

VOL 35

NO 2

2024

STELLENBOSCH LAW REVIEW REGSTYDSKRIF

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THE DIVERGENT APPROACHES OF THE CONSTITUTIONAL COURT TO THE RIGHT TO LIFE AND *UBUNTU* AND THE IMPLICATIONS FOR CIVIL SOCIETY

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Abstract

There are indications of an unduly deferential attitude towards the justices of the Constitutional Court when they pronounce on profound moral issues which deeply affect the moral fabric of South African society. A key to addressing this deference is to demonstrate the divergent approaches of the Constitutional Court when making such pronouncements. An awareness of these differing approaches has the potential to influence civil society to participate confidently in the process of giving the Constitutional text representative forms of meaning and, in the process, of buttressing democracy. As an illustration of the divergencies stemming from the Constitutional Court regarding fundamental moral matters, the most important of all the rights in the Constitution of the Republic of South Africa, 1996 has been chosen, namely, the right to life, more specifically pertaining to the death penalty and abortion. Accompanying this is a critical investigation into a foundational hermeneutic chosen by the Constitutional Court when giving content to the right to life, namely, ubuntu. Also, naturally emanating from this contribution is the advancement of right to life jurisprudence in South Africa.

Keywords: *The right to life; abortion; ubuntu; legal interpretation; civil society*

1 Introduction

*S v Makwanyane*¹ (“*Makwanyane*”) is widely regarded as the first seminal decision of the South African Constitutional Court. In this case, the Constitutional Court had to interpret section 9 on the right to life in the

¹ 1995 3 SA 391 (CC).

Constitution of the Republic of South Africa Act 200 of 1993 (“the interim Constitution”) to determine whether the death penalty was constitutional.¹ A little over two decades after *Makwanyane*, the Constitutional Court in *Linde v Minister of Health*² (“*Linde*”) was asked to consider whether abortion infringes on what many believe to be an unborn child’s right to life. In *Makwanyane*, *ubuntu* was relied upon by a number of the justices of the Court in order to prohibit the death penalty, while in *Linde*, the Court, when asked to consider the relevance of *ubuntu* in supporting the protection of the unborn child, refused to pay heed to this value; a value of high moral worth irrespective of views relating to the status of the unborn. *Makwanyane* and *Linde* deal with fundamental questions related to human life, especially bearing in mind that the Constitution of the Republic of South Africa, 1996 (“the Constitution”) is silent on these, and they touch on issues about which there are strongly held contradictory moral convictions.

Comparing *Makwanyane* with *Linde* brings to light divergent approaches relating to the Constitutional Court’s understanding of the relationship between the right to life and *ubuntu*. This, it will be argued, points to inconsistencies in the Constitutional Court’s decision-making. It must be noted that accompanying the attractions of a constitution heralding a new and democratic dispensation, is the temptation for many to believe in the ultimacy and truthfulness of what the justices of an apex court understand the content of such a constitution to mean. In affording moral content to the constitutional concepts of dignity, equality, freedom and life, many religious leaders – and by extension religious communities – have embraced the assumption that judges do not infuse their judgments with their subjective beliefs. However, there is an inextricable relationship between judges’ subjective beliefs and the judgments that they hand down.

It is imperative for the advancement of the inclusion of different views on what the right to life should mean, to unveil central yet divergent strands of thought arising from the Constitutional Court. Consequently, the first part of this contribution presents critical observations related to the different views of justices of the Constitutional Court in *Makwanyane* and *Linde* respectively. To enhance this critique, ancillary judgments by both the Constitutional Court as well as the Supreme Court of Appeal have been selected. The second part of the contribution relates to implications for civil society regarding the different approaches reflected in *Makwanyane* and *Linde*, which is followed by insights advancing the participatory, deliberative and inclusive ideals expected from a democracy.

