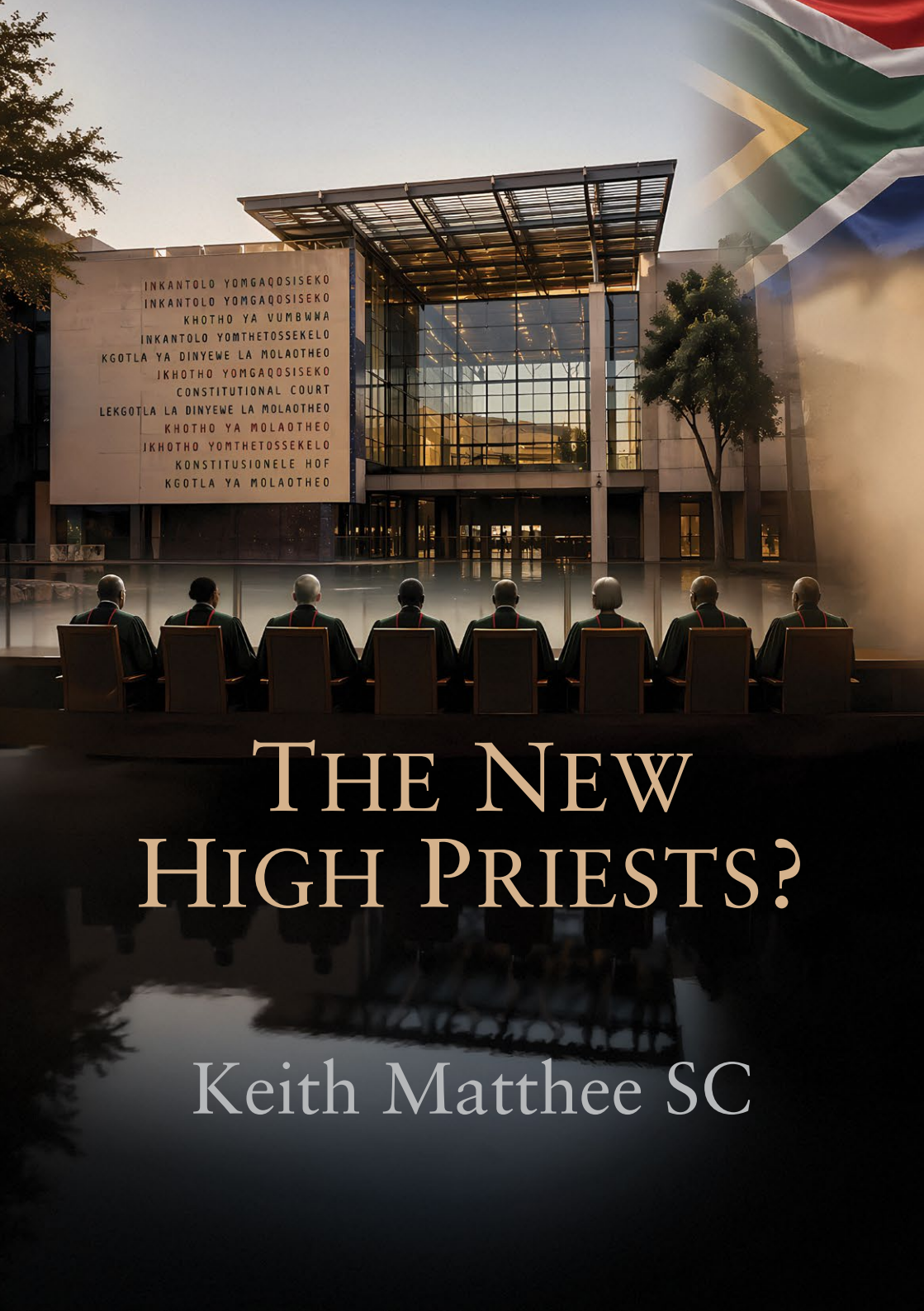




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THE NEW HIGH PRIESTS?

Keith Matthee SC

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After completing his schooling at Grey College, Keith Matthee did a year's compulsory military service in the South African Navy. Thereafter he obtained his BA LLB at the University of Natal. He was admitted as an advocate in 1979.

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He has appeared in all the courts of South Africa, including the Constitutional Court and the Supreme Court of Appeal. In 2002 he was appointed as Senior Counsel by President Mbeki. In 2007 he relocated from the Eastern Cape to the Western Cape where he was a member of the Cape Town Bar.

He is the author of *The Resurrection – a lawyer's view*, *Decolonising Jesus*, *The Emperor Has No Clothing*, *Whose Way?* and with Roslyn, his wife, *One Man One Woman*. In 2024 he completed a Doctor of Laws (LLD) from the University of the Free State on the subjective nature of the interpretation of the South African Constitution by the justices of the Constitutional Court. This thesis is available on his website at www.keithmatthee.com

He married Roslyn Stewart in 1980 and they have two sons, a daughter and five granddaughters and one grandson. Now based in Greyton he stays fit by climbing mountains, the occasional long horse ride and hoping that the Sharks rugby team will win more finals!

THE NEW HIGH PRIESTS?

Keith Matthee SC

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Dedication

To the some 2 million unborn babies who have been intentionally killed in South Africa since 1997, who the Constitutional Court, Parliament and much of civil society and the church have failed to protect. May this soon change.

The Lord spoke to Moses, saying, And if the people of the land do at all close their eyes to that man when he gives one of his children to Molech as a sacrifice, and do not put him to death, then I will set my face against that man and against his family and will cut them off from among their people, him and all who follow him in whoring after Molech.

Leviticus 20:1, 4-5

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Christian Jagers and Phillip Dowdle, for their creative work on the front and back covers. Professor Peter Rose, as always for being available with practical and sound counsel. And for my wife, Roslyn Stewart – once again, for listening, listening, listening!

High and Chief Priests

In the time of Jesus Christ, the Chief Priests were recognized as the supreme religious, political and judicial leaders in Israel, headed up by the High Priest. (The only separation of powers in effect at the time were whatever powers the colonial master, Rome, decided to retain for itself.) Central to wielding their power over the Jews was to pronounce upon what was morally acceptable and unacceptable. Right from the outset of His ministry Jesus Christ clashed with the High Priest and the Chief Priests. Central to this clash was the abuse of their religious power over the people, their failure to apply their minds to the substance of God's law, as opposed to form, and their lack of humility. They also made expedient policy decisions on profoundly moral issues, the most infamous one being Caiaphas when he perceived Jesus as a threat, advising the rest of the Chief Priests that it is better for one man to die for the people, than for the whole nation to perish.

(John 11: 49 – 52).

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The subject matter of this book forms part of a Doctor of Laws thesis I completed during 2024. My aim in this book is to make the basic message in my thesis accessible to lay readers. For those who want to engage with the subject matter in greater depth, an electronic copy of the thesis is available on my website: www.keithmatthee.com

CHAPTER 1

The new High and Chief Priests?

At the beginning of 1997 in South Africa it was unlawful intentionally to kill unborn babies. Judges did not find it difficult to see that 27 week old unborn babies were human beings. Marriage was between one man and one woman. Adultery unlawful. Parents had the freedom and responsibility to decide how best to discipline their children. The same parents had the law on their side when trying to protect their children against the dangers of dagga.

It is now 2025. Some 2 million unborn babies have intentionally and lawfully been killed since 1997. Justices of the Constitutional Court now say that to refer to an unborn baby of 26 weeks, who has died, as a “dead human body”, “would unduly strain the meaning of the words”.¹ Marriage is no longer restricted to between one man and one woman. Adultery is no longer unlawful. Parents who use moderate and reasonable chastisement to discipline their children, have been made criminals. When trying to protect their children against the dangers of dagga, children tell them that the law says it’s okay².

The 11 justices of the Constitutional Court are responsible for these changes.

These justices in effect want us to believe that they had no choice in the matter as that is what the Bill of Rights says. Thus in *Carmichele v Minister of Safety and Security* Justices Ackerman and Goldstone stated that:

Our constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative value system.³

In effect they argue that the bill of rights left them with no option. Along the same lines Justice Sachs has argued that the idealism contained in the judgments of the court “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.”⁴ Likewise Justice Jafta has reasoned that it is the Constitution itself which

defines how transformation of our society should be pursued and not a judgment by a justice of the Constitutional Court which merely serves as its mouthpiece.⁵

In doing this, the justices have denied imposing on us their vision of what our society should look like.

The purpose of this book is threefold.

Firstly, to show that when the justices of the Constitutional Court write their judgements, they are not merely expressing what is already in the Constitution. They wittingly or unwittingly are imposing their own subjective views onto the Constitution.

