berman, the public teaching of so-called scientific atheism is required in all schools and is promoted in the press and elsewhere. Therefore, says Berman, "atheism, by claiming to be not a religion, but a science or a philosophy, is in fact 'established', and traditional religions such as Christianity, Judaism, and Islam are withdrawn from public discourse".[357]

Accompanying this is the contemporary and dominant opposition to the integration of religion and rationality, which is symptomatic of a Western liberal society which is anti-religious. This anti-religiousness (which itself cannot be universally rationalised and which carries within itself some or other affiliation to a foundational belief, albeit not religious) has a strong influence on maintaining a domain fearful of integrating anything religious into teaching and scholarship. An example of this in the Constitutional Court teaching context is Sachs J in the marriage matter, dealt with in Chapter 3. At one point of his judgment, he states:[358]

> [91] As Ackermann J said in the Sodomy case:[359] 'The issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons, by persons who would not wish to have the physical expression of sexual orientation differing from their own proscribed by the law.' [92] It is also necessary, however to highlight his qualification: 'It is nevertheless equally important to point out that such views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to discrimination on the grounds of sexual orientation.' It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others… . [94]… The test, whether majoritarian or minoritarian positions are involved, must always

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356 George "A Week with Robert P. George, Part 3", http://www.canonandculture.com/a-week-with-robert-p-george-part-3/ (accessed on 14 February 2023).
357 Berman 1978:355.
358 *Minister of Home Affairs and Another v Fourie and Another* – see footnote 232.
359 *National Coalition for Gay and Lesbian Equality v Minister of Justice* – see footnote 45.

be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom.

Reflecting on this extract, the law teacher must engage with the students, *inter alia*, about the following: The assertion here is that the Constitution dictates something in regard to discrimination on the grounds of sexual orientation within the context of marriage. *Ex facie,* the constitutional text itself this is incorrect. The justice must inject a meaning into the constitutional text. To do this, the justice must decide on a reference point that best enables him to arrive at a conclusion that best promotes or retards the achievement of human dignity, equality and freedom. All three these values themselves beg the question, what is dignity, equality and freedom?[360] And how does one decide on this? Is not the only way for a justice to do this to rely on what Mokgoro J described in the death penalty matter as "a system of values extraneous to the constitutional text itself?" For her we have seen this was the undefined elusive concept of *ubuntu.* The question, therefore, is what standard or reference point did Sachs J choose to make his decision? He does not say, other than the circuitous argument, that he is merely setting out what he believes already is in the Constitution. And how does this differ from others in that particular matter wanting the court to have regard to their religious reference points? Indeed, regard being had to the subjective strands uncovered in Chapter 3, in effect, is Sachs J not using his "religious or foundational belief convictions doctrine as a source for interpreting the Constitution"?

Another example here highlighted in Chapter 3 is Chaskalson P's reliance on a host of secular documents to help him make a deeply moral decision but failing completely to make any reference to the Judeo-Christian Bible, the Koran or any other religious text, all of which abound with teaching concerning the value of life, justice, cruelty, punishment and mercy. And that, at a time when the constitution he was interpreting and applying began with the words, "In humble submission to Almighty God, … ." Reflecting on Odozor's words above, quite clearly, within an African context when grappling with moral issues, God is ever-present. Reflecting on the judgments analysed in Chapter 3, what, in effect, the Constitutional Court is

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[360] Therefore, whilst for example, grounding its jurisprudence in dignity, the Constitution does not tell us what dignity is. In this regard, see footnote 26.

doing is, in fact, "employ(ing) the religious sentiments of some (what one can call 'secularists') as a guide to the constitutional rights of others". Hence the despair of Tshehla, and the need for teachers at all our educational institutions to grasp and act on the hypothesis of this thesis.

In this secularisation process, ideas not only become marginalised but are also moulded into subjective lines of thinking. As we saw in Chapters 2 and 3, concepts are fabricated, such as 'emerging consensus of values in the civilised international community', 'a comparable liberal philosophy', 'common sense', 'evolving standards of decency that mark the progress of a maturing society', 'compelling state interest', 'prevailing norms of society', 'in our kind of democracy', 'commonsensical approach', 'neutrality', 'proportional assessments', 'objective normative value system', 'the content and the sweep of the ethos expressed in the structure of the Constitution', 'reasonableness', 'religious faith versus public and private concerns' and 'a world-view inspired by our constitutional vision must embrace *ubuntu'*, in order to protect some or other subjective understanding pertaining to rationality, specified human rights, values and constitutionalism. Not only the separation of religion from education, and therefore, the separation of religion from the law school (and other disciplines within higher education) but also the separation of religion from information platforms such as television and radio, result in educating the wider public in a manner unconducive to religious convictions and views supportive of the religious as also co-owners of the public sphere. In this regard, Richard Weaver comments that,

> The separation of education from religion, one of the proudest achievements of modernism, is but an extension of the separation of knowledge from metaphysics. And the education thus separated can provide their kind of indoctrination. We include here, of course, the education of the classroom, for all such institutionalized instruction proceeds on the assumptions of the state. But the education which best accomplishes their purpose is the systematic indoctrination from day to day of the whole citizenry through channels of information and entertainment.[361]

There is no better example of this subjective separation of knowledge/reason from metaphysics in the jurisprudence of the Constitutional Court than the already quoted extract

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[361] Weaver 1948:93.

from the school punishment matter:[362] "[33] … The most complex problem is that the competing interests to be balanced belong to completely different conceptual and existential orders. *Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly according to their reasonableness* (my emphasis)." Hence the despair of Tshehla and the urgent need to address it by civil society, not least of all in our law schools, and indeed in all other educational facilities or training programmes for law practitioners. The key to alerting and empowering our law schools and other educative programmes to this being the validity of the hypothesis of this thesis and making them aware of it.

4.4 LAW AND CONSTITUTIONAL ADJUDICATION

The liberalism which preaches for the sanctity of a public domain which accommodates a diluted (if at all) version of religious expression, accompanied by a substantive relegation of religion to the private sphere, together with an idealist view of a rationality which is consensual across society, has proven to be problematic (even to this form of liberalism itself). It also, in effect, is in opposition to the tolerance and diversity which such liberalism itself purports to uphold. Law and how it is formulated as well as applied is caught-up within these main liberal currents. Mendus comments that " … liberal states are construed as open, diverse, plural, equally hospitable to all the beliefs activities its members espouse …"[363] But is this truly the case? Law, in many instances, has evolved into an overriding authority which opposes those interpretations of right and wrong, moral and immoral, that do not ascribe to the 'official' dominant narrative of such states. Therefore, bringing to the fore subjectivity in the findings of the Constitutional Court provides an awareness or reminder of the application of law in monolithic terms. This in turn, should make us more sensitive to the fallibility, so to say, of the Constitutional Court, hereby also creating more confidence within civil society, including the Church, also to participate. To unveil central subjective strands of constitutional adjudication against the background of promoting a vibrant, inclusive and participatory democracy within a sub-Saharan African context, is inextricably connected to questions related to the meaning and

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[362] *Christian Education South Africa* - see footnote 48.
[363] Mendus 1989:69.

status of law. How we understand law also relates to how a constitution is to be understood. Jack Balkin states that:[364]

> The notion that the Constitution is higher law, in fact, is strongly connected with its role as 'our' law. Because the Constitution is higher law, it stands above positive law and critiques it. In particular, it stands above the pronouncements of judges and other legal professionals claiming to speak in the name of the Constitution. The text of the Constitution symbolizes something that people can always call upon when they believe that judges and officials have gone astray. The text of the Constitution offers itself as something authored by citizens, not by judges, and superior to judicial pronouncements.

Something of this thinking is reflected in the words of Van Der Westhuizen J in the Constitutional Court judgement of *De Lange v Presiding Bishop of the Methodist Church of Southern Africa For The Time Being,*[365] where he writes: "[75] The Constitution is the supreme law of the land. It allocates powers to the State and enshrines the fundamental rights of its citizens. But it is more. It also states the values on which we have agreed. ... … A constitution has been referred to as the 'autobiography of a nation', the 'window to a nation's soul' or the 'mirror in which a society views itself'."

This is precisely what this thesis argues in support of. Law, as reflected in the various foundational beliefs of which society is comprised, precedes the Constitution*,* and the Constitution should be viewed as aspiring towards the elevation of the plethora of foundational beliefs present in a liberal democracy within our sub-Saharan African context. The relevance of this for sensitivity to the complexity of views in South Africa on moral matters needs no further explication. As argued throughout this thesis, it is the awareness and understanding of the subjectivity of selected Constitutional Court judgments which will serve as the impetus to giving effect to what Balkin, and indeed Van Der Westhuizen J, has stated in the aforementioned. Brian Jones reminds us that "the habits, traditions and attitudes of human

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[364] Balkin 2011:240. Brian Jones similarly states: "The allure of the adjudicated constitution, and constitutional supremacy more generally, is its predilection for the fundamental. It supposedly looks beyond the practicality of daily politics and into a more reasoned and sophisticated version of the state. Under this, it becomes possible that we are not having to appeal to *human* thought and *human* constructs, but to something more lasting, and essential", Jones 2020:83.

[365] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being* Case CCT 223/14 [2015] ZACC.

communities are more powerful than law. Indeed, they are the foundation of law". Jones adds that "idolising written constitutions (no doubt he would mean detached from 'the habits, traditions and attitudes' of the relevant community) is a hollow endeavour that will fail to produce better democratic outcomes or help solve increasingly complicated societal problems.[366] This sentiment is reminiscent of the sentiment expressed by Mokgoro J in the death penalty matter, referred to earlier in this chapter and Chapter 3: "[305] '… in a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt… .' "

This thesis argues that when those in religious circles, and indeed wider civil society, place all faith in the Constitutional Court's views on what the Constitution tells us, on what purportedly is already in the Constitution, as dealt with in Chapter 3 of this thesis, then this undermines what Balkin, and indeed justices Van Der Westhuizen and Mokgoro, are saying in the aforementioned. Added to this, when justices of the Constitutional Court provide the impression that how they interpret the Constitution is the only way the rest of society should interpret the Constitution, then, it is argued, this also resorts under a type of idolisation of one interpretation of the Constitution, under the guise that they are merely "mouthpieces" of what is already in the Constitution. In this regard, what we find is the promotion of this one interpretation of the Constitution over that of laws held by, amongst others, the religious, whether in an individual or associatory context. Furthermore, this approach not only undermines the efficacy of the Constitution as a tool to promote and facilitate diversity and inclusivity in our complex sub-Saharan African context, it also fundamentally undermines the opening words of the Preamble of the Constitution, "We, the people of South Africa, … ." I will deal with this in Chapter 5.

According to Jonathan Sumption, rules of law and the discretionary powers which the law confers on judges limit the scope for autonomous decision-making by individuals. They decrease the scope within which citizens take personal responsibility for their own destinies

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[366] Jones 2020:191 (citing J. Sumption).

and those of their families, says Sumption.[367] Having said this, Sumption states that there are areas of the law which necessitate legal regulation, such as the criminalisation of murder, rape, theft and fraud, acts that are harmful to others and for which there is consensus that they are morally wrong.[368] However, says Sumption, "what is new is the growing tendency for law to regulate human choices even in cases where they do no harm to others and there is no consensus about their morality."[369] In this, Jonathan Sumption is cautioning against overplaying law for the solving of disputes and in the awarding of human rights protections. Law and the application thereof must take due cognisance of its partisanship, and this also relates to the courts. When the courts are partisan regarding matters of moral worth, it needs to be conveyed in such a manner that such partisanship is admitted and is respectful towards views which may come into opposition with the moral decisions made by a court; also bearing in mind Harold Berman's comment that:[370] " … law – in all societies – derives its authority from something outside itself, and if a legal system undergoes rapid change, then questions are inevitably raised concerning the legitimacy of the sources of its authority." Added to this, the courts must practice extreme caution in coming to decisions which may not ascribe to the general (or minority) patterns of thinking of the religious or non-religious, something which is especially relevant when dealing with claims related to the protection of religious rights and freedoms which involves clashes between religious and non-religious worldviews. John Salmond comments that:[371]

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[367] Sumption 2019:11. Sumption adds that: "These laws are addressed to moral issues on which people hold a variety of different views. But the law regulates their moral choices on the principle that there ought to be only one collective moral judgement, not a multiplicity of individual ones. This tells us something about the changing attitude of our society to law. It marks the expansion of the public space at the expense of the private space that was once thought sacrosanct" (Sumption 2019:13). This in turn leads to what Sumption refers to as "one of the supreme ironies of modern life" namely, that the range of individual rights has been expanded whilst at the same time, having drastically limited the range for individual choices to be made(Sumption 2019:16).

[368] Sumption 2019, 12.

[369] Sumption 2019, 12.

[370] Berman, 1983:16.