¹ Hugh Corder “South Africa’s Constitutional Court at 30: A Solid Foundation but Cracks are Showing” (14-04-2024) *The Conversation* <<https://theconversation.com/south-africas-constitutional-court-at-30-a-solid-foundation-but-cracks-are-showing-227570>> (accessed 16-12-2024) specifically highlights that the Constitutional Court “deliberately chose the constitutionality of the death penalty, a divisive issue, as its first case”.

² CCT case no 258/17.

2 The Constitutional Court and the relationship between the right to life and *ubuntu*

2.1 The death penalty

The facts of the matter in *Makwanyane* 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 Appellate Division 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.³ The germane issue before the Constitutional Court was whether the death penalty was permissible, which necessitated an interpretation of the right to life clause in the interim Constitution.⁴ In this judgment, *ubuntu* as a ‘hermeneutic standard’ was afforded special prominence, with seven of the eleven justices referring to it. All of these justices who relied on *ubuntu* in their reasoning concluded that *ubuntu* and the death penalty are mutually exclusive.⁵ In his judgment, Chaskalson P quoted the concluding provision on National Unity and Reconciliation which stated, in part, 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.”⁶

He continued by adding that

“[t]o 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’.”⁷

After pointing out that the interim Constitution did not define *ubuntu*,⁸ Langa J quoted the following remarks by the Tanzanian Court of Appeal as best encapsulating the meaning of the concept:

“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

³ *S v Makwanyane* 1994 3 SA 868 (AD).

⁴ As part of the interpretative exercise, the court also considered the right to dignity in s 10 of the Constitution of the Republic of South Africa Act 200 of 1993 (“the interim Constitution”).

⁵ It is important to highlight that there was only one explicit reference to *ubuntu* in the interim Constitution. There is no such explicit reference in the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

⁶ *S v Makwanyane* 1995 3 SA 391 (CC) para 130 (emphasis omitted).

⁷ *Furman v Georgia* 408 US 238 305 (1972), cited in *S v Makwanyane* 1995 3 SA 391 (CC) para 131.

⁸ *S v Makwanyane* 1995 3 SA 391 (CC) para 223.

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*.”⁹

Langa J elaborated upon these remarks by adding that

“[a]n 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.”¹⁰

He then found that because the death penalty was cruel, inhuman and degrading, it did not give effect to *ubuntu*.¹¹ He stated further that

“[s]ociety 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.”¹²

For Mahomed J, *ubuntu* gave expression to the “instinctive capacity for and enjoyment of love towards our fellow men and women”, recognised the “innate humanity” of others and acknowledged that this recognition operates not in isolation but “within the collective community”.¹³

Mokgoro J, for her part, pointed out that “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 ...”.¹⁴ She added that

“[g]enerally, *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.”¹⁵

Against the background of the meaning ascribed to the concept of *ubuntu* by the justices of the Constitutional Court in *Makwanyane*, 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

⁹ *DPP v Pete* 1991 LRC (Const) 553 at 566 b-d, cited in *S v Makwanyane* 1995 3 SA 391 (CC) para 224.

¹⁰ Para 225.

¹¹ Para 230.

¹² Para 232.

¹³ Para 263.

¹⁴ Para 307.

¹⁵ Para 308 (footnotes omitted; emphasis in the original).

22 years later in *Linde*, the latter also relating to an understanding of the right to life against the background of the fundamental moral question on when human life commences.