Secondly, without failure, every moral decision they take is consistent with western secular humanism.

Thirdly, without compromising on being good lawyers, the justices could have come to different conclusions more in line with the worldview of sub Saharan Africa.

I will deal with this by discussing some of the main judgments of that court which have been used to reshape the “moral” landscape of the country. These are the judgments dealing with the disciplining of children, unborn babies, the death penalty, marriage, adultery, and *ubuntu*.

I particularly will look at how the concept of *ubuntu* has been used as an interpretive tool by the court.

I will end off by looking at how the concept of *ubuntu* can in fact be used to develop a more inclusive society more in line with sub Saharan Africa and the hugely diverse country South Africa is.

Unlike other courts in South Africa, the Constitutional Court and its judgments are not subject to any other court⁶. Thus it is empowered even to make a ruling with profound moral implications, without giving reasons for its ruling (as we will see in chapter 5 in the application for leave to appeal matter, dealing with unborn babies). 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 and forward personal views, expressed or unexpressed, 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 in law, these cannot be challenged. (Indeed, as will be dealt with in chapter 5, they are able even to make profound moral choices for South African society about the value of unborn babies, without giving reasons, also safe in the said knowledge.)

This is helpful for the analytical method I will use in this book, 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 expressed or unexpressed assumptions, the promotion of a personal worldview and so forth from the reasoning of the justices. As du Plessis writes (2002:91): "... . 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."

An immediate problem I am confronted with is that the content of chapters 2 to 5 is critical to my argument, but for non lawyers might seem daunting to read and understand. Given the importance and urgency of the implications of the argument in this book for all South Africans, I have attempted to make these chapters accessible to all people, with the necessary application and commitment by these readers. I had thought of summarizing the judgments of the justices I look at, but decided that would not be fair to the justices and that I should allow them to speak in their own words.

To convince ordinary readers that the application needed to follow chapters 2 to 5 is warranted, I now will briefly sum up some of my conclusions as a result of my analysis of the chosen judgments.

Hopefully this will reassure lay people, "We, the people of South Africa" (see chapter 6), that given the enormous moral implications to South Africa as a society, and that the Constitutional Court has decided there is no limit to its jurisdiction when it comes to moral issues, that it is well worth the effort to

apply themselves to chapters 2 to 5. Indeed, it is their duty, not least of all given that at present any ruling by the Constitutional Court is unappealable and, in law, binding on all in South Africa.

The reader is then forewarned and forearmed as they approach chapters 2 to 5. Although this will involve a measure of repetition, given the stakes involved such repetition will be warranted, and also help consolidate the argument of this book. (To minimize repetition, I will restrict myself only to a few of my conclusions in chapters 2, 3, 4 and 5.) **All references and citations required to substantiate the brief summary which follows, are in chapters 2 to 6.**

Chapter 2 – Criminalising good parents

In the first corporal discipline judgment, Justice Sachs used as his point of departure for deciding the issue before him, that a faith community such as Christians operate primarily on faith, not reason. Unlike the competing worldview in the matter, secular western liberalism, which he stated operated primarily on reason. This assumption of his was where he in effect had to decide whether the State's limitation of the rights of parents to delegate their parental responsibility to a school where corporal punishment was involved, is reasonable or not. In other words, this flawed assumption of his at the outset made his final ruling against the parents inevitable. (It also established a deeply flawed precedent for how faith communities are seen, as regards the role of reason, in subsequent matters which come before the Constitutional Court.)

In the second corporal discipline matter, some 18 years later, Chief Justice Mogoeng Mogoeng, without laying an objective foundation for it, found as a fact that by definition corporal punishment always undermines the dignity of the child. He makes no reference to other jurisdictions when he makes this finding, nor to the complexity of the issue highlighted by Justice Sachs in the first corporal discipline judgment.

In arriving at his conclusion to criminalise parents who use reasonable and moderate corporal punishment to discipline their children, he chose not to

engage with the reasoning of Justice Sachs, he chose not to deal with the arguments of the parents raised by Justice Sachs, he chose not to have regard to other jurisdictions, he chose a definition of violence which made his conclusion inevitable, and without giving reasons was inconsistent with the interpretive approach of the first Chief Justice, in the death penalty matter.

Finally, an analysis of the jurisprudence of other sub Saharan countries reveals that these two decisions by the Constitutional Court on the use of reasonable and moderate chastisement is out of step with the rest of sub Saharan Africa, but in step with secular western liberal jurisprudence.

In other words, both Justice Sachs and Chief Justice Mogoeng Mogoeng made subjective decisions and came to conclusions wholly in line with secular western convictions, and not with sub Saharan convictions. As good lawyers, they could have decided and reasoned differently, more in line with their African brothers and sisters.

Chapters 3 and 5 – The death penalty, street names, unborn babies and ubuntu

Absent the justices giving any reasons in the unborn baby matter for their decision in effect that unborn babies are not human life and not worthy of legal protection, it would be difficult to sustain any argument as to what went through the minds of the justices before they made their decision. This despite being confronted by a figure of 400 unborn babies intentionally being killed every day in South Africa, since 1997/8. With conduct like this, it is deeply disturbing that as the final court in South Africa, the justices are free to decide not to justify their decision or explain it to South Africans.

In stark contrast all 11 justices gave detailed reasons as to why murderers for profit, should be given protection. Amongst other reasons, in the name of their understanding of *ubuntu*. Likewise, the justices used *ubuntu* in their decision to affirm the right of state institutions not to follow the stipulated law to change street names. So according murderers and the unlawful changing of street names protection in the name of *ubuntu*, whilst at the same time not even feeling compelled to explain why they decided not to

accord unborn babies the protection of *ubuntu*. It will be clear from chapter 5 that they were specifically presented with the argument that *ubuntu* must have a bearing on their decision, when it came to recognising unborn babies as human life worthy of dignity and protection.

Furthermore, the justices of the Constitutional Court chose to correct the Supreme Court of Appeal when it amongst other things found that to decide whether a baby should have been born at all, involves “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.” They found that no moral question is beyond their jurisdiction. And to repeat, no such decision by them is appealable. And, also to repeat, if they so decide, they do not have to tell South Africans why they have made their decision, as in the unborn baby matter.

Without knowing the reasons of the justices for their decision concerning unborn babies, it is impossible for “We, the people of South Africa”, to decide whether a specific judgment on moral issues was driven not by the law, but by policy/ideological beliefs. Decisions which have a daily impact on all South Africans in their day to day lives, for example as parents.

The arbitrary nature of this use of their power as justices of the Constitutional Court, is clearly seen when it comes to the use of *ubuntu*. Without any reference to it in the Constitution it is given a pivotal role in interpreting and applying the law. 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*... .”

An aggravating factor is the role the colour of the justice plays. In fact, in the street naming matter, the racial divide was stark and disturbing, for all South Africans who look to the Constitutional Court as the final arbiter when it comes to the law. If black, it appears as if it is assumed that because it is a “black African concept”, only black justices know instinctively what it is. And here it must be remembered that although it is mentioned once in the Interim Constitution, and not at all in the Constitution (see footnote 20), it

is never defined. Justice Langa in the death penalty matter specifies this. The justices themselves in that matter, and later in the street naming matter, give it content without an independent and objective reference point to support their interpretation. As things stand, this notwithstanding, all South Africans are bound by their subjective interpretation on profoundly moral issues.

A graphic illustration of the arbitrary nature of this process is how the justices dealt with a decision by the Tanzanian Supreme Court on the death penalty. Having relied on a judgment by the Tanzanian Court as regards giving content to *ubuntu*, the Constitutional Court then finds that the death penalty is inimical to *ubuntu*. This while the Tanzanian Court has found that the death penalty is justified and in fact is necessary to support the right to life. This obvious contradiction is not dealt with by the Constitutional Court in any meaningful way.

As before, the final decisions of the Constitutional Court when it comes to the death penalty and the absence of protection for unborn babies, are out of step with other sub Saharan countries, but in step with secular western liberal countries.

Given the central role *ubuntu* has been given by the Constitutional Court when it comes to interpreting and applying the Constitution, this has a direct bearing on all South Africans on a daily basis.

Chapter 4 – Adultery

In the cases analysed, at the outset it is striking that in the matter which declared that marriage also can include same sex partners (the marriage matter), the centrality of marriage as a public institution is highlighted by Justice Sachs. 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 Justice Madlanga reasons that parties to the marriage concerned must not expect the law to prop up their

marriage. This contrasts with Justice Sachs holding that the law should “not turn its back on any person requiring legal support in times of family breakdown.”