[371] Salmond 1947:155-156. Stephen Carter explains that no major liberal theorist dissents that none of the fundamental principles of liberal reasoning can be justified without looking outside the principle itself – "So, for example, Rawls' original position needs a justification apart from one flowing from the original position, Ackermann's neutral dialogue needs justification outside of neutral dialogue, and so forth …", Carter 1990a:480-481. Steven Tipton observes that Rawls seeks rational agreement on moral rules in the form of contractual principles of justice as fairness that can be justified without favouring any one of the conceptions of good that divide a society, "but such justification itself turns out to presuppose a particular conception of the person as prior to, rather than constituted by, his or her moral commitments" (Tipton 1990:194).

> It is requisite that the law should postulate one or more first causes, whose operation is ultimate, and whose authority is underived … Before there can be any talk of legal sources, there must be already in existence some law which establishes them and gives them their authority … But whence comes the rule that Acts of Parliament have the force of law … From any one ultimate legal source it is possible for the whole law to be derived, but one such there must be …

This understanding of law also being rooted in further inexplicable presuppositional points of departure is important to take cognisance of as this brings to light the subjective attribute accompanying law. Mary Ann Glendon comments that the dominance of rights talk "risks undermining the very conditions necessary for the preservation of the principal value it thrusts to the foreground: personal freedom. By infiltrating the more carefully nuanced languages that many Americans still speak in their kitchens, neighbourhoods, workplaces, religious communities, and union halls, it corrodes the fabric of beliefs, attitudes, and habits upon which life, liberty, property, and all other individual and social goods ultimately depend."[372] This points to the concept of 'human rights' being used as a type of trojan-horse to, as Steven Smith would state, "smuggle in meanings"[373] in support of whoever is arguing for the protection of a specific interest. Similar to Glendon's comment, Paul Kahn refers to liberalism's harbouring of a transnational universalism of the law of human rights and that in this, "we see the liberal ideal of a single order of law enforced by a single set of institutions, all organized around the same normative ideal of the autonomous subject guided by reason."[374] According to Stanley Fish, liberalism is informed by a faith in reason as a faculty which operates independently of any particular worldview. In the words of Fish:[375]

> It is therefore committed at once to allowing competing world views equal access to its deliberative arena, and to disallowing the claims of any one of them to be supreme, unless of course it is demonstrated to be at all points compatible with the principles of reason … the one thing liberalism cannot do is put reason *inside* the battle where it would have to contend with other adjudicative principles and where it could not succeed merely by invoking itself because its own status would be what was at issue …

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372 Glendon 1991:15.
373 In this regard, Steven D. Smith's, *The Disenchantment of Secular Discourse* (2010) is strongly recommended.
374 Kahn 2005:45-46.
375 Fish 1987:997.

As we have already seen in this thesis, there are many examples of this smuggling in of meanings through the subjective strands highlighted in Chapter 3, wittingly or unwittingly, in the judgments analysed in that chapter. We have seen Sachs J, in fact, juxtapose a "religious conviction" based worldview where he opines that practice and theory generally are based on faith (thus by necessary implication, primarily not reason) with "Countervailing public or private concerns (which) are usually not (based on faith) and are evaluated mainly according to their reasonableness". He, however, along with the other justices highlighted in Chapter 3, does not recognise in his judgment that not only are countervailing concerns in effect faith positions based on "reason", but that he, in his reasoning, has embraced such a reason-based faith position as his own and imposed it on the Constitution, notwithstanding him and Jafta J in the street naming matter in effect saying that all he is doing in an objective manner is setting out what already is in the Constitution. As Fish *supra* says, "the one thing liberalism cannot do is put reason *inside* the battle where it would have to contend with other adjudicative principles and where it could not succeed merely by invoking itself because its own status would be what was at issue …"

It is this insight related to the inescapability of reason from its own predilections which also applies to the courts in their interpretation of the Constitution. What may at a superficial level appear 'neutral' or 'rational' by many in society regarding the Constitutional Court's judgments ends up as subjective, not only not in agreement with other non-religious views, which also ascribe to being rational in their views on what the Constitution is telling us, but also with many religious views which likewise ascribe rationality/reasonableness to their interpretations of the Constitution. This also slots in with what was mentioned earlier in this chapter regarding an understanding of the context within which we find ourselves in one of the liberal democracies in the world, where the public sphere is viewed as being the platform for reason, reason which supposedly provides consensus amongst competing interests and beliefs (which once again quoting the cause of Tshehla's despair is reason seen through a "Western" lens). However, and as was alluded to earlier in this chapter, such an understanding is self-defeating in that what is viewed as rational overlaps with a subjective point of view or belief, and therefore, such rationality cannot be agreed upon by all. Consequently, a specific subjective approach or understanding arises which becomes cloaked with much idealism, splendour and

importance and which finds the support, by commission or omission, of the civil authorities to the exclusion of other possibilities.

Justice Blackmun, in the *Roe* decision, stated:[376] "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[377] In this regard, Louisell comments that one would expect, in accordance with logic, history, and constitutional doctrine,[378] that the next premise would be: "Therefore, while lack of certainty prevails, the judgment is necessarily in the legislative domain" (thus in the domain of "we the people"). However, the Court indulged not only in the abjured speculation, but in dogmatic value judgments of its own – "the unborn represent only potential human life, and have only partial human personhood". Human life, to be worthy of protection, must be "meaningful".[379] In the words of Louisell: "What has the Court's own theologism as to the nature and meaning of human life let loose upon American society? We have by judicial fiat – by 'an exercise of raw judicial power', as said by Justices White and Rehnquist dissenting in *Roe* – a permissiveness for abortion unmatched, I believe, anywhere in the world, even by legislative action."[380] In South Africa, for a number of reasons, justices of the Constitutional Court must exercise the utmost vigilance in their decisions concerning what Louisell terms "theologism". I will highlight two at this stage.

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[376] *Roe v. Wade* 410 U. S. 113 (1973).

[377] Louisell 1975:27. Note how similar this is to justice Kriegler's view in *S v Makwanyane* (which was dealt with in more detail earlier in this thesis in Chapter 3).

[378] One should especially add to this, "republicanism doctrine".

[379] Louisell 1975:27.

[380] Louisell 1975:28. One finds the same approach in other 'constitutional' and 'democratic' dispensations, for example, in the South African case of *Christian Lawyers Association of South Africa v Minister of Health and Others* (1998 (4) SA 1113), the *Choice on Termination of Pregnancy Act* was challenged in the High Court on the basis that it permitted the termination of human life. The High Court rejected the challenge. According to the Court: "The plaintiff's cause of action, founded, as it is, solely on s 11 of the Constitution (stating: "Everyone has the right to life"), is therefore dependent for its validity on the question whether 'everyone' or 'every person' applies to an unborn child 'from the moment of the child's conception'. The answer hereto does not depend on medical or scientific evidence as to when the life of a human being commences and the subsequent development of the foetus up to date of birth, nor is it the function of this Court to decide the issue on religious or philosophical grounds. The issue is a legal one to be decided on the proper legal interpretation to be given to s 11" (1118 B-D). Hereby the Court indicated further its ignorance by excluding, amongst others, religious and philosophical criteria. The Constitution itself is a document filled with religious and philosophical perceptions of reality.

Firstly, as the apex court in the land, as we have already seen earlier in this thesis, whatever it says the Constitution says stands. It is unappealable. It is thus crucial, not least of all for the rule of law, to heed the earlier warning of justice Mokgoro highlighted earlier in this chapter that "in a democracy, the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt… ." And to be attentive to giving substance to this warning, and not merely form through reasoning and judgments 'cloaked with much idealism, splendour and importance'. And such substance needs to address *inter alia*, the despair of a Tshehla. Cloaking a decision arrived at through a Western liberal lens, as "objective", or even in the name of *ubuntu*, is not sufficient. It must deal headlong and transparently with the disconnect. For example, we saw in Chapter 3 the disconnect between the Tanzanian court decision that the legitimate purposes to which the death sentence was directed was a constitutional requirement that everyone's right to life should be protected, and Langa J's finding that the death penalty is bereft of *ubuntu.* This when Langa J had just looked to the Tanzanian court to help him define *ubuntu.* Likewise, the danger of Mokgoro J's strategy to deal with a situation where the morality of the majority in a community is not in line with her morality, where she has just emphasized the importance of courts reflecting the morality of the society of which they are part. She simply declares that: "[305] … . The values intended to be promoted by s35 are not founded on what may well be uninformed or indeed prejudiced public opinion… ." This approach invites contempt for the Constitution, and all the adverse consequences for us as a nation which flows from such contempt, not least of all Tshehla's despair.

Secondly, we saw in Chapter 3, and in this chapter, that the justices of the Constitutional Court believe nothing of importance in South Africa is beyond their reach. Thus, for example, writing for the Constitutional Court in *H and Fetal Assessment Centre*[381], Froneman J writes:

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[381] *H and Fetal Assessment Centre, CCT 74/14*.

> [21] This was, in the end, also the approach of the Supreme Court of Appeal in *Stewart*.[382] It found that for a child's claim to succeed it would require a court to evaluate the existence of children against their non-existence, an exercise 'that goes so deeply to the heart of what it is to be human that it should not even be asked of the law'. [22]… *But this risks hiding a value choice. And it is a choice that judges under our Constitution need to acknowledge openly and defend squarely when they make it* (my emphasis). [23] Not to do so says that there are areas of life and law where the values of the Constitution may be ignored. That is not the kind of choice that our Constitution allows judges to make. They must ensure that the values of the Constitution underlie all law, not that some part of the law can exist beyond the reach of constitutional values…. [25] We thus need to go further. If, despite this clarification that the proper approach *involves an inevitably evaluative legal choice in accordance with the Constitution* (my emphasis), we nevertheless conclude that the claim cannot be sustained at all, no matter what the facts of a particular case may be, …

In *Stewart,* the Supreme Court of Appeal had held:

> [16] … . If it were possible to approach a being before its conception and ask it whether it would prefer to live in an impaired state, or not to live at all, none of us can imagine what the answer would be… . *We cannot give an answer susceptible to reasoned or objective valuation* (my emphasis). … . [27] Making…(the) choice in favour of non-existence not only involves a disregard for the sanctity of life and the dignity of the child (see sections 10 and 11 of the Constitution), but involves an arbitrary, subjective preference for some policy considerations and the denial of others… .[28]… . I have pointed out that from whatever perspective one views the matter, the essential question that a court will be called upon to answer if it is called upon to adjudicate a claim of this kind is whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law. For that reason in my view this court should not recognise an action of this kind.

Therefore, whilst the Supreme Court of Appeal was deferential concerning what the reach of the courts should be, the justices of the Constitutional Court have no such reservations. In this regard, a judgment already referred to by Van Der Westhuizen J, *prima facie,* seems to express a reservation. In it, he writes:[383] "[76] So, can one say that the Constitution does not reach our private religious and social spheres? I am not persuaded that we can. Is it not rather the case that the Constitution – as a set of values and protected fundamental rights – indeed reaches even into the most intimate spaces but carries with it all the rights and values it recognises?"… [79] … the Constitution is more than law, however. It is the legal and moral framework within which we have agreed to live. It also not only leaves but guarantees space to exercise our diverse cultures and religions and freely express our likes, dislikes and choices as equals with

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382 *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA).

383 *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being*. CCT 223/14 [2015] ZACC.

human dignity. In this sense, one could perhaps talk about a 'constitutionally permitted free space'. This is quite different from contending that certain areas in a constitutional democracy are beyond the reach of the Constitution or 'constitution-free' ". On closer scrutiny, there is no difference in substance between what justice Froneman is saying and what justice Van der Westhuizen is saying. For in his reasoning, it is still for the Constitutional Court to decide on the parameters and limits in such intimate spaces of how individuals may exercise their "diverse cultures and religions" and express freely their "likes, dislikes and choices, as equals with human dignity."

Thus, in Chapter 3, we saw the then Chief Justice, in a unanimous decision of that court, rule in the parental punishment matter that it was entitled to enter the homes of parents in South Africa and instruct them that if they used "reasonable and moderate chastisement" when raising their children, they would be liable to be charged and convicted of criminal assault.[384] This in a judgment which, as seen in Chapter 3, involved subjective choices by the Chief Justice at almost every step of his reasoning, starting with the seemingly arbitrary choice he made as regards the definition of violence, which made his conclusion inevitable.

Given this reach the Constitutional Court has given itself, under the guise of simply being mouthpieces for the Constitution, it is crucial for all of civil society, not least of all the religious communities whose very reason for existence is inextricably intertwined with the moral good not only of their members but of all South Africans, to grasp the hypothesis of this thesis. The argument of this thesis is that this insight will free and challenge all these parties not only critically and passionately to engage with the justices of the Constitutional Court about what content should be given to ideas and concepts such as life, dignity, freedom and equality, but also about what the limits of their jurisdiction should be when it comes to those "private religious and social spheres". And for example, whether or not they have not crossed a line which they should not have when taking upon themselves the power to tell parents how to raise their children, what marriage is, by omission to condone the worldview which says unborn

[384] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34 – see footnote 49.

children are not human life worthy of dignity and in effect rewriting the morality of the land on how it should view adultery.