2.2 Abortion

In *Linde*, three women had asked the High Court¹⁶ 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 of the Constitution.”¹⁷ 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 the ... unborn life.”¹⁸ In addition, certain consequential relief was sought. The application in the High Court, which was heard on 24 October 2016, was dismissed by Modiba J on 15 September 2017, some eleven months later. On 9 October 2017, the applicants filed an Application for Leave To Appeal to the Constitutional Court. Some four-and-a-half months later, on 21 February 2018, the Constitutional Court dismissed the application on the basis that it bore no reasonable prospects of success.¹⁹ The Constitutional Court furnished no reasons for its ruling and did not grant the women an opportunity to present oral arguments to it; consequently, a substantive disjunction is revealed when comparing the approaches in *Makwanyane* and *Linde* to the right to life and the relationship between the right to life and *ubuntu*. The hope that the Constitutional Court would approach a matter dealing with questions related to the commencement of life *vis-à-vis* the status of the unborn child with the sensitivity that *Makwanyane* approached the right to life (and its fusion with *ubuntu*), was disappointed in *Linde*. The following discussion highlights some of the material pertaining to *ubuntu* placed before the justices in the Application for Leave To Appeal, which they chose not to respond to when they made their ruling.

In paragraphs 7, 8 and 9 of the Application, the justices were alerted to the annual deaths of 73,614 “gestating human lives”. Throughout the Application, the justices were invited to use the lens of *ubuntu* when deciding on what constitutional value should be placed on gestating human lives and that these lives were more than “the contents of the uterus of a

¹⁶ *Linde v Minister of Health of the Republic of South Africa* 15-09-2017 GJ case no 37801/2015.

¹⁷ See part A of *Linde v Minister of Health of the Republic of South Africa* CCT case no 258/17 Application for Leave To Appeal (see Appendix A at the end of this contribution).

¹⁸ Relief sought in the Notice of Motion in *Linde v Minister of Health of the Republic of South Africa* 15-09-2017 GJ case no 37801/2015.

¹⁹ *Linde v Minister of Health of the Republic of South Africa* 21-02-2018 CCT case no 258/17 Court Order (see Appendix B at the end of this contribution).

pregnant woman.”²⁰ *Inter alia*, the Constitutional Court justices were alerted to the position in Germany where the national conversation about how to balance the conflicting rights of the pregnant woman and the life within her presupposed an acknowledgement by all parties that unborn children were human lives worthy of dignity, and that the state has a duty to protect the life of the unborn child at all stages of pregnancy.²¹ It was argued that the German approach was consistent with the value of *ubuntu*.²²

The Constitutional Court was also alerted in the Application for Leave To Appeal to the views of retired Constitutional Court Justice Ackerman (who was part of the Constitutional Court in *Makwanyane*), the relevant part of the application reading as follows:

“It is respectfully submitted that the learned judge erred in not having any regard to the scholarly contribution of retired Constitutional Court Justice, L Ackerman, in *Human Dignity: Lodestar for Equality in South Africa* ... referred to by the Applicants in their submissions, more particularly ... [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 ...”.²³

The applicants’ submissions on *ubuntu* were based on the reasoning of the Constitutional Court in *Makwanyane*.²⁴ Central to these submissions were, first, the importance of *ubuntu* as a hermeneutical lens and, secondly, the practical content of *ubuntu*. Notwithstanding these submissions, the Constitutional Court dismissed the application without providing any reasons why *ubuntu* did not assist unborn children. By contrast, the Court in *Makwanyane* chose to give detailed reasons concerning why and how *ubuntu* must come to the assistance of convicted murderers. Also, the decision in *Linde* to abide by the High Court’s finding rather than to address the issue of *ubuntu* clearly raised by the applicants, stands in stark contrast to the Constitutional Court’s finding concerning the centrality of *ubuntu* in *City of Tshwane Metropolitan Municipality v Afriforum*²⁵ (“*City of Tshwane*”) when it comes to the type of society envisaged by the Constitution.

²⁰ See the definition of the “termination of a pregnancy” in s 1 of the Choice on Termination of Pregnancy Act 92 of 1996.

²¹ *Linde v Minister of Health of the Republic of South Africa* CCT case no 258/17 Application for Leave To Appeal para 28. The relevant provisions in the German Constitution are Art 1(1) (“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority”) and Art 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 SA Bill of Rights.

²² Para 29 of Application for Leave To Appeal.

²³ *Linde v Minister of Health of the Republic of South Africa* CCT case no 258/17 Application for Leave To Appeal para 31.