Once again, both decisions being out of step with other sub Saharan countries, but in step with secular western countries. This is apparent from other parts of the reasoning by Justice Madlanga in the adultery matter.

Without any evidence, he also makes sweeping statements about how our society views adultery. In the process he is superficial in his reference to the stand off between the Pope and King Henry VIII. He refers to the personal agenda of the King, which no doubt he had, but shows no grasp of the underlying issues involved, amongst other things 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 sacrament⁷. One of the Roman Catholic Church’s basis for opposing adultery, in addition to it being a direct assault on marriage, is that it constitutes an injustice towards the innocent party⁸, which also would be consistent with the underlying values of the Constitution referred to by Justice Madlanga in his reasoning.

Furthermore, 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, undermines 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 the adultery 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 are 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.

This drives one once again to the conclusion that underpinning decisions by the Constitutional Court, is policy, informed amongst other things by the worldviews of the justices themselves. Thus, for example, where the policy is actively to promote and defend a certain view of marriage, as in the same sex 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 western secular humanism lens over a sub Saharan lens.

Initially, the issue before us is not which lens is correct, but that there is more than one lens to choose from and that the justices make a choice in the absence of a dispassionate objective reference point to guide their decisions.

The issue then becomes, why do the justices make a decision in line with western secular humanism, and not sub Saharan Africa? Indeed, should they not in fact rather follow a sub Saharan lens, where the Constitution permits it?

I trust that these brief summaries of a few of the conclusions arrived at in chapters 2, 3, 4 and 5, set out above, will convince the reader that it is worth their while to apply their minds to the contents of these chapters. Quite simply, for too long now “We, the people of South Africa”, have simply deferred to the 11 men and women on the Constitutional Court as they have gone about reshaping the very moral fabric of our society.

I am convinced that it was never the intention to hand over such enormous power to 11 unelected people, who have no more than legal training, and yet are making sweeping and binding pronouncements about profound moral issues. Pronouncements which are final and unappealable, even to Parliament.

In chapter 6, footnote 93, I make mention of an approach made to me by a provincial chaplaincy of the ANC to conduct a seminar for them. The purpose of the seminar was to empower ANC members of Parliament. They were unhappy with the moral content of the law on various issues, but felt helpless because their perception was that they had no alternative as in 1996, a secular western liberal constitution had been adopted by Parliament.

Fundamental to this disempowerment was a failure to grasp the argument in this book, and indeed the failure by the justices of the Constitutional Court to grasp the argument in this book.

It is for this reason that I encourage all readers to roll up their sleeves and apply their minds to the chapters which follow, so that “We, the people of South Africa”, once again can regain control of the process of creating a South Africa, not in the image of a secular western liberal country, but of a South Africa more in line with the complexity, diversity and richness of our unique country.

CHAPTER 2

Criminalising good parents

There are two constitutional court judgments which deal with the discipline of children either at the direction of parents or by parents themselves.

The first one dealt with the right of parents to authorize teachers at private church schools to use moderate and reasonable chastisement in the discipline of their children (hereafter, “the school discipline matter”).⁹

The second one dealt with whether or not parents who choose “reasonable and moderate chastisement” to discipline their children in the home should be made criminals (hereafter “the parental discipline matter”).¹⁰

The school discipline matter

Central to the test the court had to use in the school discipline matter was what is **reasonable**. So was it reasonable of government to prevent parents from authorising teachers to use “reasonable and moderate” chastisement in a private school setting?

In answering this question Justice Sachs reasoned that religious conviction and practice are generally based on faith. Whereas public or private concerns are usually evaluated mainly according to their reasonableness.

In his judgment he juxtaposes the competing rights, writing that they belong: “[33]... 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 other words, at the outset of his judgment he decided as a **fact** that the Christian parents before him based their argument primarily on faith, not reason. And that those representing government primarily based their argument on reason, on what is reasonable.

Not only is the Bill of Rights completely silent on whether or not the use of “reasonable and moderate” chastisement is acceptable, it also says nothing about whether or not a “secular” worldview is based on reason and is reasonable, whereas a Christian, Jewish or Islamic worldview is primarily based on faith, not reason. To use this alleged difference as a starting point was a subjective choice by Justice Sachs.

It also was a deeply erroneous choice.

In this choice he declares his own view that reason has no significant role in religious conviction whereas it is central to western 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 Paul¹¹, 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. In other words, he could not arrive at any other conclusion than he did – that restricting parents’s rights as regards the discipline of their children, was a reasonable thing to do by the government.

Thus 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 concerning corporal punishment, is faith, not reason¹². Furthermore, he only has regard to secular source documents when arriving at his decision, even though the source documents of Jews, Christians and Muslims have teaching on the issue at hand.

What is important is not the choices he makes, but the fact that he makes a choice without giving objective reasons or independent evidence for such a choice. Alternatively, his choice is premised on his own particular understanding that religious conviction, as opposed to secular conviction, is based primarily on faith, not reason.

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 and conclusions in the judgment fail to engage with this complexity¹³. 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 a provided a competing worldview of his own.**

His further attempts to justify his conclusion, confirm his and the law's lack of autonomy in this matter. Thus 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. And 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.

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 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".

The parental discipline matter

This matter dealt with whether or not parents who choose "reasonable and moderate chastisement" to discipline their children in the home should be made criminals.

In the school discipline matter Justice Sachs writes: “(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 discipline 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] the Chief Justice 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 by the court 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 attention¹⁴.

Whether or not this was a correct choice is not pertinent to this book. 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. This choice is his subjective choice. As will be seen there are other provisions he could have chosen.

In the school discipline matter, we saw that for purposes of his judgment Justice Sachs 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 Justice Sachs 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 Chief Justice Mogoeng Mogoeng does in this matter, is decide that Justice Sachs's assumption was incorrect as regards corporal punishment, more particularly, that it is in conflict with sections 12 (1) (c) and 10 of the Constitution.

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 see in the death penalty matter¹⁵, reflecting on what meaning to give to "cruel and inhuman punishment" in the Constitution, President (Chief Justice) Chaskalson 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 President (Chief Justice) Chaskalson would be seen as "highly technical" by Chief Justice Mogoeng Mogoeng 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 (e.g. *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 particular 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) (<https://www.oed.com/oed2/00277885>) 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...” www.merriam-webster.com

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 injure.

Although the definition of violence in Collins English Dictionary (<https://www.collinsdictionary.com>), 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 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 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 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 interpretive approach in 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 writes: “[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 round. 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.”

To further illustrate the subjective nature of this choice, the following extract from Sachs J in the earlier judgment on corporal punishment in private schools, is 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 he 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 the Chief Justice 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 in [61], “in our kind of democracy” and in [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 which 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. This choice calls to mind the title of Alistair MacIntyre’s 1988 book, *“Whose Justice? Which Rationality?”*.¹⁶ Is it merely the “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”.

Conclusions

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, Justice Sachs 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 Chief Justice Mogoeng Mogoeng, 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 Justice Sachs.

A number of subjective choices were necessary for the Chief Justice to reach his conclusion. He chose not to engage with the reasoning of Justice Sachs. 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 discipline matter itself, we have seen that from the outset and at every material juncture Chief Justice Mogoeng Mogoeng 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 interpretive 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 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 for 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".

Chief Justice Mogoeng Mogoeng 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 later chapter in this book on

ubuntu as an interpretive 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.

Finally, an analysis of the jurisprudence of other sub Saharan countries reveals that these two decisions by the Constitutional Court on the use of reasonable and moderate chastisement is out of step with the rest of sub Saharan Africa. On the other hand, widening this analysis to Western European countries will show that these two judgments are in step with their jurisprudence.

In other words, both Justice Sachs and Chief Justice Mogoeng Mogoeng CJ made subjective decisions and came to conclusions wholly in line with European secular convictions, and not with sub Saharan convictions. As good lawyers they could have decided and reasoned differently, more in line with their African brothers and sisters.

The death penalty¹⁷

Chaskalson P¹⁸ wrote the main judgment¹⁹. 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 came to the conclusion that the circumstances of the murders were such that the men should receive the heaviest sentence permissible according to law.

The germane issue before the Constitutional Court was whether or not the death penalty was permissible in terms of the Interim Constitution²⁰. At the outset Chaskalson P held 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 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 continued: “[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 on the issues dealt with by the Constitutional Court, we need carefully to look at the reasoning of the Court to understand what happened.

With this in mind we now turn to the reasoning of Chaskalson P, and indeed the reasoning of the other justices in the death penalty matter.

Subjective upfront choices

First was 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 choices were not prescribed by the Interim Constitution. His choice emphasised 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 were sections 8, 9, 10 and 11 (2)²¹ 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 at [11] where he juxtaposed the South African Government’s position that the death penalty is in conflict with s 11(2) and should be declared 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.