It is also important that the justices themselves and the rest of the judiciary in South Africa gain insight into the hypothesis of this thesis. Such insight would make them more circumspect and conscious of what is actually happening when they write their judgments and, in the process, arrive at binding conclusions on profound moral issues not in line with the majority consensus of a population-based in sub-Saharan Africa. At the very least, it would make them more aware of the centrality of their own worldviews and influences of non-sub-Saharan jurisprudence when interpreting and applying the Constitution and consequently would be more mindful of the underlying reason for the despair of someone like Tshlela. It also will give them pause for thought concerning the limits of law and their own jurisdiction. Hopefully, it also will make them mindful of Salmond's words about "first causes" and "underived" authority "before there can be any talk of legal sources". Something absent, for example, when Chaskalson P chose only to have regard to secular sources for his moral decision about the death penalty.

4.5 CONCLUSIONS

Grasping the veracity of the overarching hypothesis of this thesis is fundamental to the role of civil society in South Africa. If it merely copies the thinking of theologians dealt with above, its role in society will be significantly restricted by its own default. When civil society, and more specifically, adherents of traditional religions, grasp the reality that the jurisprudence of the Constitutional Court involves a subjective process requiring training and experience in areas such as philosophy and ethics, activists hopefully will be freed to enter the debate about the content of the "paperwork", about "our moral consensus document", even with the justices of the Constitutional Court. Currently, a number of leaders of the Church (and hereby implied, many who represent civil society) embrace the narrative that the Constitution is an objective moral consensus document for South Africa, the consensus implying that all parts of the society, including all of civil society, contributed to it. Accordingly, that all there is now to do

is for the appropriately trained expert justices, using their training and experience as lawyers, to extrapolate from this consensus document what society, as a whole, agreed to.

The flaw in this line of thinking is that it assumes that when all parts of society contributed to the writing of the Constitution, they were all of one mind as to what dignity, freedom, equality and religious freedom meant. In other words, what content to give these words and concepts in day-to-day practical situations. We have seen, for example, in this chapter and in Chapter 3, how different courts have come to completely different conclusions on the issues of the death penalty and the dignity of unborn children even though the reference point, "everyone has the right to life", in these decisions was the same. What this thesis argues is that that contributory approach by all of society to the Interim Constitution and the Constitution, which predated 1995, must continue as we as a country now strive to give practical moral content to the words and concepts in the Constitution. The dire implications of a failure to grasp this for law students, our future jurists, community leaders and advisors for the protection of religious rights and freedoms are *ipso facto* and need no further elaboration. In this chapter and in this regard, I have also highlighted the warning of Mokgoro J and the despair of someone like Tshehla.

The results of the research in this thesis enable and empower civil society to move beyond this skewed narrative and to enter a meaningful engagement with the State concerning the philosophical and ethical foundation being laid down for South Africa as a community by the Constitutional Court. As we have seen in Chapter 3, a philosophical and ethical foundation embracing profoundly moral issues such as retribution, forgiveness, what is human life, marriage, whether an unborn child is no more than the contents of a woman's uterus, whether it would have been better for a handicapped person never to have been born, parenting, adultery and justice. In the death penalty matter[385], justice Kriegler, in effect adopting a fundamentally different stance to the one in this thesis concerning the role of non-lawyers in giving content to the Constitution, nevertheless is inadvertently in agreement with this thesis that: "[207] … . Judges, (are) not sages; their discipline is the law, not ethics or philosophy … ." What this thesis in effect is proposing is that because judges are not sages, they urgently need the help of

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[385] See footnote 3.

civil society to enable them to fulfil the awesome responsibility the Constitution has bestowed on them. And that in humility, the justices must accept such help when offered or even *mero motu* proactively enlist this help when required.[386] What more can this be but a high form of participatory democracy?

This thesis assumes that this task of engagement with the State is common to all members of civil society, experts or not. In the present instance, given the profound impact the pronouncements of the Constitutional Court have on the moral fabric of South Africa as a society, the challenge to all members of civil society is carefully to interrogate the present use of the purported objective value system the Constitutional Court intimates, whether directly or indirectly, is already contained in the Constitution. Once clarity has been obtained in this regard, then it will be for members of civil society to engage one another about how to respond, or not to respond. All believers and faith communities (whether religious or non-religious), indeed all of civil society, need to become cognizant of the central role of the purported objective value system contained in the Constitution, which the Constitutional Court is using (whether advertently or inadvertently) to transform South African society. As already indicated, in this regard, this thesis argues that the first issue to be addressed is whether this

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[386] One example is, after the Constitutional Court made its ruling concerning legalising the personal use of dagga, the South African Association of Psychiatrists, usually a conservative body when it comes to issuing press statements, brought out a statement on the 23rd September, 2018 which was very critical of the judgment. Amongst other things it read: "… any change to the legislation regulating cannabis use should have been undertaken in consultation with all the relevant stakeholders, be based on good quality scientific evidence and take into consideration the availability and accessibility of current drug addiction prevention and treatment resources in South Africa." In the press statement it highlighted that 1 in 6 teenagers who uses cannabis in South Africa will become addicted. It also highlighted evidence of significant adverse effects for the individual who use cannabis and for the society in which he lives. Whether or not their criticism was justified or rationally sustainable, is irrelevant for the argument of this thesis. What is important is that here the Constitutional Court ruled on a matter which according to "sages" in the field has far reaching behavioural and moral consequences for the nation, without either *mero motu* calling for input from these sages in this field, psychiatrists, nor psychiatrists themselves offering to give input before judgment was handed down. Other examples would be asking for the input of "sages" on the rationality or otherwise for the use of "moderate and reasonable chastisement" by parents in raising their children, asking for a fetoscopy or sonar image of a 10 week old unborn child before deciding on whether the unborn child is human life worthy of dignity; asking for the input of "sages" of the effects of adultery on marriages and children before in effect simply arguing that when it comes to adultery South Africa must adapt to the times; enlisting input from "sages" well versed in African spiritualism before making a decision to separate the physical from the psychological dimensions of a healing process; and asking for input from "sages" before using and trying to apply teachings of Jesus Christ to a situation. In the death penalty matter we also saw Chaskalson P refer to secular documents to help him make his moral choice about the death penalty without calling on "sages" from the main religious groupings in South Africa and their source documents, all of which are thousands of years older than the non-religious source documents he used. I will touch on this again in Chapter 5.

value system being used for the jurisprudence of the Constitutional Court is indeed objective. This was the reason for the deconstruction of the chosen Constitutional Court judgments.

If this building block is objective, then any further engagement on the issue is superfluous, as giving it content and applying it would be the preserve of legal technicians. If not, then civil society is entitled, indeed has a responsibility, to engage the Constitutional Court in a robust and meaningful way when it comes to making pronouncements which are morally transforming/reshaping South African society. As stated in Chapter 2, the presence of subjectivity in the judiciary (and in law in general) is not a novel idea. Having said this, legal theorists (and others) have profusely and voluminously deliberated on this phenomenon, and certain schools of legal thought have brought this to the fore, such as the Realists and the CLS movement. This points to the relevance of this thesis as furtherance of this debate but with a special focus on constitutional litigation in South Africa and the implications thereof for civil society, more specifically, religious believers.

The consequence of the research in this thesis is that civil society does not simply have to defer to the Constitutional Court on moral issues which come before it.[387] It can (it must) robustly engage with the Constitutional Court concerning any moral issue about which it must decide without the fear of being accused of infringing on the sole prerogative of the Constitutional Court. Such engagement includes being proactive and initiating litigation for a declarator as an applicant, applying to join matters as an *amicus curiae* and utilising the various parliamentary and other constitutional fora to make representations and submissions. A further opportunity for such engagement is through media and exercising the constitutional rights to freedom of "Assembly, demonstration picket" and to political activity.[388] If civil society simply defers to the Constitutional Court, in effect it is abdicating its activist role and responsibility on

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[387] Fortunately, there are fine examples of parts of civil society acting responsibly by robustly engaging with the Constitutional Court. However, these efforts are still far too few to help change the mindset that civil society is simply there to help implement whatever moral vision the justices decide is part of the "values" enshrined in the Constitution. In this regard, mainline church denominations and large independent congregations are very conspicuous by their absence. Central to this would be a failure to grasp the hypothesis of this thesis and an acceptance, albeit often by omission, of the Western liberal worldview which in effect argues there is no place for a faith-based worldview in the public sphere.

[388] Sec. 17, 18 & 19 of the Constitution.

profoundly moral matters. Here it needs to be remembered that the Constitution is meant to aspire towards advancing the reflecting of the soul of the nation (as well as the individual souls of those who make up the nation), not merely the worldview of 11 unelected justices. It is supposed to be the "moral consensus document" of all South Africans. Such advancement will never be complete, perfect, nor exempt from criticism; just the same as the aspirations towards being a fully-fledged democracy will never be complete, perfect, nor exempt from criticism. Having said this, to aim at an understanding of the Constitution from a more representative stance constitutes improvement regarding the attainment of freedom for many within and loyal to, religious communities.

As things stand now, there are church leaders as well as many within religious circles and other parts of civil society who, by commission or omission, are not entering this debate as the Constitutional Court morally reshapes South Africa (but see footnote 387). The skewed narrative civil society has embraced in this regard is that these are legal matters and thus not in the preserve or expertise of civil society but the preserve only of lawyers. It is the lawyers and the judges who are being elevated as the sages of society (and those who occupy positions of authority regarding the teaching of law at our institutions of higher learning). Whereas, if civil society grasped the validity of the hypothesis of this thesis, it would then be empowered to engage the State, inclusive of the Constitutional Court, on all moral issues. Civil society would then be empowered in its activist role and responsibility to assist the Constitutional Court in giving practical content to the "moral consensus document" and not merely defer to lawyers in areas to adapt Kriegler J's words above, where sages, ethicists and philosophers are indeed needed, not merely lawyers. Civil society's role and function then would not be merely circumscribed by what the justices on the Constitutional Court rule but would be empowered to engage the Constitutional Court justices, ethically and philosophically, about what it should rule. Therefore, civil society, in a more meaningful way, would be empowered to engage the Constitutional Court on what makes for a more humane, just and diverse society within the parameters of the Constitution. This is also inextricably connected to the teaching of law as embodying a reflection of what many in South Africa deem the moral position to be regarding a specific matter.

To demythologise for civil society the purported objective value system the Constitutional Court is using as a reference point to pronounce on moral issues, crucially, also will help enable and empower law teachers to see that it is an option for them and their students to engage the Constitutional Court concerning its use of the purported objective value system, and indeed the law as recorded in the Constitution*,* when pronouncing on moral issues. It will allow and empower them to participate on platforms related to determinations of moral matters as well as to educate wider society in the misnomer of there being objective meanings in the Constitution or meanings related to values and human rights included in the Constitution that ascribe to objective universal reason, almost invariably as seen through a lens not rooted in sub-Saharan Africa. This thesis argues that it is imperative that law schools and other faculties within universities and other teaching fora grasp this so that future lawyers and other leaders in civil society do not simply defer to what the 11 men and women at the Constitutional Court say what the Constitution says and, in the process, reshape the moral landscape of the country.

Added to this, an identification of the subjective strands emanating from constitutional adjudication would also make the Constitutional Court (and the judiciary in general) more aware of its subjectivities and, where possible, to be nuanced and sensitive in the formulation of its decisions. This, in turn, would make it more mindful of the parameters of diversity and tolerance in our democracy. This, in turn, will provide the required awareness of the law's limits within a culturally and socially very complex society aspiring to be a democracy within a sub-Saharan context. It is hoped that at the same time, the justices of the Constitutional Court also will become aware of them not merely being neutral mouthpieces of what already is in the Constitution but of being people with their own worldviews, worldviews which are at times a competitor to the worldviews of the litigants before them.

To the extent that some may be of the view that a person such as Tshehla, when speaking of African spiritualism, is not covered by the description of traditional religions (which is quite possible if a Western lens is used), the South African Tshehla speaks on behalf of, also will be empowered and hopefully inspired to move beyond their despair to a robust engagement with the Constitutional Court when it seeks to make pronouncements which have a direct bearing on their belief system. After all, the Constitution begins with the words, "We, the people of

South Africa". And it is crucial that the justices of the Constitutional Court are reminded of these words daily by civil society, not least of all by the religious communities of the country, lest they are allowed to become the new high priests of the land, creating a society in their own image.