²⁴ Para 19.

²⁵ 2016 6 SA 279 (CC).

The judgment was handed down approximately a year before *Linde*. In *City of Tshwane*, Mogoeng CJ held:

“[W]e 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”.²⁶

Responding to the approach in earlier court decisions, the Chief Justice stated:

“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”.²⁷

Central to his theoretical framework for this hermeneutical approach is *ubuntu*. The Chief Justice ruled that:

“All peace and reconciliation-loving South Africans whose world view is inspired by our constitutional vision *must* 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 ...”.²⁸

What is clear here is that *ubuntu* is deemed worthy of relevance when dealing with the changing of street names, but not when having to deliberate on the status of the unborn – irrespective of what the status of the unborn is perceived to be, there is no escaping the fact that one is dealing here with fundamental questions related to the commencement of human life.

It also is instructive to compare the approach of the Constitutional Court in *H v Fetal Assessment Centre*²⁹ (“*Fetal Assessment Centre*”) to that of *Linde*. In *Fetal Assessment Centre*, 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 that he would be 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 the decision of the Supreme Court of Appeal in *Stewart v Botha*³⁰ (“*Stewart*”). In *Stewart*, Snyders AJA observed that

²⁶ Para 8.

²⁷ Para 18.

²⁸ Para 11 (emphasis added).

²⁹ 2015 2 SA 193 (CC).

³⁰ 2008 6 SA 310 (SCA).

“[t]he 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. ... In view of the conclusion that I have arrived at I do not think it necessary to evaluate all the arguments.”³¹

He concluded that

“the essential question that a court will be called upon to answer ... 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.”³²

Disagreeing with *Stewart* and writing on behalf of the Constitutional Court in *Fetal Assessment Centre*, Froneman J responded as follows:

“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’. 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.* 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.”³³

In this extract, Froneman J emphasises 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”. Froneman J also uses the phrase “an evaluative legal choice”.³⁴ Unlike *Makwanyane* and *Fetal Assessment Centre*, the Constitutional Court in *Linde* made a value choice, without acknowledging or justifying it. An additional inconsistency is revealed when one considers the way in which Froneman J and his fellow justices dealt with foreign law. In *Fetal Assessment Centre*, Froneman J writes:

³¹ Para 15.

³² Para 28.

³³ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) paras 21-23 (emphasis added).

³⁴ Para 25.

“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.”³⁵

Froneman J goes on to highlight that the German court acknowledges unborn children as human lives:

“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.”³⁶

In *Linde*, Froneman J and his fellow justices were alerted to German jurisprudence on the status of unborn children as human lives worthy of dignity and that this is wholly consistent with *ubuntu* as an interpretive lens. Despite this, the Court’s failure to engage with the relevant German jurisprudence and the interpretive lens of *ubuntu* is strikingly at odds with the provision of detailed reasons in both *Makwanyane* and *Fetal Assessment Centre*. In the latter case, Froneman J made it clear that when the Constitutional Court makes a value choice, it must acknowledge this openly and defend it squarely. In *Linde*, however, the evaluative legal choice not to assist the applicants was neither defended nor acknowledged by the Court.

3 Implications for civil society

3.1 The limits of constitutional adjudication

Revealing the different views of the Constitutional Court on what the relationship between the right to life and *ubuntu* should be, emphasises the presuppositional nature of worldviews reflected in law and its application, and by extension, constitutional adjudication (and many other kinds of adjudication for that matter). This corresponds with Harold Berman’s thesis that law, in general, is anchored in an authority that lies beyond the law itself.³⁷

³⁵ Para 32.

³⁶ Para 41.