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* (on the face of it) the Interim Constitution 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 Constitution²² and those provisions in the Interim Constitution dealing with the Attorney-General’s argument that it was for Parliament to decide²³.

Turning to the first omission. Having regard to this omission would 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.

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’ documents²⁴. Not one of these make reference to God or to source documents associated with God such as the Torah, the Christian Scriptures or the Koran²⁵. 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: “[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 préparatoires* (preparatory works) 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 Court²⁶ he writes: “[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 26 above 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 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.”, “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 are 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 there is 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 interpretive approach to the Interim Constitution (and obviously, 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.

Cruel and inhuman punishment

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 by a person/society to the suffering/pain of another person²⁷. 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.

Thus although he 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 and the subjective latitude which accompanies his interpretive 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 his 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 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.

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.”

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 word enlightened reflects his own worldview, his own presupposition.

The selective/inconsistent use of public opinion

His 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.”²⁸

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 already stated, 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.

Chaskalson P’s treatment of the Tanzanian law

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 Appeal²⁹... 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.”

He continues: “[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 obvious cause for this uncertainty. It is correct that the words used by the two Constitutions are not identical. However, given the interpretive 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 Africa³⁰. *Ex facie* his reasoning in the passages cited above, 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 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 or not 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.

European influence in begging the question

At [33] Chaskalson P writes: “... . As societies became more enlightened, they restricted the offences for which this penalty could be imposed.” Later with approval he refers to a dissenting judgment in a European 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’... .”

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.

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.

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 in chapter 5, which deals with *ubuntu*.

Ackermann J

Ackermann J is one of the justices who in *Carmichele v Minister of Safety And Security*³¹ held: "Our constitution is not merely a formal document regulating public power. It also embodies,..., an objective normative value system."

He 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 Athena³² 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.”

In essence these words of Ackermann J echo the inevitability of subjectivity/arbitrariness when value judgments need to be made, particularly where, to adapt the words of the Indian Supreme Court, “persons of reason, learning and light are rationally deeply divided in their opinion on this issue (the death penalty)”³³. 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.

Extrapolating from this reasoning, from an interpretive standpoint one concludes that where there is a choice between conflicting value judgments inconsistency/arbitrariness is inevitable.

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”.

A further illustration of the subjective nature of the choices judges make, emerge 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 negative³⁴. 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.

Didcott J

In concurring with Chaskalson P, Justice Didcott makes use of a decision by Chief Justice Gubbay³⁵ and a number of cases from the United States of America³⁶. It must be noted that Gubbay CJ was not called on to address the issue of whether or not the death penalty inherently was inhuman and degrading or inherently was 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 Gubbay’s words 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.”

He then quotes Gubbay CJ: “[177] Gubbay continued thus (at 248 B – C): ‘(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 China³⁷, 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.

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 be by need of logical

necessity, also involve arbitrariness, notwithstanding his said bulwark against “undue subjectivity”. The question being addressed by this book 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 interpretive 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 in South Africa, Didcott J sent his support³⁸.

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 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 secular 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, of his personality, of his 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 cross³⁹. Countless followers of Jesus Christ embraced their execution with joy, although outwardly the Romans devised extremely cruel methods of execution.

A further 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”, is whether when making 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 United States of America⁴⁰, 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 – plausibility and persuasiveness are no substitutes for testable evidence required to justify a claim to objectivity.

Kentridge AJ

Noting his agreement with Chaskalson P, he 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... .”

He continues: “[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 whether punishment is impermissibly cruel and inhuman.” He avoids developing on 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 reveal 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 presents. His response is a reference to their written Constitutions 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, are African countries such as Botswana⁴¹ 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.

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 as regards public opinion.

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 (my emphasis)."

An analysis of his judgment reveals that his purported mechanistic and dispassionate approach to the issue in 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 about which, to quote the cited Indian Court's observation, "persons of reason, learning and light are rationally and deeply divided in their opinion".

The objective fact is that given the constitutional structure and dispensation he 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 on a daily basis 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 courts⁴².

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 why he chose the threshold test he chose. A close 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. And 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 make reference to his worldview, does not mean he does not use it when interpreting and applying these concepts.

Mahomed J

Concurring with Chaskalson P, he 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 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 (1948:571) as far back as 1948 responding to the philosophical approach to judicial decision-making enunciated by Mahomed J writes: “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 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: (1948:593-594) “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: '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 creed⁴³".

In similar vein Mark Tushnet (1984:634) writes: "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 makes 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.

Finally, the conflicting considerations he 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 37), and fellow African countries such as Botswana and Tanzania.

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’ ”

From these extracts one can conclude that 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 key words 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 paragraph [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 euthanasia⁴⁴.

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 Court⁴⁵ with the American 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 babies and the rights of the pregnant woman, Kommers⁴⁶ (1994:31) writes:

“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’”.

Amongst other things. using this lens, the German Court came to a fundamentally different conclusion on the issue of the status of the unborn baby to that of the American Court at the time, and indeed to that of Dworkin (this will be dealt with at greater length in the chapter on *ubuntu*).

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.

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 (2012: 127) quoting the first German Court decision⁴⁷, writes: “ [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 **enure in being human** (my emphasis) are sufficient to ground human worth”. At page 159 referring to the second German matter⁴⁸ in 1993, Ackermann writes: “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 American Supreme Court, decided at a similar time to the two German matters⁴⁹.

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 49. It matters not what the exact wording of the respective Constitutions are, 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.

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 following chapters on adultery and *ubuntu* this once again will become apparent.

In the death penalty matter we have seen once again, a subjective reasoning process dressed up as an objective exercise. And once again a conclusion wholly in line with a western secular liberalism. This will be even more starkly apparent when I deal with how the Constitutional Court approached the other outstanding issue left by the negotiators of the Interim and final Constitution, abortion.

Making adultery lawful⁵⁰

This matter involved whether in terms of the Constitution the non-adulterous spouse continues to have a right of action in terms of the *actio iniuriarum*⁵¹ 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)⁵² of the Constitution for his interpretive 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 Plessis⁵³ Kentridge AJ quoted the case of *Salituro* with approval: ‘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*. 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 norms⁵⁴. In *Barkhuizen*⁵⁵ 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. Thus 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 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 uncertainty by means of an objective test. This without providing an objective reference point to decide on whether or not 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 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 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 America 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 continued, 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.’ ”

He 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 does 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 nor his conclusion that there is a “general trend” in effect supportive of his final decision, not least of all in sub Saharan countries. Once again it is of no consequence for this book whether or not 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.⁵⁶

He writes: “[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.”

He 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 so⁵⁷. 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.”

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 person⁵⁸, privacy⁵⁹, and freedom of association⁶⁰. 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 dignity⁶¹.” 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* (an act which lowers a person’s honor/status/dignity)... ; 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.”

To analyse Madlanga J’s reasoning, it would be helpful to highlight some extracts from one of the cases referred to by Justice Madlanga, namely the marriage matter (*Fourie* – see footnote 56). 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, writes: “[64] Though freely entered into by

the parties, marriage must be undertaken in a public and formal way and once concluded it must be registered. Formalities for the celebration of the marriage are strictly set out in the Marriage Act. (He then highlights the said formalities, central to which is the State and community's involvement.) Marriage is thus taken seriously not only by the parties, their families and society, but by the state. [65] One of the most important invariable consequences of marriage is the reciprocal duty of support. It is an integral part of the marriage contract and has immense value not only to the partners themselves but their families and also to the broader community... . [67] Marriage also produces certain invariable consequences in relation to children... . [68] The law also attaches a range of other consequences to marriage. (He then highlights the wide-ranging nature of these consequences which touches on almost every area of the law.)... .”

He continues: “[69] It should be added that formalization of marriages provides for valuable public documentation. The parties are identified, the dates of celebration and dissolution are stipulated, and all the multifarious and socially important steps which the public administration is required to make in connection with children and forward planning, are facilitated. Furthermore, the commitment of the parties to fulfil their responsibilities is solemnly and publicly undertaken. This is particularly important in imposing clear legal duties on the party who is in the stronger position economically. Marriage stabilizes relationships by protecting the vulnerable partner and introducing equity and security into the relationship .”

He concludes this part of his reasoning: “[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 SALRC⁶² 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;”

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 holding that the law should “not turn its back on any person requiring legal support in times of family breakdown.”

As seen above, central to this choice by Madlanga J is his view that adultery is no longer seen as it used to be by the public: “[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 also have already seen, in his reasoning, Madlanga J 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 sacrament⁶³. One of the Roman Catholic Church's basis for opposing adultery, in addition to it being a direct assault on marriage, is that it constitutes an injustice towards the innocent party⁶⁴, 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, undermines 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 are 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.