CHAPTER 5

CONCLUSION & CLOSING REMARKS

5.1 THE FIRST PART OF THE PRIMARY RESEARCH QUESTION

The Primary Research Question set out in Chapter 1 was: What are some of the central subjective strands in the adjudication of selected judgments stemming from the South African Constitutional Court, and what are the implications of these pertaining to the advancement of participation, inclusivity and freedom of religious communities in a liberal democracy? The keywords in the first part of the Primary Research question are, "What are some of the central subjective strands in the adjudication of selected judgments stemming from the South African Constitutional Court?" This requires a general philosophical and jurisprudential context followed by the critical unveiling of central subjective strands in the adjudication of selected judgments by the Constitutional Court.

5.1.1 General philosophical and jurisprudential context

In Chapter 2, we saw that, on closer scrutiny, European and African philosophers appeared to be *ad idem* that there is no such value as an "objective normative value system" or a value system devoid of subjectivity. That when it comes to making value judgments, the life story and context of the person making such a judgment will, of necessity, impinge on her judgment. Thus, even where, as in Africa, there remains an acknowledgement of God as a reference point outside of the interpreter, on closer scrutiny, objectivity is clouded by culture and belief systems. God and God's teachings are not mathematical equations to be applied. God meets people in their particular (subjective) contexts. Indeed, applying the reasoning of philosophers such as MacIntyre, Taylor, Nietzsche and Odozor, in effect, there is no, in principle, hermeneutical divide between a European and an African hermeneutic when it comes to subjectivity and the making of moral choices. Although unpalatable to a certain extent, it is difficult to fault the logic of Nietzsche that what purports to be appeals to objectivity are, in fact, expressions of subjective will, that there is nothing to morality but expressions of will.

That my morality can only be what my world creates. The value of Nietzsche is to alert society to this conundrum of subjectivity, provided society does not follow his narcissistic and nihilist advice as to how to address/resolve this conundrum.

Also, in Chapter 2, the focus was narrowed down to how legal philosophers approached the issue of objectivity, or what they termed the determinacy/indeterminacy of the law. From this research, it became apparent that legal philosophers were acutely aware of the profound consequences for the rule of law, which would be attendant on the absence of objectivity in court decisions. This awareness by legal philosophers gave rise to various attempts at addressing this conundrum of the indeterminacy of the law. These attempts involved complex theories aimed at ensuring certainty and predictability in court decisions. No matter how comprehensive the theory addresses indeterminacy of the law when value choices were made, we saw the question-begging nature of the proposed solutions. The theorists themselves admitted this conundrum. However they sought to address it by putting in place a framework which would ensure predictability and consistency in most cases. This involved using words and phrases such as “settled moral principles”, “general rules and a core of settled meaning”, “the soundest theory of the law”, “overlapping consensus”, “morally significant”, “core”, and “reasonable” as reference points to address the problem of indeterminacy of the law. (Later below, this study deals with words and phrases used by the justices of the Constitutional Court, which, in essence are mirrors of these words and phrases highlighted in Chapter 2.) We saw that all these words and phrases defy objective definition and beg prior questions to be answered.

It was especially the CLS school, which, by deconstructing judgments and the reasoning of judges, identified the circular nature of these various theories, frameworks, words and phrases. This deconstruction method involved not simply accepting words and concepts as givens in the various quests for determinacy in the law but constantly peeling back the outer skins of these words and concepts to expose what is happening when judges justify their judgments. Thus, for example, as MacIntyre[389] , in effect asks, how is it decided, and by whom, whether

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[389] MacIntyre 1988:392-393.

something is “settled”, what the “core” is, what is “reasonable”, what is “morally significant” and what qualifies as an “overlapping consensus”? The response of the CLS school was in effect similar to that of Nietzsche’s response to the proposition that objectivity is not possible when making moral or policy choices. As dealt with in Chapter 2, they argued that careful analysis of the reasoning process revealed that where value decisions need to be made by judges, a policy choice needed to be made by a judge.

Thus, we saw that even when a judge consciously endeavours to be “objective”, dispassionate and detached when making choices between competing principles and ideals, it does not address the conundrum of subjectivity. “Covert and subconsciously held” views make it impossible for a judge to come as a blank page when interpreting and applying a value-infused provision in a constitution. In this regard, although focussed on the law, in principle, there is no difference to the philosophical conundrum of subjectivity highlighted by Alasdair MacIntyre and Nietzsche in Chapter 2.

Notwithstanding Sachs J, and in effect, Jafta J, arguing in the death penalty and street naming matters respectively, that the idealism of the Constitution is to be found in the text of the Constitution and not “in the minds of the Judges”, Chapter 2 illustrates that this is an artificial separation between the Constitution and those who interpret and apply it. The Chief Justice in the street naming matter also presupposes such an artificial separation when he writes: “[8] … we also need to take steps to breathe life into the underlying philosophical and constitutional vision we have … .” As Cameron J and Froneman J in the street naming matter in effect asks of this approach: “[131] … . Who decides that and on what standard?” Even the Chief Justice’s use of the words “we have”, when compared to the approach of his fellow justices, justices Cameron and Froneman, in the street naming matter, demonstrate that in this judgment , “we” does not include two of the justices of the Constitutional Court, who made a different choice to the majority. Likewise, in Chapter 3, the artificial nature of a separation between the purported objective values already contained in the Constitution and the subjective worldviews of those who interpret and apply it emerged.

5.1.2 Constitutional Court cases analysed to illustrate subjective strands

The focus of Chapter 3 was to uncover the stage when indeterminacy enters, which Altman writes of. The method used was an in-depth analysis of various judgments of the Constitutional Court. Central to this exercise was to address the question of the thought process when justices wrote their judgments. As we saw in Chapter 2, this was the approach of the Realists and the CLS school. Likewise, also in Chapter 2, we saw that philosophers such as MacIntyre, Taylor, Nietzsche and Odozor used a similar deconstruction method in their analysis. In essence, we saw that the method involves the exegete continuing to push back to ascertain whether what is written is autonomous of the person who wrote it and of her assumptions, ideology or view of how the world should operate. We saw in Chapter 3 that the Constitutional Court and its judgments are not subject to any other court. Therefore, it is empowered even to make a ruling with profound moral implications without giving reasons for its ruling (as we saw in the unborn child matter). One of the effects of this is that justices of that court can arrive at conclusions and/or make rulings in the knowledge that such conclusions and/or rulings, in law, cannot be challenged.

A consequence of this, no doubt an unintended one, is that justices are able to make assumptions, express personal views and promote a certain view of what South African society must look like, involving deeply held moral values, without an evidential foundation being laid for such, safe in the knowledge that such, in law, cannot be challenged. Indeed, they are even able to make profound moral choices for South African society, as in the unborn child matter, without giving reasons, also safe in the said knowledge. This is helpful as the justices are more likely to drop their guard when they know their judgments and reasoning, in law, cannot be challenged. And it is in those moments when one is able to extrapolate express or unexpressed assumptions, the promotion of a personal worldview and so forth from the reasoning of the justices. As previously referenced on a number of occasions, Du Plessis writes:[390] "… . Covert and subconsciously held (theoretical) assumptions can, precisely because of an interpreter's uncritical unawareness of them, have a more decisive impact on the interpretive outcome than

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[390] Du Plessis 2002:91.

overt and consciously reasoned assumptions." In Chapter 3, we saw many examples of this happening.

Key words and phrases highlighted in Chapter 3 which have been used by the justices of the Constitutional Court to mask the subjective strands as merely setting out objectively what already is in the Constitution, thereby illustrating the subjective strands in their judicial reasoning, included: 'Generous, purposive and underlying values of the Constitution'; 'Securing for the individual, the full measure of the Constitution*'s* protection'; 'Enlightenment'; 'enlightened parts of Western society'; 'what the Constitution allows versus what the majority of South Africans allow'; 'weighing up of competing values (and interests)', 'proportional assessments'; 'emerging consensus of values in the civilised international community'; 'a comparable liberal philosophy'; 'common sense'; 'objective evidence that evolving standards of civilisation demonstrate'; 'evolving standards of decency that mark the progress of a maturing society'; 'the content and the sweep of the ethos expressed in the structure of the Constitution'; 'the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text'; 'directed to the future: to the ideal of a new society which is to be built on the common values which made a political transition possible in our country and which are the foundation of its new Constitution'; 'to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition'; 'to promote the values which underlie an open and democratic society based on freedom and equality'; 'human dignity as the touchstone of the new political order'; 'public policy which is deeply rooted in the Constitution and which is determined by the values which underly the Constitution'; 'an analysis of the *mores* of our society must include an assessment of constitutional norms' and 'public policy is now steeped in the Constitution and its value system'; 'reasonableness'; 'prevailing norms of society' and 'the values underlying the constitution'; 'opposition to religious doctrine being used to interpret the Constitution and the achievement of human dignity, equality and freedom'; 'reasonable and justifiable, in an open and democratic society based on human dignity, freedom and equality'; 'Religious faith versus public and private concerns'; 'in our kind of democracy' and 'commonsensical approach'; 'breathe life into the underlying philosophy and constitutional vision we have crafted for our collective good and for the good of posterity… . We all have a duty to transform our society and a world-view inspired by our constitutional vision must embrace *ubuntu*'; '*ubuntu* signifies

the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by'; 'the constitutional philosophy and humanism expressed both in the preamble and the post-amble to the Constitution'; 'its harmony with the national ethos which the Constitution identifies and constitutional perceptions evolving both within South Africa and the world outside with which our country shares emerging values central to the permissible limits and objectives of punishment in the civilised community'; '*ubuntu* as fundamentally denoting humanity and morality'; *ubuntu* as relating to the 'high values which reflect the quality of this nation's civilisation' and *ubuntu* described as 'a black African concept' and *ubuntu* as 'playing a significant role in black culture, custom and ethics'.

It is recognised that there must be parameters to diversity and tolerance. Hateful bigotry destructive to the substance of the rights of others to dignity, freedom and equality cannot be countenanced. The crucial issue here is what lens is used when using these keywords and phrases *inter alia* to set the parameters of diversity and tolerance in South Africa. I deal with this in the rest of this chapter, particularly in 5.4 below.

5.2 THE SECOND PART OF THE PRIMARY RESEARCH QUESTION AND THE SECONDARY RESEARCH QUESTIONS

The second part of the Primary Research Question and aspects of the Secondary Research Questions were addressed in Chapter 4. The keywords in the second part of the Primary Research question are "advancement of participation, inclusivity and freedom of religious communities in a liberal democracy". In Chapter 4, it was argued that the key to this advancement of all people of South Africa by the Constitutional Court justices when they make pronouncements which seek morally to transform South Africa is twofold. Firstly, the justices themselves must be made aware (reminded) of the influence of their own worldviews in their reasoning and conclusions. Secondly, civil society, not least of all the various religious communities of South Africa whose core function involves the moral well-being of their

members (and of the nation), must, in this knowledge, robustly and with commitment critically engage with the Constitutional Court when it comes to moral issues.

Akinola Akintayo, in an article penned in 2012,[391] analyses a judgment involving whether or not the South African President's powers to confer honours under section 84(2)(k) includes conferring the status of senior counsel on advocates to illustrate his argument that there is "pliability" and "plasticity" in the provisions of the Constitution.[392] He opines that judges in South Africa must acknowledge this and ensure that they use this "plasticity" and "pliability" to make sure that the Constitution "be interpreted to realise the constitutional values of human dignity, equality, human rights and democracy, among others."[393] He continues: "The problem, therefore, becomes how the law may unleash the progressive judge while constraining the abortive tendencies of the conservative judge under a transformative constitution." Having said this, Akintayo quotes both justices Langa and Moseneke in respective articles, where they express the sentiment that "transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the 'personal, intellectual, moral or intellectual preconceptions' on their decision-making."[394]

Whilst the research in this thesis as regards the subjective strands in the jurisprudence of the Constitutional Court is at one level *ad idem* with these views expressed by Akintayo, at a deeper level, his argument merely demonstrates once again the question-begging nature of the reasoning of the Constitutional Court justices highlighted in Chapter 3 and supported by the general philosophical and jurisprudential context dealt with in Chapter 2. Thus, when he argues, as alluded to in the preceding paragraph, for an interpretation of the Constitution by "progressive" judges "to realise the constitutional values of human dignity, equality, human rights and democracy, among others", we are back at the question, according to what and

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[391] Akintayo 2012:27.

[392] Akintayo 2012:639, 644. In essence his argument is in line with the Realists and the CLS school dealt with in Chapter 2. By "pliability" and "elasticity" he means that the provisions in the Constitution allow one judge "who is so minded" to reach a legitimate decision opposed to another judge.

[393] Akintayo 2012:641.

[394] Akintayo 2012:646. Both these justices were justices in the Constitutional Court when a number of the cases dealt with in Chapter 3 were decided. Combined their tenure stretched from 1995 to 2016.

whom? I agree with him about the need for judges to acknowledge that they do not come to matters as a blank canvas, but I strongly disagree with him about how to proceed from there onwards.