³⁷ HJ Berman *Law and Revolution: The Formation of the Western Legal Tradition* (1983) 16. Similarly, John Salmond comments that:

“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

This also relates to a judge's presuppositional loyalties regarding matters of substantive moral worth. Benjamin Cardozo comments that judges cannot escape the inherent philosophical inclination of being human, a philosophical presupposition that provides coherence and direction to thought and action.³⁸ Aligned with this are inherited instincts, traditional beliefs and acquired convictions that all play a role in carving out the path of the judge's view on matters. Consequently, says Cardozo, even if we try to view things objectively, "we can never see them with any eyes except our own."³⁹ These propositions on the inherent subjectivity in law and its application are, of late, borne out by the Critical Legal Studies ("CLS") scholars' deconstruction of the reasoning of judges in matters which come before them. This deconstruction involves not simply accepting words and concepts as self-evident in the various quests for determinacy in the law but constantly peeling back the outer skins of these words and concepts. Thus, for example, as Alasdair MacIntyre in effect asks, how is it decided, and by whom, whether something is "settled", what the "core" is, what is "reasonable", what is "morally significant", and what qualifies as an "overlapping consensus"?⁴⁰

Regarding modern-day liberal democracies, the CLS movement (and its intellectual predecessor, American Realism) in particular did much to dispel the idea that the judiciary can be wholly objective. According to Andrew

any one ultimate legal source it is possible for the whole law to be derived, but one such there must be ...".

See G Williams (ed) *Salmond on Jurisprudence* 10 ed (1947) 155-156. Also see eg SL Carter "The Uses of Empiricism and the Uses of Fanaticism" (1990) 69 *Oregon LR* 471 480-481.

³⁸ BN Cardozo *The Nature of The Judicial Process* (1921) 8.

³⁹ Cardozo *The Nature of The Judicial Process* (1921) 9. Also see M Modak-Truran "The Religious Dimension of Judicial Decision Making and the *De Facto* Disestablishment" (1998) 81 *Marquette LR* 255 263, 273. Lourens du Plessis *Re-Interpretation of Statutes* (2002) 91 opines that "covert and subconsciously held ... assumptions can ... have a more decisive impact on interpretive outcome than overt and consciously reasoned assumptions". This also relates to policymaking by the judiciary. In this regard, Michael Perry, in the US context, comments that

"[v]irtually all of modern constitutional decision-making 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."

M Perry *The Constitution, the Courts, and Human Rights* (1982) 2, cited in S Levinson "Law as Literature" (1982) 60 *Texas LR* 373 378. Regarding the practice where judges create a rule to curb their power, George Braden "The Search for Objectivity in Constitutional Law" (1948) 57 *Yale LJ* 571 571-572 writes:

"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?"

⁴⁰ A MacIntyre *Whose Justice? Which Rationality?* (1988) 392-393.

Altman, CLS views the judge as having to make a choice which is not dictated by law. Therefore, 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.”⁴¹ Altman writes that while the CLS school concedes that there are formal constraints on judges, it also argues that this does not salvage law from indeterminacy. He adds:

“What they ... 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. Legal form fails to screen out or significantly reduce the range of ideological conflict present within the general political culture.”⁴²

It is, therefore, important to be reminded of the fact that law generally has an external presuppositional point of authority, an understanding which is inextricably related to inherent subjectivities on the part of those who are called to interpret and apply the law. Human rights clauses, due to the brevity of the wording of such clauses in many instances, create the opportunity for a variety of views, and judges are by no means immune to this.⁴³

Having said this, and as stated by Stephen Carter, although the ideal of the objective judge was slain by the legal realists long before the CLS movement resurrected it in order to kill it again, “the ghost of the objective judge refuses to go away.”⁴⁴ What is more, a written Constitution is surrounded by a godly type of aura. As Daniel Lazare observes:

“For the past two centuries, 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.”⁴⁵

⁴¹ A Altman “Legal Realism, Critical Legal Studies, and Dworkin” (1986) 15 *Philosophy & Public Affairs* 205 216-217.

⁴² 229.

⁴³ This subjectivity related to the interpretation of the Constitution by the judiciary is summarised in Levinson (1982) *Texas LR* 377:

“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”.