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 justices 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 corporal punishment and death penalty matters, in doing this the court chooses a western secular humanism lens over a sub Saharan lens, when giving content to the Constitution. And with such a lens, Justice Madlanga’s conclusion was from the outset inevitable. This need not have been the case, if he had chosen to use a sub Saharan lens.

***Ubuntu* – murderers, street names and unborn babies, in order of value to the Constitutional Court!**

Justification of the use of *ubuntu*

As we have seen, Kriegler J in the death penalty matter held that when answering the question 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... .”

She continues: “[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 35⁶⁵, 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: “[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 which 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 that: “[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 the Interim 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 (see footnote 5), the Chief Justice declares: “[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 interpretive 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 (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 “hermeneutical 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).”

Thus 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 the Chief Justice, reveals that the justification for such a choice rests on two pillars. On the one hand, one reference to it 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)⁶⁶ 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 P 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.

On face value, in the epilogue there is no explicit indication that it must be used as the (or a) pre-eminent interpretive 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, opines: “[392] Accordingly, the idealism that we uphold with this judgment 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.”

The Chief Justice in his assertion in the street naming matter about the centrality of *ubuntu* as an interpretive 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 problem 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* world-view, 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 book, 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 an interpretive 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.

Process used to define *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 or not 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 interpretive standard, notwithstanding there being no reference to it in the Constitution, how is the concept defined? With the exception of 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 proceeded to define it. In the process he finds:

“[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 an interpretive 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 matter⁶⁷.

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.”

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 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 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?” (A question which is a variation of MacIntyre’s book, **Whose Justice? Which Rationality**, 1988.)

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 not⁶⁸.

As already quoted in the death penalty chapter, later he 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.

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 the problem with what is the “ordinary” meaning of cruel. When it comes to the death penalty, the Constitution is silent. It is thus the justices who have to 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 acknowledgment 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 any event, words and concepts such as “humaneness”, “morality”, “compassion”, “basic norms and collective unity” and “human dignity” defy objective definition, particularly in the context where it is admitted that *ubuntu* is not defined by 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.

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 Tanzania⁶⁹: “[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, 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.

Once again the issue is not which is the correct application of the interpretive 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 problem, 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. And thus his assumption of the content of *ubuntu* 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 him 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 makes 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.

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

Death penalty matter/unborn baby 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 baby matter.

In the unborn baby 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 of the Constitution⁷⁰.” 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 sought⁷¹ (hereafter “the Modiba judgment”).

The application in the High Court, which was heard on 24 October 2016, was dismissed by Modiba J (the Modiba judgment) on 15 September 2017, some 11 months later. On the 9th October 2017, the women filed an Application For Leave To Appeal to the Constitutional Court (hereafter “the application for leave to appeal”)⁷². Some four and a half months later, on the 21st February 2018, the Constitutional Court dismissed the application for leave to appeal on the basis that it “bears no reasonable prospects of success.” The Constitutional Court furnished no reasons for its ruling and did not grant the women an opportunity to present oral argument to it⁷³.

At paragraph 19. b. xi of the application for leave to appeal the three women state: “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 in chapter 3, to the legislative history leading up to the adoption of the unqualified right to life provision in the Interim Constitution (see footnote 26), as it applies to the death penalty and abortion (and by necessary implication the constitutional status of the unborn baby).

As we have seen earlier in this book, the Constitutional Court went to great lengths to justify the constitutional normative value choice as regards the death penalty. As regards the intentional killing of hundreds of thousands of unborn babies it was alerted to, it made a “constitutional normative value choice” without giving any reasons for such a choice.

In the absence of reasons for this “constitutional normative value judgment”, one can only 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 reasons.

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 unborn babies. 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 lives of unborn babies and that they were more than “the contents of the uterus of a pregnant woman⁷⁴”.

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 acknowledgment by all parties that unborn babies were human life worthy of dignity, and that the state has a duty to protect the life of the unborn baby at all stages of pregnancy⁷⁵. 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 Ackerman, 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, L Ackerman, 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;.. .”⁷⁶

Further illustration of reliance on *ubuntu* in the application for leave can be seen in paragraph 19 thereof:

“19... .

a.

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

- 1.1 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;
- 1.2 When interpreting and applying these core values, judges need to make normative value choices;
- 1.3 No part of the law or life in South Africa can exist beyond the reach of constitutional values, even the most intimate spaces;
- 1.4 When making these value choices, judges must seek to help bring about the type of society envisaged by the Constitution;
- 1.5 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;
- 1.6 A building block for this new society and a crucial lens through which the Constitution must be interpreted, is *Ubuntu*;
- 1.7 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;
- 1.8 Repeated and deliberate attacks on the dignity of one human life compromises the dignity of all in South African society;
- 1.9 *Ubuntu* demands the nurturing and valuing of all human life;

- 1.10 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;
- 1.11 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”);
- 1.12 No human life must be allowed to be variable;
- 1.13 No arbitrary measures must be permitted when it comes to the sanctity of all human life;
- 1.14 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 three women are based on the reasoning of the Constitutional Court in the death penalty matter⁷⁷. As we have seen, central to these submissions are firstly, the importance of *ubuntu* as an interpretive 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 or not this was a correct decision. It is that not only was a choice made concerning whether or not *ubuntu* applied, and if so, what the content of *ubuntu* is 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 babies.

In their reasoning in the death penalty matter the conundrum of arbitrariness and inconsistency was highlighted. This conundrum is compounded in the unborn baby matter, given the absence of reasons/reasoning.

Street naming matter and the unborn baby matter compared

A comparison between the Constitutional Court's approach to the impact *ubuntu* has in the two different matters 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 interpretive 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 is 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"⁷⁸."

In the unborn baby 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), will have profound physical effects for the average annual figure of 73 614 gestating human lives⁷⁹. (As seen earlier the Abortion Act describes such unborn babies as "the contents of the uterus of a pregnant woman".)

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 approach of Modiba J, even

when confronted with the undisputed statistic of the consequent death of 73 614 unborn babies 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 in effect chose to accept 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.

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 baby matter, it also is instructive to compare the approach of the Constitutional Court in *H and Fetal Assessment Centre*⁸⁰ (hereafter “the fetal assessment matter”, decided some two years before the unborn baby matter), to that of the unborn baby 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 Appeal⁸¹ (hereafter “Stewart”).

In Stewart the Court stated: “[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).’

The court continues: “ [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 responded: “[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).”

He continues: “[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 baby matter, Froneman J and his fellow justices in effect made the “evaluative” choice that unborn babies must not be considered as human life worthy of dignity. However, unlike in the death penalty and fetal assessment matters, in the unborn baby 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 another 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 in effect goes on to highlight that the German Court acknowledges unborn babies 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 baby matter, Froneman J and his fellow justices are alerted to the German Court holding that unborn babies 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 three women, in the unborn baby matter.

Conclusions

Absent reasons in the unborn baby 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 reasoning of the Indian and Tanzanian Courts as to why judicial decisions are not arbitrary⁸², 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".

What we can say with certainty is that the justices were required to make a choice as to whether *ubuntu* viewed an unborn baby 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 baby 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 baby 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 Laurie Ackerman, judges of the German Court and in effect 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 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 inconsistent approach of the Constitutional Court when making profound moral choices, 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 not to give any reasons, is then, in effect, to use Stewart’s phrase, not “susceptible to reasoned or objective valuation.”

This selective and inconsistent approach of the Constitutional Court supports the view that what drove the moral decision by the justices when it came to unborn babies, primarily was 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 an interpretive 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.

As we have already seen, 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 American matter of *Furman v State of Georgia* - see [131] of the death penalty matter.)"

Here he thus does assume 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 of the Interim Constitution certainly 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 makes reference to it. He is the only justice in the death penalty matter who endeavours, without any concrete success, 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 see in the death penalty matter Sachs J specifically highlighting the absence of any evidence which enables 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* world-view, 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 interpretive 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"⁸³, Ackermann J, made no mention of *ubuntu* in the death penalty matter. Later however, as an author (2012:48) he describes *ubuntu* as a "black African concept".

He writes (2012:78): "*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 makes reference to literature chosen by him in an attempt to give content to the concept. At one point he writes (2012:79): “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 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 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 (2012:114-115): “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*.

Furthermore, it introduces an unbridgeable gap between black and white judges in effect disqualifying white judges from engaging on this issue as equals with their black colleagues.