Even by using the descriptive words "progressive" and "conservative" judges, Akintayo is begging a prior question. What does that mean in South Africa? Is the reference point a context of being located in a sub-Saharan context or in a Western secular liberal context? We saw in chapter 3 for example, Langa J follows the latter rather than the former when it came to his decision that the death penalty was bereft of *ubuntu*. Was that him being "progressive", whereas the Tanzanian judges were employing "the abortive tendencies of the conservative judge" when they found that the legitimate purpose to which the death sentence was directed was a constitutional requirement that "everyone's right to life shall be protected"? Likewise, when the Constitutional Court chose to follow Western jurisprudence, as opposed to sub-Saharan jurisprudence on the other issues dealt with in Chapter 3, such as marriage, discipline of children, unborn children (although no reasons were given, the outcome, with the exception of Germany, is in line with the approach of the West, not sub-Saharan Africa) and adultery, were the justices being "progressive", and their colleagues in other parts of sub-Saharan Africa employing "the abortive tendencies of the conservative judge"?[395] Even more importantly, the route Akintayo advises will not advance the participation by, inclusivity and diversity of, and tolerance towards, all South Africans, not least of all religious communities. It will simply further divide the people of the country. I will return to this later in the chapter.

Akintayo's approach also conflicts with what we saw in Chapter 4 as regards the Secondary Research questions, central to which are the limits of constitutional adjudication. Tied up with this is what the role of constitutional adjudication should be in a complex society such as ours,

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[395] From a perusal of Macumber et al. (2022) it is clear that South Africa for example, on the issues of abortion and same sex marriage, is totally out of step with the overwhelming majority of sub-Saharan countries, indeed of North African countries as well. These include countries such as Botswana, Ghana, Kenya, Malawi, Namibia, Zambia, Zimbabwe, Nigeria, Swaziland, Tanzania and Uganda, all of whom are democracies and achieved independence from their colonial powers many years before South Africa. From some of the cases analysed in Chapter 3 we also saw a disparity on issues such as the death penalty, adultery and the discipline of children.

where it is imperative that our courts be finely attuned to what Sachs J described as a society with: "[95] …intensely-held world views and lifestyles (and that these differences be) accommodate(d) and manage(d) … in a manner that is not mutually destructive … ."[396] Express or implied in Akintayo's approach, and in line with the approach of for example, the CLS school dealt with by him and in Chapter 2 of this thesis, is current popular thought on the courts and judicial review as being the first solution to the protection and advancement of a democracy. In this regard, Tom Daly comments that:

> Various signs point to the need for a new model for democracy-building: the backlash against the court-centric model in states worldwide; worrying levels of democratic decay in highly judicialised democracy-building projects (e.g. in Hungary, Brazil, South Africa); enduring resistance to robust adjudication in Africa and Asia … we must begin to seriously consider the enduring viability of our current thinking on courts as central institutions for democracy-building, and how we can move to a model, or perhaps multiple models, for sharing the democracy-building burden more evenly. Courts will remain key institutions in any attempt to build democracy on the ashes of an authoritarian regime, but we need to move beyond a model in which courts and judicial review are touted as the first solution to any challenge encountered or expected in this endeavour.[397]

This thesis argues in support of what Daly pleads for, namely, that we move beyond a model in which the judiciary is touted as the first solution to any challenge encountered or expected in this endeavour. As in effect argued in this thesis, Brian Jones comments that:[398]

> Written constitutions have been in vogue for over two centuries, and their presence in state architecture nowadays is commonplace and expected. Nevertheless, increasing idolisation of these documents has produced unrealistic and impractical expectations regarding what they can achieve. This book has challenged many of the underlying assumptions about the effectiveness of these constitutional documents, bringing forward some major questions: can they provide an enhanced sense of unity among the citizenry; can they deliver on their 'We the People' claims; are 'good' documents necessary for state survival; can they invigorate democracies and provide for a more collective sense of constitutional ownership; and do they provide enough scope for states to perform vital constitutional maintenance? In many ways when answering these questions, written constitutions come up short or raise further questions as to their utility.

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[396] The marriage matter – see footnote 232.
[397] Daly 2017:303.
[398] Jones 2020:190.

The falling short of written constitutions to which Jones refers to in the above is what this thesis points to, albeit not at the expense of looking to the Constitution as an instrument to promote participation by and inclusion of as wide part of the citizenry as possible in a manner which better serves the complexity of our society and in the process promotes inclusivity, tolerance and greater freedom of the religious communities in South Africa. Simply dividing judges into two categories, "progressives" and judges who follow "the abortive tendencies of the conservative judge", will be counterproductive to these noble aims of the Constitution.

Civil society, not least of all that portion of it made up by the religious communities in the country, must be encouraged robustly to engage with the Constitutional Court about the substance of the particular moral issue before it. It also must alert the Constitutional Court to the limits of law and constitutional adjudication in a very diverse and complex society, lest it fail in helping facilitate inclusivity, particularly when it comes to the freedom of religious communities in South Africa. Crucial here would be for civil society to alert the Constitutional Court to the need for it to disavow the all-embracing power it thus far has held it has.

5.3 "WE, THE PEOPLE OF SOUTH AFRICA"

In Chapter 4, I dealt with two reasons why it was crucial for justices and civil society to grasp the hypothesis of this thesis and act on it – the fact that all decisions by the Constitutional Court are final, combined with that the justices have made it clear that nothing of importance in the country is beyond their jurisdiction, including the intimate personal aspects of our day to day lives. There is a third reason.

Before I deal with the third reason, a cautionary qualifying observation would be salutary. In Chapter 3, we saw that prior to the adoption of the Interim Constitution, no agreement on the issues of abortion and the death penalty could be reached (see footnote 187). It was decided that these two issues would be held in abeyance and decided later. A careful analysis of the conduct of the Constitutional Court revealed the following. In the death penalty matter, the various justices indicated that the general consensus in wider South African society was that

the death penalty should be retained. As we saw in Chapter 3, one of the arguments before it was that in terms of the negotiations leading up to the adoption of the Interim Constitution, the issue of the death penalty should be decided by Parliament, not the Constitutional Court. In other words, by "We, the people… ." This argument was rejected, and the death penalty was abolished, a decision in line with Western liberal democracies but in contrast to other democracies such as Botswana, Tanzania and India. When confronted by the other unresolved issue, abortion, without giving reasons, it simply allowed the Abortion Act (see footnote 268), legislated by Parliament and once again whose provisions are in line with Western liberal democracies, and not with sub-Saharan Africa, to remain in place.[399]

Therefore, whilst ruling that the death penalty fell under its jurisdiction, without giving substantive reasons, it allowed Parliament to exercise authority as regards abortion. Thus, whilst ruling that the death penalty fell under its jurisdiction and giving comprehensive reasons why the death penalty is unconstitutional, the same cannot be said for when it was confronted with the other unresolved issue, abortion. It gave no reasons whatsoever for its decision not to engage in any manner with the evidence and submissions before it concerning Parliament's decision about abortion. The consistent fact being that the outcome of this inconsistency were decisions on abortion and the death penalty in line with a Western liberal lens. Had the death penalty matter also been left to Parliament, the indications are from their own observations about the majority of South Africans supporting the death penalty, that the death penalty would have remained, which would not have been in line with such a lens.

The cautionary note, as we turn our attention to the third reason, is that the probabilities here support the conclusion that the justices did decide when it came to the death penalty and abortion to make a moral decision fashioned in their own images. In effect, what the CLS writers call a "policy decision", respectively by commission and omission.[400] This, as

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[399] See footnote 395.

[400] Retired law professor, Hugh Corder in a recent paper, specifically highlights that the Constitutional Court "deliberately chose the constitutionality of the death penalty, a divisive issue, as its first case." This simply underlines the argument in this thesis and this word of caution. Corder "South Africa's Constitutional Court at 30: a solid foundation but cracks are showing" *The Conversation*, https://theconversation.com/south-africas-constitutional-court-at-30-a-solid-foundation-but-cracks-are-showing-227570 (accessed on 8 June 2023).

previously highlighted in Chapter 4, is in direct conflict with Mokgoro J's warning that "… in a democracy, the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt… ." Buttressing this cautionary note, as we also saw in Chapter 4, is the reasoning process of Mokgoro J in the same judgment where she uttered the above caution. When confronted by the argument that the overwhelming public opinion is in favour of the retention of the death penalty, without any objective evidence, indeed without any evidence at all, she simply rationalises this away by describing such views on the death penalty "as uninformed or indeed prejudiced public opinion". This lack of consistency when dealing with the death penalty and abortion, which in itself is reminiscent of subjectivities, clearly suggests "policy decisions" by the Constitutional Court, confirmed, for example, by the said rationalisation of Mokgoro J, which calls for constant vigilance. Such vigilance is required on the part of both the justices themselves about whether they arrive at decisions in good faith or not and by civil society so as not unnecessarily simply to defer to the justices of the Constitutional Court.

One further observation at this juncture is warranted. As seen in Chapter 3, when comparing the Constitutional Court's approach in the death penalty, fetal assessment and unborn child matters, that court, in effect, made a profound moral choice about the value of the unborn without giving any reasons, unlike in the death penalty and fetal assessment matters. Grasping the full implications of "We, the people" (dealt with in the following paragraphs), linked with the veracity of the hypothesis of this thesis, will hopefully empower civil society to make the Constitutional Court more transparent and accountable to the people of South Africa. In the unborn child matter *inter alia*, by compelling/pressurising that court to justify its ruling to all South Africans, and not simply accepting that that court has the power to make such a profoundly moral decision, without giving account to the people of South Africa.

I now deal with the third reason. The first words of the Interim Constitution were, "In humble submission to Almighty God." The first democratically elected parliament of South Africa intentionally decided to change that in the Constitution to "We, the people of South Africa". In other words, all power was vested in "We, the people of South Africa". The Constitution then

set up various mechanisms and safeguards to ensure that any delegation of power by "We, the people of South Africa" could be monitored and managed by "We, the people". An obvious example is elections to the three tiers of government at regular and fixed intervals.

For civil society, and indeed the Constitutional Court (and all other courts) not to grasp the hypothesis of this thesis and act on it would be to discard the key to "We, the people" exercising our right, and indeed responsibility, to being included in and participating in decisions of the Constitutional Court, the effect of which is to rewrite the very moral fabric of the society of "We, the people". And this by 11 unelected men and women about whom Kriegler J writes in the death penalty matter:[401] "[206] …. The 'Court of final instance over all matters relating to the interpretation, protection and enforcement' of those provisions is this Court, appointment to which is reserved for lawyers. *The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics* (my emphasis)."

The binary choice, in effect facilitated by the approach of the Realists and the CLS school, and indeed by Akintayo, by necessity results in the exclusion of and lack of tolerance for those not subscribing to the "progressive" agenda. As indicated above, it simply will further divide the people of the country and exclude communities, not least of all religious communities, who often would not be seen as "progressive", using the Western secular liberal lens to make this finding.

Chapter 3 of this thesis reveals a fundamental misunderstanding of "We, the people" when it comes to South Africa. Looking at these words through a Western liberal lens, by definition, it is assumed that the choice made was a choice to be secular, to be autonomous of religious beliefs and their source documents, particularly in the public sphere. That "We, the people", lost their sense of being under the authority of God and, in His place, agreed to submit to the authority of secular liberal reason. Accordingly, notwithstanding Mokgoro J's warning concerning being attuned to the moral consensus of the community, Chaskalson P, in the death

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[401] See footnote 3.

penalty matter, simply ignores the source documents of the various religious communities in South Africa when deciding on a profoundly moral issue and only cites secular liberal sources. And as we have seen in Chapters 3 and 4, Sachs J specifically rules in the marriage matter that the Constitutional Court would be out of order to use religious doctrine as a source for interpreting the Constitution, whilst he uses non-religious, yet belief-grounded liberal doctrine to interpret and apply the Constitution.

In a paper titled, *Faith diversity at UP: Non-theological arguments,* Christo Lombaard makes a number of observations which have a direct bearing on this misunderstanding and, in effect, on the dualism being imposed on religious communities in South Africa.[402] He argues that when using the word secular, it is incorrectly assumed that this implies a-religious and that it is assumed that an a-religious position "implies a faith-free position (which is false, akin to claims of objectivity… .)". Concluding on the assumptions made in this regard, he writes:[403] "… that a secular or a-religious position is a neutral stance taken within democratic societies (which it clearly is not; a secular or a-religious standpoint is by definition an actively taken position on religion, at times even enforced by the armed apparatus of the state… .)". We have seen this assumption in some of the cases analysed in Chapter 3, in effect in terms of his reasoning, not least of all by Sachs J in the school punishment matter.