⁴⁴ SL Carter “The Religiously Devout Judge” (1989) 64 *Notre Dame LR* 932 944. The response of the Critical Legal Studies school was similar to that of Friederich Nietzsche’s response, over a century ago, to the proposition that objectivity is not possible when making moral or policy choices. According to A MacIntyre *After Virtue: A Study in Moral Theory* (1981) 107-108, Nietzsche understood more clearly than any other philosopher, both that what was viewed as appeals to objectivity were in fact expressions of subjective will, as well as 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” (107-108).

⁴⁵ Cited in R Hirschl *Towards Juristocracy* (2004) 5.

Generally speaking, it would be challenging to refute the relevance of this observation within the South African context regarding the status of the South African Constitution. Aligned with this allure that accompanies a constitution, is the high esteem that is popularly projected onto the judiciary as the interpreter of the Constitution. Jonathan Sumption has commented that

“[j]udges 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?”⁴⁶

The popularity and high regard in general that is enjoyed by the Constitution, together with the elevated status in authority ascribed to the judge whose responsibility it is to interpret the Constitution, naturally afford a type of superhuman or divine attribute to the process of constitutional adjudication. Accompanying this is the failure to grasp, whether intentional or unintentional, that a judge is also inescapably loyal to a cosmological and epistemic framework that is not necessarily aligned with the cosmological and epistemic framework of another judge or another individual or group of individuals in society who share the same fundamental viewpoints on what is right and wrong, moral and immoral. This becomes especially important when dealing with the interpretation of the right to life, which includes questions about the legality of the termination of human life. Therefore, irrespective of the high esteem placed in general on the authority of the Constitution and the judiciary to interpret the Constitution, we need to be reminded of the substantive divergence in views stemming from such authority when dealing with fundamental questions related to the meaning of the right to life and its relationship with *ubuntu* within the context of the death penalty and abortion. Implicit in this is the idea that the conclusions which flow from constitutional adjudication do not constitute the ultimate authority on the right to life for example.

As mentioned previously, the popularity and high regard enjoyed by the Constitution, together with the elevated status in authority ascribed to the judge, results in a type of superhuman or divine attribute being ascribed to the process of constitutional adjudication. A prime example of this is evident in the approaches taken by scholars from within religious circles regarding the status of the Constitution and of constitutional adjudication, which, in turn, represent the views of important role-players in civil society.⁴⁷

⁴⁶ J Sumption *Trials of the State: Law and the Decline of Politics* (2019) 33-34.

⁴⁷ See S de Freitas “The Constitutional Dynamic of Civil Society and the Role of the Churches in South Africa” (2005) 37 *Acta Academica* 21 26-27 for confirmation of the composition of civil society as including the domain of the traditionally religious. He observes that

Wessel Bentley, referring to the broader context of South Africa as a constitutional democracy, observed:

“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”.⁴⁸

The first part of Bentley’s observation is predicated on the assumption that the content and meaning of the values of the Constitution are objectively ascertainable by the judiciary. A similar assumption informs Clint Le Bruyns comment that “[t]he ‘good’ in political life is reflected in our *moral consensus* document, the national Constitution, which includes a ‘Bill of Rights’”⁴⁹ and Nico Koopman’s statement that

“[a]lthough 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. 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.”⁵⁰

These opinions all reflect the view that the Constitutional Court is the ultimate arbiter on how the Constitution should be understood.

The South African High Court judgment in *Gaum v Van Rensburg NO*⁵¹ (“*Gaum*”) also serves as an apt example of prominent sectors within religious circles that view the judiciary as the ultimate harbinger of meaning when interpreting the Bill of Rights. The High Court in *Gaum* 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

“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” (30).

R Wuthnow *Christianity and Civil Society: The Contemporary Debate* (1996) 7 (cited in De Freitas (2005) *Acta Academica* 22) states that the importance of examining the relationship between Christianity (and, by implication therefore, traditional and mainstream religions 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 organisations.