Thus 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 the role of *ubuntu*. 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 consciously see themselves as black or white justices. As du Plessis writes (2002:91): “... . 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 an interpretive lens, is compounded if we have regard to the arguments of Ackermann (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 re-quoting: “... 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’ ”⁸⁴

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, in the matters highlighted in this chapter, raises fundamental questions in response to the assertion that the Constitution contains objective values, of which justices of the Constitutional Court are merely mouthpieces.

Towards a tentative solution

“We, the people of South Africa”

In this book I have highlighted that all decisions by the Constitutional Court are final, and 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.

We also have seen that prior to the adoption of the Interim Constitution, no agreement on the issues of abortion and the death penalty could be reached and that it was decided that these two issues would be held in abeyance and decided on later.

A brief recap in this regard would be helpful.

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. 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 secular western 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, legislated by Parliament and once again whose provisions are in line with secular western liberal democracies (other than Germany), and not with sub Saharan Africa, to remain in place⁸⁵.

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 secular 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.

This suggests that the probabilities support the conclusion that the justices, when it came to the death penalty and abortion, decided to make a moral decision in their own image. In other words, they made a policy decision, reflecting their own morality, and dressed it up in legal jargon particularly using the claim that all they were doing was in an objective fashion setting out what already was in the Constitution. This is in direct conflict with Mokgoro J's warning referred to earlier in this book 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... ."

Supporting this observation by me 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, 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.

The analysis of the other cases involving corporal punishment and adultery confirms the lack of objectivity and that the court when it comes to moral issues, makes and then implements policy decisions, using legal jargon, invariably in line with a secular western liberal worldview.

One further observation at this juncture is warranted. As seen earlier, when comparing the Constitutional Court's approach in the death penalty, fetal assessment and unborn baby matters, that court, in effect, made a profound moral choice about the value of the unborn baby 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 insight that justices are writing judgments in their own subjective images, will hopefully empower civil society to make the Constitutional Court more transparent and accountable to the people of South Africa. In the unborn baby 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.

Turning specifically to the words, "We, the people of South Africa".

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 are 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 my argument (regarding the lack of objectivity and policy decisions) thus far 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:⁸⁶ “[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 analysis of the various judgments earlier in this book, reveals a fundamental misunderstanding of “We, the people” when it comes to South Africa. Looking at these words through a secular 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 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, despite the opening words in the Interim Constitution.

And 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.⁸⁷ 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:⁸⁸ “... 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 I have analysed, in effect in terms of his reasoning, not least of all by Sachs J in the school discipline matter.

In the same paper, Lombaard makes other germane observations/arguments which have a bearing on this misunderstanding and what my analysis of the judgments 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.”⁸⁹ 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.”⁹⁰

This observation by Lombaard has direct application to the dualism being thrust onto the religious communities in South Africa dealt with earlier in this book and in an 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:⁹¹ “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.⁹² 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 discipline 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.⁹³ Had he grasped my argument in this book, 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 secular western liberalism.

Another illustration, touching on the various issues mentioned above, is found in a matter⁹⁴ 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 looking at the issues involved exclusively through a secular western liberal lens. It simply fails to grasp the integrated wholism of the couple when it comes to their faith, and asks the Equality Court to impose its fragmentation/dualism onto them, 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, whether that be Christian, Traditional African Belief systems, Judaism, Hinduism, Buddhism or Islam.

Secondly, despite the words therein being cloaked with legal jargon, importance and idealism, 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 them, such as a certain Mr Tshehla despaired of when it came to African healing/religion⁹⁵. In effect, it uses the subjective concept of “fairness” to destroy the substance of the integrated wholism of the Christian faith of the farm couple. 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”.⁹⁶ Which in effect also is what Sachs J himself does in the school discipline 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.”⁹⁷

“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 couple use their farm. On the surface, these attempts by Sachs J and the Commission, to balance out the competing interests 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 said couple and parents who want to obey Scripture when raising their children. In the name of “reason” and “fairness”, through a secular western liberal lens.

Lastly, the third choice offered by the Commission to the farming couple, 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 couple 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, foreshadowed in this book and my analysis of the various cases, 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 and inclusivity of the right to freedom of belief, religious or non-religious?

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 reality of the subjectivity of the judicial process of the Constitutional Court and act on it. Crucial to this would be that court allowing and/or of its own accord calling for and encouraging a participatory approach by civil society when it comes to its moral decisions. Not in a binary manner, but in an attitude of humility and understanding of those who have strongly held views seemingly in direct conflict to ours. And for civil society to stop simply deferring to the justices of the Constitutional Court, as if they were the new High Priests of South Africa.

At the moment, if one has regard to the judgments dealt with in this book, 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. In effect one of the competitors in this complexity, secular western liberalism, is prevailing every time under the pretext of objectivity. The Constitutional Court and much of civil society simply are failing to see that in fact secular western liberalism is one of the competitors, not merely an objective reference point for every decision about diversity in our complex society.

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 secular 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 to 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.

“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 and 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 inclusivity and the advancement of participation by 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 reality of what the justices of the Constitutional Court are doing when they write their judgments about profound moral issues.

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 an interpretive 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 5. 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 western 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 anathema to participation by, and inclusivity of all people in South Africa. The irony being that currently, as we have seen in my analysis of the various cases, notwithstanding subscribing to *ubuntu* as their lens, the same justices when deciding on moral issues have in practice invariably made decisions in line

with secular western liberalism, as opposed to following the jurisprudence of most of the other sub Saharan African courts.

The inevitable subjective strands of *ubuntu*, as already seen in Chapter 5, if also colonised by secular western liberalism, will greatly impede diversity, inclusivity and understanding in South Africa to the extent that Western liberalism is anathema to sub Saharan 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 understanding 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. Civil society and the Constitutional Court need 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, should be involved in developing and giving meaning to the concept of *ubuntu*. The present use of *ubuntu* militates against diversity, inclusivity and understanding as it is assumed that it is only a black African concept – in effect this was part 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 use a locomotive and carriages illustration, all South Africans will then have an opportunity to design the locomotive itself, and not merely be passengers in carriages attached to the locomotive designed by

the 11 justices of the Constitutional Court, as they lead us as a country into a morality made in their own image.

To guard against abuse and bigotry this locomotive obviously would have to set parameters to diversity, inclusivity and understanding, as the Constitutional Court has attempted to do⁹⁸. The change needed is to use a different lens when using these words and phrases. A lens along the lines proposed above.

To give content to this proposed lens of *ubuntu*, it is suggested that the sentiments expressed by one Koomers, would be helpful 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.

Koomers writes:⁹⁹

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 Koomers, 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 earlier in this book of black African justices to define the subjective idea of *ubuntu* and this extract by Koomers, 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 an interpretive 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 how the justices at present are in fact arriving at their decisions on profoundly moral issues.

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 subjective judicial reasoning in the Constitutional Court urgently is not grasped by “We, the people”, acknowledged by the justices themselves and acted on by them and civil society, in effect “We, the people” by omission would be forfeiting the power vested in the people in 1996 to contribute to giving content to the text, the locomotive, authored by us. We then would merely be passengers.

If this 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 31 of 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, if this is not grasped and acted on by all, 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, will persist and inevitably lead to a complete loss of confidence in the Constitution as an instrument which promotes true diversity in a very complex society without destroying any person's dignity and deeply held convictions and worldviews.

Given the reality of the inevitability of strands of subjectivity in the reasoning of the justices of the Constitutional Court, as illustrated in the cases analysed in earlier chapters, that court, under the guise of objectivity, is **in effect promoting a competing worldview, central to which is 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. The justices of the Constitutional Court must humbly accept this constraint on them, and reread *Stewart*¹⁰⁰. They must not allow themselves to become the new High and Chief Priests of “We, the people of South Africa”.

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 locomotive 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 argument in this book 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 secular western liberalism, to “Believ(ing) that South Africa belongs to all who live in it, **united in our diversity** (my emphasis)”.¹⁰¹ 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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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* 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. 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

PETER LE MOTTÉE ATTORNEYS

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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.

APPENDIX C

Dagga and Psychiatrists

Introduction

On the surface this APPENDIX is a detour from the rest of this book. I have included it to illustrate how a subjective, disengaged from daily life, armchair approach by the justices of the Constitutional Court can have really bad practical outcomes for us as a community. Not least of all, given the unappealability of their rulings and, according to the justices in their judgments, the all embracing reach of their powers.

I also have included it as an example of where the justices should have displayed a measure of humility about their limitations in training and experience when it comes to a substance like dagga, either by refusing to hear it and referring it to the elected representatives of “We, the people”, Parliament – where the process followed would have encouraged and allowed civil society to be an integral part of any decision taken. Or, of its own accord, refused to hear the matter without including the participation of trained and experienced members of civil society before any decision was taken. (In fact, given its powers, even now it can do whatever is necessary to recall the matter in some form, given the input of the Association of Psychiatrists referred to hereafter – amongst other things, this also will require a measure of humility by the justices.)