In the same paper, Lombaard makes other germane observations/arguments which have a bearing on this misunderstanding and what Chapter 3 of this thesis has revealed, not least of all concerning the lens chosen and the approach to issues about which religious communities have "intensely- held world views and lifestyles". He questions the use of the term "religious tolerance". He argues that this "automatically casts religion within the category of the problematic."[404] He opines that this, by definition, then sets it apart from the rest of life. For him, "It is, therefore, more natural to describe religion as an ordinary expression of humanity."[405] This observation by Lombaard has direct application to the dualism being thrust onto the religious communities in South Africa dealt with earlier in this thesis and in an

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402 Lombaard 2022:27-30.
403 Lombaard 2022:28.
404 Lombaard 2022:28.
405 Lombaard 2022:28.

illustration hereafter. (He suggests that in the place of "religious tolerance", something like "diversely-religiously affirming" can be used. In this regard, it is striking that whilst the Constitution uses the phrase "united in our diversity" in the Preamble, it does not use the word tolerance.) Lombaard concludes his paper as follows:[406] "Exclusive liberalism is the *faux liberalism* that tends reflexively to exclude religion from public life… . Inclusive liberalism, on its part, accepts that religion is as much a part of human life as is any other and, therefore, affords matters of faith no special status or position (be that … of privilege or exclusion or marginalisation). In popular, populist or *faux paus* liberalism, *sameness* and equality are often conflated. However, when equality becomes *sameness*, diversity is suppressed." The reality of South Africa is that the overwhelming majority of "We, the people", are deeply religious people of faith.[407] And even though there are a multiplicity of faiths and religious tenets and doctrines, anathema to almost all of them would be to impose what they would see as an artificial divide between the private and the public spheres of their lives as they seek to live out their beliefs day by day.

The danger in the view by justices of the Constitutional Court that they are merely giving flesh to what is already in the Constitution is that, in fact they have no option but to rule as they rule. A good example of this are the judgments of Mogoeng Mogoeng CJ in the adultery and parental punishment matters. There are parts of those judgments where he suggests that his findings are in conflict with his Christian beliefs but that the Constitution gives him no option but to decide as he decides.[408] Had he grasped the hypothesis of this thesis, he might well have written different judgments, more in line with "We, the people", indeed more in tune with much of sub-Saharan Africa, as opposed to the competing worldview of Western secular liberalism.

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406 Lombaard 2022:29-30.

407 See footnote 43.

408 Anecdotally, a few years back, I was approached by a provincial branch of the ANC Chaplaincy. Their brief to me was to conduct seminars with members of the chaplaincy with the aim of empowering them to empower ANC members of parliament, who were unhappy with various legislative measures with moral implications in direct conflict with their faith positions, to resist or influence the content of such measures. The perceived stumbling block for them being that they had no alternative as in 1996, a Western liberal constitution had been adopted by Parliament. Fundamental to this disempowerment was a failure to grasp the hypothesis of this thesis.

Another illustration touching on the various issues mentioned above is found in an as-yet-undecided matter[409] concerning a farming couple's right to live out their belief in the commercial use of their farm. The germane belief being that in the eyes of Jesus Christ, marriage is a union between one man and one woman. Accordingly, in obedience to Christ, they have refused to host marriages on the farm involving same-sex couples. In its Replying Affidavit, the South African Human Rights Commission (hereafter "the Commission") *inter alia*, asserts the following:

> 38.1. Unlike the … Respondents' religion, the law is primarily concerned with their deeds and not their innermost convictions or motives. …
>
> 38.3. The Equality Act's prohibition pertains to conduct, regardless of the underlying motive. …
>
> 38.5. If the belief does not discharge the onus of proving fairness, the ensuing consequence would not be a prohibition against holding the belief, it would instead redress the conduct and remedy the resultant harm.
>
> 39. The … Respondents postulate a false dichotomy in their Answering Affidavit. They contend that the Commission presents them with a choice either (i) to abandon their religious beliefs by hosting same-sex weddings or (ii) to break the law by continuing to discriminate against same-sex couples in accordance with their faith. …
>
> 40. The dichotomy is false because the … Respondents fail to recognise the third option available to them, which is not to run the wedding business at all. The … Respondents have not alleged that, by not hosting monogamous, heterosexual weddings, they will be acting contrary to their faith. The third alternative thus enables them to respect the law and their religious beliefs simultaneously.

This extract from the Replying Affidavit by the Chapter 9 (of the Constitution) State Institution, perhaps most directly involved in protecting and promoting the rights enshrined in sections 15 and 31 of the Constitution and in facilitating the advancement of participation, inclusivity and freedom of religious communities, is revealing in a number of ways.

Firstly, it is a graphic illustration of the cause of Tshehla's despair. It looks at the issues involved exclusively through a Western secular liberal lens. It simply fails to grasp the integrated wholism of the Respondents when it comes to their faith, indeed as with Tshehla,

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409 *South African Human Rights Commission and 10 others*, Case No: ECO4/2020, The Equality Court of South Africa (Western Cape Division, Cape Town).

and asks the Equality Court to impose its fragmentation/dualism onto the Respondents, in effect in the name of the Constitution. A dualism completely in line with the competing worldview of secular or non-religious liberalism and in conflict with a significant part of the country's community whose transcendent authority does not permit such a dualism.

Secondly, despite the words therein being "cloaked with much idealism, splendour and importance", they are in effect destructive of the right to live out the substance of their Christian belief on their farm. It imposes a dualism on the Respondents, such as Tshehla despaired of when it came to African healing/religion. In effect, it uses the subjective concept of "fairness" to destroy the substance of the integrated wholism of the Christian faith of the Respondents. To quote from the marriage matter, they fail "to accommodate and manage difference of intensely held world views and lifestyles in a reasonable and fair manner… (and) to do so in a manner that it is not mutually destructive".[410] Which in effect also is what Sachs J himself does in the school punishment matter when he decides that:

> [51] … . The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience… . What they are prevented from doing is to authorize teachers, acting in their name and on school premises, to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos.[411]

"This one aspect", the responsibility as parents to raise, educate and discipline their children to the parents concerned is core to Christian parenthood and discipleship. As is living out a life of obedience in how the said Respondents use their farm. On the surface, these attempts by Sachs J and the Commission, to balance out the "irreducible conflicts within plurality and dissenting positions"[412] in an even handed, dispassionate and reasoned manner, on a closer analysis is in fact imposing a secular dualism on Tshehla and Traditional Healing/Religion, the

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[410] *Minister of Home Affairs*, see footnote 232.
[411] *Christian Education South Africa*, see footnote 48.
[412] Tushnet 1984 - footnote 250.

said Respondents and parents who want to obey Scripture when raising their children. In the name of “reason” and “fairness”, through a secular western lens.

Lastly, the third choice offered by the Commission to the Respondents, not to bring their faith into the public sphere, is the final nail in the coffin of “the advancement of participation, inclusivity and freedom of religious communities” in South Africa. In effect, it tells the Respondents that if any part of their faith position is in conflict with what the Commission, or indeed the Constitutional Court justices, believe is fair and/or reasonable, they can only hold that belief in their own minds but not use their farm to support their family and the wider working population on the farm in a manner which is pleasing to their God.

The further conundrum for the justices, already foreshadowed in Chapters 1 and 2, and confirmed by the analysis in Chapter 3, is in the absence of objectivity, what reference point to use when deciding on what the law’s limits should be when accommodating such complexity. By what standard do they decide whether a strongly held belief or opinion promotes or retards the achievement of human dignity, equality and freedom; or which basic norms and standards should be binding on all? What content do they give to “fair” and/or “reasonable”? In other words, what reference point do they use to decide on the parameters of diversity, inclusivity and tolerance, of the right to freedom of belief, religious or non-religious? As indicated before I will deal with this in 5.4 hereafter.

Given the limitless reach of the Constitutional Court and that any decision by the justices is unappealable, it is imperative for the justices and civil society, not least of all religious communities, to grasp the hypothesis of this thesis and act on it by allowing and/or *mero motu* calling for and encouraging a participatory approach by civil society when it comes to decisions of the Constitutional Court. Not in the binary manner promoted by the Realists or the CLS school, or the narcissistic manner espoused by Nietzsche, but in an attitude of humility and tolerance of those who have strongly held views seemingly in direct conflict to ours. At the moment, if one has regard to the judgments dealt with in Chapter 3, in effect there is only lip service being paid to the complex diversity in our society and to inclusion of all parts of this complexity.

The justices need to be assisted by civil society to see this reality and that they are not only objective mouthpieces for what is already in the Constitution, as seen through a Western liberal lens. At the same time civil society, not least of all the religious communities of South Africa, and indeed law schools in South Africa, having grasped the reality of the subjective strands in the jurisprudence of the Constitutional Court, need to be reminded that in 1996 the people of South Africa, through their elected representatives in Parliament, decided to place the power in the hands of, "We, the people", and act accordingly in our day to day lives, whether it be in lecture theatres, churches, courts or wherever. In this regard civil society must make it very difficult for the justices of the Constitutional Court ever be seduced into thinking that they have the power to reshape the moral fabric of South Africa in their own image, without the full participation of, "We, the people of South Africa." Put in another way, the main sources of law in South Africa are Parliament and the Constitutional Court. Without meaningful participation in the latter, "We, the people" relinquish the power vested in us by the Constitution. An inevitable consequence of this would be an alienation between "We, the people" and the practical implementation of the Constitution their representatives authored. This in turn would undermine the realisation of the full measure and content of the rights enshrined in sections 15 and 31 of the Constitution.

5.4 "WE, THE PEOPLE", AND *UBUNTU*

It is hoped that by showing that when making moral pronouncements, the Constitutional Court is not merely in an objective manner setting out what the purported objective value system in the Constitution says, but expressing subjective moral viewpoints that churches and the rest of civil society ("We the people"), will be empowered to engage all arms of the State, including the judiciary, on what makes for a more humane, moral and just society within the parameters of the Constitution. The starting point for this process is for all to acknowledge the inevitability of subjectivity but then in an inclusive manner, fully conscious of the complexity of our diversity, as opposed to in a binary manner, look to giving concepts such as dignity, life and freedom content through a lens which best facilitates the advancement of participation by, inclusivity and freedom of religious communities and the rest of civil society in this process.

In other words, in a manner which promotes for all South Africans the rights enshrined in sections 15 and 31 of the Constitution.

For this to happen the consciences, religions, thoughts, beliefs and opinions of "We the people" must inform the content given to the said sections 15 and 31, as opposed to the 11 justices of the Constitutional Court unilaterally deciding on what the practical content of those rights are going to be, under the guise of merely setting out what is already in the Constitution. This will require a fundamental change in the mindset of that court, and indeed of civil society. A crucial key to this changed mindset is for all involved to grasp the hypothesis of this thesis.

What could be a lens conducive to this aim is an *ubuntu* lens, set in a sub-Saharan context. However, if we are to use *ubuntu* as a hermeneutical lens for this process, it needs to be defined in a manner which is more accommodating of diversity and inclusivity. In a manner which considers the diversity of the consciences, religions, thoughts, beliefs and opinions of all South Africans, referred to in sections 15 and 31 of the Constitution. Civil society needs to help the Constitutional Court move beyond viewing *ubuntu* merely as a "black African concept". In this regard, perhaps the most disturbing feature of the street naming matter is that the racial divide amongst the justices was stark and apparent, as we saw in Chapter 3. All nine justices who embraced using *ubuntu* as a lens for anything of importance were black. Those opposed were both white. Furthermore, on a closer reading of the majority judgments of Mogoeng Mogoeng CJ and Jafta J, they clearly saw *ubuntu* as only a black African concept, which was to bind all South Africans, whether they bought into it or not. Hence the alarm bells sounded by justices Cameron and Froneman.

In the same way as imposing a secular liberal lens on the Constitution and opining that all one is doing is setting out what is already in the Constitution, is anathema to participation by and inclusivity of all people in the country, so such a subjective use of *ubuntu* is. The irony being that currently, as we have seen in Chapter 3, notwithstanding subscribing to *ubuntu* as their lens, the same justices when deciding on moral issues have in practice invariably made decisions in line with Western secular liberalism, as opposed to following the jurisprudence of much of the other sub-Saharan courts.

The inevitable subjective strands of *ubuntu*, as already seen in Chapter 3, if also colonised by Western secular liberalism, will greatly impede diversity, inclusivity and tolerance in South Africa to the extent that Western liberalism is anathema to sub-Saharan African culture, which in its essence is a conservative and religious culture when it comes to issues such as marriage, men and women, abortion, adultery, discipline and punishment. Diversity, inclusivity and tolerance would then greatly favour those who hold to a secular Western liberal culture/worldview and thus discriminate against the majority of South Africans, which then obviously would undermine the full realisation of the rights enshrined in sections 15 and 31 of the Constitution.

Likewise, if the subjective strands are colonised by *ubuntu* as a black African concept, this also will greatly impede the advancement of participation by, inclusivity and freedom of religious communities in South Africa. One option would be for civil society and the Constitutional Court to embrace *ubuntu* but then together develop an overlapping consensus of what *ubuntu* actually means in a complex and diverse society such as South Africa, cognisant of its own complexity, including religiosity, within a sub-Saharan context. Practically this would mean black Africans, white Africans, coloured Africans and indian Africans, must be involved in developing and giving meaning to the concept of *ubuntu.* The present use of *ubuntu* militates against diversity and tolerance as it is assumed that it is only a black African concept – this lay at the heart of justices Cameron and Froneman's rejection of it as a hermeneutical lens for all South Africans in the street naming matter. But if civil society, representing all colours, creeds, religions and cultures, gets involved with the process of defining *ubuntu* and giving it content, then it can become a concept which truly will promote participation, diversity and inclusivity.