⁴⁸ W Bentley “The Place of the Church in the New South Africa” in W Bentley & DA Forster (eds) *Between Capital and Cathedral: Essays on Church-State Relationships* (2012) 89 91.

⁴⁹ C le Bruyns “The Church, Democracy and Responsible Citizenship” in W Bentley & DA Forster (eds) *Between Capital and Cathedral: Essays on Church-State Relationships* 59 61 (emphasis added).

⁵⁰ NN Koopman “Towards a Human Rights Culture in South Africa. The Role of Moral Formation” (2007) 48 *Dutch Reformed Theological Journal* 107 107.

⁵¹ 2019 2 All SA 722 (GP).

as ministers in the church, along with a prohibition against the solemnising 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 to a conclusion based on a specific moral view of 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. This approach 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, because it was requested to do so by all the parties before it. In this regard, all the parties were members of the Dutch Reformed Church. Therefore, what we find here is a tendency to allow law to infiltrate ‘a religious world of meaning’. Furthermore, *Gaum* is reflective of an 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.⁵²

These examples, having emanated from authoritative religious sectors within civil society and which therefore point to realistic possibilities of broader support from other parts of society, of a subtle yet material placing of the Constitution on a pedestal is aligned with what Brian Jones refers to as “constitutional idolatry”.⁵³ Jones defines the concept as “drastically or persistently over-selling the importance and effects of written constitutions”.⁵⁴ This also has implications for the limitations placed by such constitutional idolatry on members of society at large and their views on human rights, especially fundamental human rights such as the right to life. In this regard, Jack Balkin comments that

“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. We may well be unaware of how much the increasing formalisms, the gradual encrustations of constitutional language ... obscure our understanding rather than illuminate it. ... We may be unaware of this

⁵² 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. See eg R Ahdar & I Leigh *Religious Freedom in the Liberal State* 2 ed (2013) 375-389, 425-426. For further discussion of *Gaum v Van Rensburg NO 2019 2 All SA 722 (GP)*, see S de Freitas “Whose Equality? Freedom of Religious Association and *Gaum v. Van Rensburg*” (2023) 38 *JLR* 249.

⁵³ B Jones *Constitutional Idolatry and Democracy* (2020) 2.

⁵⁴ 2 (emphasis removed).

precisely because these concepts and categories seem so natural to us ... because we work with them daily, so that they have become the familiar and regular tools of our constitutional understanding.”⁵⁵

Therefore, it is imperative to take note of divergent views enunciated by the justices of the Constitutional Court to realise the limitations of constitutional adjudication reflected in the subjectivities and arbitrariness accompanying the interpretation of the Constitution by the judiciary. This especially relates to seminal cases on fundamental concerns regarding the right to life and *ubuntu*. An awareness of these limitations of constitutional adjudication also counters the attractions related to the deification of especially the Constitutional Court’s understanding of the rights involved in a given matter which in turn promotes effective democratic representation, participation and deliberation.

3.2 Advancing democracy

As pointed out earlier, since the advent of the Constitution, there are those who have embraced the assumption that justices are the final arbiters on the understanding of the Bill of Rights and, implicit in this assumption, that justices do not infuse their judgments with their subjective beliefs or convictions. An awareness of divergent approaches by the Constitutional Court to the right to life and *ubuntu*, serves as a catalyst towards motivating and empowering civil society to engage with the powers that govern regarding matters of substantive moral worth. Among other things, such an awareness would counter a mindset that is unduly deferential to the justices of the Constitutional Court as objective mouthpieces of the Constitution. This, in turn, would encourage those parts of civil society who are well qualified to give input concerning the moral content to be given to the Constitution, to enter the fray. Consequently, the upholding of inclusive participation and deliberation will be cultivated. This relates to 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.”⁵⁶

How we understand law also relates to how a constitution should be understood. Balkin comments that:

“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

⁵⁵ JM Balkin *Constitutional Redemption: Political Faith in an Unjust World* (2011) 128.