My observations above would apply to all issues of great moral, social and religious import. “We, the people of South Africa”, must be fundamental to any such policy decision, or whatever other word is used to describe such a decision. **We must not permit 11 unelected women and men, who only have legal training, morally and socially to transform our society in effect without our meaningful input.**

Anecdotal average South African mother

The woman who has worked for us for many years now, came to me a few years ago to express her outrage at the Constitutional Court about its judgment on dagga. She has grown up in a really tough environment and as a deeply committed mother has tried to raise her four children in the best way she could. This in a deprived community where gang leaders and drug dealers are the role models. And where their lifestyles are aspirational to the youth.

Dagga is central to all of this, and amongst other things is a gateway drug to addiction and participation in violent crime. (In fact in my early years at the Bar, when I represented many people accused of murder, I can only remember two murder accused I represented where dagga was not involved in any way.)

The reason for her outrage? With their judgment on dagga the Constitutional Court had pulled the carpet from under her feet in being firm with her children about dagga. Now they simply responded, but the Constitutional Court says it is okay.

Obviously, a nuanced reading of that judgment does not simply say it is okay. But her children, and their friends, and her wider community, and indeed the average policeman in her community, do not read it with that nuance. Quite simply, it is now seen that the Constitutional Court says smoking and being in possession of dagga is okay.

The Constitutional Court should have anticipated this response, given its incredibly powerful position in our society. Once again, the practical outcome of its judgment is in line with the narrative of secular western liberal countries.

Response of Association of Psychiatrists

Sadly, informed civil society, in the form of the Association of Psychiatrists, only responded after the judgment had come out. At the very least the Constitutional Court should have had its feet more on the ground and of its own accord asked a body such as this Association to make submissions to help guide the court. The justices should have had a greater awareness of their lack of experience and training when it comes to a substance like dagga, and of how the average young South African was going to respond to their judgment.

The following press statement after the judgment by the Association of Psychiatrists is worth quoting in full.

“1 in 6 Teenagers who use cannabis will become addicted

Research has shown that 9% of individuals who experiment with cannabis will become addicted to it. This number increases to 1 in 6 when use starts during adolescence. In response to the recent legalisation of cannabis for personal use, the South African Society of Psychiatrists (SASOP) notes with concern a growing public perception of cannabis as a ‘harmless’ plant, and that few measures have been instituted to address this.

According to Dr Abdul Kader Domingo, member of the SASOP Special Group on Addictions, it is estimated that 1 in 6 teenagers using cannabis will become addicted to it.

“Human brain development and maturation is a process that is guided by the body’s endogenous cannabinoid system and occurs until the early 20’s. Exposure to phyto-cannabinoids (cannabinoids obtained from the cannabis plant) during this vulnerable period may disrupt the process of brain maturation and affect aspects of memory, attention, processing speed and overall intelligence. Cannabis use during

the adolescent period may cause lasting cognitive deficits, even after sustained abstinence.”

He points out that the Global Burden of Diseases Study of 2010 estimates that 2 million people living with disability were attributed to cannabis. The South African Community Epidemiology Network on Drug Use (SACENDU) reports that, during the 2nd half of 2016, cannabis was the most common primary substance of abuse for persons younger than 20 years presenting to treatment facilities in all areas across South Africa, except for the Free State, Northern Cape and North West.

A review article by the World Health Organization in 2016 concluded that current evidence points to a modest contributory causal role for cannabis in schizophrenia and that a consistent dose-response relationship exists between cannabis use in adolescence and the risk of developing psychotic symptoms or schizophrenia.

Dr Domingo says that 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.

“SASOP concurs with the Executive Committee of the Central Drug Authority (CDA) of South Africa that the approaches to combat the use and abuse of psychoactive substances should include harm reduction (interventions aimed at reducing the harmful consequences associated with substance use), supply reduction and demand reduction/preventative strategies.”

“We agree with the Executive Committee of the CDA that there is currently insufficient evidence to predict the long-term consequences of the legalization of cannabis.”

“The ease of accessing an intoxicating substance may have an underestimated impact on the initiation, frequency and amount of use, and the subsequent risk of developing a substance use disorder. Legalization should therefore not have been considered at this point.”

“The decriminalisation of cannabis removes the criminal penalty related to the use of cannabis; it allows for a distinction between a drug dealer and an individual experimenting with or addicted to a drug. While SASOP supports the human rights of all individuals, we argue that a decision to protect those addicted to substances should not be viewed as a simple binary decision based on criminal penalties.”

In 2001 Portugal augmented the decriminalization of illicit substances with drug dissuasion commissions, increased the number of facilities offering detoxification

and therapeutic admissions, increased the number of drug education campaigns and refocused policing efforts on large scale trafficking operations.

“The decriminalization of cannabis must be preceded by and augmented with similar socially responsible strategies for it to be successful in South Africa.”

Dr Domingo says available evidence does not support the strong positive public opinion and anecdotal reports favouring medicinal cannabis.

“The exceptions are the moderate quality evidence of medicinal cannabis for treating chronic pain, spasticity due to Multiple Sclerosis and weight loss associated with HIV. This evidence includes trials investigating pharmaceutical medications based on phyto-cannabinoids. Good quality evidence does however exist regarding the frequently occurring side effects of cannabis such as confusion, dizziness, diarrhea, euphoria, fatigue and hallucinations.”

“Any potential benefit obtained from cannabis must therefore be weighed against its risk of causing addiction, psychosis, cognitive impairments and a 2.6 times greater likelihood of motor vehicle accidents. SASOP further notes with concern the growing evidence linking cannabis use with an increased risk of an acute myocardial infarction as well as an ischaemic stroke.”

He concludes to say that “SASOP commends the Medical Control Council’s decision to limit the use of cannabis for medicinal purposes to registered prescribers and for individuals in which an acceptable justification is provided.”

“We support ongoing research on the use of cannabis for medicinal purposes to ensure that its purported and potential benefits can be scientifically measured against medical and societal risks.”

(REFERENCE

Research on 1 in 6 teenagers can be found here:

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4827335/#!po=0.724638>)

FOOTNOTES

- 1 Extract from the judgment of the CC in the *Voice of the Unborn Baby* case handed down on 15th June 2022 (CCT 120/21). For my Op-Ed on this judgment see my book, *The Emperor Has No Clothing*, page 103. (Available on my website at no cost – www.keithmatthee.com)
- 2 I will not analyse this judgment. However, I will attach, as Appendix C, some practical observations and the response of a part of civil society (representing psychiatrists) to that judgment.
- 3 2001 (4) SA 938 CC at 961F.
- 4 *S v Makwanyane and Another* 1995 (3) SA 391 (CC), par. 392 (hereafter “the death penalty matter”).
- 5 *City of Tshwane Metropolitan Municipality and Afriforum and Another* [2016] ZACC 19, par. 171 (hereafter “the street naming matter”). This involved an interim restraining order granted by the North Gauteng High Court stopping the Tshwane City Council from removing old street names in Pretoria until it followed the correct legal procedures to change the names.
- 6 Section 2 read with section 167(3) (a) of the Constitution. Section 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.” Section 167(3)(a) reads: “The Constitutional Court - is the highest court in all constitutional matters;”
- 7 <https://en.wikipedia.org/wiki/Sacrament>.
- 8 Adultery - Encyclopedia Volume - Catholic Encyclopedia - Catholic Online.
- 9 *Christian Education South Africa v Minister of Education* 2001(4) SA 938 (CC).
- 10 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34.
- 11 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. My first book, *The Resurrection – a Lawyer’s view* – looks at the rational evidence for the Resurrection. (It is available on my website at no cost - www.keithmatthee.com)
- 12 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, Professor Jordan Peterson. His lectures on the Old Testament are freely available on the internet.
- 13 An example of the complexity of this teaching of Jesus is found in Bonhoeffer and the Sovereign State, Elshtain, Jean Bethke, First Things, 65 Aug-September 1996, p27-30 ISSN: 1047-5141 or extracts from the Confessing Church’s Barmen Declaration (8.15, 8.18 and 8.22-5 of the declaration) at page 225 of *Bonhoeffer* by Metaxas, E. 2010. Nashville: Thomas Nelson.