In other words, to go right back to my train illustration in Chapter 1, all South Africans will then have an opportunity to design the train/locomotive, and not merely be passengers on a train designed by others. As already indicated, it is recognised that this train also must set parameters to diversity, inclusivity and tolerance, as the Constitutional Court has attempted to do *inter alia*, with the use of the key words and phrases referred to above. The change needed is to use a different lens when using these words and phrases. A lens along the lines proposed

above. Although it is not within the purview of this thesis to give content to this proposed lens of *ubuntu*, it is suggested that the sentiments expressed by Kommers as quoted in Chapter 3, would be apposite as one starting point of giving *ubuntu* content, particularly as regards the need to introduce our responsibilities to one another as a counter balance to our rights and of the need to root our jurisprudence in sub Saharan Africa. Kommers writes:[413]

> The image of the human person in American constitutional law is that of an autonomous moral agent unconnected to the larger community in any meaningful sense. It is the image of a woman alone, isolated and independent, and bounded by little more than self-interest. German constitutional law, by contrast, has a strong community orientation, and it tells the story of human solidarity, a story that tries to join public virtue to liberty, one that speaks of social integration and the wholeness of life. As the court has said in another context: 'The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favour of a relationship between individual and community in the sense of a person's dependence on and commitment to the community, without infringing upon a person's individual value'.

I intentionally use these words of Kommers, a non-African thinker, as an illustration to show that in substance, *ubuntu* need not be seen only as a black African concept. A comparison between the various attempts we saw in Chapter 3 of black African justices to define the subjective idea of *ubuntu* and this extract by Kommers, reveals shared communitarian thinking, involving responsibility, accountability, social integration, wholeness of life, whilst at the same time respecting the individual's sacredness and interests. There is no sense of compelling people to separate their beliefs from how they live, to divide the public from the public sphere; of denying people the freedom to speak their language of meaning, in word and deed. This suggests that black, white, coloured and indian Africans in South Africa together in all their diversity, can develop a workable consensus of the meaning which must be given to *ubuntu* as a hermeneutical lens for interpreting and applying the rights enshrined in sections 15 and 31 of the Constitution (and indeed all the other rights enshrined in the Constitution). It is clear that for such an undertaking to succeed, the Constitutional Court and civil society together must embrace this responsibility and challenge, central to which is grasping the reality of the hypothesis of this thesis.

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[413] Kommers 1994 – see footnote 221.

When “We, the people of South Africa” chose to be a constitutional democracy, we took final power away from the institution which we could replace every five years with our votes and gave it to the Constitutional Court. If the hypothesis of this thesis urgently is not grasped and acted on by civil society in effect “We, the people” by omission would be taking away the power vested in the people in 1996 to contribute to giving content to the text authored by us. If the hypothesis of this thesis is grasped and acted on by civil society, and the Constitutional Court itself, “We, the people of South Africa” would likewise be able to participate meaningfully in the advancement of the participation by and inclusion of all the consciences, religions, thoughts, beliefs and opinions of “We, the people”, referred to in sections 15 and 31of the Constitution*,* as we help shape the Constitutional Court judgments dealing with the moral shaping of our society, once again mindful at all times of the warning of Mokgoro J in the death penalty matter: “[305] ‘… in a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt…’ ” Alternatively, it leads to the despair of a Tshehla, the criminalising of loving parents seeking to raise and discipline their children or the compelling of farmers to keep their beliefs only in their minds and not to be able to live them out on their farm.

Given the reality of the inevitability of strands of subjectivity in the reasoning of the justices of the Constitutional Court, within the cases analysed in Chapter 3, that court under the guise of objectivity is in effect promoting a competing worldview, central to which is a dualism. Civil society and the Constitutional Court must be ever vigilant to this danger, especially given the complexity of South African society. This is particularly germane to religious communities, whose substantive belief systems do not distinguish between private and public spheres. Furthermore, this vigilance must include a conscious awareness of the limits of law and constitutional adjudication, combined with a healthy dose of humility and restraint as advanced in the *Stewart* matter. Law can never replace the moral consensus of the community. For South Africans to take ownership of the Constitution*,* the Constitutional Court and civil society must do everything in their power to advance participation by all South Africans in the design of the train itself, which includes setting out the parameters of our freedom of belief, whether

religious or non religious. At all times the Constitutional Court and civil society must not lose sight of the opening words of the Constitution.

Having authored the Constitution, "We, the people of South Africa", must guard against relinquishing authority over it by default, by simply deferring to eleven unelected justices. Key to this is that all the parties grasp the hypothesis of this thesis so that all South Africans not only were part of writing and legislating the original text of the Constitution, but that they continue to be authors by participating in the process of giving the Constitutional text and the words and concepts in it, practical substance. Hopefully this will help us as a nation move from merely tolerating one another, provided that in our daily practical lives of work, learning and home we behave in a manner consistent with Western secular liberalism, to "Believ(ing) that South Africa belongs to all who live in it, *united in our diversity* (my emphasis)".[414] So that as a people we become more "diversely-religiously affirming", to use the phrase by Lombaard alluded to earlier, inclusive of both religious and "a-religious" in all spheres of our lives.

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[414] Preamble to the Constitution.

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Triveniben v State of Gujarat [1992] LRC (Const) 425 (Sup Ct of India)

Tanzania

DPP v Pete [1991] LRC (Const) 553

Mbushunu and Another v The Republic Criminal Appeal 142 of 1994 (30 January 1995)

United Kingdom

Soering v United Kingdom (1989) 11 EHRR 439

United States of America

Brown vs Board of Education, 347 U.S. 483 (1954)

District Attorney for the Suffolk District v Watson and Others 381 Mass 648 (1980)

Furman v State of Georgia 408 US 238 (1972)

Roe v. Wade 410 U. S. 113 (1973)

The People v Anderson 493 P (2d) 880 (1972)

Zimbabwe

Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others 1993 (4) SA 239 (ZS)

APPENDIX A

CONSTITUTIONAL COURT OF SOUTH AFRICA	CASE CCT 258/17
In the matter between:	
LINDE, DEBRA	FIRST APPLICANT
LOOTS, SHELLEY	SECOND APPLICANT
MATTHEE, ROSLYN	THIRD APPLICANT
and	
MINISTER OF HEALTH	
OF THE REPUBLIC OF SOUTH AFRICA	RESPONDENT

APPLICATION FOR LEAVE TO APPEAL

A. BE PLEASED TO TAKE NOTICE that the Applicants hereby make application for leave to appeal to the Constitutional Court against the order by Modiba J, in the South Gauteng High Court, heard on 24 October 2016 and handed down on 15 September 2017, dismissing the application of the Applicants (judgment attached hereto as "Annexure A"). The application dealt only with the constitutional matter of whether or not gestating human life is life as envisaged in section 11 of the Constitution and must be accorded dignity in terms of section 10 of the Constitution, and certain consequential relief (Notice of Motion attached hereto as "Annexure B").

B. BE PLEASED TO TAKE NOTICE FURTHER THAT the Applicants found their application for leave to appeal against the dismissal of the application on the grounds that Modiba J misdirected herself in the following respects:

1. It is respectfully submitted that the learned judge erred in not finding that without articulating a constitutional foundation for protecting gestating human life, as asked for in prayers 1 and 2 of the Applicants' Notice of Motion, all measures, including section 2 of The Choice On

Termination of Pregnancy Act 92 Of 1996 (hereafter “the Act)”, having an impact on gestating human life, and indeed on the rights of the pregnant woman, will be arbitrary, relative, irrational and variable.

2. It is respectfully submitted that at the outset in setting out the order sought by the Applicants the learned judge erred by not making reference to the fact that central to the relief sought was striking a balance between the rights of the pregnant woman and of the gestating human life in her, thereby in effect casting the application as one where there must be a winner and a loser, which was not the case argued by the Applicants.

3. In framing the order in this manner, the learned judge erred by not having due regard to the declarator sought leading to a national conversation concerning balancing the interests and rights of the pregnant woman and the gestating human life in her.

4. The learned judge erred in deciding that the application is an abstract application where the Applicants “fail to articulate the nature of the impact they contend the relief they seek will have on girls, women, fathers, gestating human lives and on South African society”.

5. In holding this it is respectfully submitted the learned judge misconstrued on whose behalf the Applicants primarily were acting, namely gestating human life.

6. In holding that the Applicants set forth no factual basis for the relief sought and merely relied on abortion statistics and their “life values and personal experiences”, it is respectfully submitted the learned judge misconstrued on whose behalf the Applicants were acting, namely gestating human life.

7. It is respectfully submitted that the learned judge erred in requiring the Applicants to advance “evidence on the impact a woman’s decision to terminate her pregnancy has on the gestating human life”, when such impact is self-evident, more particularly the death of an average figure of 73 614 (a figure not disputed by the Respondent) gestating lives per annum.

8. It is respectfully submitted that the learned judge erred in not applying the authority cited by her, *Savor and Others v National Director of Public Prosecutions and Another,* that even if the challenge of the Applicants was an abstract challenge, merely on the face of it, the effect of the definition of “termination of a pregnancy” (“the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman”) in the Act, read with section 2 of the Act, would be the death of an average figure of 73 614 gestating human lives per

annum, particularly in the absence of any articulated constitutional protection of the gestating human lives.

9. Alternatively, it is respectfully submitted that the learned judge erred in not holding that it is self-evident that such separation and expulsion of the gestating human life from the mother's uterus will have profound physical effects for the average annual figure of 73 614 gestating human lives.

10. It is respectfully submitted that the grounds for this application as set out in paragraphs 8 and 9 above are buttressed, when dealing with the issue of the right to an abortion, by the learned judge's own dependence on a woman's right to reproductive choice, which when applied to a pregnant woman, can only mean the death of the gestating life within her.

11. It is respectfully submitted that the learned judge erred by not accepting the unchallenged abortion statistics provided by the Applicants as adequate evidence of the fundamental impact the lack of an articulated constitutional value of gestating human life and the Act has on the lives of hundreds of thousands of gestating human lives, namely the termination of their lives.

12. It is respectfully submitted that the learned judge erred in not having regard to the Respondent's Answering Affidavit where he in effect concedes that a decision for an abortion means the termination of the life of the gestating human life, more particularly:

"51. An important consideration that the applicants failed to address adequately, or at all, in their founding papers is what impact more restrictive abortion laws would have on the child born in circumstances where he/she was a result of an unwanted pregnancy. From statistics received ...more than 3500 babies were abandoned in South Africa in 2010. Placing further restrictions on the ability to terminate a pregnancy is therefore likely to cause the statistic to increase even further. ...

68. Save to point out that the relief sought by the applicants will no doubt contribute to an increase in the number of orphaned and vulnerable children in South Africa if the relief sought by the applicants is granted, ...".

12. It is respectfully submitted that the learned judge erred in her application of the passage cited in *Zantsi v Council of State*, more particularly in that in the present matter without the declarator sought in prayer 1 of the Notice of Motion, the balancing act referred to in prayers 2 – 4 of the Notice of Motion is not possible.

13. It is respectfully submitted that the learned judge erred by not having due regard to the fact that the observations, in what the learned judge refers to as Christian Lawyers 2, (2005 (1) SA 509) which are germane to the present matter were *obiter*.

14. It is respectfully submitted that the learned judge erred in failing to distinguish the present application from, what the learned judge referred to as the Christian Lawyers 1 (1998(4) SA 1113) case, where at 1123 G it was found that: *"It is convenient at this stage to point out that the plaintiffs have framed the cause of action in absolute terms - namely, that the foetus is a person and that the Act must therefore be struck down in its entirety. The particulars of claim do not suggest that they are competing rights and that a balance must be struck between the rights of woman and that the foetus. This also negates the alternative argument advanced on behalf of the plaintiffs that the Act is 'overbroad' and, if the court is not prepared to strike it down in its entirety, the 'objectionable' features thereof, and in particular section 2, should be declared invalid. This is not raised on the plaintiffs' pleadings. It was, however, argued that it was competent for this Court to do so under the alternative relief sought. That, however, would be deciding the issue on a cause of action different from that pleaded. Clearly this is not permissible. The plaintiff must stand or fall in the case pleaded by them."*

15. It is respectfully submitted that the learned judge erred by not having regard to the effect of the absolutist approach taken in *Christian Lawyers 1* by the plaintiff, on the judgment handed down in that matter.

16. It is respectfully submitted that the learned judge erred by not finding that in the present matter if the relief sought was granted there would not be the effects and anomalies on pregnant women highlighted in Christian Lawyers 1, and that full cognisance could be taken of the rights of the pregnant woman highlighted in that judgment in the balancing process which would follow the declarator sought by the Applicants.