⁵⁶ Jones *Constitutional Idolatry* 11.

of judges and other legal professionals claiming to speak in the name of the Constitution. The text of the Constitution symbolises 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.”⁵⁷

Civil society’s cognisance of the subjective and divergent strands of reasoning emanating from the Constitutional Court is also inextricably related to the teaching of law at our institutions of higher learning. In this regard, Pius Langa observes that:

“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 ... However, 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.”⁵⁸

It is imperative that awareness be cultivated of the subjectivities and personal convictions of even jurists in matters of high moral importance, also bearing in mind Stephen Carter’s comment that “the civil authorities should not always be seen as less likely than the individual to make a moral error”.⁵⁹ Consequently, such an awareness can raise the confidence and sense of obligation of those within civil society and our institutions of higher learning to advance various views on matters of fundamental moral importance, the right to life being a valuable example. In the final instance, this will advance participatory and deliberative democracy and simultaneously promote inclusion and tolerance.⁶⁰

⁵⁷ Balkin *Constitutional Redemption* 240. Jones *Constitutional Idolatry* 83 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” (emphasis in the original).

⁵⁸ P Langa “Transformative Constitutionalism” (2006) 3 *Stell LR* 351 356. Also see Levinson (1982) *Texas LR* 388-389.

⁵⁹ SL Carter *God’s Name in Vain: The Wrongs and Rights of Religion in Politics* (2000) 163.

⁶⁰ It is clear from the Constitution and the jurisprudence of the Constitutional Court, that central to the society envisaged by the Constitution is one which allows for diversity and promotes tolerance. The Constitutional Court’s confirmation of the importance of tolerance and inclusion is reflected in the Court’s endorsement of the Constitution as supportive of the protection and promotion of diversity. In this regard, see eg *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 64-65, 75-76, 104, 107; *National Coalition for Gay and Lesbian Equality v*

4 Conclusion

This article has shown that the Constitutional Court has differed in its views on the relationship between the right to life and *ubuntu*, against the background of the death penalty and abortion. In *Makwanyane*, the death penalty was met with the utmost regard for the sanctity of life through the interpretive lens of *ubuntu*. In *Linde*, abortion was met with a disregard for an understanding of *ubuntu* and an approach unbecoming to matters on the periphery of the commencement of born human life. By highlighting these divergent approaches, this contribution has demythologised any purported ultimate or encompassing value system to which the Constitutional Court has access, as well as confirmed that judges are not sages. Consequently, this allows for an improved sense of relevance, confidence, worth and belonging in those individuals or groups of individuals within society who hold specific, yet contrasting, views on matters of fundamental moral importance. Furthermore, an identification of the divergent strands of argument emanating from constitutional adjudication may heighten the Constitutional Court justices' awareness (and that of the judiciary in general) of their subjectivities and, where possible, that they need to adopt a nuanced and sensitive approach to decisions on matters of fundamental moral importance, especially when dealing with matters related to the right to life. The hope is that emanating from all of this is the advancement of right-to-life jurisprudence in South Africa.

Minister of Justice 1999 1 SA 6 (CC) paras 107, 134-135; *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 4 SA 1176 (CC) paras 146-147; *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) paras 24-25; *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) paras 49, 79, 147, 170; *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) para 95.

APPENDIX A⁶¹

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.

⁶¹ This Application for Leave To Appeal is reproduced in its original format.

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. ...
11. ...
12. ...
13. ...
14. ...
15. ...

16. ...
17. ...
18. ...
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* demands 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. ...
 - 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. ...
 - 27. ...
 - 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 Ackerman, 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 commercialisation of abortion.
34. ...
35. ...
36. ...
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. ...
42. ...
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 Ackerman 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 ...

APPENDIX B⁶²

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.

⁶² This Court Order appears in its original format.