- 14 Section 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." Section 10 reads: "... Everyone has inherent dignity and the right to have their dignity respected and protected."
- 15 *S vs Makwanyane supra*.
- 16 MacIntyre, A. 1988, *Whose Justice? Which Rationality?*.
- 17 I oppose the death penalty. Reasons for this are set out in Chapter 1 of, Matthee, K. 2010. *The Resurrection - a lawyer's view*. Cape Town: MPH. (Available at no cost on my website.)
- 18 The first presiding justice of the Constitutional Court was called, "The President", thus "P". This designation after the rationalization of the court structures in South Africa, was changed to Chief Justice.
- 19 *S v Makwanyane and Another supra*.
- 20 The **Interim Constitution** is Act 200 of 1993. The final Constitution is **Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution")**. For purposes of this book, unless stated otherwise, in essence there is no difference between the two constitutions. The only case I deal with where the Interim Constitution applies is in the death penalty matter – thus where the justices in this judgment refer to the Constitution, they are referring to the Interim Constitution.
- 21 Section 8 - Equality (1) Every person shall have the right to equality before the law and to equal protection of the law... Section 9 – Life – Every person shall have the right to life. Section 10 – Human Dignity – Every person shall have the right to respect for and protection of his or her dignity. Section 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.
- 22 "In humble submission to Almighty God".
- 23 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."
- 24 See for example paragraphs [3] – [92] in *Makwanyane supra*.
- 25 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.
- 26 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.

- 27 The Concise Oxford Dictionary of Current English, Fifth Edition, 1964, Oxford, Oxford University Press, defines cruel as indifferent to, delighting in, another’s pain; painful, distressing.
- 28 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 read with footnote 26.
- 29 *Mbushumu and Another v The Republic* Criminal Appeal 142 of 1994 (30 January 1995).
- 30 Tanzania achieved independence from her colonial master in 1961.
- 31 See footnote 3.
- 32 Dworkin’s (1978:105) lawyer “of superhuman skill, learning, patience and acumen”.
- 33 *Bachan Singh v State of Punjab* (1980) 2 SC 684 – see [76] in the death penalty matter.
- 34 *Bachan Singh supra*.
- 35 *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.

- 36 *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).
- 37 According to worldpopulationreview.com in 2018 China had 1,409,517,397 people, India 1,339,180,127 people and the USA was the third most populated country with 324,459,463 people.
- 38 See *Weekly Mail & Guardian* of 17 February, 1995 (footnote 194 of my thesis).
- 39 Matthee, K.V. 1988. *Jesus The Foot-Washer And Isaiah's "Suffering Servant" As A Model For The Church In South Africa*, submitted in partial fulfilment of the requirements for the Degree Bachelor Of Divinity, Rhodes University.
- 40 See for example paragraphs [198] – [199] in the death penalty matter.
- 41 Botswana achieved its independence in 1964. It is a parliamentary democracy. It permits the death penalty.
- 42 Chapter 6 in Morris, E. 1975. *Technique in Litigation*, 2nd Edition, Cape Town: Juta.
- 43 Rutledge, A Declaration Of Legal Faith (1947) as quoted at page 571 in footnote 102 by Braden (1948).
- 44 Dworkin, R. 1993, *Life's Dominion: An argument about abortion and euthanasia*.
- 45 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 supra* at page 961.
- 46 Kommers, D. 1994, *The Constitutional Law of Abortion in Germany: Should Americans pay attention?* Notre Dame Law School NDL Scholarship.
- 47 39 [BVerfGE] 1 (First Senate) (F.R.G.) 1975 ("the first German matter").
- 48 88 [BVerfGE] 203 (Second Senate) (F.R.G.) 1993 ("the second German matter").
- 49 *Roe v Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v Casey*, 112 S. Ct. 2791 (1992).
- 50 *De v RH*, CCT 182/14.
- 51 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.
- 52 Section 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."
- 53 *Du Plessis and Others v De Klerk and Another* 1996(3) SA 850 (CC).
- 54 Madlanga J in a footnote refers to *Carmichele supra* at paragraph 36 where the Constitutional Court held that: "...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)."
- 55 *Barkhuizen v Napier* 2007(5) 323 (CC) at paragraphs 28-29.
- 56 *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”).

- 57 African Charter on Human and People’s Rights, June 1981 – article 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.”
- 58 Section 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; ... ”
- 59 Section 14 of the Constitution reads: “Everyone has the right to privacy.”
- 60 Section 18 of the Constitution provides: “Everyone has the right to freedom of association”.
- 61 Section 10 of the Constitution provides: “Everyone has inherent dignity and the right to have their dignity respected and protected.”
- 62 Discussion Paper 104 published by the South African Law Reform Commission (SALRC).
- 63 <https://en.wikipedia.org/wiki/Sacrament>.
- 64 Adultery - Encyclopedia Volume - Catholic Encyclopedia - Catholic Online.
- 65 Section 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”.
- 66 “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.”
- 67 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.
- 68 Cf Sachs J in the corporal 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....”

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

70 Section 10 reads: “Everyone has inherent dignity and the right to have their dignity respected and protected.” Section 11 reads: “Everyone has the right to life.” For the equivalent sections in the Interim Constitution see footnote 21.

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

72 Attached as Appendix A. (*Linde and Two Others v Minister of Health* CCT 258/17.)

73 Attached as Appendix B.

74 Definition of the unborn baby contained in the Definitions section of the **Choice on Termination of Pregnancy Act** 92 of 1996 (hereafter “the Abortion Act”).

75 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.

76 There is a strong German influence in the history of the genesis of the Constitutional Court. For example in *Carmichele supra* at 961 F, Justices Ackerman 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 allguiding 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.”

77 See chapter 3.

78 Paragraphs 4 – 9 of the application for leave, Appendix A.

79 Paragraphs 4 – 9 of the application for leave, Appendix A.

80 *H and Fetal Assessment Centre* CCT 74/14.

81 *Stewart and Another v Botha and Another* 2008 (6) SA 310 (SCA).

82 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.

83 See footnote 3.

84 See also footnote 43.

85 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, Uganda, Kenya, Eswatini, Namibia, Zambia, Zimbabwe, Nigeria, Malawi and Tanzania. All but one of these countries are democracies and all achieved independence from their colonial masters many years before South Africa. From some of

the cases analysed in this book we also saw a disparity on issues such as the death penalty, adultery and the discipline of children.

86 See footnote 4.

87 Lombaard 2022:27-30.

88 Lombaard 2022:28.

89 Lombaard 2022:28.

90 Lombaard 2022:28.

91 Lombaard 2022:29-30.

92 See footnote 25.

93 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 secular western liberal constitution had been adopted by Parliament. Fundamental to this disempowerment was a failure to grasp the argument in this book.

94 *South African Human Rights Commission and 10 others*, Case No: ECO4/2020, The Equality Court of South Africa (Western Cape Division, Cape Town).

95 Tshehla, 2024: "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, 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."

96 *Minister of Home Affairs supra (Fourie)*.

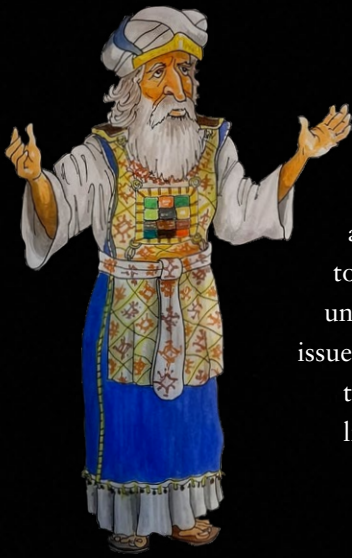
97 *Christian Education South Africa supra*.

98 There is a long list of words and phrases which have been used by the justices of the Constitutional Court in their attempt to set such parameters, in the final chapter of my LLD thesis. As I have argued, these words and phrases are all question begging, and do not address the problem of subjectivity. Some include, '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, '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'.

99 Kommers 1994.

100 See footnote 81.

101 Preamble to the Constitution.



Keith Matthee writes in chapter 1: “In chapter 6 ... , I make mention of an approach made to me by a provincial chaplaincy of the ANC to conduct a seminar for them. The purpose of the seminar was to empower ANC members of Parliament. They were unhappy with the moral content of the law on various issues, but felt helpless because their perception was that they had no alternative as in 1996, a secular western liberal constitution had been adopted by Parliament.

Fundamental to this disempowerment was a failure to grasp the argument in this book, and indeed the failure by the justices of the Constitutional Court to grasp the argument in this book.

It is for this reason that ...all readers (are encouraged) to roll up their sleeves and apply their minds to the chapters which follow (2,3,4 and 5 – which will require application), so that “We, the people of South Africa”, once again can regain control of the process of creating a South Africa, not in the image of a secular western liberal country, but of a South Africa more in line with the complexity, diversity and richness of our unique country.”