17. It is respectfully submitted that the learned judge erred in approaching the present matter also in absolutist terms and in not having due regard to the balancing of rights which would flow from the primary relief sought by the Applicants, more particularly that the granting of prayers 2, 3, 4 and 5 would initiate a process involving a nationwide conversation, involving lay people and experts across the spectrum culminating in an Act of Parliament which seeks to address the said balancing act within the context of a caring and supportive community and state.

18. It is respectfully submitted that in doing this the learned judge erred by prematurely focusing on the rights of the pregnant woman, which rights would be addressed during the process following the declarator sought. The absolutist approach of the plaintiff in *Christian Lawyers 1* did not permit of this separation.

19. In addition to not having due regard to this distinguishing feature between *Christian Lawyers 1* and the matter of the Applicants, the learned judge erred in finding that the Applicants provided no compelling reason that the above Honourable Court should depart from the finding in both the *Christian Lawyers* matters, more particularly in that the above Honourable Court, and the judges in the Christian Lawyers matters, either had no regard or inadequate regard to the following:

a. The Applicants never questioned a woman's right to an abortion.

b. When it comes to interpreting and applying the Constitution to the declarator sought, regard must be had to:

i. The inextricably intertwined core values of life and dignity of all human life, particularly the need to defend the dignity and life of the most defenceless and innocent of human life;

ii. When interpreting and applying these core values, judges need to make normative value choices;

iii. No part of the law or life in South Africa can exist beyond the reach of constitutional values, even the most intimate spaces;

iv. When making these value choices, judges must seek to help bring about the type of society envisaged by the Constitution;

v. Central to this exercise must be a deep mindfulness of our past where *inter alia* some human life was made more important than other human life;

vi. A building block for this new society and a crucial lens through which the Constitution must be interpreted, is *Ubuntu*;

vii. Central to *Ubuntu* is recognising the innate humanity of all human life within a context of communality as opposed to the rampant individualism of non African jurisdictions;

viii. Repeated and deliberate attacks on the dignity of one human life compromises the dignity of all in South African society;

*ix. Ubuntu d*emands the nurturing and valuing of all human life;

x. Although other jurisdictions must be considered, our courts when making a value choice must at the end of the day use our own indigenous value systems as a premise from which to proceed;

xi. The Constitution is silent about the constitutionality of abortion. It is thus for our courts to make a constitutional normative value choice in this regard as was done in *S v Makwanyane and Another* (hereafter, "the death penalty matter");

xii. No human life must be allowed to be variable;

xiii. No arbitrary measures must be permitted when it comes to the sanctity of all human life;

xiv. There are profound moral similarities between the post Nazi Germany and the post apartheid South Africa, which should give our courts pause for reflection when deciding on the foreign jurisdiction they should have regard to when dealing with gestating human life.

20. The learned judge erred by finding that the development of German abortion law was driven by the unification process between East and West Germany whereas it primarily was driven by what transpired during the Nazi period where some human life was considered worth more than others and arbitrary measures were used to decide on the fate of human life.

21. The learned judge in Christian Lawyers 1 erred by in effect asserting that one of the reasons not to apply German jurisprudence on the issue, is that South Africa did not share the oppressive history of Germany.

22. It is respectfully submitted that the learned judge erred in holding that for her to make a normative value judgment concerning whether constitutional value ought to be attached to gestating human life, as opposed to the extent and reach of this value and the balancing of rights which would follow, (where evidence clearly would be needed), she required evidence.

23. In the demand for evidence to enable it to make a normative value judgment, the above Honourable Court erred in not having due regard to the approach of the Constitutional Court *inter alia* in the death penalty matter and in H and Fetal Assessment Centre matter.

24. In her approach to interpreting and applying the Constitution in a normative manner, the learned judge erred in not having due regard to the Constitutional Court decision in *Carmichele v Minister of Safety and Security* that like the German Constitution, our Constitution contains

not only defensive subjective rights for the individual, but also an objective normative value system applicable to even the most intimate areas of our lives.

25. The learned judge erred by not finding that central to that objective normative value system is the sanctity of all human life, including gestating human life.

26. The above Honourable Court erred in making in effect the value judgment that the right to reproductive choice includes the right to an abortion without the benefit of evidence, notwithstanding her finding regarding her not being able to make a normative value judgment without evidence, and notwithstanding that the Constitution is silent on abortion.

27. The above Honourable Court erred in finding in effect that the right of a person to reproductive choice includes the right to an abortion, thereby effectively finding that abortion is a means of contraception, notwithstanding the Act asserting that abortion is not a form of contraception.

28. It is respectfully submitted that the learned judge erred in not having due regard to what transpired in Germany, where no party disputed or required evidence for the normative value judgment that gestating human life was human life worthy of constitutional protection and that the German conversation about how to balance out the conflicting rights presupposed an acknowledgment by all the contestants that the state has a duty to protect the life of the foetus at all stages of pregnancy and that the state has a compelling interest in this regard.

29. It is respectfully submitted that the learned judge erred in not finding that this conversational approach in Germany was consistent with the underlying values of a process driven by *Ubuntu.*

30. The learned judge erred in not having due regard to the implicit and foreshadowed balancing act contained in the words of the late Chief Justice Mahomed in the death penalty matter: "[268] *In the first place, (the death penalty) offends section 9 of the Constitution, which prescribes in peremptory terms that 'every person shall have the right to life'. What does that mean? What is a 'person'? When does 'personhood' and 'life' begin? Can there be a conflict between the 'right to life' in section 9 and the right of a mother to 'personal privacy' in terms of section 13 and her possible right to the freedom and control of her body?....[269] It is, for the purposes of the present case, unnecessary to give to the word 'life' in section 9 a comprehensive legal definition which will accommodate the answer to these and other complex questions. Whatever be the proper resolution of such issues, should they arise in the future, it*

is possible to approach the constitutionality of the death sentence by question with a sharper and narrower focus ....";

31. It is respectfully submitted that the learned judge erred in not having any regard to the scholarly contribution of retired Constitutional Court justice, L Ackermann, in *Human Dignity: Lodestar for Equality in South Africa* (2012, Cape Town: Juta Publishers), referred to by the Applicants in their submissions, more particularly:

a. That German dignity jurisprudence is singularly important for a proper understanding of dignity and its application to gestating human life under the South African Constitution;

b. His argument that "*certain aspects of human dignity pre-date birth and that the Constitution (and not the scientist) must ultimately determine when the various aspects of human dignity, guaranteed by the Constitution, begin and cease".*

c. His argument that "*human dignity accrues to human life, regardless of the stage of development of this life and that gestating human life is developing as a human being and not towards being a human being".*

d. His caution that if the Constitution does not protect human beings as a species, and not merely as individual human beings, there will be the ever present danger of relativising the concept of human dignity and the right to life flowing from it, resulting in human dignity being launched on a slippery slope that has no non-arbitrary restraints.

32. The learned judge erred by not having due regard to the academic article by the scholar, Donald Kommers (*The Constitutional Law of Abortion in Germany: Should Americans pay attention?* 1994 Notre Dame Law School NDL Scholarship).

33. It is respectfully submitted that the learned judge erred in not having any regard to various points raised by Kommers, and referred to by the Applicants, about the German conversation which resonates with the principles and processes underpinning *Ubuntu* and a country which shares a similar history to Germany when it comes to undermining the dignity and value of human life. These include:

a. A deep concern for all of human life;

b. A desire to be inclusive, not least of all by listening to all and attempting to craft a response which displays a sensitivity to the whole of society and avoiding a simplistic dualistic approach involving the stock "pro and con" arguments;

c. Eschewing a winner and loser approach to an issue which strikes deeply at the belief systems of the people of South Africa;

d. An honest "owning" of and grappling with the difficult questions which the issue raises;

e. A refusal by the state, and the wider community, to abdicate responsibility, not least of all by delegating it to the medical profession or burdening and isolating the pregnant women in distress;

f. Contrasting the image of the human person in American constitutional law, where a woman is seen as alone, isolated and independent, and bounded by little more than self-interest, with German constitutional law with its strong community orientation and integrated human solidarity;

g. Taking a strong stand against the commercialization of abortion.

34. It is respectfully submitted that in the absence of evidence the above Honourable Court erred in finding that the Act was legislated without discord as opposed to rather analyzing the *ex facie* provisions of the Act to discern whether it is consistent with the broad inclusive engagement about the issues which would be raised by a balancing of the rights of the pregnant woman with that of the gestating human life in her.

35. The learned judge erred in not finding that absent the declarator sought in prayer 1 of the Notice of Motion, any constitutional debate about the rights of the pregnant woman to an abortion, or indeed any limits placed on her in this regard, as for example by the Act, would be irrational and meaningless.

36. The learned judge erred in not finding that if the relief as sought was not granted the result would be that the Act remains unchanged without the benefit of an inclusive national conversation.

37. The learned judge erred in not finding that the present *status quo* is merely a reflection of the American winner take all approach to an issue of profound moral importance to all South Africans and is inimical to the inclusive process central to *Ubuntu.*

38. It is thus respectfully submitted that the above Honourable Court erred in not finding that the German approach to gestating life would be the one most consistent with the type of society envisaged by the Constitution. A society grounded in *Ubuntu* which is caring, nurturing and

supportive of women in distress whilst at the same time displaying an inclusivity when it comes to the life and dignity of all human life, inclusive of gestating human life.

Interests of justice

39. Given that the nature of the relief sought will by necessity require the above Honourable Court to make a critical and life and death normative value judgment affecting millions of future gestating human lives, it is difficult to conceive of a matter requiring more urgent and definitive direction from this Honourable Court.

40. Furthermore, the declarator sought will have a profound moral effect on South Africa as a nation when it comes to affirming the infinite worth and value of all human life, and thus is of paramount importance to all South Africans.

41. There have already been significant delays in the present matter, which was initiated on 27 October 2015, including a delay of some 11 months between the matter being argued and judgment being handed down. Furthermore, there was an application for direct access to the above Honourable Court made on 3 July 2015. This application was refused on 9 September 2015, the order stating that it was dismissed "as it is not in the interests of justice to hear it at this stage".

42. In addition, given the nature of the declaratory relief sought, it is respectfully submitted that there would be no disputes of fact involved. Such disputes of fact only will emerge when it comes to the practical implementation of the declarator, that is, when it comes to dealing with and accommodating the competing rights involved when reviewing the Act and other existing germane law.

43. There are now three High Court decisions which have pronounced on the constitutional issues involved.

44. Furthermore, it is respectfully submitted, the above Honourable Court in the matter of **H and Foetal Assessment Centre** has, **in effect**, by highlighting the rights contained in section 12 of the Constitution, assumed that gestating human life is not life as envisaged in the Constitution and thus need not be considered when the decision to abort is taken by the pregnant woman. If this is a correct interpretation of the said case, it is respectfully submitted that this decision was arrived at without the issue specifically being argued before the above Honourable Court, which may have a significant impact on the decision of other courts in the land.

45. In contrast there are the views referred to above of retired Constitutional Court justice, Justice Ackermann and the German Constitutional Court. In addition, there are the observations referred to above by the former Chief Justice, Justice Mahomed, foreshadowing a balancing act which presupposes the possible constitutional status of gestating human life.

46. It is respectfully submitted that if one has regard to the cumulative effect of all the above, it is in the interests of justice for the above Honourable Court to give a definitive finding as soon as possible on whether or not gestating human life must receive constitutional recognition and protection.

47. An application for leave to appeal to the Supreme Court of Appeal has been lodged with the South Gauteng High Court. Such application is conditional on the above Honourable Court not granting leave to appeal directly to it. At the time of lodging this application, the South Gauteng High Court had not yet heard the application.

48. Accordingly, it is respectfully submitted that it is in the interests of justice that leave to appeal to the Constitutional Court be granted.

Dated at Johannesburg on this 4th day of October 2017

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TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT

JOHANNESBURG

AND TO:

THE STATE ATTORNEYS

Defendant's Attorneys

10th Floor, North State Building

95 Albertina Sisulu Street, Cnr. Kruis

Private Bag X9, Docex 688 ?

APPENDIX B

CONSTITUTIONAL COURT OF SOUTH AFRICA	CASE CCT 258/17

In the matter between:

DEBRA LINDE	FIRST APPLICANT
SHELLEY LOOTS	SECOND APPLICANT
ROSLYN MATTHEE	THIRD APPLICANT
and	
MINISTER OF HEALTH	
OF THE REPUBLIC OF SOUTH AFRICA	RESPONDENT

ORDER DATED 21 February 2018

CORAM: Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J.

The Constitutional Court has considered this application for leave to appeal. It has concluded that the application should be dismissed as it bears no reasonable prospects of success. The court has decided not to award costs.

Order:

The application for leave to appeal is dismissed.

There is no order as to costs.